

**Patents as property in Taiwanese jurisprudence:  
rebuilding a property model for patents**

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**A Thesis Submitted for the Degree of Doctor of Philosophy**

**Centre for Commercial Law Studies**

**Queen Mary University of London**

**October 2012**

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## ABSTRACT

The reconciliation of patents within the Taiwanese Law of Things has received negligible attention from legal scholars. The primary reason for this is the hesitation, by courts and scholars alike, to construct a new property paradigm, referring instead to treat patents under the existing rules on physical things. This dominating stance has had an impact on the manner in which Taiwanese courts adjudicate on the nature of patents, and dealings therewith. The aim of the thesis is to show that this stance is theoretically illogical.

The underlying issue is the different classification of patents within the civil and common law systems. The study employs a historical and comparative law methodology in order to inform an intra-law solution to the problem of how to overcome the classification dilemma. It does this by critically analysing the evolution of patent categorisation as personal property in common law and, by employing this foundation, seeks to distinguish the substantial differences in the concept of property between the common and civil law traditions. In light of these differences, and to establish a consolidated way of reconciling patents into the current Taiwanese legal framework, the thesis further analyses the similarity of the property notion under English common law and Taiwanese customary law, both of which are shaped by exclusion rules.

The hypothesis is that ownership of land within these two systems, in similar with that of patents, was not an absolute and outright ownership of land governed by inclusion rules, but was instead a freehold which granted intangible rights that could be divided by the duration of the holding. It is suggested that a theoretically more coherent property model can be achieved by adopting this approach, and analogising patents to the tenure systems that existed within both English common law and Taiwanese customary law.

To this end, the thesis proposes to contextually rebuild the property model for patents within Taiwanese law by the insertion of five new reform clauses into the Patent Act and the Civil Code.

## ACKNOWLEDGEMENTS

This thesis would not have been possible without the support of several individuals who in one way or another contributed their valuable assistance in the preparation and completion of this study.

First and foremost, my utmost gratitude to the Ministry of Education in Taiwan and the Chiang Ching-kuo Foundation for International Scholarly Exchange, whose awards paid my tuition fees and living expenses. This thesis would not have been finished punctually without their steady financial support. Special thanks to Ms. Yu-wen Chen, Ms. Huei-chun Wu and Ms. Li-mei Hsun from the Culture Division of the Taipei Representative Office in the UK, and Ms. Hsiao-lan Yu from the Chiang Ching-kuo Foundation for their support and care.

I also extend sincere thanks to my three L.L.M teachers, Professor Richard L. Thurston, Professor Spenser Y. Hor and Professor Chi-min Yu for their generosity in providing letters of recommendation and encouraging me to study abroad. I am very grateful to Professor Richard L. Thurston for his constant encouragement and support in spirit for my study in London, with words unable to adequately express my full appreciation.

During my three year study, I have benefitted significantly from the space and resources provided by the Intellectual Property Archive, the Centre for Commercial Law Studies (CCLS), with special thanks to:

My supervisor, Professor Uma Suthersanen, for her insightful guidance. I am grateful to her for accepting me as her supervisee in a year she was excessively busy. Her generosity supporting this research and the dedication of her supervision will always be deeply appreciated.

My two reviewers, Dr. Catherine Ng and Dr. Ilanah Fhima, for their profound and insightful advice on this study.

Mr. Malcolm Langley, for his incredible efficiency and effort in obtaining unobtainable materials. This study has been availed by his passion and profession to work in many aspects, with an infinite number of words being unable to describe my full appreciation of his support. I thank him for being a lunch mate, a climbing mate and a very good friend while staying in London.

Mr. Darren Finch, for his kind help providing grammatical advice, and Dr. Gaetano

Dimita, for his invaluable feedback on my moot viva. Their generosity in sharing their advice and experiences will always be remembered and appreciated.

My fellow PhD candidates, both at the School of Law and CCLS, and especially Ana Alba Betancourt, Marc Dominic Mimler, Troels Larsen, Nilanjana Sensarkar, Georgina Tsagas, Kadir Bas, Katerina Stechova, Celi Dlundlu and Henry Nampandu. The happy moments and witty conversations we have shared together will always be remembered.

This thesis is dedicated to my family, Chin-lung, Huei-ling and Meng-han, for their endless love and support. Without their strong support and back-up, this thesis would not have been possible to finish punctually. I would like to thank my father's friend, Mr. Chu Liang-wei, for being the guarantor of my sponsorship contract with the government. Last but not the least, my special thanks to my mum, Huei-ling, for her encouraging words over the phone that gave me the strongest support to finish this study during intense moments of stress and loneliness.

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## Terminologies

The terms used in this research require clear definitions. This glossary gives brief, but not necessarily exhaustive, definitions of technical, foreign, and unusual terms in the sense in which they are used in the text. It is not a substitute for a law lexicon or an ordinary dictionary but is intended to provide a ready reference for the convenience of readers who may not be familiar with these terms, particularly with the specialized meaning they sometimes have in this research. Unless otherwise specified, terms used in this research are based on civil law terminology, however, both civil law and common law terminologies are utilized in this research, depending on the context.

**assignment:** If this word is used in the civil law concept with a Chinese translation *rang-yu* (讓與), this word means the disposition of a physical thing. If this word is used in English common law, assignment means transfer of rights<sup>1</sup> but not necessarily a physical thing disposition.<sup>2</sup>

**bundle of rights:** This term follows Honoré's definition<sup>3</sup> that a bundle of rights

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<sup>1</sup> In a general sense, 'transfer' is a larger concept that covers tangible thing disposition and intangible rights conveyance, with the word 'conveyance' referring only to intangible rights' transfer. See Gerg Tolhurst, *The Assignment of Contractual Rights* (Hart 2006) 35-36. 'The word "transfer" is capable of wide meaning. In its day-to-day use it is employed to describe the situation where a person parts with something in circumstances where the transferee obtains the exact same thing as that once held by the transferor'. 'In law, "transfer is also used to describe a conveyance of property. In the context of a conveyance, the law's focus is not merely on the transfer of tangible things but on the transfer of property rights'. 'An "assignment", in legal discourse, is said to involve a transfer'.

<sup>2</sup> See *ibid* 40. Gerg explains chose in action assignment well. She says that 'assignment' is a term that involves a transfer without a physical thing disposition, so this term is suitable for describing an intangible things' transfer. Originally, this word is an English term which derived from the Latin *assignare* means to appoint, distribute, or assign. See Walter Ross, *Lectures on the History and Practice of the Law of Scotland Relative to Conveyancing and Legal Diligence* (2nd edn, Bell & Bradfute 1822) Ross further cited Britton, the origin of this word was used to the transfer of property between a father and his bastard son. He said, 'Britton (one of the oldest English writers) mentions that this word was first brought into use for the favour of bastards, because they cannot pass under the name of heirs, and therefore were and are provided under the name of assignees'. Today, there is no such implication anymore.

<sup>3</sup> Honoré identified 11 elements, and Backer identified 13. See A M Honoré, 'Ownership' in Carl Wellman (ed), *Rights and Duties: Property Rights and Duties of Redistribution*, vol 6 (Routledge 2002) 25-65, and Lawrence C Becker, 'The Moral Basis of Property Rights' in J Rowland Pennock and John W Chapman (eds), *Property: Nomos XXII* (New York University Press 1980) 190-191.

including: 1) the right to possess, 2) the right to use, 3) the right to manage, 4) the right to income, 5) the right to the capital, 6) the right to security, 7) the incident of transmissibility, 8) the incident of absence of term, 9) the prohibition of harmful use, 10) liability to execution, and 11) residuary rules.

**chose:** [ French ] refers to a thing,<sup>4</sup> whether tangible or intangible; a personal article; or a chattel.<sup>5</sup> In this research refers to any asset other than land.<sup>6</sup>

**chose in action:** a legal expression used to describe a proprietary right in personam, which can only be claimed or enforced through legal or court action, and is not in one's physical possession.<sup>7</sup>

**civil law:** This study uses this term in a broader sense that the law that has been permeated by Roman law in continental Europe;<sup>8</sup> by contrast, the failure of Roman law to permeate is called 'common law'.

**common law:** The term 'common law' used in this research, in contrast to the term 'civil law', refers to English law or Anglo-American law particularly. Common law of English in this thesis is refined to the common law of England and Wales, not including

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<sup>4</sup> Elizabeth A Martin and Jonathan Law, *A Dictionary of Law* (6th edn, Oxford University Press 2006) 90. Also in Bryan A Garner (ed) *Black's Law Dictionary* (9th edn, West 2009) 275.

<sup>5</sup> Garner (n 4) 275.

<sup>6</sup> J E Penner, *The Law Student's Dictionary* (Oxford University Press 2008) 45. Also in J E Penner, Herbert Newman Mozley and George Crispe Whiteley, *Mozley and Whiteley's Law Dictionary* (12th edn, Butterworths 2001) 53.

<sup>7</sup> The term in the dictionary means: 1) a proprietary right in personam, such as a debt owned by another person, a share in a joint-stock company, or a claim for damages in tort, or 2) the right to bring an action to recover a debt, money or thing, or 3) personal property owned by one person but possessed by another, with the owner being able to regain possession through a lawsuit. See Garner (n4) 275. From the definition it reveals, in the common law sense, this term covers intangible rights to real things and obligations.

<sup>8</sup> JM Kelly, *A Short History of Western Legal Theory* (Clarendon 1992) 179. The great division of western legal civilised legal world is to divide it into two families: one is the civil law family and the other is the common law family. According to Kelly, the essential basis of the division was 'the permeation of continental Europe's jurisdictions by Roman law, the *ius civile* in the Romans; own language; and, by contrast, the failure of Roman law permanently to penetrate the English legal profession, which persisted in the native traditional rules'.

Scotland and Northern Ireland. Common law of the United State of America in this thesis refers to the American states where common law is implemented and does not include the state of Louisiana. In this research, this term was not used in the concept of *ius commune* that refers to a commonly thought of legal principles which formed the basis of a common system in Western Europe as civil jurists usually mean.

**conveyance:** In this study, conveyance is a disposition of estate in land when the grantor and grantee are alive,<sup>9</sup> usually used for intangible right transfer.

**debt:** This research uses this word in two senses: a monetary or non-monetary thing one person owes another,<sup>10</sup> or a personal liability that describes the abovementioned owing situation.

**fee simple absolute in possession:** This term originally means an estate is inheritable, indefeasible and capable of passing to the general heirs, with a guarantee of the receipt of rent and profit. The word 'fee' originally meant that 'the estate was inheritable' in the fifteenth century during Littleton's time.<sup>11</sup> 'Simple' meant that the fee was 'capable of passing to the heirs general and was not restricted to passing to a particular class of heirs'.<sup>12</sup> 'Absolute' denoted that it clearly 'excludes an estate that is defeasible either by the breach of a condition or by the possibility that it may pass to some new owner upon

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<sup>9</sup> Peter Butt, *Land law* (5th edn, Lawbook 2006) 7. Butt defines conveyance as an assurance of land *inter vivos*, more particularly of land under common law system title. The phrase *inter vivos* means when donor and donee are alive.

<sup>10</sup> Garner(n4) 462. According to Black's law dictionary, debt has four meanings: '1. Liability on a claim; a specific sum of money due by agreement or otherwise. 2. The aggregate of all existing claims against a person, entity, or state. 3. A nonmonetary thing that one person owes another, such as goods or services. 4. A common-law writ by which a court adjudicates claims involving fixed sums of money'.

<sup>11</sup> E H Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (18th edn, Oxford University Press 2011) 151. Also in A J Oakley, *Megarry's Manual of The Law of Real Property* (8th edn, Sweet & Maxwell 2002) 32.

<sup>12</sup> Burn and Cartwright (n 11) 151. The word 'simple' is used to distinguished a fee simple that used to be called a fee tail (is now called entailed interest) whereas the owner can only pass on to a particular class of lineal descendants.



the happening of a specified event'.<sup>13</sup> The phrase 'in possession' meant that the estate is a present estate and not in remainder or in reversion. This research follows the original meaning of the term.

**grant:** used as a noun in this research means: 1) an agreement which creates a right of any description other than the one held by the grantor. For example, when this thesis uses a term such as a leases grant, a patent grant, a franchise grant or a licence grant.<sup>14</sup> 2) a freehold interest so transferred,<sup>15</sup> depends on the context. The verb 'to grant', as used in this research, means 'to permit or agree to'.<sup>16</sup>

**immovable (thing):** a thing which cannot be moved like a piece of land, or an object so firmly attached to land that it is regarded as being part of land, such as a building.<sup>17</sup>

**in personam:** [ Latin 'against a person' ] This term has two meanings in this study: 1) the personal rights and obligations of parties; and 2) a legal action brought against a person rather than property.<sup>18</sup> The context adopts the first meaning when using 'rights in

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<sup>13</sup> *ibid* 152. Also in Oakley (n 11) 79-80.

<sup>14</sup> Garner (n4) 768. Simonds defines a patent grant as 'an instrument in writing, conveying an exclusive territorial right under a patent'. See William Edgar Simonds, *Practical Suggestions on the Sale of Patents with Forms of Assignment, License, Contract, Power of Attorney to Sell Rights, &c., Many of Them Original, and Instructions Relative thereto, with Hints upon Invention and the United States Census* (William Edgar Simonds 1871) 43.

<sup>15</sup> Originally this word applied to the creation of smaller interest (normally intangible interest in land) out of another larger one, rather than to the disposition of an interest already created, but there is no significant difference now. See Butt (n 9) 7. 'Grant originally applied to the creation of an interest out of another (larger) one, rather than to the assurance of an interest already created. Thus, we speak of the "grant" of a lease, or of a life estate, or of an easement. But the word is also used nowadays in the more general sense of "assurance". "Grant" was originally the correct word when creating and intangible ("incorporeal") interest in land, such as an easement; but it is now also apt for conveying a freehold interest already held by the granter'. The word 'assurance', according to Butt, has a similar meaning to 'disposition' and 'alienation'.

<sup>16</sup> Garner (n4) 769.

<sup>17</sup> 'Immovable' is also termed as an 'immovable thing' in Black's law dictionary. See Garner (n4) 817.

<sup>18</sup> Adopted from Garner (n4) 862. In Roman law, rights are classified as two types, one is *in personam* rights and the other is *in rem* rights. The expressions in rem and in personam are opposed to each another. In ancient Rome, ius referred to actions rather than rights. See Boudewijn Bouckaert, 'What is Property?' (1990) 13 Harv J L & Pub Pol'y 775, 784

personam'. When using 'action in personam', the second meaning applies.<sup>19</sup> Rights in personam means an interest protected solely from specific individuals.<sup>20</sup>

**in rem:** [ Latin 'against a thing' ] used in this research has two meanings: 1) the status of a thing, so rights *in rem* means the rights that a person has with respect to a thing;<sup>21</sup> and 2) a legal action brought against a thing.<sup>22</sup> This context adopts the first meaning when stating jural relations of rights *in rem*; when referring to action *in rem*, the second meaning applies.

**intangible (property/thing):** This word is used in a general sense for an object which is incorporeal and lacks a physical existence, such as responsibility, stock options and business goodwill,<sup>23</sup> or an asset which is not corporeal, such as intellectual property.<sup>24</sup>

**intellectual property:** This term is used in a general sense which refers to an ethereal, intangible property without a corporeal existence, including, but not limited to, the

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<sup>19</sup> The 2004 version of Black's law dictionary adopted R H Graveson, *Conflict of laws* and defined action in personam as: 'an action is said to be *in personam* when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgment in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action *in personam*'. However, the 2009 version refined the definition: 1. An action brought against a person rather than property. An in personam judgment is binding on the judgment-debtor and can be enforced against all the property of the judgment-debtor. 2. An action in which the named defendant is a natural or legal person. See Garner (n4) 33.

<sup>20</sup> Black's law dictionary also terms right in personam as personal right or jus in personam. *ibid* 1438.

<sup>21</sup> *ibid* 864.

<sup>22</sup> Definition of 'action in rem' is more refined in the 2009 version than in the 2004 version. In the 2004 version, Black's law dictionary cites R H Graveson, *Conflict of laws* (7<sup>th</sup> edn 1974) 98 and defines action in rem as 'the one in which the judgment of the court determines the title to property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated'. Further in the 2009 version, Black's law dictionary specifically defines 'action in rem' as: 1. An action determining the title to property and the rights of the parties, not merely among themselves, but also against all persons at any time claiming an interest in that property; a real action. 2. Louisiana law. An action brought for the protection of possession, ownership, or other real rights in immovable property. 3. Louisiana law. An action for the recovery of possession of immovable property. 4. An action in which the named defendant is real or personal property. See *ibid* 34.

<sup>23</sup> *ibid* 879. 'Something that lacks a physical form, an asset that is not corporeal, such as intellectual property'. Also in *ibid* 1336. Under the word 'property', intangible property is defined as 'Property that lacks a physical existence'.

<sup>24</sup> *ibid* 879. Penner defines intangible rights as a kind of property opposed to tangible rights. Intangible rights or incorporeal property includes, but is not limited to, bank balances, patents, copyrights, advowsons, and rents. Penner, *The Law Student's Dictionary* (n 6) 287.

notion of a patent, copyright, and trade mark.<sup>25</sup> Although the terms ‘intellectual property’ and ‘intellectual property rights’ are often used interchangeably as they are in the WIPO definition,<sup>26</sup> to be precise in this research, when ‘intellectual property’ is used, it refers to the actual results of the concept of intellectual endeavour. When the term ‘intellectual property rights’ is used, it refers to the concept of legal protection that the law grants to the legal owner of his intellectual endeavour.

**landlord:** In this research, landlord means the one who can dispose of his/her immovable thing or transfer his/her estate to another.<sup>27</sup> This research does not refer landlord to feudal lord unless otherwise stated.

**lease/leasehold:** used in the common law sense in this research means a grant of proprietary interest,<sup>28</sup> however, when it is used in the civil law sense, it means a contractual commitment without creating an encumbrance to the ownership.<sup>29</sup> Unless otherwise stated, this word used in this research normally refers to the civil law meaning, that a lease/leasehold is a contract by which a rightful owner/possessor of a physical thing conveys the right of use to a person wanting temporary enjoyment in exchange for a rent.<sup>30</sup>

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<sup>25</sup> Penner defines ‘intellectual property’ as ‘Any patent, trademark, copyright, design right, registered design, technical or commercial information or other intellectual property’. Penner, Mozley and Whiteley, *Mozley and Whiteley’s Law Dictionary*, 184. Also in Penner, *The Law Student’s Dictionary* (n 6)151.

<sup>26</sup> Thomas E Hays and Claire C Milne, *Intellectual Property Law in Practice* (Thomson/W Green 2004) 2.

<sup>27</sup> In English common law, landlord also means the feudal lord who retained the fee of the land, and is sometimes shortened to *lord* or termed *lessor*. *ibid* 957. Unless otherwise stated, this research does not refer landlords as the feudal lords.

<sup>28</sup> In English law, the notion of a lease emanates from ownership and is imposed on ownership, while in Roman law, a lease does not emanate from ownership—a lease does not entail the modification of ownership in Roman law. Fritz B Schulz, *Classical Roman Law* (Clarendon 1951) 334. ‘The right of the Roman lessee, in sharp contrast to the English, does not emanate from ownership and it is immaterial whether the lessor is or is not the owner of the land. If the lessor is owner, the right of the lessee does not modify ownership; it is not, like usufruct, a charge imposed upon ownership’.

<sup>29</sup> Lease/leasehold is an encumbrance of ownership in English law, but not in Roman law. See Graham Beynon and John Hughes, *Jurisprudence* (Butterworth & Co 1955) 391- 392. ‘By the encumbrance of a right is meant “some adverse, dominant, and limiting right in respect of it”. So where A owns property which is leased and mortgaged, A will be the owner, and the lessee and mortgagee the encumbrancers’.

<sup>30</sup> According to Garner (n4) 970, a lease is ‘a contract by which a rightful possessor of “real property” conveys the right to use and occupy the property in exchange for consideration, usually rent’. Here, ‘real

**licence:** has two meanings in this research: 1) a permission to perform some act which, without such permission, could not lawfully be performed,<sup>31</sup> or 2) the certificate or document evidencing such permission.<sup>32</sup>

**movable thing:** refers to a thing which is not attached to an immovable thing, which can be carried from place to place. In this study, a movable thing is not synonymous with personal property<sup>33</sup> because of a different categorical classification of English personal property and civil law personal obligations as stated in details in 5.6.3.

**mutatis mutandis:** meaning with the necessary modifications.

**numerus clausus:** This research uses this term as real rights that are limited to a small number of well-defined types.<sup>34</sup>

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property' in the common law covers tangible aspects (such as soil and buildings) and intangible aspects (such as easements). However, in the Taiwanese code, an easement cannot be leased. Therefore, in this research, the object of a lease is limited to tangible property only.

<sup>31</sup> See Penner, *The Law Student's Dictionary* (n 6) 173. Clarke has a better explanation to the word 'licence'. She said that '... "licence" is a broad term covering any permission to make any kind of use of any thing...it covers not only the grant of a personal right to occupy the land but also the grant of any right to make use of the land in any other way which is purely personal and not proprietary'. Alison Clarke and Paul Kohler, *Property Law: commentary and materials* (Cambridge University Press 2005) 273. This research uses the word 'licence' in this broad sense.

<sup>32</sup> Adopted from Garner (n4) 1002.

<sup>33</sup> Penner, Mozley and Whiteley, *Mozley and Whiteley's Law Dictionary* (n 6) 294. Also in Penner, *The Law Student's Dictionary* (n 6) 243. Also in Rahmatian (n 92) 15 note 90. This author agrees with the first half of Rahmatian's comment that personal property and moveable property are not identical terms. However, this author disagrees with the second half of the comment that these terms can be used interchangeably in the present context of copyright.

<sup>34</sup> See H Hansmann and R Kraakman, 'Property, Contract, and Verification: the numerus clausus problem and the divisibility of rights' (2002) 31(2) *J Legal Stud* S373 at S374. See also Jan Smits, 'How to Mix Legal Systems in a Fruitful Way? Some Remarks on the Development of a *Ius Commune Europaeum* through Competition of Legal Rules' (Towards a European Private Law by Competition of Legal Rules, Maastricht, November 19th, 1998) 2 'One common feature of many European private law systems, at least of the continental ones, is—in property law—the existence of a *numerus clausus* of real rights. From the North Cap to Palermo and from Porto to Odessa, *rights in rem* are part of a closed system; other rights than the (essentially) seven that have been recognized in law, cannot be accepted. This is, e.g., the case in France (art. 543 CC) in Belgium (*idem*), in Germany and in The Netherlands (art.3:81 lid 1 BW and art. 584 BW(oud))'.

**ownership:** (*suo-you-quan* 所有權 in Chinese, *shoyuhken* in Japanese) In this study, ownership is normally used in the civil law sense that ownership is a comprehensive right over a thing (no matter it is movable or immovable) which, in principle, endows its holder with full power over it.<sup>35</sup> In some literature, the word ‘property’ is used as a synonym for the notion of ownership,<sup>36</sup> but in this thesis, property and ownership have their own separate definitions. Ownership is a concept which cannot be fragmented in substance in the Taiwanese Civil Code;<sup>37</sup> it cannot be divided by different time durations and to different persons.<sup>38</sup> When this word is used in association with Taiwanese Civil Code, this word contains a relatively narrow meaning compared with that in classical Roman law,<sup>39</sup> and is termed *suo-you-quan* hereunder.

When ‘ownership’ is used in the common law sense, it is not regarded as being a single all embracing right but rather a complexity of different rights.<sup>40</sup> As this thesis will

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<sup>35</sup> Schulz (n 28) 338. Barry Nicholas defines it as ‘the unrestricted right of control over a physical thing, and whosoever has this right can claim the thing he owns wherever it is and no matter who possesses it’. See H F Jolowicz and Barry Nicholas, *Historical Introduction to the Study of Roman Law* (3rd edn, Cambridge University Press 1972) 140. According to Maine, ownership is a larger concept than possession because ownership involves three elements: possession, adverseness of possession and prescription in Roman law. Henry Sumner Maine, *Ancient Law: its connection with the early history of society and its relation to modern ideas; with introduction and notes by Sir Frederick Pollock, Bart* (John Murray 1918) 277. Holland made a ranking between possession and ownership, saying that the lowest form of right is possession and the highest form is right of ownership. See Thomas Erskine Holland, *The Elements of Jurisprudence* (13th edn, Clarendon 1924) 193.

<sup>36</sup> Examples like Bouckaert, ‘...Roman lawyers did not have a clear-cut definition of property (dominium) as a legal right’. Bouckaert 781. Or Munzer, ‘property as social relations’. Stephen R Munzer, *New Essays in the Legal and Political Theory of Property* (Cambridge University Press 2001) 36.

<sup>37</sup> However, this is not the case in ancient Roman law. See Hans Ankum and Eric Pool, ‘Traces of the Development of Roman Double Ownership’ in Hans Ankum and Eric Pool, ‘Rem in bonis meis esse and rem in bonis mean esse: trace of the development of Roman double ownership’ in Peter Birks (ed), *New Perspectives in the Roman Law of Property: essays for Barry Nicholas* (Clarendon 1989) 5.

<sup>38</sup> ‘Contrary to English Law, which permits the separate ownership of horizontal strata (as in Lincoln’s Inn, where a set of chambers on the ground floor may be owned by one tenant in fee while the floor above is owned by another tenant in fee), the Roman Law admits no departure from the principle *cujus est solum ejus est usque ad sidera et ad inferos* and the allied rule *superficies solo cedit*. Therefore, no one could own the surface except as owning the land’. RW Lee, *The Elements of Roman Law: with a translation of the institutes of Justinian* (4th edn, Sweet & Maxwell 1956) 174.

<sup>39</sup> Schulz (n 28) 336. Although it is evident that, under classical Roman law, the bounds of ownership were very wide, especially when compared with medieval Germanic ownership.

<sup>40</sup> Ross perceived that the central concern of Blackstone was the individual’s relationship with the ‘thing’, and it was not until this century when the emphasis was changed by Hohfeld. Historically, property and ownership in the common law world were conceived in terms of rights, to or in things. See Ross Grantham, ‘Doctrinal Bases for the Recognition of Proprietary Rights’ (1996) 16(4) *Oxford Journal Legal Studies* 561, 566-567. Clarke had a different opinion, citing Blackstone’s commentaries and Whelan’s annotation, concluding, ‘From this perspective, it is clear that Blackstone did not regard ownership as a single

further explain, ownership in common law has been regarded as a two-ended relationship with both sides being persons,<sup>41</sup> while Roman law views ownership as a right emanating from a person to a thing.<sup>42</sup>

**possession:** is defined as the detention of a physical thing with the intent to hold it as one's own in this research. This carries the meaning of the right to exclude and excludes the rights to use and capital.<sup>43</sup> When it is referred back to the Taiwanese Civil Code, possession is a fact<sup>44</sup> of having or holding things in one's power.<sup>45</sup>

**property:** an object which belongs to someone, whether it is a physical or intangible thing. 'Property' in this study has a broader meaning than 'things' in civil law, but when the term 'real property' is used, it refers to immovable things, or interests in immovable things only. In this research, the term 'property' is not used as a synonym of 'ownership' (which has the meaning of a comprehensive collection of legal rights over an object; see

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all-embracing right but, as Whelan again notes, rather "a complex of different rights" not accounted for by the simple notion of "sole and despotic dominion". Clarke and Kohler (n 31) 184. Hughes further explained why there is a different understanding between common law and civil law. 'The reason for the vagueness of English jurists on this concept of ownership is not difficult to discover...English legal remedies are not in their form concerned with the protection of ownership but with possession and the right to possess'. 'The plain conclusion is that ownership is not a legal concept in the English system, but rather a social concept'. See Hughes (n 29) 395.

<sup>41</sup> 'Ownership is manifestly a relation, rather than a property of things'. See Henry C Mitchell, *The Intellectual Commons: toward an ecology of intellectual property* (Lexington Books 2005) 196.

<sup>42</sup> This is because, since English lawyers became familiarised with the Roman concept of ownership in the legal renaissance of the 12<sup>th</sup> and 13<sup>th</sup> centuries, the concept of ownership has been modified by common law lawyers to fit in with the common law estate structure. See Charles Reinold Noyes, *The Institution of Property: a study of the development, substance and arrangement of the system of property in modern Anglo-American law* (Longmans & Co 1936) 296, note 31. 'It is true, as Holdsworth says, that the common law structure of estates has been modified by the Roman concept of dominium'. In note 31, 'The Roman concept of ownership,....as we have seen, that conception has never been completely acclimatised in the common law, yet common law has acquired a conception of ownership which is different from that better right to possess which was the dominant theory'. A similar saying can be found in Hughes (n 29) 391. 'English law has never evolved a theory of ownership with the precision which the Romans brought to that fullest form of ownership in Roman law, dominium'. 'English law evolved its protection of property through the doctrines of seisin and possession, and was not in its early stages much concerned with ownership'.

<sup>43</sup> Wang Ze-jian(王澤鑑), *Minfa Wuquan(民法物權)=The Law of Things in The Civil Code* (San Min 2009) 10. 'Ownership has the right to exclude others and the right to use and capital, while possession has the right to exclude but lacks the rights to use and capital'. 'Possession is not the "rights" which Article 184 refers to, it needs be combined with obligations (such as a lease) in that the obligations provides the basis for the right to use and capital'.

<sup>44</sup> However, some jurists argue that it is a right. See *ibid* 517 note 2 of his book.

<sup>45</sup> Adopted from Garner (n4)1281.

also ‘ownership’ below).<sup>46</sup>

**property rights:** In this study, this term is used in a general sense refers to rights to a specific property, whether tangible or intangible.<sup>47</sup>

**quasi:** [ Latin ‘as if’ ] seemingly but not actually; resembling; nearly. <sup>48</sup>This is a Latin word ‘frequently used in the civil law, and often prefixed to English words’.<sup>49</sup> When this word is used in this thesis it implies a strong superficial analogy, and points out that the conceptions are sufficiently similar.

**quasi-possession:** Although in traditional Roman law, intangible things cannot be possessed,<sup>50</sup> however in Japanese and Taiwanese possession theory, intangible things can be possessed.<sup>51</sup> Therefore, in this research, quasi-possession means possession over real rights.<sup>52</sup>

**real property:** land and anything growing on, attached to, or erected on it.

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<sup>46</sup> According to Black’s law dictionary, property is defined as ‘1. The right to possess, use, and enjoy a determinate thing (either a tract of land or a chattel); the right of ownership, also termed *bundle of rights*. 2. Any external thing over which the rights of possession, use, and enjoyment are exercised’. The first definition is a synonym of ‘ownership’, but this research does not adopt the first definition. Rather, it adopts the second definition. Garner (n4)1335-36.

<sup>47</sup> Adopted from *ibid* 1338 and 1437 under ‘right’.

<sup>48</sup> Adopted from *ibid* 1363.

<sup>49</sup> The word quasi ‘marks the resemblance, and supposes a little difference, between two objects, and in legal phraseology the term is used to indicate that one subject resembles another, with which it is compared, in certain characteristics, but that there are also intrinsic and material differences between them’. Adopted from 74 C.J.S. Quasi, at 2 (1951) in *ibid*.

<sup>50</sup> Barry Nicholas, *An Introduction to Roman law* (Clarendon 1975) 106. ‘Incorporeal things cannot be possessed, since possession essentially requires a physical holding. Therefore, they cannot be acquired or transferred by any method with involves the transfer or acquisition of a possession’. Also in Lee (n38) 181.

<sup>51</sup> The German and Swiss codes reject the Roman law possession theory. The French law substantially adopts the Roman law possession theory. Since the German and Swiss codes reject the Roman theory of possession, Germanic law in this respect is nearer to English law than Roman law. See Lee (n 38) 184.

<sup>52</sup> This term ‘quasi-possession’ is widely used in Taiwanese legal scholarship. See Wang (n 43) 698, and also [1953] *Zuigao Fayuan Taishang Zi* number 288 (最高法院台上字第 288 號) *Zuigao Fayuan Precedent* (Supreme Court).

**real rights:** a civil law term where a right is connected between a person with a movable or immovable thing, rather than a person with another person. Real rights in the civil law concept include ownership, use, habitation, usufruct, predial servitude, pledge and real mortgage, and is also a term that can be used interchangeable with ‘rights *in rem*’.<sup>53</sup> In this research, if this term is used under the concept of civil law, it refers to the meaning stated above; if this term is used under the concept of common law, it refers to rights in relation to land.

**register:** When used as a noun, it means the registry, or the registration system of land or patents.<sup>54</sup> This study uses ‘registration’ as its synonym, especially referring to a certain principle like the ‘principle of registration’.

**right:** (*quanli* 權利 in Chinese) used in this study means a way to protect a person’s legal interests, but it is not identical to interests. It is a legal power to maintain one’s legal interest.<sup>55</sup>

**rights *in rem*:** This term generally means rights that a person has in relation to a thing. This thesis provides a detailed analysis in 4.2.2 regarding a different understanding of this term between Anglo-American law writers and Taiwanese law writers. Put simply here, ‘rights *in rem*’ in Hohfeld’s lexicon meaning rights against many people,<sup>56</sup> whilst in Taiwanese civil law, rights *in rem* signifies the real rights an owner has over his/her

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<sup>53</sup> Adopted from Garner (n4) 1437 under ‘right’.

<sup>54</sup> Adopted from Stephen F Jones and Paul Cole, *CIPA Guide to the Patents Acts* (7th edn, Sweet & Maxwell 2011) 467.

<sup>55</sup> Taking reference from Joseph Ernest De Becker, *The Principles and Practice of the Civil Code of Japan* (Butterworth & Co 1921) at introduction XXII-XXIII. The Taiwanese Civil Code defines it the same as the Japanese Civil Code.

<sup>56</sup> Hohfeld defines ‘rights *in rem*’ as ‘one of a large class of fundamentally similar yet separate rights, actual and potential, residing in a single person (or single group of persons) but availing respectively against persons constituting a very large and indefinite class of people’. See Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26(8) Yale L J 718. Kocourek criticises on this definition. See Albert Kocourek, *Jural relations* (2d edn, The Bobbs-Merrill company 1928) 198.



thing,<sup>57</sup> and is normally used interchangeably with real rights.

**tangible things:** used in this research refers to both movable and immovable things, including water and electricity, but excluding responsibility, stock options, business goodwill and intellectual property.

**tenure:** is derived from the Latin *tenere* meaning ‘to hold’, with a ‘tenant’ being the simple ‘one who holds’. Therefore, a ‘tenure system’ used in this study means a landholding system in a society, with the relationship between landlords and tenants not necessarily associated with a lease.<sup>58</sup>

**thing:** a subject matter of a right, limited to a tangible object.<sup>59</sup>

**the law of obligations:** This research uses ‘the law of obligations’ in the civil law sense. In the civil law world, the law of obligations includes the law of torts, the law of restitution (such as unjust enrichment), and the law of contract.<sup>60</sup> A contract is regarded as one of, but not the only, source of legal duties (obligations), with this concept of ‘obligations’ (*zhai 債* in Chinese) being the fundamental notion in all civil law countries that is not found in the common law world.<sup>61</sup>

**the law of things:** This research uses ‘the law of things’ in the civil law sense. The law

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<sup>57</sup> In Taiwanese Civil Code, ‘rights in rem’ equals to ‘*wu quan* (物權)’ or real rights. The notion of rights in rem (*wu quan* 物權) is a larger concept than ownership (*suo-you-quan* 所有權). In addition to ownership, rights in rem can also refer to a mortgage right on a ship (also named ‘real securities’ in Roman law), a usufruct on a piece of land and any other rights admitted by law. See Wang (n 43) 10.

<sup>58</sup> Adopted from S Rowton Simpson, *Land Law and Registration* (Cambridge University Press 1976) 27.

<sup>59</sup> Black’s law dictionary defines a ‘thing’ as ‘the subject matter of a right, whether it is a material object or not; any subject matter of ownership within the sphere of proprietary or valuable rights’. In common law, a ‘thing’ has a broader meaning than its definition in the Taiwanese Civil Code. This research does not adopt the dictionary meaning, for the reason that, in the Germanic-Japanese style of law, a thing is limited to tangible objects only. See Garner (n4)1617.

<sup>60</sup> Rene David, *English law and French law: a comparison in substance* (Stevens & Sons 1980) 101.

<sup>61</sup> *ibid* 101.

of things under the civil law system is different from the ‘property law’ in the common law system. The law of things deals with the jural relationship between a person and a physical thing, while ‘property law’ in common law covers the jural relationship arising from property rights, whether the objects are physical or not. Here, in this study, the law of things refers to the civil law deals with relationship of a person and a physical thing.

**transfer:** When used as a noun, it is a general term which embraces every mode of disposing of, or parting with, an asset or an interest in an asset.<sup>62</sup> When used as a verb, transfer means to change the possession or control.<sup>63</sup>

**usucapio:** meaning a positive right to gain title to a property, no matter whether it is movable or immovable, by someone who has remained in possession of another person’s property for a given period of time.<sup>64</sup>

**usufruct:** meaning a right to use and enjoy another’s immovable thing for a period of time without damaging or diminishing it,<sup>65</sup> a right less than ownership. Usufruct used in this research follows the definition in the Taiwanese Civil Code, which may refers to the

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<sup>62</sup> Garner (n4) 1636. For a further supplement from case law, see David Hay, *Words and Phrases Legally Defined* (4th edn, LexisNexis 2006) 851. Adopted from Australian case *Coles Myer Ltd v Commissioner of State Revenue (1998)* ‘Although the word “transfer” is not a term of art and is a word with wide connotation, to my way of thinking it is the passing of rights to another, so as to vest them in that other person, which is essential for a transfer, properly understood. It is not a mere disposition, a ridding oneself of the right or interest; it is the vesting in the transferee of that right or interest, precisely or substantially, which is necessary to affect a transfer, as ordinarily understood in the law’. According to this opinion, ‘transfer’ is not merely a mode of disposition, but also clothes the transferee with legal rights.

<sup>63</sup> Garner (n4) 1636.

<sup>64</sup> See Damien Abbott, *Encyclopedia of Real Estate Terms: based on American and English practice, with terms from the Commonwealth as well as the civil law, Scots and French law* (3rd edn, Delta Alpha 2008) 1287. Abbott defines ‘usucapio’ as ‘In Roman law, a positive right to gain title to property (real or personal, movable or immovable) by someone who has remained in possession of another’s property for a given period of time’. Also in Wang (n 43) 167.

<sup>65</sup> Black’s law dictionary defines ‘usufruct’ as ‘a right to use and enjoy the fruit of another’s “property”’. Garner (n4)1684. Here, ‘property’ which includes tangible and intangible aspects has a broader meaning than immovable. However, in the Taiwanese Civil Code, the object of a ‘usufruct’ is limited to immovable things only. See Wang (n 43) 341. ‘The object of the usufruct in this code is limited to immovable things. A usufruct cannot be created over a movable thing’. Therefore, Black’s law dictionary’s definition changed to ‘immovable’ by this author. Besides, quasi-usufruct is not recognised in the Taiwanese code, unlike the Roman law. A right to use movable things can be fulfilled by means of the law of obligations, better than creating a quasi-usufruct. See *ibid* 341.

following four types of right: surface rights,<sup>66</sup> agricultural tenancies, easement and *diǎn* (典), depends on the context.<sup>67</sup>

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<sup>66</sup> Surface rights, originating from Roman law superficies, were adopted by German and Swiss civil codes as well as by the civil code of Taiwan. See Wang (n 43) 352. Originally, superficies mean all things built upon or attached to the ground, such as houses and buildings, but also trees and other plants. As long as the one who built on another's land or cultivated it acted with the consent of the landowner, either a *servitus* or an *emphythesus* could apply. See Alexander P Kazhdan, *The Oxford Dictionary of Byzantium* (Oxford University Press 1991) vol 3, 1977. Regarding the definition of *emphythesus*, see *ibid* vol 1, 693. 'In the 4<sup>th</sup> C., the term referring to a set of administrative regulations whereby estates belonging to the crown were transferred to private cultivators. By the late 5<sup>th</sup> C. *emphythesus* had developed into a specific type of written contract governing long-term, usually perpetual leases of real property applicable not only to crown lands but to holdings of private and ecclesiastical landlords. Emp. Zeno defined *emphythesus* as a right distinct from lease or sale, although possessing certain qualities of both'.

<sup>67</sup> Under *numerous clausus* principles, the creation of a usufruct is limited to the recognition of statutory law and customary law, therefore, under Taiwanese Civil Code, there are only four types of usufruct as stated. Usufruct is majorly comprised of two of the rights—the right of use and the right of enjoyment, but does not include the right of disposition. See Abbott (n 64) 1287. 'Usufruct comprises two of the rights to property as recognized in Roman law, the right of use (*usus*) as the right of enjoyment (*fructus*), but does not include the right to destroy or 'abuse' the property (*abusus*); this latter right is only available to the *nu-propriétaire* (absolute owner)'. In Roman law, a usufruct emanates from ownership, and is independent of ownership, but constitutes a restriction to ownership. See Schulz (n 28) 334.

## CHAPTER ONE

### INTRODUCTION

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#### 1.1 Overview of the problem

How to correctly classify patents in the taxonomy of Taiwanese property institutions is a topic that has received insufficient discussion by the Taiwanese legal scholarship. An overriding number of jurists<sup>68</sup> believe that rights *in rem* from the law of things in

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<sup>68</sup> For example, reputable professor Tsai Ming-cheng (蔡明誠) states, ‘...according to the prevailing opinions in Germany, the character of “things” should be *Zuordnungsrecht* (to whom it belongs to). Rights *in rem* could be named *recht der Verömegenszuordnung von Sachen*, such as patents, utility models, design patents, trade marks, copyrights and alike, are rights *in rem* (*dingliche Rechte*).’ [translation by this author] See Tsai Ming-cheng, *Wuquanfa Yanjiu* (物權法研究)=*A Study on The Law of Things* (Xue Lin 2003) 6. Another reputable professor Shieh Zai-quan (謝在全) highlights, ‘Rights *in rem* have moved from a single thing to a combination of things: including movables and immovable things, even covering intangible things such as trade mark rights, patent rights, [rights in rem] being a combination of things for a specific economic purpose that have more and more in common.’ [translation by this author] Shieh Zai-quan conceives that rights in a trade mark and patent are a collective concept of things, and can therefore be applied to the law of things. See Shieh Zai-quan, *Minfa Wuquan Lun-shang* (民法物權論-上)=*On The Law of Things vol I* (3rd edn, San Min 三民 1989, 2004 reprint) 25. A similar saying can be also found in Shieh Ming-yan(謝銘洋), *Zhahui Caicanquan Fa*(智慧財產權法)=*Intellectual Property Law* (Yuan Zhao 2008) 43-72. Chapter 4 of Shieh’s book discusses whether Articles 768, 801, 948, 966 apply to intellectual property. Also in Rui Mu(芮沐), *Minfa Faluxingwei Lilun Zhi Quanbu*(民法法律行為理論之全部)=*An Overall Theory of Legal Acts in the Civil Code* (San Min 2002) 7-8. Rui Mu classifies intellectual property rights as absolute rights like real rights. Lin Ko-ching(林克敬), *Minfa Shang Quanli Zhixing Shi* (民法上權利之行使)=*Exercise of Rights in the Civil Law* (San Min 2009), 9. Lin Ko-ching suggests that the right

Taiwanese Civil Code explain the nature of a patent well, so there is no need for further discussion. In fact, court decisions that have adopted jurists' opinions sometimes successfully explain the law, but sometimes they do not. Judges are persuaded by jurists that the principles arising from the law of things support the property nature of a patent, even though no article in the law of things supports such a premise. Both the court and academia have failed to develop a deeper comparative study between real rights in the Taiwanese law structure and the estate concept used in patents in common law England. The theoretical gap between these three systems has created a significant obstacle in Taiwan's international patent transaction business.

There are many historical antecedents that have caused this misconception. Taiwanese academia are more imbued by Japanese and German law thinking than by the common law of England or the common law of the United States of America because Japanese/German law reception in Taiwan began early in the 1920s, with legal science arising from it and dominating the Taiwanese academia since then. It was not until the second half of the 20<sup>th</sup> century that Anglo-American law started to influence the development of Taiwanese intellectual property law.<sup>69</sup> Compared to the strong influence of Japan during the first half of the 20<sup>th</sup> century, the reception of Anglo-American

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to dominate a thing applies to intellectual property. Chuang Sheng-jung, *Min Fa—Wu Quan* (民法—物權)=*The Civil Code—Rights in rem* (Shu Quan 2003) 6. Chuang Sheng-jung (莊勝榮) conceived rights *in rem* in the law of things encompassing copyrights and trade mark rights. Qin Hong-ji (秦宏濟) used the 'lease' concept in the law of things to understand the concept of a 'licence'. His commentary on the 1944 Patent Act was the work closest to the time when this Patent Act was made. See Qin Hong-ji, *Zhuanli Zhidu Gailun* (專利制度概論)=*On the Patent Law System* (Shang Wu Publisher 1946) 99. Not only did Qin Hong-ji use the 'lease' concept in the law of things to understand the concept of a 'licence' but the Supreme Court also set the precedent ruling that a civil law leasehold is applicable to be adopted in a patent licence, meaning that patents have been seen as things or rights *in rem* that are available to lease. See [1970] Zuigao Fayuan Taishangzi number 4297 (最高法院台上字第 4297 號) Zuigao Fayuan Precedent (Civil Supreme Court). 'It is hard for this court to say that Article 423 of the Civil Code does not apply to a patent leasehold.' [translation by this author] The original clause of Article 423 reads, 'The lessor shall be bound to deliver to the lessee the thing leased in a condition fit for the stipulated use or for the collection of profits as agreed upon. He shall be also liable to keep it up in such a condition as to be fit for such use or collection of profits during the continuance of the lease.' [translation by Lawbank]

<sup>69</sup> According to Justice Yang Ren-shou (楊仁壽), Taiwanese Civil Code is more influenced by the principles of German, Swiss and Japanese laws, while commercial law is more penetrated by Anglo-American law. See Yang Ren-shou, *Faxue Fangfa Lun* (法學方法論)=*On the Jurisprudential Methodology* (San Min 1986) 151-152.

intellectual property law was rather ostensible. Judges and jurists still used their past legal training in real rights to interpret the nature of a patent, being especially perplexed by the word ‘property’ in intellectual property law. Many paradoxical statements have been made because of this belief by not only jurists but also the courts and the Intellectual Property Office authority being misled, with the premise of the decisions making the risk of international patent licence business difficult to manage.

The risks associated with licencing appear in two ways: firstly, inconsistency in court decisions make outcomes unpredictable and further reduce the willingness for transactions (sale and licence) in Taiwan; and secondly, according to this author’s personal experience, civil law ownership invites resentment by researchers in seeking patent protection, especially those researchers in the agricultural field. The first risk emerges when courts apply the same rule to different types of intellectual property cases. For example, in a copyright case, the court decides a copyright cannot be possessed and owned by the lapse of time, like possession for a movable thing.<sup>70</sup> However, in a trademark case, the court adjudicates that a trademark can be possessed by the lapse of time providing that the complainant files a new registration.<sup>71</sup> More inconsistent court decisions are presented in Chapter 2. Resentment by agricultural researchers seeking patent protection was attributed to civil law ownership, to patent rights being primary and absolute. This primary and absolute ownership of a patent contradicts researchers’ moral beliefs about fraternity to all mankind because the nature of agricultural knowledge is highly related to famine prevention. To occupy knowledge that benefits all people has been considered immoral and thus seeking patent protection has been detained.

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<sup>70</sup> See [2009] Zhihui Caichan Fayuan Xingzhishangsuzi number 44 (智慧財產法院刑智上訴字第 44 號) Lawbank (Intellectual Property Court).

<sup>71</sup> See [1997] Zuigao Fayuan Taishangzi number 2996 (最高法院台上字第 2996 號) Lawbank (Supreme Court).

Indeed, the ‘property’ nature of intellectual property is not as clearly stated in statutory laws as a physical object in the law of things. Despite the interpretation made by the Justice of the Constitutional Court that covers all intellectual property under the constitutional protection of private property,<sup>72</sup> neither the Patent Act specifically stating that a patent owner has the right to use or sell, nor Taiwanese Civil Code, expressly supporting the owner’s rights arising from the Patent Act, are deemed property rights. Consequently, when these rights are transferred, the court provides different explanations because of this vagueness. The court and jurists fail to distinguish the underlying understanding of the term ‘property’ used in a patent for inventions and ‘property’ used in physical things, making the issue more complicated and confusing.<sup>73</sup> How far the existing property laws operate in the arena of intellectual property transactions remains unclear.

As this study further demonstrates tumultuous results associated with vagueness in Chapter 2, a profound issue lies in the problem of a different taxonomy on property in civil law and common law jurisdictions. The underlying issue is apparently a different classification of things holding. A basic analysis of property holding and an advanced analysis of patent holding are crucial to this research. The hierarchy of interpretation in laws (intra-laws, customary law and foreign jurisprudence) set forth in Article 1 of

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<sup>72</sup> [1987] Shizi number 213 (釋字第 213 號) Lawbank (Council of Grand Justices: Constitutional Court) 199, [1995] Shizi number 370 (釋字第 370 號) Lawbank (Council of Grand Justices: Constitutional Court), and [2005] Shizi number 594 (釋字第 594 號) Lawbank (Council of Grand Justices: Constitutional Court). One piece of literature disagrees with the Constitutional Court. See Chen Zhen-he (陳正和), ‘Zhihui’ shi Xianfa Baozhang de Caichanquanma? Yi Zhuzuoquanfa wei Chungxin lun Zhihui Caichanquan zhi Xianfa Jichu (『智慧』是憲法保障的財產權嗎?以著作權法為中心論智慧財產權之憲法基礎)=A Constitutional Protected Property? On the Constitutional Ground of Intellectual Property from the Copyright Perspective’ (MPhil, Chengchi University 2005)

<sup>73</sup> Most authors, whether from Taiwan or China, merely point out that these two laws are different. Such as Li Chen (李琛), *Lun Zhishi Canquanfa de Tixihua* (論知識產權法的體系化)=*On the Systematization of Intellectual Property Law* (Peking University Press 2006) 78-80. Li Chen only inquires about insufficient communication between intellectual property law and civil law professors. However, Li Chen does not go deep enough to analyse how far the doctrines in civil law should be applied to intellectual property law. Concerning judicial decisions, see the analysis in Chapter 2 of this research.

Taiwanese Civil Code is followed. This research will discuss the intra-law explanation initially before moving onto discuss Taiwanese customary law, with English common law (the foreign jurisprudence) serving as the source of comparison. English common law is chosen because historically the current Taiwanese Patent Act 2011 originated from Patent Act 1944 made in China, when China was required to grant use and ownership to patents in a unilateral treaty with the United States of America (hereunder 'U.S.')

in 1903.<sup>74</sup> English common law is chosen as the source of comparison because the patent use and ownership notion was introduced to China, and then Taiwan, by Anglo-American law. This concept of Anglo-American use and ownership originated from English common law, thus this study begins by introducing English common law. An advanced focus is centred on patents because patent transactions have suffered the most from this vagueness. Patent transfer (including licence and sale) is a US\$1.75 billion business in Taiwan each year, with the scale of the licensing business increasing by at least 10% per annum.<sup>75</sup> Taking the Industrial Technology Research Institute of Taiwan as an example, they have a body of 6000 researchers, with each researcher having at least 1.5 patents on average transferred to companies/institutions outside Taiwan;<sup>76</sup> nearly every researcher has to face an international transfer once. The researchers and the staff at the technology transfer office need the laws to play the role of a safety net for their transactional risks. Unfortunately, the statutory laws have not kept up with this rapid development during the past 60 years. Despite the connection between domestic innovation and the international market becoming more inseparable than it was in the past, a more harmonised concept of owning, selling and licencing a patent in line with a global consensus remains scant.

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<sup>74</sup> For a full analysis of the historical evolution of Patent Act 1944 under the influence of the 1903 treaty with the U.S., see this author's Master's thesis, Chung Shang-pei (鍾尚倍), 'The Origins, Evolution and Impact of the Development of a Patent Law in Taiwan' (MPhil thesis, Soochow Law School 2009) 84-103.

<sup>75</sup> See Central Bank of the Republic of China, Taiwan, 'Balance of Payment Standard Presentation (by Year)' <<http://www.cbc.gov.tw/public/data/economic/statistics/bop/cSY.xls>> accessed July 27, 2010.

<sup>76</sup> For more information about Industrial Technology Research Institute (ITRI) licence business, see Industrial Technology Research Institute, 'Technology Transfer & IP Business' <<http://www.itri.org.tw/eng/econtent/business/business02.aspx?sid=6>> accessed 15 June 2012



Under pressure from the U.S. using Section 301 of the Trade Act of 1974 against Taiwan in 1989-1999,<sup>77</sup> and self-motivation for joining the World Trade Organization in 2002,<sup>78</sup> the Taiwanese government endeavoured to keep patent law in line with the international trend. The most recent effort was the latest amendment to the Taiwanese Patent Act in 2011, with the government consulting English Patents Act 1977,<sup>79</sup> and in particular the definition of the word ‘exclusive licence’,<sup>80</sup> and adopting it into the newly added section 3 of Article 64.<sup>81</sup> The English language has a significant influence on Taiwanese patent law making, which is why this research explores the position of a patent in property classifications and the meaning of licence in that classification.

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<sup>77</sup> For legislative records see Legislative Yuan, *Lifayuan Gongbao* 立法院公報 (*Legislation Communique*): *Yuanhui Jilu* 院會紀錄 (*Meeting Minutes*) (Folio 82, Issue 32, Number 2631, vol.1, 1993) 54-64. For more background information about the US using Section 301 of the Trade Act of 1974 against Taiwan in order to influence the policy and law making of intellectual property law, see Huang Chen-ling (黃貞綾), ‘Meiguo dui Zhongguo (gong) Yu Taiwan ZhihuiCaichanquan Tanpan Zhi Bijiao (美國對中國 (共)與台灣智慧財產權談判之比較)=On the U.S. Intellectual Property Right Negotiations with Taiwan and China:1989~1999’ (MPhil, National Chung Cheng University 2000).

<sup>78</sup> For legislative records see Legislative Yuan, *Lifayuan Gongbao* 立法院公報 (*Legislation Communique*): *Weiyuanhui Jilu* 委員會紀錄 (*Committee Meeting Minutes*) (Folio 86, Issue 6, Number 2898, vol.2, 1997) 235-262, Legislative Yuan, *Lifayuan Gongbao* 立法院公報 (*Legislation Communique*): *Weiyuanhui Jilu* 委員會紀錄 (*Committee Meeting Minutes*) (Folio 89, Issue 40, Number 3099, vol.2, 2000) 159-200, and Legislative Yuan, *Lifayuan Gongbao* 立法院公報 (*Legislation Communique*): *Weiyuanhui Jilu* 委員會紀錄 (*Committee Meeting Minutes*) (Folio 92, Issue 4, Number 3278, vol.1, 2002) 203.

<sup>79</sup> For legislative records see Legislative Yuan, *Lifayuan Gongbao* 立法院公報 (*Legislation Communique*): *Yuanhui Jilu* 院會紀錄 (*Meeting Minutes*) (Folio 100, Issue 81, Number 3933, vol. 1, 2011) 167. Under the column of ‘[Lifa 立法] Shuo Ming (說明)’ [Legislation reasoning], the statement says, ‘Adding section 3. The current section 2 of Article 84 allows an exclusive licensee to demand a person who infringes to stop such infringement. However, the law did not explicitly state the legal effect of an exclusive licence granting. Taking references from section (1) of Article 130 of English Patents Act [1977]...If a patentee has a need to exercise the innovation him/herself, (s)he may exercise such an innovation after the consent of his/her exclusive licensee.’ [translation by this author]

<sup>80</sup> Section (1) of Article 130 of English Patents Act 1977 reads, “‘exclusive licence’ means a licence from the proprietor or applicant for a patent conferring on the licensee, or on him and persons authorised by him, to the exclusion of all other persons(including the proprietor or applicant), any right in respect of the invention to which the patent or application relates, and “exclusive licensee’ and “non-exclusive licence” shall be construed accordingly;’ See legislation .gov.uk, ‘Patents Act 1977’ <<http://www.legislation.gov.uk/ukpga/1977/37/section/130>> accessed 27 March 2013.

<sup>81</sup> The new added section 3 of Article 64 of Taiwanese Patent Act 2011 reads, ‘An exclusive licensee may, within the licensed scope, exclude the patentee and any other third party from exercising such an innovation.’ [translation by this author] Before this new added section, no one knew whether an exclusive licensee may exercise his/her right to exclude upon the patentee in real practice. This is the reason why the 2011 amendment consulted the definition of ‘exclusive licence’ in section (1) of Article 130 of English Patents Act 1977, with the statement of ‘exclusive licence means a licence from the proprietor... to the exclusion of all other persons, including the proprietor or applicant’ to formulate the wording for section 3 of Article 64 in the Taiwanese Patent Act 2011.

## 1.2 Previous research

The main issue concerns the taxonomy and classification of the notion of holding a property. With such a notion being used to interpret the holding of patents, the literature review focuses on works that directly comment on it, or have misinterpreted it by misdelineating patents with movable/immovable things. This study excludes literature justifying property from the perspective of natural law, labour theory and other philosophical justifications because this study discusses taxonomy and classification. This work is not a philosophical justification study, so focuses mainly on a discussion of legal science in taxonomy and the achievements of a chosen taxonomy being used in interpretation. Another reason why legal philosophy is excluded is that judges in Taiwan favour using legal methodology as a legal basis and reasoning rather than using legal philosophy in court decisions (more in 6.2.3). A study like this has more referential value to judges. This study is an analysis of taxonomy; a further use of taxonomy in the interpretation of law. For the purpose of demonstrating the applicability of this studying being accepted by Taiwanese society, a historical and sociocultural description in this study is inevitable. The areas of previous research cover Taiwan and Japan only because both jurisdictions have the same problem due to a similar evolutionary route. This study excludes literature from other jurisdictions that have no substantial ruling and law enactment in Taiwan. English literature on this matter is occasionally consulted when this study further comments on them.

Previous researches from Taiwanese jurists directly on positioning patents in property taxonomy are few and unsatisfactory. Only two intellectual property law professors Zhen

Zhong-ren (鄭中人)<sup>82</sup> and Shieh Ming-yan (謝銘洋)<sup>83</sup> mention that real rights in Taiwanese Civil Code are inapplicable to handle all situations created by intellectual property transactions (including patent transfer), but none of them provide a successful suggestion to fill the void.

Japanese jurists like Masaakira Tomii (富井政章),<sup>84</sup> Sakae Wagatsuma (我妻榮)<sup>85</sup> and Shouichi Iwara(井藁正一),<sup>86</sup> even favour using the ‘property’ concept originating from the law of things to persistently explain intellectual property transfers (including patent transfers), except for Ichiro Kiyose (清瀨一郎), who suggests that patents should be isolated from the Japanese Civil Code and applied to its own law.<sup>87</sup> However, to what content of law patents should be applied to, Ichiro Kiyose fails to provide an answer. Modern scholars, like Nobuhiro Nakayama (中山信弘), acknowledge the differences between real rights and patent rights,<sup>88</sup> but without providing a detailed analysis about

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<sup>82</sup> Wang Wen-yu (王文宇) and Zhen Zhong-ren (鄭中人), ‘Cong Jingji Guandian Lun Zhihui Caichan Quan de Dingwei Yu Baozhang Fangshi(從經濟觀點論智慧財產權的定位與保障方式)=On The Nature and The Protection of Intellectual Property Rights From An Economic Perspective’ (2007) 147 *The Taiwan Law Review* 199.

<sup>83</sup> Shieh Ming-yan (謝銘洋), ‘Cong Xiangguan Anli Tantaoh Zhihui Caichanquan yu Minfa zhi Guanxi (從相關案例探討智慧財產權與民法之關係)=A Discussion on the Relationship of Intellectual Property Rights with the Civil Law through Relevant Cases’ (2004) 33(2) *National Taiwan University Law Journal* 208.

<sup>84</sup> Tomii has a vague view about this issue, stating that ‘patent rights are not “purely property rights”, but in a mortgage relationship, a patent can be treated as an object’. Masaakira Tomii, *Minpoh Genron* (民法原論)=*The Principles of Civil Law* (Yuhikaku 1903) 512.

<sup>85</sup> Wagatsuma favoured intellectual property being applied to the law of things, stating that, ‘intangible property rights including copyright, patent right and trade mark right function well in quasi-possession theory in the law of things’. Sakae Wagatsuma(我妻榮), *Minpoh: Bukken Hou* (民法:物權法)=*Civil Code: Rights in rem* 387-388.

<sup>86</sup> Shouichi Iwara(井藁正一), *Tokubetsu Hou Gai Ron* (特許法概論)=*Introduction to Patent Law* (Gan Shou Dou 1928) 128. Iwara states that the substantive rights in Article 35 of the 1921 Japanese Patent Act (the right to manufacture, use and sell etc.) share the same meaning with those in the law of things (Article 206 of the Japanese Civil Code).

<sup>87</sup> Ichiro Kiyose(清瀨一郎), *Kougyou Shoyuhken*(工業所有權)=*Ownership to Industrial Property* (Sanshorou 1936) 24-30. Ichiro Kiyose suggests that because of the unique character of a patent having all the characteristics of the law of things, the law of obligations and moral rights, it is improper to categorise a patent into each one alone. He suggests that Japan should take the Germany’s experience under consideration because prevailing thought in Germany suggests that patents should be isolated from the Japanese Civil Code and applied to its own law, but not applied back to the Civil Code.

<sup>88</sup> See Nobuhiro Nakayama (中山信弘), *Industrial Property Law. Volume 1, Patent Law. 2nd Revised and Enlarged edn* (Koubundou 2000) 3. Page numbers refer to the English translation of the manuscript, and this English translation is done by Institute of Intellectual Property of Japan. Nakayama states that, ‘Although patent rights are similar to rights in rem, the two rights are different in terms of historical

how real rights differ from patent rights, leaving this area of research unexplored. Most jurists still believe that ‘property’ in real rights is sufficient enough to be a supplement for the ‘property’ status of a patent.<sup>89</sup> Few jurists allude to differences in the substance of these two rights, and none of them further analyse how different the meaning of ‘property’ in real rights and patent rights are.<sup>90</sup> The appropriate positioning of patent rights in the system of property law remains obscure.

Previous research on English literature provides some insight into this issue. Intellectual property law comparatists Helen Gubby<sup>91</sup> and Andreas Rahmatian<sup>92</sup> acknowledge that civil law categorises property differently than common law, with this difference potentially impacting on copyright or a patent’s role as a property. This study however, challenges Rahmatian’s assertion that Hohfeld’s bundle of rights theory echoes Roman law rights *in rem* for Hohfeld has a unique way of understanding rights *in rem* to civil law lawyers,<sup>93</sup> as will be explained later.

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background, objectives, nature of subject matter and content of right’.

<sup>89</sup> Example such as Mitsue Toyosaki (豊崎光衛) stated that ‘Provisions in the Civil Code are supplementary to a patent law’ and that ‘in many occasions, patent law did not limit itself to the application of the Civil Code especially when rights *in rem* claims arise from patent infringement disputes’. Mitsue Toyosaki, *Kougyou Shoyuiken Hou* 工業所有權法=*Industrial Property Law* (Yuhikaku Publishing 1980) 120. Sugimoto (杉本) uses the same statement in Yumi Gaku (萼優美), *Tokkyo Jitsu Shinan Isyou Syouhyou Gakusetsu Hanketsu Soran Zokkan* (特許實用新案意匠商標學說判決總攬)=*Statement of Judicial Decisions and Doctrinal Commentaries on Patent, Utility Models, Design, and Trademark* (Bun Sei Sha 1933) 779-780.

<sup>90</sup> Iwara states that it is a pity that no Japanese jurist has explored the nature of a patent under the framework of the Japanese Civil Code. See Iwara (n 86) 126.

<sup>91</sup> Helen Gubby, *Developing a Legal Paradigm for Patents* (Eleven International Publishing 2012) 258-293

<sup>92</sup> Andreas Rahmatian, *Copyright and Creativity: the making of property rights in creative works* (Edward Elgar 2011) 5-9, 25.

<sup>93</sup> Despite Rahmatian conducting a comparative study on Roman law rights *in rem* and Hohfeld’s bundle of rights throughout pages 5 to 9 in Rahmatian, however, at page 25, he states, ‘This in reality, intellectual property protection principles are conceptually practically the same in Civil law and Common law countries, despite their different ownership (protection) conception’. Rahmatian believes that copyrights have positive internal rights, stating ‘The prominence of the external aspect of real rights with intellectual property rights has led some commentators to define intellectual property rights as merely “negative rights”: rights to stop others doing certain things. Copyright shows well that such a definition neglects the internal side of real rights and is incomplete. This internal aspect, the right to use, manifests itself especially in the right to assign or license and is the principal economic pillar of the copyright industries’. This author disagrees with this conclusion by providing a deeper comparative study of the right to use in the common law and civil law systems (see 4.3.1 and Figure 4-2).

This study also disagrees with Rahmatian's conclusion that intellectual property protection principles are conceptually the same in the civil law and common law systems. Chapter 4 in this study shows that the civil law and common law systems are substantially different in property classification. This study also suggests that Gubby's analysis is only partial because she began from eighteenth century England when choses in action had already extended to real rights action in the sixteenth century (see the analysis by this author in 4.1.5) and the word 'property' already spanned from personal to real in the seventeenth century (see 4.1.6). Her conclusion is unpersuasive because she uses judges' opinions in copyright cases and equally applies it to patents<sup>94</sup> without looking into the history of patents. Her doubt concerning categorising patents as personal property does not help this research harmonise the gap between civil law and common law. Asian jurists like civil law lawyer Chang Zhe-lun, Taiwanese civil law professor Li Shu-ming and Chinese intellectual property law professor Wu Hangdong disagree with using real rights to understand intellectual property,<sup>95</sup> but without

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<sup>94</sup> Gubby uses judges' opinions in copyright cases to answer her patent questions. She states, 'The question was: had an inventor ever been able to protect his invention from piracy without a patent granted by the crown?' Gubby cites Lord Camden's opinion on copyright case *Donaldson v Beckett*, 'If there be such a right at common law, the crown is an usurper; but there is no such right at common law...' and also Justice Yates' opinion on *Millar v Taylor* 1769, stating 'This kind of property has always the additional distinction of prerogative property. The right is ground upon another foundation; and is founded on a distinction that can not exist in common property'. She believes that a patent is also a royal prerogative grant so that the judges' comments in copyright cases equally applies to patent cases, but we think this assertion has no solid evidence supporting it. She states, 'A patent for a new invention was also a grant of the royal prerogative. As the king's property was "ground upon another foundation", it would seem from Yates' comment on prerogative patents for printing that a patent grant made by the crown for a new invention equally could not be seen as having the common law as its source'. See Gubby (n 91) 274-75.

<sup>95</sup> Chang Zhe-lun (張哲倫), 'Zhihui Caichan Quan Fa Diyi Jiang: Zhihui Caichan Quan Gailun: Yi Quanli Zhi Xingzhi Wei Zhongxin(智慧財產權法第一講:智慧財產權概論:以權利之性質為中心)=Intellectual Property Law Lecture One: the concept of intellectual property rights: on the nature of intellectual property rights'(2009) 78 Taiwan Jurist 91. Chang Zhe-lun (張哲倫) states that, 'Some commentators said patent rights are one kind of property right, therefore the right to exclude others is the same as a real property owner, but this point of view clearly misunderstands the character of "the right to exclude" in the Patent Act. For instance, the owner of a basic patent could assert his right against the owner of an improved patent. But a house owner cannot assert his right against another legitimate owner. In the world of real property, two houses are unlikely to overlap, but in the world of patents, it usually happens'. And see also Li Shu-ming (李淑明), *Min Fa Wu Quan (民法物權)=Rights in rem of the Civil Code* (Yuan Zhao 2006) 13. Li Shu-ming (李淑明) states in Article 421 that this Civil Code cannot be applied to intellectual property, which means that a licensee cannot rent a patent from a patentee. The object in a transaction is a thing according to Article 421, and is not intellectual property. Also in Wu Hangdong (吳漢東), *Zhishi Chanquan Lifatili yu Mingfadian Bianzuan (知識產權立法体例與民法典編纂)=Intellectual Property Law from the Legislative Perspective and its Relationship to the Civil Code* in

providing any constructional advice, their complaints are more querulous than helpful.

### **1.3 Objective and scope of this study**

This study is legal methodology research that abides by the legal science of law interpretation, deploying the analysis from the perspective of history and society on a comparative basis. English and Taiwanese social anthropologists' work is occasionally consulted in the study in order to strengthen a certain perspective, even though this study mainly concerns the legal taxonomy of property being adopted in a patent's position. The main objective of this study is to provide a persuasive law interpretation of patent rights being classified as property in accord with Taiwanese property institution. As such, this research follows the hierarchy of interpretation in laws set forth in Article 1 of Taiwanese Civil Code. An intra-law interpretation is looked into, with Taiwanese customary law also explored. Foreign jurisprudence is only looked into when Taiwanese customary law cannot provide adequate explanations about laws. Common law of England is chosen as the comparative counterpart because the taxonomy of property in English common law is similar to that in Taiwanese customary law. This study excludes models from civil law jurisdiction from use for comparison because civil law jurisdiction shares the same absolute, unitary, primary ownership notion with Taiwanese statutory civil law that cannot provide a solution (as presented in Chapter 2). Another reason for the common law of England being chosen concerns the many licencing activities that are highly active between Taiwan and the U.S., with Anglo-American common law originating from English common law. The Taiwanese Patent Act was deeply influenced by the 1903 US treaty, making tracing back to the root of English common law crucial to this study. Considering the joining of the global technology licence market currently

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Wu Hangdong and Chen Xiaojun 陳小君 (eds), *Sifa Yanjiu 私法研究=Private Law Review* (2003) 3 China University of Political Science and Law Press 68-71.

dominated by U.S., selecting common law to serve as the source of comparison in this study will benefit Taiwan's entering of this global licencing market.

This study begins by analysing intra-law interpretations. The court, jurists and the Intellectual Property Office in Taiwan favour using rules and doctrines arising from the law of things, to provide a complete and satisfactory answer to a patents position in property taxonomy. As this study will show, an intra-law explanation is not only confusing but also self-contradicting.

Chapter 3 provides a historical explanation of a misconceived intra-law interpretation widely accepted by Taiwanese legal society. The goal of Chapter 3 is to manifest quasi-possession theory, a theory that has constructed the whole misconception of applying rules and doctrines from the law of things to patents, and that originated from the selective adoption of Joseph Kohler's scholarship. The paradoxical view is further strengthened by court decisions (and considering that Chapter 2 demonstrates that the intra-law explanation does not work for patents). According to the hierarchy of Taiwanese Civil Code Article 1, the next step is a discussion of customary law. However, before a further discussion of customary law in Chapter 5, a deeper understanding of how a patent is positioned in English common law's property taxonomy is essential too. As such, Chapter 4 provides a historical exploration of patents being classified as property in English common law taxonomy. The goal of this chapter is to demonstrate that in medieval times patents were granted in fee simple where holding rights were not perpetual. By utilising the history as foundation, this study distinguishes the taxonomic differences of a property notion in civil and common law. With a clear distinction, this study seeks an explanation why civil law real rights cannot explain the property nature of patents, and therefore the jurisprudence elsewhere, such as rules in Taiwanese customary law needs to be looked into. Chapter 5 investigated the classification in

Taiwanese customary law, with a comparison of that in common law. This research searches for the similarity of these two classifications, and aim to build an explanation for patents based on Taiwanese customary law.

This study seeks to:

Examine the hazards caused by the linkage of civil law of things and patents.

Explore the evolution of a patent being property in common law jurisdiction (limited to England and the United States of America).

Gain a taxonomy basis from English common law to further establish the property nature of patents in Taiwanese customary law.

Establish an explanation, based on Taiwanese customary law, for the property nature of patents and reconciling that into Taiwanese civil law framework.

To achieve the above purposes, this chapter sets out the following six questions that will be answered:

1. What are the underlying reasons to explain patents by way of the law of things?
2. What has happened in the past that has led jurists and judges to use principles arising from the law of things to explain the nature of a patent?
3. What are the substantial differences of real rights between English common law of and Taiwanese civil law?
4. Insofar as the statutory laws do not solve the problem completely, is there any customary law in Taiwan that can help replenish the abovementioned gap?
5. How similar is this customary law to that in English common law?
6. Is this similarity applicable to work under the framework of Article 1 in the Taiwanese Civil Code?



Chapter 2 answers question 1 above, whilst Chapter 3 answers the second question. Chapter 4 explores the history and evolution of how patents have been categorised as property, and provides answers to the third question in 4.3. Chapter 5 tackles questions 4 and 5, with the last question answered in Chapter 6.

#### **1.4 Hypothesis**

The hypothesis of this study is that, the Taiwanese customary law on property, just like English tenure, was built on exclusion rules. Ownership of land, just like that of patents, was not an outright civil law ownership governed by inclusion rules but a freehold for intangible rights that could be divided by the duration of the holding. Taiwanese customary law shares the same characteristic as the common law of England, thus it is possible to rebuild a property model for patents by way of analogising patents to a tenure system in Taiwan.

#### **1.5 Research methodology**

In developing the arguments and recommendations set out in this thesis, the chosen methodology is a historical and comparative analysis on the classification of property rights between civil law and common law system. The ambit of a historical discussion of civil law is limited to Japanese and Chinese civil law before 1945 as these two laws had most impact on the formation of Taiwanese civil law during that time. The common law is English, on account of the common law patent system arising from England, and also Anglo-American common law, because the introduction of common law notions to Taiwan was via Anglo-American common law post-1945. The historical analysis follows a traditional historical research approach covering time, place, and event analysis. Insights gained from these historical and comparative law analyses will inform an

intra-law solution to the legal problem of how to bridge the gap previously unsolved by the Taiwanese legal and scholarly communities to reconcile patents within the Taiwanese Civil Code.

In order to conduct the above stated tasks, this study relies on the analysis of three main sources:

1. Reported judicial decisions, legislative reports, legal literatures, consultation gazettes and administrative missives.

Regarding court decisions, the author mainly relies on the professional database *Lawbank*.<sup>96</sup> The Supreme Court's meeting minutes for civil case disputes and Judicial Yuan's restatement of court decisions<sup>97</sup> are used as supplements when necessary. Concerning court decisions in Japan, the author relies on the database *Lexis Nexis Japan*, and also the cases and precedents collection edited by Fujirou Miyake (山宅富士郎) and Yumi Gaku (萼優美).<sup>98</sup>

Regarding the analysis of legislators' original legal language and reasoning, the author

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<sup>96</sup> Lawbank, <<http://www.lawbank.com.tw/>> accessed 28 September 2012

<sup>97</sup> For more details of the Supreme Court's meeting minutes, see Supreme Court, *Zui Gao Fa Yuan Min Xing Shi Ting Hui Yi Yue Yi Lu Quan Wen Hui Bian* (最高法院民刑事庭會議決議錄全文彙編)=*A Compilation of Supreme Court Meeting Minutes of Civil and Criminal cases* (Supreme Court 1928-1984). Concerning the Judicial Yuan's restatement, see the following four books: 1) Judicial Yuan (Ministry of Justice) Department of Judicial Administration, *Sifa Yanjiu Nianbao*(司法研究年報)=*Annuals of Judiciary Decisions*, vol 6 (Judicial Yuan 1986); 2) Judicial Yuan (Ministry of Justice) Department of Judicial Administration, *Sifa Yanjiu Nianbao*(司法研究年報)=*Annuals of Judiciary Decisions*, vol 9 (Judicial Yuan 1989); 3) Judicial Yuan (Ministry of Justice) Department of Judicial Administration, *Sifa Yanjiu Nianbao*(司法研究年報)=*Annuals of Judiciary Decisions*, vol 11 (Judicial Yuan 1991); 4) Judicial Yuan (Ministry of Justice) Department of Judicial Administration, *Sifa Yanjiu Nianbao*(司法研究年報)=*Annuals of Judiciary Decisions*, vol 16 (Judicial Yuan 1996).

<sup>98</sup> Fujirou Miyake, *Tokubetsu Hou Hanketsu Soran* (特別法判例總攬)=*Statement of Judicial Decisions on the Patent Cases* (Imperial Law and Precedent Publishing House 1943) and Yumi Gaku, *Tokkyo Jitsu Shinan Isyou Syouhyou Gakusetsu Hanketsu Soran Zokkan*(特許實用新案意匠商標學說判決總攬)=*Statement of Judicial Decisions and Doctrinal Commentaries on Patent, Utility Models, Design, and Trademark* (Bun Sei Sha 1933).

relies on legislative reports, literature, consultation gazettes and administrative missives preserved in the Academia Historica archive room at National Taiwan University, National Central Library, Fu Si-nian Library at the Institute of History and Philology, Kou Ting-yee Library at the Institute of Modern History in Academia Sinica and the staff library at the Intellectual Property Office. All Taiwanese historical references used by this author are primarily from archival sources, with the copies held by this author.

## 2. Court Archives and Oral History

In order to state how Taiwanese people understand the patent as a property in 3.3.2, the Taiwan Colonial Court Archives database<sup>99</sup> is heavily relied on. This database contains legal case documents from 1895 to 1945, originating from the courts of Taipei, Hsinchu, Taichung and Chiayi, with the records including official court decisions on civil cases, notarial documents, non-contentious matters, criminal cases and files on law enforcement. The supporting evidence cited by this author used notarial licence contracts filed in the relevant courts. Paragraph 3.3.2 also cites patent agency Mr. Sun Jiang-huai's oral history to reflect the fact.

## 3. Academic investigation reports

For those paragraphs stating traditional Taiwanese real property law, the author relies on the academic investigation report 'Taiwanese Private Law' created by the 'Temporary Investigation Committee of Taiwanese Customary Law' established in 1901-1919. As this committee is hosted by law school professor Santarou Okamatsu from Tokyo Imperial University, the investigative content concerning the property law is important to

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<sup>99</sup> Taiwan Colonial Court Archives, [http://tccra.lib.ntu.edu.tw/tccra\\_develop/](http://tccra.lib.ntu.edu.tw/tccra_develop/) (1895-1945), accessed July 31, 2010.

reference. This study also double checks information using a monthly journal called the ‘Taiwanese Customary Law Investigation Report’, produced by the Taiwan Customary Law Study Group, which was established by officers from the Government of Formosa at that time.<sup>100</sup>

#### 4. Textbooks, treatises and commentaries

Textbooks, treatises and commentaries have been widely consulted in this study. This author uses materials preserved at National Taiwan University (which used to be a division of Tokyo Imperial University), and textbooks and treatises preserved at the staff library at the Intellectual Property Office. Commentaries were acquired from the National Central Library in Taiwan, the British Library, the British Library of Political and Economic Science, the Library of the School of Oriental and African Studies, the Institution of Advanced Legal Studies Library, UCL Library and Queen Mary Library and IP Archive.

### 1.6 Limitations

The width of coverage of this comparative study, whether it is due to a long time scale or the diversity of different jurisdictions, will necessarily and inevitably result in the sacrifice of detailed analysis of particular law issues. This research does not cover a history of patent novelty, utility, or originality-inventorship, which is beyond the scope of this study. The study focuses on Taiwanese civil law, English and Anglo-American common law, excluding a wider discussion of common law and civil law comparisons.

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<sup>100</sup> For more detailed information on the committee and study group see Chung Shu-min (鍾淑敏), ‘Riju Chuqi Taiwan Zongdufu Tongzhi Quan de Queli(日據初期台灣總督府統治權的確立)=To establish a regime in the early domination of Formosa Government’ (MPhil thesis, National Taiwan University 1989) 118.

This study also excludes a philosophical discussion from the perspective of natural law, labour theory and other philosophical theories because this study discusses legal taxonomy on the notion of holding a property, as well as explaining patent licencing in this taxonomy. Models from other civil law jurisdiction are also excluded from this study because civil law jurisdiction all share the same ownership notion that leads to a similar legal taxonomy on property that cannot provide adequate explanations using Taiwanese statutory law.

The cause and effect discussion in the history chapter, namely Chapter 3 inevitably sacrifices some trivial details that are less relevant to the Taiwanese Civil Code. Some insufficiencies in historical statements are directly caused by incomplete database collections,<sup>101</sup> or unrecognisable handwriting in the original documents due to deterioration and/or poor preservation. Regardless of the insufficiencies, the author endeavours to present a logical statement with applicable archives that is still readable and attempts to summarise the systematic cause of the issues.

This study is limited to publications available in English, Chinese (both traditional and simplified) and Japanese languages (both ancient and modern) that the author collected in Taiwan and England. Unless otherwise specified, all authors and the titles of their publications are translated into English; some selected contents are also included in the footnotes for the reader's further reference.

## **1.7 Study outline**

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<sup>101</sup> The Taiwan Colonial Court Archives database does not collect court decisions made by Tainan(台南) district court, Kaohsiung(高雄)district court and Yilan(宜蘭) and Hualian (花蓮)district courts. The reason why these courts decisions are not collected in the database is due to either the court staff reporting missing files (Tainan, Yilan) or an incomplete collection (Kaohsiung, Hualian).

Chapter 1 introduces and sets out the goal and purpose of this study. This chapter set out the following six questions that will be answered: Why does popular opinion explain patents using the law of things? What has happened in the past? What are the substantial differences between English common law taxonomy and Taiwanese civil law taxonomy on property? Is there any customary law in Taiwan that can help replenish the abovementioned gap? How similar is this customary law to that in English common law? Is this similarity applicable to work under the hierarchy of Article 1 in the Taiwanese Civil Code? These questions will be answered in the following chapters in *seriatim*.

Chapter 2 begins with a statement of problems, including the fallacy of Taiwanese jurists' opinions and court decisions. This chapter points out which part of their consensus is unsound and contradictory. The purpose is to provide background knowledge about issues that happened in real practice.

Chapter 3 focuses on the formulation of the above stated misconception. This chapter provides an historical explanation of the issues and includes a cause and effect analysis and traditional historical descriptions. The author uses many primary resources to show the institutional, legal and ideological development of this misconception.

Chapter 4 reviews the evolution of English patents: how franchises were associated with the doctrine of estates in the thirteenth century and eventually grew into a property concept in the seventeenth century. This chapter uses history as a way to ask fundamental questions about what kind of property a patent should be. A comparative study of real rights in the common law of England and Taiwanese civil law is also included in this chapter. This chapter manifests that it is fallacious to directly apply civil law real rights into explanations about the nature of a patent. Put simply, the real rights structure in the civil law of Taiwan lacks two significant characteristics: the

segmentation of fee simple by different duration and the incorporation of leasehold and tenancy into real rights. How these two characteristics influence the explanation of a patent as property will be further stated in this chapter.

Chapter 5 builds a property model for patents based on the similarities between the tenure concept in the common law of England and Taiwanese customary law. This chapter presents six suggestions to the current law, including 1) the law of *yeh*(業)being more feasible than the law of things; 2) the *yeh-zhu-quan*(業主權)concept is superior to Taiwanese civil law ownership *suo-you-quan*(所有權); 3) the principle of registration shall not be adopted into the patent register; 4) patent ‘assignment’ should not be translated into *zhuan-rang* (轉讓) to prevent any confusion with the existing usage of outright ownership alienation for physical things; 5) ‘patent assignment’ shall be translated as ‘*zhuan-li-zhuan-rang*’(專利轉讓)rather than a civil law term ‘*zhuan-li-rang-yu*’ (專利讓與); and 6) a licence is similar to the concept of *pacht* (贖), thus licences can be envisaged as personal obligations made by the grantors and grantees in relation to real rights.

Chapter 6 presents the applicability of reconciling the common law estate concept by way of its similarity to Taiwanese customary law within the scheme of Article 1 in the Taiwanese Civil Code. According to Article 1, local customary laws and foreign jurisprudences will be adopted in civil cases. This chapter proves that the customary legal term and concept proffered in the previous chapters are confined to the definition of ‘customs’ in Article 1, and the legal methodology—the three steps analysis used by this research—satisfies the requirement of ‘jurisprudence’ in the Taiwanese Civil Code. As with statutory law, this author suggests patents should be separated from the law of things that prevents patents from being deemed physical things. The direct analogy for real rights in the law of things is proven inappropriate by this author; a more suitable

analogy for Taiwanese customary law, which corresponds to the doctrine of estate in the common law, is a better path to create a robust and successful patent transactional environment. This study concludes that Articles 66 and 67 in the Civil Code and Articles 6(1), 62(1) and 84 need to be significantly amended. The term ‘rang-yu’ (讓與) used in Articles 6(1), 13 (1) and (2), 62(1), 64, 65(1), 84, 88 and 138 need to be modified into ‘zhuan-rang’ (轉讓) and Articles 57, 59, 62, 63, 64, 69, 84, 87, 88, 89, 90, 91, 96, 97, 138 and 140 in relation to the terms ‘licences’, ‘licensees’ and ‘compulsory licences’ need to be changed into ‘xu-ke’ (許可, meaning permission) accordingly.

### **1.8 Note on translation and terminology definitions**

In this research, Chinese authors’ names appear with their family name preceding their given name, with Japanese names appearing with their given name preceding their family name. The *Hanyu pinyin* (漢語拼音) system is used for Chinese names, book titles and relevant concepts, unless the author has *Tongyong pinyin* (通用拼音) otherwise noted in the referenced document. *Kanji* (漢字) was pronounced in Japanese reading, with both *Hiragana* and *Katakana* translated into the Roman alphabetic system. All Chinese and Japanese texts have been translated by the author when no English version could be found.

A definition of terminology is presented in page 12, and a comparison character list is attached in Appendix Two.



## CHAPTER TWO

### THE PROBLEMS OF APPLYING THE TAIWANESE CIVIL CODE TO PATENT TRANSACTIONS

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This chapter aims to answer the first question—why popular opinion explains patents using the law of things? To answer this question, this chapter involves a structural discussion and a discussion on the substance of law. Section 2.1 and 2.2 reveal the structural flaw and the vagueness of the word ‘things’, with section 2.3 presenting the results of this combination. Section 2.4 challenges popular opinion by presenting inconsistencies in these opinions. Section 2.5 provides a solution to overcome the structural flaw; however, as this section will demonstrate, placing a requirement (delivery) with another requirement (registration) only creates new issues, with the results being unsatisfactory. This chapter concludes that the intra-law explanation cannot provide a satisfactory answer to overcome the flaw that patents were not clearly positioned in the property classification; as such, Chapter’s 4 and 5 will discuss customary law.

## 2.1 Overview of the Taiwanese Patent Act in the Civil Code structure and the problems caused by real practice

Taiwanese legal system combines commercial law and civil law together. Taiwanese Civil Code 2012 ('Civil Code' in this paragraph) is equipped with general rules for private jural relationships, addresses legal effects arising from one person against another person, and a person to his/her thing. Taiwanese Patent Act 2011 ('Patent Act' in this paragraph) is a part of this private law, a neighbouring field of civil law.<sup>102</sup> Due to this lack of separation, some basic legal doctrines arising from the code are inevitably used in patents. Civil law ownership,<sup>103</sup> co-ownership<sup>104</sup> and the possession concept<sup>105</sup> are basic concepts that have been used to explain holding status. Principles of registration, separability and abstraction, and acquisition by prescription have been discussed by law school professors concerning whether they are appropriate for patents.<sup>106</sup> It is not an uncommon phenomenon for civil law rules and principles to be

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<sup>102</sup> Yang Chong-sen(楊崇森), *Zhuanlifa:Lilun Yu Yingyong* (專利法:理論與應用)=*Patent Law:Theory and Application* (San Min 2003) 19.

<sup>103</sup> A typical example is the civil court stating that 'Section 1 of Article 56 of the Patent Act...is the same with Article 765 of the Civil Code, regulates the scope of ownership. The legislative purpose of these two laws is to create, to set the boundaries of ownership and the scope of patent rights.' See [2007] Difang Fayuan Zhizi number 28 (地方法院智字第 28 號) Lawbank (Taipei Civil District Court). The original clause of section 1 of Article 56 of the Patent Act states, 'Unless otherwise provided for in this Act, the patentee of an invention patent has an exclusive right to prevent others from exploiting the invention without the patentee's consent.' Article 765 of the Civil Code stating, 'The owner of a thing has the right, within the limits of the Acts and regulations, to use it, to profit from it, and to dispose of it freely, and to exclude the interference from others.' [translation by Lawbank] The court apparently used civil law ownership to understand patent rights' holdings.

<sup>104</sup> Using the co-ownership concept from tangible (movable and immovable) things to patents, see Legislative Yuan, *Lifayuan Gongbao* 立法院公報 (*Legislation Communiqué*):*Weiyuanhui Jilu* 委員會紀錄 (*Committee Meeting Minutes*) (Folio 99, Issue 22, Number 3987, 2010) 511. The Director of Intellectual Property Office Mrs. Wang Mei-hua (王美花) replied to the legislator Mr. Pan Men-an's (潘孟安)query, regarding whether a waiver to co-ownership and co-ownership to a movable and immovable thing under the Taiwanese Civil Code equally applies to a patent co-ownership, with Director Wang Mei-hua answering 'Yes'. Also in Yang (n 102) 299. 'The patent co-ownership...may apply to Article 831 of the Civil Code with *mutatis mutandis*.' [translation by this author]

<sup>105</sup> A typical example is civil law jurist Wang Ze-jian (王澤鑑) stating, 'The object of quasi-possession limits to property rights...and property rights included real rights, personal debts and rights over intellectual property'. See Wang (n 43) 696-697.

<sup>106</sup> An example is Professor Shieh commenting that 'acquisition by prescription' and 'quasi-possession' has been wrongfully applied in intellectual property transactions. See Shieh (n 68) 52-53. Not every professor agrees with Professor Shieh. Professor Wang believes that the quasi-possession concept is appropriate. Professor Cheng conceives that both 'acquisition by prescription' and 'quasi-possession' are

adopted to explain various legal effects arising from patent transactional activities.

Some adoptions successfully explain certain legal effects, whilst others fail. As more issues will be addressed later, the core issue appears to be patents in the property taxonomy being unclear. As a separate law does not otherwise address this issue, any dispute arising from commercial activities is governed by the general principles in the Civil Code. According to the general principles in the Civil Code, a patent sale contract is made when parties reach a mutual consensus.<sup>107</sup> The transfer of ownership only arises when a patent is delivered.<sup>108</sup> Some inquiries then arise, such as ‘How to fulfil delivery requirements by handing over a patent specification?’ and ‘Does a patent fit in the meaning of rights in rem of personal property set forth in section 1 of Article 761?’ To what extent do the rights a patentee owns are not well elaborated in the Civil Code.

In real practice, this lack of clarity creates ambiguity in law applications. In a situation where a patent portfolio is in auction, the bidder often asks ‘When will the interests and risks pass to the bidder?’ This question touches upon when a patentee has done with his/her transfer of ownership, and according to section 1 of Article 761, it means when a patentee finishes his/her delivery process. The same inquiries then arise again: ‘How to fulfil the delivery requirements, and is a patent right *in rem* of personal property anyway?’ This inquiry also happens when an insolvent patentee sells his/her patents to a buyer. The timing of a successful transfer decides who carries the burden of loss, and without a clear position for patents in the property taxonomy, it is difficult to answer the above questions from the ground up. The above questions all point to one

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applicable. See Wang (n 43) 696, 697 and Zhen Yu-po(鄭玉波), *Min Fa Wu Quan*(民法物權)=*The Law of Things* (San Min 1958, 8<sup>th</sup> edn 1980) 414,415.

<sup>107</sup> Section 1 of Article 153 of Taiwanese Civil Code 2012 states, ‘When the parties have reciprocally declared their concordant intent, either expressly or impliedly, a contract shall be constituted.’ [translation by Lawbank]

<sup>108</sup> Section 1 of Article 761 of Taiwanese Civil Code 2012 stating, ‘The transfer of rights in rem of personal property will not be affected until the personal property has been delivered.’

direction—why a discussion of delivery requirements is important in the first place? Is there an underlying legal structure issue in the Civil Code?

As a matter of fact, there is. The underlying legal structure is governed by the principle of separation and abstraction. The following section begins by explaining the principle of separation and abstraction, how much variation there is between them, and why it is a problem for a patent transaction to be covered under the Taiwanese Civil Code structure.

## **2.2 The principle of separation and abstraction and the dilemmas associated with patent transactions**

### **2.2.1 What are the principles of separation and abstraction?**

Civil law families in the world have roughly two different attitudes to the arrangement of property transfers. One is the principle of combination ('Einheitsprinzip' in German) and the other is the principle of separation ('Trennungsprinzip' <sup>109</sup> in German).<sup>110</sup> The principle of combination concerns when the owner has the intention to sell his thing and the other party agrees to accept his thing, with the ownership of such a thing being thus transferred to the other party. 1804 French Civil Code,<sup>111</sup> 1942 Italian Civil Code,<sup>112</sup>

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<sup>109</sup> According to the Oxford-Duden German dictionary, the German word 'trennung' is translated as 'separation' in English. See Werner Scholze-Stubenrecht and J B Sykes, *The Oxford-Duden German Dictionary: German-English/English-German* (Clarendon 1997) 716. 'Prinzip' is translated as 'principle'. *ibid* 577.

<sup>110</sup> Chen Tian-hui (陳添輝), 'Wuquan Wuyinxing Yuanze (物權無因性原則)=The Abstract Nature Alternation of the Act of Real Right' (2005) 88(6) *Chengchi Law Review* 67.

<sup>111</sup> See French Civil Code Article 1583. Chinese translation see Lin Yi-dian (林易典), 'Yong Bijiaofa Tanxun Minfadian de Xinfanxiang: Xi Wuquan Xingwei zhi Youying Xing wei Zhongxin (用比較法探尋民法典的新方向：以物權行為之有因性為中心)=Using The Comparative Law in Search of A New Way for The Civil Code: focus on the causative juristic act' (2004) 1207 *Judicial Weekly* 3 note 7.

<sup>112</sup> See Italian Civil Code Article 1376. See *ibid* 3 in his note 9.

1964 Polish Civil Code,<sup>113</sup> 1966 Portuguese Civil Code<sup>114</sup> and the inactive 1794 General State Laws for Prussian States ‘Allgemeines Landrecht für die Preußischen Staaten’, ALR) take this approach.<sup>115</sup> The advantages of the principle of combination are that ownership is transferred when the parties have made a deal and the transaction progresses fast and efficiently. However, it also has some disadvantages. If the buyer does not receive the thing after the agreement is made, he bears a great risk of loss. In French civil law particularly, it is not an essential requirement for the seller to transfer his ownership to the buyer by delivery and the thing could fail to reach the buyer after the agreement is made. If the thing being lost is not attributed to being the seller’s fault or destroyed by force majeure before it reaches the buyer, the loss belongs to the buyer. The buyer still has to pay the purchasing price. The principle of combination sometimes results in an unfair circumstance.

The principle of separation, on the other hand, means a separation of legal relationships between persons and things. Such a separation leads to two separate legal categories: the law of obligations and the law of things. Each requires the expression of ‘will’ from the seller and ‘acceptance’ from the buyer. From the seller’s side, it requires the will to sell in the law of obligations and the will to transfer ownership in the law of things. Likewise, from the buyer’s side, it requires the will to accept the buyer’s sale in the law of obligations and the will to receive ownership in the law of things. Unlike a singular contractual relationship (ownership is transferred upon the agreement being made) is involved in the principle of combination, there are two contractual relationships occupying the principle of separation: the sale contract and ownership transfer contract.

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<sup>113</sup> See Polish Civil Code Article 155 section 1. See *ibid* 3 in his note 12.

<sup>114</sup> See Portuguese Civil Code Article 408 section 1. See *ibid* 3 in his note 13.

<sup>115</sup> Chen (n 110) 67. Although French and Austrian civil codes are roughly categorised as being the same principle, there is some nuance between these two codes. For example, French code does not require ‘delivery’ as the requirement of ownership transfer, whilst the Austrian code requires ‘delivery’ [in movable] and ‘registration’ [in immovable] as the essential requirement of an effective transfer.

German Civil Code and the Swiss Code take this approach.<sup>116</sup>

The German law model however, is slightly different from the Swiss law model. The Swiss law model conceives that the two contractual relationships are causative and related, and thus the invalidity of the sales contract leads to the ineffectiveness of the ownership transfer contract.<sup>117</sup> However, the German law model regards these two contracts as two separate, mutually independent contracts. The German law model is thus called ‘das Abstraktionsprinzip’ (translated as ‘the principle of abstraction’)<sup>118</sup> by scholars. It means, in contrast to the Swiss law model, that the ineffectiveness of the sale contract does not invalidate the ownership transfer contract, and vice versa. The ownership transfer contract remains valid, despite the sale contract being invalid or void.

Taking a daily transaction as an example, assume this author wants to buy a box of strawberries. In the German law model, the vendor and I have two separate agreements. The first contract is the sales contract that the vendor wants to sell a box of strawberries to me for a pound, and I agree to pay a pound to buy that box of strawberries. This sale contract is governed by the law of obligations. The ownership of that box of strawberries has not been transferred because it is not enough to have only one contract. Conceptually, there is another contract where the vendor agrees to transfer ownership to me and I agree to receive the transfer. The second contract—the ownership transfer contract, is governed by the law of things.

The above example can be modified slightly to present why some Taiwanese jurists

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<sup>116</sup> *ibid* 67.

<sup>117</sup> *ibid* 82-84.

<sup>118</sup> The German word ‘Abstraktion’ is translated as ‘abstraction’ in English. See Scholze-Stubenrecht and Sykes 47. ‘Prinzip’ is translated as ‘principle’ in English. See *ibid* 577.

think the German law model is superior to the French law model, and the principle of abstraction should be used for every property transaction.

Assume I want to buy a box of strawberries. The vendor misunderstood what I wanted as raspberries and bags the raspberries for me. Without checking the bag I took the raspberries with me after payment. When I reached home and found the mistake, I went back to the vendor and prepared to rescind my contract with him.

According to the principle of combination, the sale contract is void when I rescind the contract caused by a mistake. The transfer of the ownership of raspberries and money is thus invalid. The vendor remains the owner of his raspberries and the pound I paid is still mine, we then need to return each other's thing to each other.

However, if the principle of separation and abstraction are employed, the sales contract is void but the transfer of ownership remains valid. His raspberries are still mine and my money remains his. Technically, I am the true owner of the raspberries. Differing slightly from the principle of combination where we need to return each other's thing, the reason for returning is different. Under the principle of separation and abstraction neither he nor I can demand a return based on that thing being mine. Instead, we can ask each other for a return based on, not an action ground on real rights, but a weaker claim based on the 'unjust enrichment' principle governed by the law of obligations.<sup>119</sup> I need to return the raspberries not because it is his but because the raspberries are the interest without any legal grounds. Therefore, at the level of the law of things, I do not need to return them, but at the level of obligations, I do.

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<sup>119</sup> Article 179 of Taiwanese Civil Code, 'A person who acquires interests without any legal ground and prejudice to the other shall be bound to return it. The same rule shall be applied if a legal ground existed originally but disappeared subsequently'. [translation by Lawbank]

The advantage of the principle of separation and abstraction begins to emerge when the vendor goes bankrupt. If I rescind the sales contract by mistake, in the French law model (the principle of combination) the transfer of ownership is therefore invalid as well. The raspberries then become his, not mine. According to the law of things (*rei vindicatio*) the vendor can demand that I return his raspberries back to him, but he cannot return me my money because he is bankrupt. The inferior customer suffers this disadvantageous position under the principle of combination.

Such an unfair situation will not happen if the principle of separation and abstraction has been adopted. As the invalidity of the sale contract does not influence the validity of the ownership transfer contract, I am still the true owner of that box of raspberries. As the true owner of the raspberries, I have the right to resell them to someone else, regardless of the vendor's opinion. Although the German law model's 'two mutual independent contracts' concept has often been criticised by some Taiwanese jurists for being too hypothetical and strange to daily life experience,<sup>120</sup> it no doubt protects the inferior buyer when the seller is bankrupt.<sup>121</sup>

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<sup>120</sup> Chen (n 110) 81. Also in Yin Zhang-hua (尹章華), 'Zhaiquan Xingwei Yu Wuquan Xingwei Zhi Fali Jiegou (債權行為與物權行為之法律架構)=The Legal Structure of The Act of Real Rights and The Act of Obligations' (1990) 57(3) Falu Pinglun(法律評論)=The Law Review 351-352.

<sup>121</sup> The principle of abstraction however, has a drawback if the vendor sells the same thing twice to a different individual. Assume I want to buy a box of strawberries and there is only one box left. The vendor and I agree that I will pay a pound to him first and that he will keep that box of strawberries for me until I come back to get them later. When I come back, the vendor has already sold it to another client. Under the French law model (the principle of combination), I have the right to demand that that client (if I know who he/she is) returns my strawberries because I am the true owner.

However, the same scenario happens differently when the principle of separation and abstraction are employed. Under the German law model, a successful delivery from the seller to the buyer is an essential requirement of a valid transfer, so in the above scenario, the strawberries belongs to the person whom the vendor handed them over to. Despite in the above situation, I made the sale contract with the vendor first and the box of strawberries was not handed over to me, ownership is not successfully transferred to me. Instead, they go to the subsequent buyer in that scenario.

With the principle of separation and abstraction, the invalidity of the sales contract does not influence the validity of the transfer contract and I have no right to demand that the second buyer returns the box to because he is the true owner of the strawberries. If the thing I purchase is not a box of strawberries, but something unique in the world like an antique, the buyer's situation in the German law model is worse than that in the French law model.



Despite the popular opinion agreeing that the advantage of principle of separation and abstraction equally benefits the patent transaction, this author however, has a different perspective. There is no obvious advantage for the buyer because once the sales contract is signed, ownership is transferred to the buyer before the buyer makes any payment. This is because, in a patent transaction, it is beyond imagination to deliver a patent to the buyer, so ownership transfer to the buyer is faster than for a physical thing transaction. Once the buyer learns the seller has gone bankrupt after the contract is signed, the buyer will choose not to make the payment.

The buyer is not in an inferior situation as in a physical thing transaction; on the contrary, the buyer is the party that benefits from the patent transaction because ownership has been transferred to the buyer, with the buyer not paying the seller under bankruptcy, so the buyer may own the patent without any legal grounds. According to the unjust enrichment principle, the buyer needs to return the patent to the seller. No one benefits from the principle of abstraction and separation. As argued later in 2.2.4, if the buyer goes bankrupt instead of the seller, the seller becomes the victim of this transaction because the seller suffers loss of ownership. Unlike a physical thing transaction, the seller can control whether the thing is delivered before the seller gets the money; in a patent transaction, the ownership transfers to the buyer once the sales contract is signed. The principle of separation and abstraction benefits neither the buyer, nor the seller. There is no strong reason to support the principle of separation and abstraction being applied to patent transactions.

### **2.2.2 Various model of principle of separation and abstraction**

There are more models due to different combinations than the German law and French law models in the civil law family. Technical speaking, the combination takes place

between two different approaches (the principle of combination or the principle of separation) and four separate requirements (with the principle of abstraction, or not, with delivery/register as an essential requirement, or not), there might be at least six possible combinations. One possibility is the principle of combination being adopted with no requirements; France and Poland take this approach. Another possibility is the principle of combination being adopted, with a requirement of delivery/register being an essential element of a valid transfer. Countries like the Czech Republic<sup>122</sup> and Spain<sup>123</sup> belong to this kind. There is another possibility that the principle of separation is adopted without having the principle of abstraction, but it is required to fulfil the due delivery/register process. Countries such as Switzerland and the Netherlands have this combination.<sup>124</sup> There is also when all requirements being considered. A country like Germany adopts the principle of separation and abstraction, with the requirement of due delivery/register process if a valid ownership transfer proceeds.

There are also some other combinations different from the above stated models. The 1940 Greek Civil Code adopts the principle of separation but treats movable things and immovable things differently. If the transactional object is a movable thing, the principle of abstraction is adopted; if it is an immovable thing, the principle of abstraction is excluded.<sup>125</sup> Japanese civil code is another type of combination. The majority of Japanese jurists conceive that the Japanese Civil Code has the principle of combination and the principle of abstraction.<sup>126</sup> If the majority's opinion has been widely

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<sup>122</sup> See 1964 Czech Republic Civil Code Article 132 section 1 and 133 section 1. See Lin (n 111) 3 note 27.

<sup>123</sup> See 1888 Spanish Civil Code Article 609 section 2 in *ibid* 3 in his note 25. See also Su Yeong-chin (蘇永清), *Guyou Fazhi Yu Dangdai Minshi Faxue*(固有法制與當代民事法學)=*Ancient Law and Contemporary Civil Law* (San Min 1998) 312.

<sup>124</sup> Swiss Civil Code see Chen (n 110) 83. Chapter 3 Article 84 section 1 of the 1992 Dutch Civil Code see Lin (n 111) 3 note 24.

<sup>125</sup> See 1940 Greek Civil Code. Article 1034 states the legal effect the movable thing transactions, Article 1033 regulates the real estates. See Lin (n 111) 2,3 note 30.

<sup>126</sup> See Shi Shang-kuan (史尚寬), 'Lun Wuquan Xingwei Zhi Dulixing Yu Wuyinxing(論物權行為之獨立性與無因性)=On the Principle of Separation and Abstraction' (1956) 1(1) *Faxue Congkan 法學叢刊*

accepted,<sup>127</sup> then the Japanese Civil Code is truly another unique type of combination.

### 2.2.3 The principle of separation and abstraction in the Taiwanese Civil Code

Taiwanese Civil Code separates the law into the law of obligations and the law of things, therefore most jurists agree that the Taiwanese Civil Code adopts the principle of separation.<sup>128</sup> The majority of Taiwanese jurists conceive that Taiwanese Civil Code follows the German style.<sup>129</sup> They think the code has the principle of separation and abstraction, with the delivery/register requirement being an essential requirement of a valid transfer.<sup>130</sup> Some say that the Taiwanese Civil Code is different from the German law model. In fact, it is a conditional principle of abstraction rather than a genuine principle of abstraction.<sup>131</sup> The other school of professors conceives that the Taiwanese Civil Code inclines to the Swiss style more than the German style. They think the Code has the principle of separation and the delivery/register requirement, but does not have the principle of abstraction.<sup>132</sup>

They have a good reason to believe so. In the German law model, there is an essential

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=China Law Journal 63,65-66. Regarding Japanese Civil Code Article 176, see Qu Tau (渠濤), *Zuixi Riben Minfa* (最新日本民法)=*The Latest Japanese Civil Code* (Law Press China 2006) 42. Also in Chen (n 110) 72 and Lin (n 111) 3 note 11.

<sup>127</sup> Some Japanese jurists believe that the Japanese Civil Code has no principle of abstraction. See Yao Rui-guang (姚瑞光), *Minfa Zongze Lun* (民法總則論)=*On the General Principles of the Civil Code* (Dazhongguo 大中國 2002) 267. Also in Chen (n 110) 72.

<sup>128</sup> Shi (n 126) 63, 67. Also in Wang Ze-jian(王澤鑑), 'Minfa Zongzebian Guanyu Faluxingwei Zhi Guiding Dui Wuquan Xingwei Shiyong Zhi Jiben Wenti(民法總則篇關於法律行為之規定對物權行為適用之基本問題)=Some Basic Issues of A Juristic Act in The General Principles Applies to The Law of Things' (1986) 31(3) Faxue Congkan 法學叢刊=China Law Journal 27, 28.

<sup>129</sup> Including Wang, 'Minfa Zongzebian Guanyu Faluxingwei Zhi Guiding Dui Wuquan Xingwei Shiyong Zhi Jiben Wenti(民法總則篇關於法律行為之規定對物權行為適用之基本問題)=Some Basic Issues of A Juristic Act in The General Principles Applies to The Law of Things' (n 128) 28, Zheng Guan-yu(鄭冠宇), 'Wuquan Xingwei Wuyinxing Zhi Tupo(物權行為無因性之突破)=A Breakthrough of the Principle of Abstraction' (1998) 43(4) Faxue Congkan(法學叢刊)=China Law Journal 59,68.

<sup>130</sup> Wang, *Minfa Wuquan*(民法物權)=*The Law of Things in The Civil Code* (n 43) 68, 83.

<sup>131</sup> Zheng (n 129) 68, Shi (n 126) 67.

<sup>132</sup> Xie Zhe-sheng(謝哲勝), 'Wuquan Xingwei Dulixing Zhi Jiantao(物權行為獨立性之檢討)=A Rethinking of the Principle of Abstraction' (1994) 52 Chengchi Law Review 351-352 and Yin (n 120) 25.

element for the parties to ‘consent’ to the ownership transfer, whilst in the Swiss law model, there is not. Taiwanese Civil Code has no article that regulates ‘consent’ being essential; therefore, the minority has grounds for thinking that the Taiwanese Civil Code is closer to the Swiss law model. However, those who support the German law model also have a good reason as well. One of the legislators of the Taiwanese Civil Code specified that the Code follows the German law style.<sup>133</sup> The German law model supporters cite the legislators’ opinion and base their reasoning on it. Whether the Taiwanese Civil Code is closer to the Swiss law model or German law model remains unsolved by the academia, with Taiwanese courts favouring the German model more than the Swiss model. Almost all court decisions are more inclined towards the German than the Swiss law model.<sup>134</sup>

As a matter of fact, not only was the German Civil Code consulted in the Taiwanese Civil Code, the Japanese Civil Code and the Swiss Civil Code were also consulted.<sup>135</sup> It has the principle of separation, a conditional principle of abstraction<sup>136</sup> and the

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<sup>133</sup> Shi (n 126) 63, 67.

<sup>134</sup> Wang, *Minfa Wuquan*(民法物權)=*The Law of Things in The Civil Code* (n 43) 69,70. ‘The overriding consensus is our Civil Code adopted the second model [German model], and that is, apart from a sale contract, we have an independent ownership transfer contract with the principle of abstraction... It is conclusive that the court admits the existence of such an ownership transfer contract.’ Professor Wang Ze-jian (王澤鑑) illustrated two Supreme Court precedents, six Supreme Court decisions and one constitutional court decision to support this, including precedents [1941] Zuigao Fayuan Taishangzi number 411(最高法院台上字第 441 號) Zuigao Fayuan Precedent (Civil Supreme Court) ‘The seller of an immovable thing is obligated to sustain a legitimate ownership transfer contract after a valid sale contract is made.’ [translation by this author]; and the Supreme Court decision [2000] Zuigao Fayuan Taishangzi number 961 (最高法院台上字第 961 號) Lawbank (Civil Supreme Court) ‘An ownership transfer contract has its independency and abstraction, and will not be invalidated by a sale contract that is void or revocable.’ [translation by this author]; and also a constitutional court decision [1994] Shizi number 349 (釋字第 349 號) Lawbank (Council of Grand Justices: Constitutional Court) ‘The judicial acts in the Civil Code are separated into, the act in relation to obligations and the act in relation to things.’ [translation by this author] This author found another Supreme Court decision that directly mentioned the principles of separation and abstraction. See [2006] Zuigao Fayuan Taishangzi number 1859 (最高法院台上字第 1859 號) Lawbank (Civil Supreme Court) ‘The so called separation and abstraction of an act in relation to things, means this act is not affected by the invalidity, voiding or withdrawal of the sales contract.’ [translation by this author]

<sup>135</sup> Su (n 123) 281.

<sup>136</sup> ‘Conditional’ here means that under certain circumstances the seller and the buyer can ignore the principle of abstraction. For further information about what the certain circumstances are, see *ibid* 307-310. Also in Wang, *Minfa Wuquan*(民法物權)=*The Law of Things in The Civil Code* (n 43) 84, and Zheng (n 129) 61-68.

delivery/register requirement. Without the ‘consent’ requirement from the parties for the ownership transfer, like in the German law model, the Taiwanese Civil Code is actually a sui generis type. This sui generis structure has a significant impact on patent transactions because when a physical thing is replaced with a patent, obstacles might emerge in this sui generis structure whilst the same obstacles may not appear in other civil law models, such as in the French model. The next section will discuss this impact.

#### **2.2.4 How do these principles influence intellectual property transactions?**

Assume I want to buy a patent instead of strawberries. As stated above, Taiwanese Civil Code is a sui generis type of civil law that has the principle of separation and conditional principle of abstraction. Successful delivery of the product sold is an essential requirement of a valid ownership transfer; without it, the ownership transfer contract is void. The biggest question then emerges in a patent transaction is how can the seller ‘deliver’ a patent to the buyer because a patent is intangible? Are the rules arising from physical things feasible for intellectual property transactions?

Germany solved this problem by citing section 413 and 398 of German Civil Code, wherein section 413 in the law states, ‘The provisions relating to transfer of claims are applied with the necessary modifications to the transfer of other rights unless otherwise provided by law.’ Section 398 further indicates that ‘A claim may be transferred by the obligee to another person by contract with that person (assignment). When the contract is entered into, the new obligee steps into the shoes of the previous obligee.’<sup>137</sup> The sale of a patent is confined to ‘the transfer of other rights’ in section 413; therefore the law allows the sale of a patent to be treated as a sale of a claim, subject to the rules of

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<sup>137</sup> Available at Bundesministerium der Justiz, German Civil Code BGB (English translation), [http://www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html), accessed 19 March, 2013.

contract law.<sup>138</sup> In accord with section 398, a claim is transferred when a contract is made, with no requirement of delivery or registration being fulfilled in this respect.

Taiwanese Civil Code does not have the same provision as German Civil Code section 413. Due to this deficiency, Taiwanese copyright professor Tsai Ming-cheng believes that, if Taiwanese Civil Code adopts German Civil Code section 413, the unsound delivery requirement will be avoided.<sup>139</sup> This author, however, is not convinced that having a clause like German Civil Code section 413 is enough, because it only dodges the unsound delivery requirement, without giving a clear answer to a patent's nature. Is a patent proprietary or not remains unclear. Moreover, when contract law is applied in a patent transaction, the patent is then forced to be confined to the law of obligations where a claim is the object of that transaction. However, a claim is an assertion made between an obligee and an obligor, without any proprietary nature (a right to exclude). The assignee cannot assert the patentee's right against infringers based on the claim (s)he purchases. Some may argue a patent sale can be regarded as a real rights sale, however, a real right is attached to something immovable/movable, so when a real right is sold, the immovable/movable thing remains held by an owner, with the real right transferred to another assignee. However, in the case of a patent sale, the patent is attached to nothing tangible. A patentee loses his/her ownership when a patent is transferred; there is nothing tangible a patentee can hold as an owner. Patent rights are

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<sup>138</sup> See Friedrich-Karl Beier, Gerhard Schrickler and Wolfgang Fikentscher, *German Industrial Property, Copyright and Antitrust Laws: legal texts with introduction* (3<sup>rd</sup> edn, Max Planck Institute for Foreign and International Patent, Copyright and Competition Law 1996), I/A/4. 'Industrial property law is a neighbouring field to that of civil law, regulated primarily by the Civil Code (BGB). Industrial property rights, together with the judicially developed right to an established business, are absolute rights protected by Sec. 823 I of the German Civil Code...The exploitation of industrial property rights by transfer and licensing is subject to the rules of contract law...'

<sup>139</sup> See Tsai Ming-cheng(蔡明誠), 'Zhuzhuo Caichanquan Rangyu Qiyue yu Minfa Shiyong Wenti: zuigaofayuan bashiliu niandu Taishangzi diyilingsanjiuhao pinxi (著作財產權讓與契約與民法適用問題: 最高法院八十六年度台上字第一〇三九號評析)=The Assignment of Copyright and Application of Civil Code:Comments on a Supreme Court Decision in Taiwan:1997 Taishan Zi Number1039' in Li Jian-liang (李建良)(ed), *Lun Quanli Baohu Zhi Liluan yu Shijian (論權利保護之理論與實踐)*(Angle 元照 2006) 506, 507.

not the same as real rights.

Another reason why the German model is not an ideal approach is this model has been largely influenced by Joseph Kohler.<sup>140</sup> Bausch states that patents are deemed quasi-*in-rem* rights when they are granted by way of an exclusive licence,<sup>141</sup> this author sees no difference between the German approach and Taiwanese/Japanese approach. As this research further demonstrates in 3.2.2 and 3.4, Joseph Kohler's quasi-possession hypothesis provided little help in solving the taxonomy issue for Japan and Taiwan. As this study shows in 3.2.2, there is still an unexplainable jural relationship between the patentee and the infringers which highlights that Joseph Kohler's quasi-possession hypothesis is not enough. In the case of patent infringement, the legal basis of a patentee's assertion is the law of delict.<sup>142</sup> The subjects that the law of delict protects are either moral rights or civil law rights *in rem*.<sup>143</sup> Without an explicit clause stating patents are rights *in rem*, it is difficult for patentee to assert his/her claim directly. Besides, Joseph Kohler's hypothesis does not explain why a tenant has a right to use, while a non-exclusive licensee does not. The German approach is not an appropriate model for comparison.

According to the above analysis, Taiwan's unique legal structure in the Civil Code

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<sup>140</sup> Substantiated by German professors, when it comes to industrial property, 'German legal doctrine take an interest in the new subject and attempt to integrate it, together with the simultaneously-developing and associated field of copyright, in the system of German private law, and to clarify its basic principles. The greatest influence still traceable today was exerted by Joseph Kohler through his concept of intangible property rights (*Immaterialgüterrechte*)...' See Beier, Schrickler and Fikentscher, I/A/1.

<sup>141</sup> Rainer Bausch, 'Patentlizenz und Insolvenz des Lizenzgebers' (2005) 8. Jg. NZI-Neue Zeitschrift für das Recht der Insolvenz und Sanierung 289-295. In the abstract, it says, 'Der nachfolgende Beitrag behandelt die exklusive Patentlizenz in der Insolvenz des Lizenzgebers, ihre Rechtsnatur als quasi-dingliches Recht.' In English, 'The following contribution treats the exclusive patent licence in the event of licensor's insolvency, its nature being a quasi-*in-rem* right.' [translation by this author]

<sup>142</sup> Section 1 of Article 184 of Taiwanese Civil Code 2011 stating, 'A person who, intentionally or negligently, has wrongfully damaged the rights of another is bound to compensate him for any injury is done intentionally in a manner against the rules of morals.' [translation by Lawbank]

<sup>143</sup> Professor Wang however, classified patents into civil law rights *in rem* in his book on the law of delict. See Wang Ze-jian(王澤鑑), *Qinquan Xingwei Fa* (侵權行為法)=*The Law of Delict*, vol 1 (San Min 1998) 192-196. This author challenges this classification by analysing the differences between rights *in rem* in common law jurisdiction and civil law jurisdiction stated in 4.2.2.

makes a patent sale an inevitable encounter with the delivery requirement if the patent is deemed proprietary. However, without any law in the Patent Act supporting patents as proprietary, the next question is whether the Civil Code defines a patent's proprietary. There is a need to understand the meaning of 'things' in the Civil Code and whether they cover patents, so the definition of 'things' in the Taiwanese Civil Code requires further exploration. If there is room for interpretation for intangible things in the Taiwanese Civil Code, there might be a chance to analogise these principles in a patent transaction. If there is not, then apparently, the patent transaction needs its own rules apart from the above stated principles.

Unfortunately, the legislative record of the Taiwanese Civil Code did not answer this question. According to records from legislators, the meaning of things is 'deliberately' not clearly defined in the code.<sup>144</sup> The legislators allow much room when interpreting the word 'things'. This vagueness is considered an issue for judges when future unforeseeable objects are created. Therefore, simply relying on legislative records does not answer the question.

It is not only a choice between an analogy of principles when considering a patent transaction, or the creation of new set of rules, it also involves a delicate allocation of responsibility between seller and buyer. Under Taiwanese Civil Code, the requirement of selling a physical thing is different from that of selling an intangible claim, such as

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<sup>144</sup> Tsai Dun-ming (蔡墩銘), *Minfa: Lifaliyou Linghan Shishi Panjie Juyi Shiwu Wenti: Huibian* (民法：立法理由令函釋示判解決議實務問題彙編)=*Civil Code: Consultative Documents, Gazettes, Explanations, Decisions, Meeting Minutes and Practical Issues: Compilation* (Wu-nan 五南 1983 reprint) 82. 'Rights in the law of things refer to claims the owner has towards his things. Every country defines things differently. For example, in French Civil Code, things cover tangible and intangible things. Germany and Japan limit things to physical things. Thailand defines things as tangible things in the General Principles but extends the definition in other laws. Some jurisdictions like the Swiss Confederation and the Soviet Union do not define things expressly. No matter how things have been defined, it can be either too broad or ambiguous, with both of them being improper. This code adopted the legislative principle of the Swiss Confederation and Soviet Union law. Therefore, the word "things" is not defined intentionally'. [translation by the author]



the right to collect a debt. If a patent is regarded as a physical ‘thing’, according to Section 1 of Article 348 in the Taiwanese Civil Code, the seller needs to deliver such a patent to the buyer.<sup>145</sup> If the patent is regarded as a claim, or a real right, the seller does not need to perform the delivery requirement. Instead, it is enough if the buyer ‘conceptually’ accepts this patent.<sup>146</sup> Apparently, the latter (conceptually acceptance) is easier than the former (delivery).

The law also regulates warranty differently if an object is physical or not. If it is a transaction involving a physical thing, the seller carries a general warranty to assure that no one will assert any right to this thing in the future.<sup>147</sup> If the transactional object is a claim or an intangible right, the seller bears a limited warranty. The law merely requires the seller to assure the existence of this claim/intangible right when the contract is signed.<sup>148</sup> If we take the former approach to allocate more liability on the side of the seller, then we have the difficulty of fulfilling the delivery requirement in the law, especially in the case of methodology patents. If we take the latter approach to avoid the delivery requirement, what happens if the patent is invalidated by the third party after the contract is signed? Insofar as the seller only provided assurance about the existence of this patent at the moment when the contract was signed, can the buyer have their money back since the patent has become non-existent? The legislators’ records do not provide solutions in detail and we need to search elsewhere for an answer.

Suppose we temporarily neglect the delivery requirement in the law, how do the

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<sup>145</sup> Article 348, Section 1, ‘The seller of a thing is bound to deliver the thing to the buyer and to make him acquire its ownership’. [translation by Lawbank]

<sup>146</sup> Article 348, Section 2, ‘The seller of a claim is bound to make the buyer acquire the right sold. If, by virtue of such claim, the seller can possess a certain thing, he is also bound to deliver the thing’. [translation by Lawbank]

<sup>147</sup> Article 349, ‘The seller shall warrant that the thing sold is free from any right enforceable by third parties against the buyer’. [translation by Lawbank]

<sup>148</sup> Article 350, ‘The seller of a claim to a debt, or any other claim, shall warrant the actual existence of such claim’. [translation by Lawbank]

principle of separation and abstraction impact on a patent transaction?

The delivery requirement might be controversial, but most legal practitioners agree that the principle of separation and abstraction has no difficulty being adopted in a patent transaction.<sup>149</sup> This author argues that such an assertion is hazardous in the case when the buyer goes bankrupt. In a normal situation, the sale contract is the first stage of any transaction, so if anything goes wrong during the first stage, the seller and the buyer can cease with the transaction in the second stage (like refusing to proceed with the delivery/register process) to prevent ownership from transferring. However, this does not happen in a patent transaction.

With the Taiwanese Civil Code being a *sui generis* type, the ownership of a patent passes to the buyer faster and stays with the buyer firmer than the normal situation. Ownership is transferred when the sale contract is signed, insofar as delivery is unimaginable, in practice this delivery stage is normally skipped. However, in theory, because the principle of separation and abstraction impacts on a patent transaction worse than under French law model when something goes wrong in the first stage there will be no second stage, or worse than the Swiss law model when the first stage fails then the second stage fails, the Taiwanese law model allows the second stage to be sustained. Not only is it sustained, but for the principle of abstraction, the transfer of ownership is not influenced by the invalidity of the first stage. Therefore, if something goes wrong in the middle of the first and/or the second stages, like the buyer going bankrupt after signing the sale contract, the seller will not receive their money and lose ownership. The principle of separation and abstraction break the equal allocation of transactional risk between the buyer and seller. In a patent transaction, the seller bears

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<sup>149</sup> For example, Justice Su Yeong-chi who is also a law professor, agrees that the principle of separation and abstraction applies to intellectual property transactions. See Su (n 123) 302.

more risk in the Taiwanese law model than in the French or Swiss law models.

The Taiwanese Civil Code, as a *sui generis* law model, has a negative impact on patent transactions. The principles and requirements from a physical things transaction cannot be directly applied to patent transactions; moreover, many aspects prove to be problematic. It is unimaginable to perform the delivery requirement stated in the law, as well as the principle of separation and abstraction breaking the risk management balance for the seller and buyer. The legislator's records again do not answer our particular questions, so the next section will look into court decisions and the opinions of Taiwanese academia.

### **2.3 Popular opinions of the Taiwanese academia and courts**

#### **2.3.1 The principle of separation and abstraction equally applies to the intellectual property transactions**

The most popular opinion held by Taiwanese academia concern the rules from the law of things, the principle of separation and abstraction, applying to intellectual property transactions. Nearly all scholars in Taiwan favour patents being regarded as rights *in rem*, whereby the law of things equally applies. Law professors such as Shieh Ming-yan,<sup>150</sup> Rui Mu,<sup>151</sup> Shieh Zai-quan,<sup>152</sup> Lin Ko-ching,<sup>153</sup> Tsai Ming-cheng,<sup>154</sup> Chuang Sheng-jung,<sup>155</sup> and many others<sup>156</sup> expressly support for this popular view in

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<sup>150</sup> Shieh, *Zhihui Caicanquan Fa* (智慧財產權法)=*Intellectual Property Law* (n 68) 43-72. Chapter 4 of Shieh's book discusses whether Articles 768, 801, 948, 966 apply to intellectual property.

<sup>151</sup> Rui (n 68) 7-8. Rui Mu classifies intellectual property rights as absolute rights like real rights.

<sup>152</sup> Shieh, *Minfa Wuquan Lun-shang*(民法物權論-上)=*On The Law of Things vol I* (n 68) 25. Shieh Zai-quan conceives that rights in a trade mark and patent are a collective concept of 'things', and can therefore be applied to the law of things.

<sup>153</sup> Lin (n 68) 9. Lin Ko-ching suggests that the right to dominate a thing applies to intellectual property.

<sup>154</sup> Tsai, *Wuquanfa Yanjiu*(物權法研究)=*A Study on The Law of Things* (n 68) 6.

<sup>155</sup> Chuang (n 68) 6. Chuang Sheng-jung conceived rights *in rem* in the law of things encompassing

their publications.

The reason for supporting this popular view are because the law of things (civil law real rights) regulates the ‘belongings’ status of a thing to a person and legislators taking a vague stand on the definition of that ‘thing’, meaning that there is no reason to exclude intellectual property from the law of things. According to their view, the law of things also regulates the belongings status of a patent to a person, and thus the principles arising can be *mutatis mutandis* applied to a patent transaction.

### **2.3.2 The reason for challenging this popular view**

This author challenges this popular view by proving that the fundamental jurisprudence of civil law ‘things’ is totally different from common law’s <sup>157</sup> property concept in Chapter 4. Before that, the author also disagrees with the popular view by simply pointing out that there is an inherent logical error in this popular view that is seemingly absent from academia discourse.

According to Article 757 of the Taiwanese Civil Code, unless otherwise provided by the law or custom, no rights for things shall be created.<sup>158</sup> In other words, the law does not allow any rights in relation to things to be created by anyone’s will; it has to be created by law. If the patentee’s rights to his/her patent can be regarded as real rights to his/her patent, this has to be found somewhere in the law. Unfortunately, neither in the law of things in the Taiwanese Civil Code, nor in the Taiwanese Patent Act, can any article be

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copyrights and trade mark rights.

<sup>156</sup> Such as a Chinese patent jurist Qin Hong-ji, who used the ‘lease’ concept in the law of things to understand the concept of a ‘licence’. His commentary on the 1944 Patent Act was the work closest to the time when this Patent Act was made. See Qin (n 68) 99.

<sup>157</sup> ‘Common law’ here refers to the common law of England and the common law jurisdiction of the United States of America.

<sup>158</sup> Article 757 of the Civil Code, ‘No rights in rem shall be created unless otherwise provided by the statutes or customs’. [translation by Lawbank]

found to grant the patentee a property right for his/her patent. The Patent Act merely grants a negative claim ‘to exclude the infringers from enjoyment’ to the patentee,<sup>159</sup> without expressly granting the patentee those rights to use, capital and disposition, and leaving the patentee with no positive rights for his/her patents. The mutatis mutandis application to the real rights held by the popular view is not grounded on any laws. So far, the example of a mutatis mutandis application can only be found in the Fisheries Act 2008<sup>160</sup> and the Mining Act 2003<sup>161</sup>, with none in the intellectual property laws including the Patent Act, the Copyright Act and the Trade Mark Act. This author concludes that the popular view has no legal grounds for their assertions.

Nonetheless, this popular view remains dominant in the Taiwanese academia. In the following we not only see the academia but also the courts holding the same opinion without giving due consideration. The next section highlights courts’ misinterpretation, by citing various decisions widely distributed in patent, copyright and trade mark cases.

### **2.3.3 The courts’ and the Intellectual Property Office’s attitudes towards this popular view**

After looking into all the decisions mentioning the property nature of intellectual property, which covers all fields including patent, copyright and trade mark cases, the judges rarely make decisions other than supporting the above popular view. Surprisingly,

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<sup>159</sup> Section 1 of Article 56 in the Patent Act, ‘Unless otherwise provided for in this Act, the patentee of a patented article shall have the exclusive right to preclude other persons from manufacturing, making an offer for sale, selling, using, or importing for above purposes the patented article without his/her prior consent’. [translation by Lawbank]

<sup>160</sup> Article 20 of the Fisheries Act, ‘The fishery right shall be considered as the rights over things. Except as this Act otherwise provides, the provisions of the Civil Code governing immovables of the right over things shall, mutatis mutandis, apply’. [translation by Lawbank]

<sup>161</sup> Article 8 of the Mining Act, ‘The mining right shall be considered as the rights over things. Except as this Act otherwise provides, the provisions of the Civil Code governing immovables of the right over things shall, mutatis mutandis, apply’. [translation by Lawbank]

the popular scholarly view is widely supported by judges in the District Court,<sup>162</sup> High Court<sup>163</sup> and Supreme Court<sup>164</sup> of Taiwan without any appearance of dissenting opinion. Some judges even stretch this popular view further, making a creative link between the principle of registration in the land register system and the patent register system.<sup>165</sup> This will be discussed further in 2.5.2.

The Taiwanese Intellectual Property Office also stretches the popular view further by segregating licensing activities into an exclusive licence and non-exclusive licence. According to the Intellectual Property Office, an exclusive licence is an act relating to things, while a non-exclusive licence is an act relating to obligations.<sup>166</sup> The office concluded this based on the consequences of licence activities. The Intellectual Property Office believes that since the exclusive licensee obtains a ‘right to exclude’, it must be the result arising from the law of things and not the law of obligations. Moreover, the non-exclusive licensee does not have a right to exclude, with the Intellectual Property Office concluding that a non-exclusive licence shall be governed by the law of obligations. The Civil High Court supports the Intellectual Property Office opinion.<sup>167</sup> The court classified the patent licence into an exclusive licence and non-exclusive licence with two separate arrangements. When an exclusive licence issue is involved, the law of things is applied to the issue; when a non-exclusive licence issue is involved,

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<sup>162</sup>[2002] Difang Fayuan Suzi number 613 (地方法院訴字第 613 號) Lawbank (Civil District Court Banciao Division), and [2007] Difang Fayuan Zhizi number 28 (地方法院智字第 28 號) Lawbank (Taipei Civil District Court)

<sup>163</sup> [2000] Gaodeng Fayuan Shangyizi number 222 (高等法院上易字第 222 號) Lawbank (Civil High Court), and [2000] Gaodeng Fayuan Shangyizi number 381 (高等法院上易字第 381 號) Lawbank (Kaohsiung Panel High Court)

<sup>164</sup> [1997] Zuigao Fayuan Taishangzi number 1039 (最高法院台上字第 1039 號) Lawbank (Civil Supreme Court), and [2006] Xing Zheng Fayuan Panzi number 285 (最高行政法院判字第 285 號) Lawbank (Administrative Supreme Court)

<sup>165</sup> [2005] Difang Fayuan Zhiyizi number 43 (地方法院智一字第 43 號) Lawbank (Banciao Civil District Court) ‘Any third party who replies to the title on the register shall be protected by this court’. [translation by the author]

<sup>166</sup> [1999] Zhifazi number 88007117 (智法字第 88007117 號) Lawbank (Taiwan Intellectual Property Office)

<sup>167</sup> [2006] Zhi Shangyizi number 18 (智上易字第 18 號) Lawbank (Taichung Civil High Court)

the law of obligations is employed. As a matter of fact, a licence is not a grant of positive rights, with this fallacy originating from a different perception of allocating rights in property, particularly a right to use. Civil law lawyers and judges incline to use civil law inclusionary rules by thinking of common law exclusionary design, but this approach is inappropriate. This point will be further stated in 4.3.1. Before that, a simple example in the following section will show the error of this view.

#### **2.3.4 The fallacy of the Intellectual Property Office and courts' opinions**

A simple example is as follows. Consider patentee 'X' licences his patent to licensee 'Y'. In the licence contract, both parties agree that Y exclusively enjoys the rights X grants for 5 years. When the licence contract ends, Y requires a non-exclusive licence for another 3 years. If the explanation provided by the Intellectual Property Office is true, then the opinion given by the Intellectual Property Office is confusing to both the licensee and licensor. According to the Intellectual Property Office, an exclusive licence applies to the law of things, while a non-exclusive licence applies to the law of obligations. In the first 5 years, licensor X and licensee Y's relationship is governed by the law of things, with the patent is regarded as a physical thing. However, in the coming 3 years, the parties' relationship will be changed to the law of obligations just because it is a non-exclusive licence. The patent is now regarded as a personal debt. If the Intellectual Property Office and the court are correct, the essence of the patent shall be the same, whether the parties' relationship in the first 5 years is an exclusive licence or non-exclusive licence in the coming 3 years. Intellectual Property Office and court presumptions must be wrong.

Moreover, the Civil Court of Taiwan, as stated above in 2.3.3, has more mercurial and interesting positions regarding different types of intellectual property licence. The Civil

High Court, like the Intellectual Property Office, separates the patent licence into an exclusive licence and non-exclusive licence.<sup>168</sup> However, it did not equally do so in the copyright licence case.<sup>169</sup> In copyright licence cases, the Panel High Court decided that no matter whether it is an exclusive or non-exclusive licence, the claims arising from the licence should be governed by the law of obligations.<sup>170</sup> As argued before, the nature of intellectual property shall be the same at any occasion. The inconsistency in the High Court itself shows something goes very wrong in intrinsic legal thinking concerning the property nature of an intellectual property, something which will be further explored in Chapter 4.

### **2.3.5 Is the delivery requirement feasible in an intellectual property transaction?**

The popular view can be attested from a different angle. The popular view suggests that the principles and rules arising from things can be equally used in a patent transaction, with the delivery requirement equally applying to the patent transaction. Under this logic, Professor Shieh believes that the delivery of copyrighted work is possible.<sup>171</sup> Shieh argues that ownership of copyright is transferred at the time when the work is ‘delivered’ to the assignee, rather than when the sales contract is signed. His legal basis is on Article 151-1 of the Taiwanese Civil Code,<sup>172</sup> inasmuch as the law says that the right of publication cedes to the editor when the owner delivers his/her writing to the editor. From his perspective, the principle of separation equally applies to this

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<sup>168</sup> *ibid.*

<sup>169</sup> [1996] Gaodeng Fayuan Shangyizi number 3316 (高等法院上易字第 3316 號)Lawbank (Penal High Court), [1996] Gaodeng Fayuan Shangsuizi number 1012 (高等法院上訴字第 1012 號)Lawbank (Panel High Court), and [2001] Gaodeng Fayuan Shang-geng er zi number 391(高等法院上更二字第 391 號) Lawbank (Panel High Court).

<sup>170</sup> *ibid.*

<sup>171</sup> Shieh, ‘Cong Xiangguan Anli Tanta ZhihuiCaichanquan yu Minfa zhi Guanxi (從相關案例探討智慧財產權與民法之關係)=A Discussion on the Relationship of Intellectual Property Rights with the Civil Law through Relevant Cases’ (n 83 )220.

<sup>172</sup> Article 151-1 states, ‘The right of publication cedes to the editor when the person ceding the right of publication according to the contract for publication delivers the writing to the editor’. [translation by Lawbank]



transaction.<sup>173</sup> In his opinion, the two stages (the law of obligations and then the law of things) employ the copyright transaction; it is not until the author hands over his work to the publisher that the copyright ownership is transferred, which is somewhat bizarre.

The Supreme Civil Court makes its decisions based on the same logic above: delivery is possible and the principle of separation equally applies to the copyright transaction. In the Xu Yi-jin v. Linkingbooks case (number1039)<sup>174</sup>, the court rejected Xu Yan-pian's (the deceased writer in the case) daughter's (the applicant, Xu Yi-jin) appeal because the writer Xu Yan-pian did not deliver his work to his daughter. Instead, the author Xu Yan-pian delivered his work to the publisher (the respondent, Linkingbooks) after he signed an assignment contract with his divorced wife stating that his copyright is assigned to their daughter. Both of the assignment agreements, the one with his divorced wife and the one with the publisher, were valid and binding under the law of obligations. The court reasoned, for Xu Yan-pian failed to deliver his manuscripts to his daughter, that ownership of his copyright was not transferred to his daughter. Instead, his publisher had the copyright. The court concluded that ownership of the copyright belonged to the publisher, in spite of the writer agreeing to assign his copyright to his daughter first.<sup>175</sup>

### **2.3.6 The impractical part of the requirement of delivery**

The court's views above are however problematic. If delivery is feasible in an intellectual property transaction, it must be applicable in every type of intellectual property transaction, including a patent transaction. However, this is not true. A methodology patent for example, is in nature ethereal, intangible and without a

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<sup>173</sup> Shieh (n 83) 220.

<sup>174</sup> See [1997] Zuigao Fayuan Taishangzi number 1039 (n 164).

<sup>175</sup> *ibid.*

corporeal existence, so how can it possibly be delivered? Unlike rights in the copyright attached to a physical manuscript, a ‘methodology patent’ is attached to nothing physical.

Besides, the courts do not all agree with the Supreme Civil Court. The Panel High Court made three decisions, number 3316, number 1012 and number 391, declaring that the Panel High Court’s position is that a ‘copyright assignment is an act relating to the law of obligations’.<sup>176</sup> The Panel High Court does not think that the delivery process is essential or required in a copyright assignment; ownership is transferred when a sale contract is signed. Unfortunately, the Panel High Court is in the minority. The Supreme Civil Court supports the delivery requirements, as do the majority of the civil courts.

#### **2.4 The major flaw in the popular view**

The popular view begins with their reasoning by directing the principle of separation into a patent transaction. This is not supported by any laws but by purely analogical work done by the academia. Academia, in order to perfectly explain the principle of separation and abstraction work equally well in a patent transaction, forced the patent to be confined to the restricted classification of a physical thing and a debt. However, this classification is not tailor-made for intellectual property because intellectual property is neither a physical thing nor a personal debt.

The law of things under the principle of separation in particular was designed for physical things. All the rules in the law of things were designed to deal with the movement of such a physical thing, with no intellectual property rights considered

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<sup>176</sup> See [1996] Gaodeng Fayuan Shangyizi number 3316; [1996] Gaodeng Fayuan Shangsuzi number 1012; and [2001] Gaodeng Fayuan Shang-geng er zi number 391(n 169).

during that original design.

That is a problem for patents. Ostensibly, a patent seems to be closer to a physical thing than a personal debt. However, when it comes to total application, it cannot be delivered like a physical thing. Some characteristics of a patent puzzle scholars because the right to exclude others in patents is similar to the right to exclude others in owning a physical thing. The law of things looks more promising than the law of obligations.

On the other hand, if patents are viewed as personal debts governed by the law of obligations, it looks less promising than being viewed as physical things because the personal debt relationship is a relative concept. By saying relative, it means the law of obligations deals with a one (person) to one (another person) relationship. A patentee's right to exclude cannot be explained by this one to one relationship, because the right to exclude others empowers the owner to fight against many others instead of only one, with the law of obligations not able to explain the notion of many others. The law of obligations does not result in exclusivity either. Neither does the law of things totally apply to patents, nor can the law of obligations explain the exclusivity of patents; patents have no room neither in the law of things nor in the law of obligations.

The patent is forced to be confined to the restricted classification of physical things or personal debts under the framework of the popular view. The major flaw in this popular view is that by directing the principle of separation to the patent transaction, it does not naturally answer what the nature of a patent is. Instead, it swings between the law of things and the law of obligations because neither was designed for it. The popular view's stand point, as will be proved by this author later, is fundamentally erroneous.

## **2.5 Placing the delivery requirement by registration: is it applicable or not?**

### 2.5.1 What is the principle of registration?

If there is difficulty in adopting the delivery requirement in a patent transaction as stated in 2.3.6, could we replace the delivery requirement with registration?

Registration has a unique meaning in German law and also in legal systems adopting a German law structure, like Taiwanese Civil Codes.<sup>177</sup> The title of real property (an immovable thing such as land or a house) shows who the owner of that real property is. Moreover, the register also creates absolute ownership for the title owner. In other words, by granting the title to the owner, it also means a creation of absolute ownership by the government. The registered title becomes reliable ground to the public, with any access or change of ownership being traceable. This whole concept is called ‘Publizitätsprinzip’ (translated as the ‘principle of registration’ hereinafter) in German.<sup>178</sup> For those who hold the title deed but fail to register on the public register, they cannot claim ownership over that property. The supremacy of the register is a significant characteristic of the principle of registration. Japanese scholars prefer to call this supremacy registration of land ownership ‘hassei-yoken’ [requisite for creation] instead of ‘taiko-yoken’ [requisite for opposition, like in France].<sup>179</sup> Taiwanese Civil Code adopted this supremacy registration since 1905.

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<sup>177</sup> For a detailed comparative study of registration of real property, see Zhu Po-song(朱柏松), *Minshifa Wenti Yanjiu: Wuquanfa Lun*(民事法問題研究：物權法論)=*A Study of the Civil Law Issues: on the Law of Things* (Angle 元照 2010) 18-27. Zhu Po-song compares the registration system in France, Germany, Australia, England and the United States of America.

<sup>178</sup> Trevor Jones, *The Oxford-Harrap Standard German-English Dictionary* (Clarendon 1977) 88. ‘Publizitätsprinzip’ according to the dictionary, it means (i) principle that entries in the Land Register, Commercial Register, etc., of interest to a third party should be available for scrutiny; (ii) principle that certain registers and entries are worthy of being recognised by law.

<sup>179</sup> Suzuki Mitsuo, ‘Creation and Development of Modern Land Ownership under the Japanese Colonial Government of Taiwan: the Case of Aolan Plateau, Puli’ in Chen Chiu K and Hsu Hsueh-chi (eds), *The Land Issues in Taiwan History: Symposium Series No1* (Taiwan History Field Research Office, Academia Sinica 1992) 289. The Japanese-English translation follows the same as Suzuki Mitsuo.

The principle of registration in Taiwanese Civil Code means that any creation or change to real rights must be recorded on the register so that the public know who the true owner is.<sup>180</sup> To all Taiwanese jurists, the principle of registration is the underpinning of true ownership to the owner.<sup>181</sup> The person recorded on the register is presumed to own the real rights legitimately, so any *bona fide* third party who trusts in the false recordation is protected by the law.<sup>182</sup> If the holder fails to process the registration, any future assignment or disposition of this real property will be invalidated by the law.<sup>183</sup>

It is theoretically possible to replace the delivery requirement by registration. If registration could possibly replace the delivery requirement, then the direct analogy of the rules in the law of things looks more promising than ever. However, registration for the real rights has an inherent supremacy notion; it represents absolute ownership of the title owner. In other words, the register, represented by the authority, creates absolute ownership for the owner. The inherent notion of this supremacy is the other side of the coin, namely ownership in the law of things.

### **2.5.2 The court's improper connection between the register for real property and the patent register**

The supremacy notion of the register represents the creation and existence of ownership.

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<sup>180</sup> Article 758 of Taiwanese Civil Code says, 'The acquirement, creation, loss and alternation of rights in rem of real property through the juridical act will not effect until the recordation has been made'. Article 759 states, 'A person, who has acquired rights in rem of real property by succession, compulsory execution, taking, a judgment of the court or other non juridical act before recordation, shall only dispose of such rights until recordation has been made'. [translation by Lawbank]

<sup>181</sup> See Wang, *Minfa Wuquan*(民法物權)=*The Law of Things in The Civil Code* (n 43) 86, also Li (n 95) 6 and Zhen (n 106) 28.

<sup>182</sup> Section 1 of Article 759-1 states, 'If a right in rem of real property has been recorded, the right-holder recorded in the register is presumed to own the rights legitimately'. Section 2 states, 'If a bona fide third party in reliance of the real property recordation has recorded an alternation to the right in rem of real property pursuant to a juridical act, the validity of the alternation shall not be affected by the original false recordation of a right in rem'. [translation by Lawbank]

<sup>183</sup> Li (n 95) 6. Also in Shieh, *Minfa Wuquan Lun-shang*(民法物權論-上)=*On The Law of Things vol I* (n 68) 58.

As the matter of fact, it is a principle only exists under immovable things. However, as stated above, the popular view believes that the rules in the law of things can be equally applied to intellectual property transactions. In order to fulfil its theory, the popular view further stretches this supremacy notion to any intellectual property with a register system, despite the fact that no law expressly states that the register for land is connected to the register system for intellectual property.

The Civil High Court in Taiwan firstly connected the register for land to the trade mark register system.<sup>184</sup> However, during the same year, the Civil Supreme Court did not make the same assertion in copyright cases.<sup>185</sup> Unlike the Civil High Court, the Supreme Court reasoned that the registration of copyright is ‘merely management by the administrative office’.<sup>186</sup> Apparently, justices have different opinions on this matter, and although the Civil High Court has no cases regarding patents, this void was fulfilled by the Judicial Yuan who connects the register for real property with the patent register. Judicial Yuan is a place where all justices unify their disagreements with a voting system. Concerning patent cases, they conclude that the principle of registration also applies to patents, with 21 judges out of 29 voting in favour.<sup>187</sup> Henceforward, the principle of registration in land registration was officially recognised by the court as

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<sup>184</sup> [1997] Gaodeng Fayuan Taishangzi number 2996 (高等法院台上字第 2996 號) Lawbank (Civil High Court). The court said, ‘The transfer of a trade mark right should be registered to the authority, and the trade mark owner shall have no locus standi against any third party unless the transfer is recorded with the authority. The transfer of a movable thing is not required to be registered, therefore a trade mark right is apparently related to Article 758 and 759 of the Civil Code, and similar to the nature of land registration.’ [translation by this author]

<sup>185</sup> [1997] Zuigao Fayuan Taishangzi number 1039 (n 164). The court said, ‘The registry for copyright is merely management by the administrative office, it does not have the legal effort to assume ownership.’ [translation by this author]

<sup>186</sup> *ibid.*

<sup>187</sup> [2009] Zhaihui Caichan Falu Zuotanhui Tian Ji Yantao Jieguo Minshi Susong Lei number 9 (智慧財產法律座談會提案及研討結果民事訴訟類第 9 號) The meeting minutes of the Intellectual Property Law Symposium Civil Judgment) Lawbank (Judicial Yuan) Judicial Yuan said, ‘Patent rights are intangible and have the nature of quasi-*in-rem* rights, so they cannot be delivered like movable things. For this reason, [patent registration] adopts the principle of registration from land registration, with the requisite for opposition. The meaning of opposition is, in a case when various rights conflict, inconsistency or the situation balance each other out, ‘registration’ is the basis of judging belongings.’ [translation by this author]

being equally applicable to patent cases, with this misconnection jointly made by the Civil High Court and the Judicial Yuan. Bizarrely, it is recognised by the court as being applicable to a patent and trade mark case but not to a copyright case, which further leads to another of inquiry concerning why Judicial Yuan tolerates such an inconsistency in the same area as intellectual property laws.

### **2.5.3 The significant defect in the court's opinion**

The court's opinion however reverses the cause and effect. Although copyright does not have a register system, the existence of ownership of a copyright is unaffected by whether it has a register system or not. On the other hand, although patent rights and trade mark rights have a registration system, to register or not register does not influence the validity of a patent or trade mark rights transfer.<sup>188</sup> There is no clear evidence showing that the register for real property has something to do with the intellectual property register, let alone the supremacy notion in land register having anything to do with the patent register. The court improperly linking the principle of registration with land registration and patent registration is particularly problematic.

The courts opinion is attested wrongly from a different angle. The supremacy notion of the register represents the creation and existence of ownership. The ownership that this supremacy notion creates is perpetual ownership. To have a patent registered in the register means owning a patent perpetually, even though it is impossible to have a patent forever because it contradicts the current notion that we now have. The linkage between

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<sup>188</sup> Article 59 of the Taiwanese Patent Act, 'The assignment, trust or licensing made by the patentee of the patent right of an invention to another person to practice the invention, or the pledge created on the patent by the patentee shall not be asserted against any third party, unless it has been registered with the Patent Authority'. Article 35 of Taiwanese Trade Mark Act, 'An assignment of trade mark right(s) shall be entered and recorded by the Registrar Office. An unrecorded entry shall have no locus standi against any third party'. [translation by Lawbank]

the creation of ownership and patent register system is apparently wrong.

## **2.6 Conclusion**

The crux of the paradoxical view held by academia and the court lies in the dilemma that a patent has a proprietary nature, whilst at the same time should be transferred by contractual rules without the civil law requirement of ownership transfer. Under the taxonomy of claims and things separation, patents are difficult to place either in the claims category or the things category. To classify patents in the things category based on a patents proprietary nature lures the problem of delivery/registration requirement being applicable in patent transfer activities. To classify patents in the claims category, based on the convenience of patent transfer, entices another question concerning not having proprietary rights transferred to the assignee. Being placed in either category creates an unexplainable part in the interpretation of laws.

The things/claims classification works well on things when they are physical and tangible, but it is inappropriate for patents. This paradoxical view held by academia and the court demonstrates that it is a slippery slope when considering patents as physical things. This misconception originated from the insufficient definition of the word 'things'; nevertheless, this misconception dominates Taiwanese academia and the court at present.

The intra-law explanation does not provide a satisfactory answer about a patent's position in property taxonomy. In accord with Article 1 of Taiwanese Civil Code, this study moves onto a customary law discussion. However, before venturing into customary law, it is necessary to understand the formation of this misconception. The next chapter proves that there is an underlying theory, quasi-possession theory that



supports patents being viewed as civil law things. It was not created by a single incident; instead, it was a presentation of accumulated effects. The next chapter looks into the historical making of this paradoxical view, showing that it is not a unique phenomenon existing only in Taiwan but that the same problem also arises in Japan.

## CHAPTER THREE

### A HISTORY OF MISCONCEPTION: RESEMBLE PATENTS AS PHYSICAL THINGS

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This chapter answers the second question—what has happened in the past that has led jurists and judges to use principles arising from the law of things to explain the nature of a patent? As this chapter will present, it is an accumulation of a series of incidents occurring throughout recent history when both the civil code and the law of patent were reformed. Section 3.1 displays the fact that Taiwanese academia was significantly influenced by German and Japanese law before 1945. Section 3.2 presents that a structural flaw existed in Japanese law leads the Japanese academia to overcome it by adopting Joseph Kohler's scholarship into law interpretation. Section 3.3 shows the same flaw existing in Taiwanese law, with the same approach adopted by Taiwanese academia. Section 3.5 concludes that Joseph Kohler's scholarship created a misconception that the law of things is enough for a patent transaction, and Taiwanese academia follows this trend by accepting this assertion without further challenge.

### **3.1 The influence of Japanese law in Taiwan before 1945**

The first incident concerns the influence of German and Japanese law on Taiwanese academia. The tendency of using Japanese or German legal thinking in most legal interpretations is certainly a creation of history. This tendency can be traced back to Taiwan's colonial past when it was ruled by Japan for 50 years (1895-1945). Japanese laws and German law had a significant influence on Taiwanese academia thereafter because the Japanese Civil Code in particular transplanted most of the structure from the German Civil Code.

Taiwanese legal professions learnt European civil laws from Japanese law.<sup>189</sup> Many translations and commentaries were imported to Taiwan during that time. During Japanese rule, Taiwan was a society different from Japan in both local custom and language, with Japanese Civil Code not completely fitting Taiwanese society. In order to rule Taiwan smoothly, the Japanese government allowed many Taiwanese local customs to survive alongside Japanese statutory laws, especially concerning family and succession institutions. Over the years, these traditional institutions were gradually dissolved and westernization took hold. In order to present the reform, it is necessary to begin with the formation of Japanese Civil Code and the Patent Act back in the nineteenth century.

#### **3.1.1 A brief history of Japanese Civil Code: from the French style to the German style**

The first European Civil Code that Japanese people translated was the 1804 French

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<sup>189</sup> Wang Tay-sheng(王泰升), *Taiwan Falushi Gailun*(台灣法律史概論)=*Concise Taiwanese Legal History* (Angle 元照 2004) 119.

Civil Code. Right after the Meiji Restoration,<sup>190</sup> Dajokan's famous officer, Shimpei Eto, appointed Kuri Mitu to translate the 1804 French Civil Code into Japanese in 1869.<sup>191</sup> The French style of law was the first European Civil Code that Japanese people ever encountered.<sup>192</sup> Later in 1873, after Mitu's translation, the Japanese government hired a French scholar, Dr. Gustave Emile Boissonade (1825-1910), to help Japan draft its own Civil Code. From 1879 onwards, Boissonade made a great contribution to the codification work.<sup>193</sup> He separated articles into five chapters, handling three chapters (general provisions, the law of things and the law of obligations) himself. He left Family law and Succession chapters to Japanese scholars, having considered that these two chapters were close to Japanese local customs and conventions.<sup>194</sup> Dr. Boissonade's version was honoured as the 'Boissonade Civil Code' and also named the 'Old Civil Code' in the history of Japanese law.

The Boissonade Civil Code was deeply influenced by the French Civil Code and Roman law. In the definition of 'things' in Article 2, patent rights and copyrights were identified as things.<sup>195</sup> In accordance with the legal structure of the Boissonade Civil Code, patent rights and copyrights were classified as 'movable things' in Article 6, covered by the ownership claim in Article 30, and with the owner able to assert his/her right over infringers according to Article 36.<sup>196</sup>

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<sup>190</sup> The modernisation of Japan began after the Meiji Restoration in 1868 when, in the name of modernisation, Japan transplanted legal principles en masse from European civil laws, with the exception of family and succession laws. The Dajokan political structure, which was learned from the western separation of powers, was first established during the Meiji Restoration. See Xu Jie-lin(許介麟) and Yang Jin-chi(楊鈞池), *Riben Zhengzhi Zhidu*(日本政治制度)=*Japanese Political System* (San Min 2006) 6-7.

<sup>191</sup> Qu (n 126) 361.

<sup>192</sup> This translation was recognised as a pre-modern code in Japanese Civil Code history. *ibid* 366.

<sup>193</sup> *ibid* 367.

<sup>194</sup> *ibid* 366-367.

<sup>195</sup> For more details of the analysis, see Tetsuo Tomita (富田徹男), 'Zyunnbukkenn Toshiteno Titekisyoyuukenn: Kougyousyoyuukenn to Tyosakukenn Niokeru Sashitome Seikyuu no Rekishi (準物権としての知的所有権—工業所有権と著作権における差止請求の歴史)=Intellectual Property Rights as Quasi-in-rem Right: A History of the Injunction of Industrial Property Rights and Copyright' (1995) 86 *Social Science Review*, Saitama University 95-126.

<sup>196</sup> *ibid* para I(2)ff below.

Unlike the German law style, the French-Roman law style had no rigid principle for separation and abstraction. No further explanation concerning the nature of a patent was considered to be necessary in the Boissonade Civil Code, with all kinds of new property types finding their own place in the French-Roman style of law. Due to the flexibility of the French-Roman style, patent transactions fit into the Boissonade Civil Code. Unfortunately, the Boissonade Civil Code has never truly been enacted in Japan.

The Boissonade Civil Code was boycotted by Japanese scholars because of nationalism and ideological arguments.<sup>197</sup> Yatsuka Hozumi, Kenjiro Ume and Massakira Tomii redrafted the code so that it was more inclined towards the German style. It is said that, when the code was re-drafted in 1888, two foreign codes were included as its major references, namely, the 1804 French Civil Code and the first draft of the 1900 German Civil Code, coupled with some British common law principles as minor references.<sup>198</sup> It was substantiated by the legislator, Tomii, that this newly redrafted code (hereinafter the ‘Japanese Civil Code’) was mostly influenced by German law,<sup>199</sup> whether in the structure or the wording of the code used.<sup>200</sup> Since then, German legal thinking

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<sup>197</sup> The promulgated articles of Boissonade Civil Code were provisions on property, the acquisition of property, security of obligations, evidence and personal matters. These articles were promulgated in April and October, 1890. However, although the announcement set a condition that all these articles should be enacted as from January 1893, the enactment was postponed by the Imperial Congress (Diet) until the end of 1896. Strictly speaking, the Boissonade Civil Code was not enacted by the Japanese government. An Investigation Committee was established in March 1893, comprising of Japanese scholars. This committee re-drafted the General Principles, the law of things, and the law of obligations in 1895 which were passed by the Imperial Congress and promulgated on the 28 April 1896. See JE Becker (n 55) at introduction v.

<sup>198</sup> For a detailed analysis of the impact of these three foreign laws on the Japanese code, see Qu (n 126) 392.

<sup>199</sup> Disputes arose when the scholars debated which foreign Code had the most influence on drafting. Professor Eiichi Hoshino asserted that the French Civil Code influenced the Code the most, with Professor Masanobu Kato strongly disagreeing, arguing that both the Committee and legislators took first and second drafts of the German Civil Code as their major reference, and therefore, the Code was influenced more by the German Civil Code than the French Civil Code. *ibid* 392-393. Professor Masanobu Kato’s assertion is substantiated by the Japanese civil code legislator Masaakira Tomii, who stated: ‘The German Civil Code is the ‘most perfect code’ of all modern Civil Codes; therefore it is not to be doubted that Japan should take the German Code as its major reference during legislation’. See *ibid* 393.

<sup>200</sup> For example, Article 85 of the Japanese Civil Code declares, “‘Things’ in the sense of this Code

gradually became the dominant trend in the Japanese and Taiwanese academia.

### **3.1.2 A brief history of Japanese Patent Act 1885: patent law was meant to cling to the French style of Civil Code but the code was then changed to the German style**

The first Japanese Patent Act was enacted on April 18, 1885, and modelled on the 1877 German Patent Act.<sup>201</sup> When the Japanese Patent Act was drafted, Dr. Boissonade was drafting the French-Roman style Old Civil Code. The Japanese Patent Act was enacted before Boissonade Civil Code changed to the newly developed German style,<sup>202</sup> with it being clear that the Japanese Patent Act currently in use is grounded in the French law style (Old Civil Code) but not the German law style (Japanese Civil Code now).<sup>203</sup> As there is no principle of separation and abstraction in the Old Civil Code like the German law style has, patent transactions are treated the same as other types of transaction in this flexible structure. It makes sense for a patent transaction to use transactional rules out of movable things because none of the patent sellers or buyers suffered an extra risk from transactions in the Old Civil Code. However, it did become a problem when the Old Civil Code changed its style to the German law style, which will be discussed in detail later.

For the reason that the Japanese Patent Act hooks onto the French law style, the legislators were confident to claim the patent represents a new type of property. The key

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refers to corporeal things'. This sentence is translated by William Joseph Sebald, *The Civil Code of Japan* (Butterworth & Co 1934) 21. The same as BGB § 90. Fritz Baur/Rolg Stürner and Chang Shuang-gen 張双根(trans), *Sachenrecht=Dekuo Wuquan Fa* (德國物權法)=*German Rights in Rem* (Law Press China 2006) 22.

<sup>201</sup> April 18 has been Japanese National Innovation Day since 1877. The German Patent Law (Patentgesetz v.25.5.1877) was also a reference source of the Austrian Patent Law. The German Patent Law influenced at least two countries at that time, namely, Austria and Japan. Tawara Shizuo (俵静夫), *Kougyou Shoyuuken Hou: Doitsu Kougyou Shoyuuken Hou (1)*(工業所有權法：獨逸工業所有權法(1))=*Industrial Property Law: Germany Industrial Property Law (1)* (Yuhikaku Publishing 有斐閣 1938) 5-7.

<sup>202</sup> Qu (n 126) 369.

<sup>203</sup> Tomita (n 195) para I(2)ff below.

legislator, Korekiyo Takahashi (who later became the first comptroller of the Japan Patent Office), said in his posthumous manuscript that,

[B]y means of the enactment of the Patents Act, a [new] type of property is created. Everyone needs to acquire the prior consent of the inventor to obtain his innovation. Otherwise, within a certain period of time, no one can manufacture or sell his innovation. This is the right owned by the first inventor, i.e., the patentee. Shouldn't this liberal right enjoy the freedom to be pledged, mortgaged, and sold? For the above reason, a new type of property which this nation has never had before is created.<sup>204</sup>

Concerning the Old Civil Code, it is clear that the patent concerns a new type of property, but for the Old Civil Code later changed to the German style, the answer is trickier. The Japanese Civil Code adopted the German law definition of 'things', in which things were limited to physical things only,<sup>205</sup> expressly excludes patents from the meaning of 'things'. Henceforward, the code was split into the law of things and the law of obligations, which represents physical things and personal debt respectively. It becomes a problem for the patent transaction using transactional rules out of physical things because the code was not in the French style anymore and the newly developed German style of code offers no room for a patent at all.

### **3.2 Japanese jurists' efforts to bridge the gap using quasi-possession theory**

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<sup>204</sup> Korekiyo Takahashi, 'Posthumous Works of Korekiyo Takahashi (6)' (*Industrial Property Training Institute Research Office Japan Patent Office*, 2000) <<http://www.iip.or.jp/chizaishi/pdf/korekiyo4.pdf>> accessed 8 June 2012 in p.3-4 [translation by the author]

<sup>205</sup> Many translations of Article 85 can be found. Gubbins translates 'The term "things" in this Code signifies material things'. See John Harington Gubbins, *The Civil Code of Japan: with the Japanese text* (Maruya & Co 1897) 34. Sebald's translation runs, "'Things" in the sense of this Code refers to corporeal things'. See Sebald (n 200) 21.

### 3.2.1 Before 1916: quasi-possession theory

In order to find room for a patent in the code, the Japanese academia began to develop a doctrinal supplement based on quasi-possession theory. According to the quasi-possession theory, intellectual property rights can be equated with ‘rights over a thing’. By means of this equation, it is possible to dispose of patents like physical things. Scholars, such as Sakae Wagatsuma,<sup>206</sup> Massakira Tomii<sup>207</sup> and Kenjiroh Ume<sup>208</sup> who published their work before 1916 all used this quasi-possession theory to bridge the gap between intellectual property law and the civil law but did not notice the fundamental difference between physical things and patents. The author will come back to this point in Chapter 4.

Why is possession theory important in justifying property status for intellectual property?

It has something to do with the legal science in civil law being different to common law.

Civil laws are laws penetrated by Roman law. Roman law requires special reasons to justify the ‘granting’ of such protection. However, contrary to Roman law, English law requires special reasons for the ‘refusal’ of protection to possessors.<sup>209</sup> This nuance generates a different attitude towards the justification of property status for patents: the law must specifically support a patent as a property in the possession section under a civil law structure. If the law has no such supports expressly, the void can be supplemented by a court decision or by common consensus by scholars. This is the

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<sup>206</sup> Wagatsuma states that ‘Intangible property rights include copyrights, patents and trade marks which function well in quasi-occupancy theory’. [translation by the author] See Wagatsuma 387. (note: there is no publication year or name of a publisher in the original archive). The same statement could be found in his student, Kazuo Shinomiya’s, work. See Shinomiya Kazuo(四宮和夫), translated by Tang Hui (唐輝)and Qian Meng-shan (錢孟珊), *Riben Minfa Zongzhi*(日本民法總則)=*General Principles in Japanese Civil Code* (Wu-nan 五南 1995) 127.

<sup>207</sup> Tomii (n 84) 754-756.

<sup>208</sup> Kenjiroh Ume(梅謙次郎), *Minpoh Yougi: Bukken* (民法要義：物權)=*A Guidance to Civil Law: the law of things* (Hosei University 1915) 99-100.

<sup>209</sup> William Searle Holdsworth, *A History of English Law vol VII* (Methuen & Co 1923) 459.



reason why Japanese scholars began their arguments by explaining why a patent needs to be protected and started their justification of extending the meaning of possession in the laws by scholarship. With an expectation that one day it would influence court decisions,<sup>210</sup> they wish their scholarly consensus to supplement the void in the code.

### **3.2.2 After 1916: translating Joseph Kohler's work and its influence**

There is still an unexplainable jural relationship between the patentee and the infringers that highlights that the quasi-possession hypothesis is not enough. In the legal science of the Japanese Civil Code, there were two ways that claims on infringers are laid: one is based on *rei vindicatio* (a claim that requires the illicit possessor to return the thing one possessed to the true owner) governed by the law of things, and the other is based on the law of delict. The provision to claim monetary compensation from infringers (based on the breach of duty of care) were in the law of delict, with the subjects that the law protected referring back to moral rights or rights *in rem*. Under the structure of Japanese law of things, 'things' refer to physical things. The patentee could not directly assert his/her claim based on the provisions provided in the Japanese Civil Code because an injunction arising from *rei vindicatio* was granted to the owner of a physical thing. Monetary compensation was either granted to the owner of a physical thing, or a debtor/creditor. The patent had to find a room to fit in.

Japanese scholars searched for a solution. After Mao Konishi translated the work of the German scholar, Joseph Kohler, into Japanese in 1916,<sup>211</sup> Japanese scholars found their answer. Kohler's work was welcomed and fully discussed by Japanese scholars insofar

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<sup>210</sup> According to Justice Yang, both Japan and Taiwan have a phenomenon where the scholarship of a reputable jurist can have a significant influence on court decisions. See Yang (n 69) 263.

<sup>211</sup> Joseph Kohler and Mao Konishi(小西真雄)(trans), *Tokyohou Genron*(特許法原論)=*Patent Law* (Gan Shou Dou Shoten 巖松堂 1916).

as his assertions shed some light on resolving the aforementioned dilemma.

Kohler equated the ownership of patent rights with the ownership of physical things, since both of these rights had ‘exclusivity’, and infringing such rights was an invasion of the owner’s ‘absolute right’.<sup>212</sup> His work swept among Japanese scholars, particularly after the Patent Act was amended in 1921 (as Law No. 96).<sup>213</sup> Kohler’s influence can be seen in many commentaries during that time, such as Ichiro Kiyose stating ‘the dominant saying among German scholars’, which referred to Joseph Kohler. The whole context reads,

[T]oday, the dominant saying among German scholars is to view a patent as being an intangible property. I think that if we only provide protection to physical things in our society that will be too insufficient. Suppose we consider that a human being’s idea exists objectively outside the human body and between this human being and his idea, there are interests need to be protected like him and his physical things, these interests will be protected. As for patent rights, they exist objectively. Despite the fact that they are intangible, they benefit human beings. These rights deserve to be treated as rights.<sup>214</sup> [translated by this author]

Commentaries by Shouichi Iwara,<sup>215</sup> Yumi Gaku<sup>216</sup> and Hane Iizuka<sup>217</sup> followed the same statement. Generally speaking, the trend to adopt the legal approach using the law

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<sup>212</sup> Tomita (n 195) para II(4)ff below.

<sup>213</sup> *ibid* para II(4)ff below.

<sup>214</sup> Kiyose (n 87) 29.

<sup>215</sup> Iwara (n 86) 58. ‘Patent rights are the rights to enjoy profits (*Genusstrcht* in German). The inventor of a spiritual creation shall enjoy his/her right to exclude others, i.e. when an inventor obtains his/her patent rights, he/she has an absolute right under the law of things to fight against others’. [translation by the author]

<sup>216</sup> Gaku (n 98) 779-780.

<sup>217</sup> See Hane Iizuka(飯塚半衛), *Mutai Zaisan Hou Ron*(無體財産法論)=*On Intangible Property Law* (Gan Shou Dou Shoten 巖松堂 1940).

of things and German jurists' doctrinal hypothesis as its explanation based on patent rights had already taken shape before the Second World War.

This assertion was subsequently strengthened by young intellectuals, enchanted by the highly similar wording used in the Japanese Patent Act and in the Japanese Civil Code.<sup>218</sup> Put simply, in the Japanese Patent Act, the patentee had the exclusive right to 'manufacture, use, sell and distribute' his/her invention.<sup>219</sup> While in the Japanese Civil Code, the owner had the right to 'use, gain profit from, and dispose of' the things he/she owned.<sup>220</sup> This similarity provided a hope for patent rights transfers to be applied back to the Japanese Civil Code, where the Patent Act has no rules for it. Combined with the quasi-possession theory developed before 1916, the rules and principles in physical things seem as if they can be equally applied to patent transactions.

### **3.2.3 An extension to licence after 1945 in Japan**

In the first half of the twentieth century, we see Japanese scholars trying to find a place for the patent in the law of things. They mainly focus on justifying the property nature of a patent by way of the ready-made rules they had at hand. It was not until the Second World War ended that scholars began to stretch their ideas further to licence. The reason for this late development is attributed to the 1921 Patent Act (and also its amendment in 1929) that merged the concept of licensing and assignment together.<sup>221</sup> Licensing

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<sup>218</sup> Tomita(n 195) para IV(1)ff below.

<sup>219</sup> Article 35 of the 1929 Japanese Patent Act, 'In the case of a patented invention of an article, the patentee has the exclusive rights to manufacture, use, sell and/or distribute such an article, while in the case of the patented invention of a process, he/she has a exclusive right to use such a process and to use, sell and/or distribute articles manufactured by such a process'. JE De Becker and EVA De Becker, *Japanese Laws and Ordinances Concerning Patents, Trade-marks, Designs and Utility Models* (JL Thompson; Butterworth & Co 1930) 10.

<sup>220</sup> Article 206 of the 1921 Japanese Civil Code states, 'The owner has the right to use, gain profit from and dispose of the things he owns within the limitation of the law and regulations'. For a more detailed explanation of this article, see Becker JE and Becker EVA (n 219) 151-153.

<sup>221</sup> Article 44, section 1 of the 1929 Patent Act says, 'A patent right may be transferred with or without restrictions'. [translation by De Becker] See Becker JE and Becker EVA (n 219) 13.

activity was not prosperous before 1945.

It was not until the Japanese Patent Act saw a significant amendment in 1959 (as Law No. 121) regarding patent licences that patent transactions caught the attention of academia. Nakayama stated,

[W]hile the old Law (Law of 1921) had a system to transfer a patent right within limits (section 44 (1)), its legal nature was not quite clear, and the system was hardly used. Thus, under the current law, the system was revised from the form of transfer to the form of licence, having an exclusive nature. Since transfer with limitations under the old Law was often considered as being analogous to a usufructuary real right, it can be regarded as being almost identical to the system under the current law.<sup>222</sup>

Basically, most professors welcomed these ready-made rules being applied to patent transactions. Writers like Tetsu Tanabe and Harold Wegner's even used Roman law terms to support the popular view without knowing that the term 'rights *in rem*' used by a common law writer is different from a civil law writer. They stated,

[T]he *senyo* licence may be an exclusive licence for all of Japan, or the licence may be divided time-wise, geographically, or by field of use. Just as a piece of land may be split into two discrete units, so also may the *in rem* right of the patent be split in such a manner.<sup>223</sup>

This study will come back to the differences between common law and civil law writers'

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<sup>222</sup> Nakayama (n 88) 32. [translation by the Institution of Intellectual Property]

<sup>223</sup> Tetsu Tanabe and Harold C Wegner, *Japanese patent law* (AIPPI Japan 1979), 199. They provide a detailed ideological clarification between a '*senyo* licence' and an 'exclusive licence'.

understanding of ‘rights *in rem*’ in 4.2.2.

### 3.2.4 The Japanese court’s opinion—the same as Japanese academia

The court also adopted the academia’s opinion. The Japanese Supreme Court sustained the Japanese High Court’s reasoning, whereby it analogised an exclusive licence to a surface right of land. In 2005, the Japanese Supreme Court stated,

[ T ] he issue of this case is like a real property owner granting his surface right to others. The superficiary has the right to exclude intruders, generally speaking, and the owner’s *in-rem* rights (to the intruders) are not limited by the granting of the surface right.<sup>224</sup>

The Japanese Supreme Court decided that a patent owner had a right to exclude others based on real rights, and this right was not exhausted when an exclusive licence was granted, just as surface rights were granted. This case became the precedent for subsequent decisions. Despite the real rights concept being particularly different from the property notion of a patent, as will be shown in 4.3.1, this misconception has unfortunately become a supplement to the void in Japanese Civil Code today.

In sum, Japanese professors tried to find a place for the patent in the law of things. Before 1916, scholars developed quasi-possession theory to justify the property nature of a patent; after 1916, the scholars used Joseph Kohler’s scholarship to strengthen their theory. The ready-made principles in the law of things were then used for patent licences after 1945. The Japanese Supreme Court further consolidated this direct

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<sup>224</sup> [2005] June 17 precedent number 997 Lexis Nexis Japan (Supreme Court Second Division)  
[translation by this author]

analogy in 2005.

### 3.3 Japanese scholarship starts to influence Taiwanese academia

#### 3.3.1 Before 1945: statutory laws came in and the practitioners' legal backgrounds

Taiwan was ruled by Japan for 50 years (1895-1945), with most judges and prosecutors coming from Japan. According to a 1943 record, out of 66 judges in Taiwan, only one in ten was Taiwanese, with none of the 33 prosecutors being Taiwanese.<sup>225</sup> According to a 1945 record, there were 46 Taiwanese lawyers, with most of them educated in Japan.<sup>226</sup> Japanese law and scholarship have deeply influenced Taiwanese legal practitioners since 1896.

The 1899 Japanese Patent Act was directly enacted from Japan to Taiwan through the *shixingcelin* 施行敕令(No. 290) on 1 July, 1899.<sup>227</sup> However, the law of things in Japanese Civil Code, especially the sections of immovable things, was enacted tardily after 1923.<sup>228</sup> Prior to 1923, civil cases regarding real estate were decided by

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<sup>225</sup> Wang (n 189) 236.

<sup>226</sup> *ibid* 241.

<sup>227</sup> *Shixingcelin* (施行敕令) is a kind of ordinance which means a direct enactment order. The Japanese central government had more than one way to enact a law in Taiwan. The Japanese Imperial Congress conferred legislative powers upon an executive branch, i.e., the Government of Formosa (comprising of Japanese officers) who had the power to enact laws (*lulin* 律令) and ordinances (*fulin* 府令) according to Law Number 63. The Imperial Congress maintained the appearance that it owned the overall powers of law-making. However, in fact, it was the Formosa government that made and enacted all laws (*lulin* 律令), which had the same effect as congressional laws. See Wang Tay-sheng(王泰升), *Taiwan Rizhi Shiqi de Falu Gaige*(台灣日治時期的法律改革)=*Legal Reform in Taiwan under Japanese Colonial Rule* (Linking 聯經 1999) 67-68.

<sup>228</sup> Wei Jia-hong(魏家弘), 'Taiwan Tudi Souyouquan Gainian de Xingcheng Jinggou: cong yeh dao suoyouquan(台灣土地所有權概念的形成經過：從業到所有權)=On The Reform of Ownership in Taiwanese Real Property' (MPhil, National Taiwan University College of Law 1995) 169, 209-210. The Japanese government first enacted an ordinance to the judges which said that civil cases should be decided according to customary Taiwanese law and general principles. (Article 2, *Rilin* (日令) No.21-3 *Taiwan Zhumin Minshi Susonglin* 台灣住民民事訴訟令, 17 Nov. 1895) In 1898, *Lulin* (律令) No. 8 and No.9 stated more clearly that 'Taiwanese customary law should be applied to civil cases concerning the immovable things of Taiwanese people or Japanese people who are domiciled in Taiwan'. [translation by this author] In other words, the Japanese 1896 Civil Code would be applied to subject matter other than

Taiwanese customary law. No evidence shows the Taiwanese academia using Japanese quasi-possession theory to understand patents before 1945, nor is there any record that manifests that this theory equally influenced Taiwanese academia. Part of the reason is that patents owned by Taiwanese inventors were insignificant and did not catch academia's attention for discussing whether it is better to use Taiwanese customary law to understand the property nature of a patent or not. Another part of the reason concerns Taiwan no longer being under Japanese rule when the 1921 Japanese Patent Act was significantly amended in 1959. The prosperous licensing activities happening in Japan after the Second World War did not equally impact on the Taiwanese academia.

### 3.3.2 Before 1945: understanding by the people of Taiwan

Despite there being no evidence showing that the Taiwanese academia were influenced by Japanese scholars in the first half of twentieth century, there were still a small number of licensing activities that happened in Taiwan between 1929 and 1930.

The first evidence is three licence contracts made in 1929 between two Japanese individuals who lived in Taiwan: Yoichi Hosono (細野又市) and Tousiro Maeda(前田藤四郎).<sup>229</sup> Yoichi Hosono owned a valuable charcoal manufacturing patent and transferred it to Tousiro Maeda, who permitted Mr. Maeda to use his invention within 7

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real estate from 1898. See *ibid* 169. In 1908, *Lulin* (律令)No.11 (substituted No. 8), maintained the same regulation. See also *ibid* 209. It was not until 1922, that *Celin* (敕令)No.406 promulgated that 'the law of things fully enacted in Taiwan, starts from 1 January 1923', with the law of things being fully enacted in Taiwan ever since.

<sup>229</sup> The first contract was made on 15 June 1929. See Taiwan Colonial Court Archives, 'Tokkyo Hatsumei Jishiken Zyouto Keiyaku Syousyo Genpon(特許發明實施權讓渡契約證書原本 2924, 2925 號)=Patent Right Transfer Agreement number 2924, 2925' (15 June 1929) <[http://tccra.lib.ntu.edu.tw/tccra\\_develop/record.php?searchClass=all&id=tu0987](http://tccra.lib.ntu.edu.tw/tccra_develop/record.php?searchClass=all&id=tu0987)> accessed 25 February 2010. And the second contract was made on the same date as the first contract. The third contract was made on 22 July 1929. See Taiwan Colonial Court Archives, 'Tokkyo Hatsumei Jishiken Zyouto Keiyaku Syousyo Genpon(特許發明實施權讓渡契約證書原本 3123 號)=Patent Right Transfer Agreement number 3123' (22 July 1929) <[http://tccra.lib.ntu.edu.tw/tccra\\_develop/record.php?searchClass=all&id=tu104010012059](http://tccra.lib.ntu.edu.tw/tccra_develop/record.php?searchClass=all&id=tu104010012059)> accessed 1 September 2011.

different districts: Yamaguchi Prefecture, Shikoku and Okayama Prefecture in Japan, 3 districts in Korea and one district in Taiwan.

So far, there is no evidence showing that Taiwanese inventors licenced patents to Taiwanese people, but there is one case where a Japanese individual co-owned a patent with a Taiwanese citizen. Masatoshi Toyama (富山正敏) jointly owned his patent with Liang Xi-quan (梁溪泉). In their co-ownership contract, we see co-ownership through the sharing concept originating from the law of things being used in the patent.<sup>230</sup> Even the Taiwanese patent agent used the word ‘lease’ to describe ‘licence’. The only surviving patent agent, Mr. Sun Jiang-huai (孫江淮), states in his memoir that ‘Taiwanese people preferred to lease the designs to others rather than to assign to them’.<sup>231</sup> Using loanwords and concepts arising from physical things to understand a new concept seems spontaneous, a phenomenon that even last until today.<sup>232</sup>

### 3.3.3 Taiwanese Civil Code was influenced by Japanese scholarship: the same problem as Japan’s Civil Code

Japan lost the Second World War and renounced its right, title and claim to Taiwan.<sup>233</sup>

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<sup>230</sup> Patentee Masatoshi Toyama (富山正敏) transferred half of his patent rights to Taiwanese citizen, Liang Xi-quan (梁溪泉). Mr. Toyama also transferred half of his patent rights to another patent still in the application stage to Mr. Liang on 31 January, 1930. Transferee Liang paid 4000 Japanese Yen on the same day, and Mr. Toyama assented that he received the transfer fee as per the agreement. As per the registration requirement (for countering third parties) in the 1921 Patent Act (and its amendment in 1929), Article 45, Mr. Toyama agreed to file this transfer in the Imperial Patent Office on the same day as they signed the agreement. See Taiwan Colonial Court Archives, ‘Tokkyoken Mochibun Zyouto Keiyaku Syousyo Genpon(特許權持分讓渡契約證書原本 3077 號)=The Original Script of Patent Proprietary Rights Transfer Agreement number 3077’ (31 January 1930) <[http://tcra.lib.ntu.edu.tw/tccra\\_develop/record.php?searchClass=all&id=tu104010012663](http://tcra.lib.ntu.edu.tw/tccra_develop/record.php?searchClass=all&id=tu104010012663)> accessed 1 September 2011.

<sup>231</sup> Wang Tay-sheng (王泰升) and Lin Yu-ru (林玉茹), ‘Daishubi Shangrenfeng: Baisui Renrui Sun Jiang-huai Xiansheng Fangwen Jilu(代書筆、商人風：百歲人瑞孫江淮先生訪問紀錄)=Escrow Agent in Business: an oral history of Mr. Sun Jiang-huai in his age of 100’ in Lin Yu-ru (ed), *Local and the World Oral History vol 4* (Yuan-liu 2008) 63.

<sup>232</sup> See Liu Cheng-yu (劉承愚) and Lai Wen-zhi (賴文智), *Jishu Shouquan Qiyue Rumen (技術授權契約入門)= Understanding Technology Licensing* (Zhi-sheng 智勝 2005) 15.

<sup>233</sup> On 8 September, 1951, the Allied Powers signed the Treaty of Peace (the ‘San Francisco Peace



After the Second World War, the government of the Republic of China, who lost power in China, took over the rule vacated by the Japanese government in Taiwan. The current Taiwanese Civil Code, which has been in effect in Taiwan since October 25<sup>th</sup> 1946, was in fact first drafted in 1911 in China for the social and economic conditions there.

When this Civil Code was drafted (it was Chinese Civil Code, but is now known as ‘Taiwanese Civil Code’), it was heavily influenced by Japanese scholarship. The general principles, the law of obligations and the law of things were handled by Japanese scholar, Yashimasa Matsuka.<sup>234</sup> Confirmed by scholar He Qin-hua, the first draft of the 1911 Civil Code took the 1896 Japanese Civil Code as its major reference. Therefore, the overall structure of the first draft was close to the German law style.<sup>235</sup> The second draft was not changed much.<sup>236</sup> However, in the third amendment, because the legislators consulted German law, Swiss law and Japanese law when drafting, the code became a sui generis type of civil law structure, as stated in 2.2.3.

In the third amendment (the 1929 Civil Code), the legislators did not make this sui generis type more harmonious, and instead the definition of the word ‘things’ was changed from limited physical things (Japanese law style), to a vague definition. To

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Treaty’) with Japan after Japan surrendered. In Chapter II, Article 2, section (b) of the San Francisco Peace Treaty, it states, ‘Japan renounces all right, title and claim to Formosa and the Pescadores’. See United Nations, *Treaty Series: treaties and international agreements registered or filed and recorded with the secretariat of the United Nations* (1952) number 1832, 45-164.

As the treaty used the word ‘renounces’ not the word ‘recede’ or ‘return’, it became an unsettled dispute about Taiwan’s international status.

<sup>234</sup> Huang Yuan-sheng(黃源盛), *Minchu Falu Bianqian yu Caipan 1912-1928*(民初法律變遷與裁判 1912-1928)=*The Law Reform and Judiciary Decisions at the beginning of the 20th Century 1912-1928* (Huang Yuan-sheng 2000) 373.

<sup>235</sup> He Qin-hua (何勤華) and Li Xiu-qing(李秀清), *Waigoufa yu Zhongguofa: 20 Shiji Zhongguo Yizhi Waigoufa Fansi* (外國法與中國法：20世紀中國移植外國法反思)=*Foreign Laws and Chinese Laws: a rethinking of a transplantation of foreign laws in the 20th century* (China University of Political Science and Law 2003) 233-235.

<sup>236</sup>The second draft was modified based on the first draft during 1925-1926. See Li Xiandong(李顯冬), *Chong Daqing Luli Dao Minkou Minfa Dian de Zhuanxing: Jianlun Zhongguo Gudai Guyou Minfa de Kaifangxing Tixi* (從大清律例到民國民法典的轉型：兼論中國古代固有民法的開放性體系)=*From Daqing code to Minkou Civil Code: on the flexibility of Chinese traditional civil laws* (Chinese People's Public Security University Press 2003) 200.

make the word ‘thing’ vague did not solve the problem of there being no place for patents in the law. This problem continued and was not solved even when Taiwan changed the Japanese Civil Code to this 1929 Civil Code.

Unlike the 1929 Civil Code being inclined towards the German and Japanese style, the Patent Act from China (known as the ‘Taiwanese Patent Act’) has less inclination to one specific jurisdiction. It was hurriedly drafted and took references from fourteen countries during the Second World War in China.<sup>237</sup> The Chong Qing National government promulgated this Act on May 19<sup>th</sup> 1944 (the 1944 Patent Act), but it was never actually enacted in China.<sup>238</sup> This Act, in turn, was enacted in Taiwan to replace the total repeal of Japanese laws and regulations on the 10<sup>th</sup> of February 1947.<sup>239</sup>

Like Japan, when both the 1929 Civil Code and 1944 Patent Act were enacted in Taiwan after 1947, there was no place for patents in the 1929 Civil Code. The following section will look into the development of Taiwanese scholarship after 1945.

### **3.4 The reaction of Taiwanese academia to Japanese influences: Joseph Kohler’s influence and quasi-possession theory being imported into Taiwan**

Taiwanese patent law jurists are normally civil law lawyers who do not specialise in comparative law study. Therefore, without having knowledge about distinguishing the property concept of patents with a real right concept in the law of things, they welcome Joseph Kohler’s paradoxical statement in academia, and even stretched Kohler’s

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<sup>237</sup> Qin (n 68)117.

<sup>238</sup> National Government, *Guominzhengfu Dangan: zhuanlifa gongbu* (國民政府檔案: 專利法公佈)= *Promulgation of Patent Act* (Academia Historica 1944) (Folio 001012640A006).

<sup>239</sup> Taiwanese Administrative Offices, *Taiwasheng Zingzheng Zhanguan Gongshu Daidianshiyou: wei qixian feizhi riben shidai falinXi fenbie xiuding huo feizhi* (臺灣省行政長官公署代電事由: 為期限廢止日本時代法令希分別修訂或廢止)= *Taiwan Administrative Offices: Repeal of all Japanese Laws* (1947) *Taiwasheng Zingzheng Zhanguan Gongshu Gongbao* (臺灣省行政長官公署公報) Spring (34) 540.

influence further. A good example is Taiwanese Patent law professor Yang Chong-sen, who states that,

[A]rticle 19 (is now article 21) of the Patent Act says, ‘the term “invention” as used herein refers to any creation of technical concepts by utilizing the rules of nature’. This definition follows Joseph Kohler’s definition of invention.<sup>240</sup>

Taiwanese scholars began to widely accept the Japanese quasi-possession theory at the second half of the twentieth century. A scholar, Zhen Yu-po,<sup>241</sup> kicked off this hypothesis by claiming that copyrights have room in the law of things. Textbooks writers such as Yao Rui-guang<sup>242</sup> and Xu Wen-chang<sup>243</sup> make the same statement. Xu Wen-chang further extends this idea to trade marks.<sup>244</sup>

The new generation took a more aggressive step. In 1964, textbook writer Hu Chang-qing began to classify copyrights, patent rights and trade marks as absolute rights.<sup>245</sup> Shieh Zai-quan followed Hu Chang-qing, asserting that the concept of ‘things’ in Taiwanese Civil Code should be further extended to trade marks and patents.<sup>246</sup> Intellectual property law professor, Shieh Ming-yang, began to write commentaries using real rights protection to explain the nature of intellectual property.<sup>247</sup> Furthermore, Rui Mu put copyrights and patent rights directly into the law of things, classifying these

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<sup>240</sup> This passage is translated by the author. Original wordings see Yang (n 102) 51. In his footnote, he sites Joseph Kohler’s definition in German.

<sup>241</sup> Zhen (n 106) 414.

<sup>242</sup> See Yao Rui-guang(姚瑞光), *Minfa Wuquan Lun(民法物權論)=On The Law of Things* (Dazhongguo 1999) 428.

<sup>243</sup> See Xu Wen-chang(許文昌), *Minfa Wuquan Gaiyao(民法物權概要)=Guidelines to The Law of Things* (Wen Sheng 文笙 1995 reprint) 70.

<sup>244</sup> *ibid* 70.

<sup>245</sup> Hu Chang-qing(胡長清), *Zhongguo Minfa Zonglun (中國民法總論)=The Civil Code of China* (Da Xin 1964) 41, 43.

<sup>246</sup> Shieh, *Minfa Wuquan Lun-shang(民法物權論：上)=On The Law of Things vol I* (n 68)25.

<sup>247</sup> Shieh Ming-yan, *Zhihui Caicanquan zhi Jichi Lilun (智慧財產權之基礎理論)=A Fundamental Theory of The Intellectual Property Law* (National Taiwan University 1995) 20-23.

rights as rights with moral integrities.<sup>248</sup> Tsai Ming-cheng equated the ‘belonging’ status of a thing to a person, with the ‘belonging’ status of patent rights to the patentee.<sup>249</sup>

Taiwanese scholars began to overstate the ‘right to exclude’ in the law of patent as highly similar to having ownership of a thing. Professor Shieh Ming-yang further developed this equation in his commentary and textbook writing.<sup>250</sup> Inconsistencies can be sometime found in the same writer’s work. Shieh objects to quasi-possession theory being applied to intellectual property law but agreed with the extending of this equation to licensing activities.<sup>251</sup> No one can be sure whether there is a room for patents or not, but what they did do was using the ready-made rules from physical things to justify the property status of a patent. This popular view quickly swept the court and Taiwanese Intellectual Property Office, as shown in 2.3.3.

### 3.5 Conclusion

The misconception was triggered by a natural structural defect in the progress of transplanting too many laws from diverse resources. The academic community found flaws and tried to redress any voids by forming a common scholarly consensus using the quasi-possession theory. This hypothesis was selectively mirrored in Joseph Kohler’s scholarship, whereby Japanese and Taiwanese scholars could find their positions. This paradoxical view was further strengthened by court decisions. The patent

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<sup>248</sup> Rui (n 68) 7.

<sup>249</sup> Shieh, *Zhahui Caicanquan zhi Jichi Lilun*(智慧財產權之基礎理論)=*A Fundamental Theory of The Intellectual Property Law* ( n 247) 6.

<sup>250</sup> As for Shieh Ming-yan’s commentary, see Shieh, ‘Cong Xiangguan Anli Tantaos ZhahuiCaichanquan yu Minfa zhi Guanxi (從相關案例探討智慧財產權與民法之關係)=A Discussion on the Relationship of Intellectual Property Rights with the Civil Law through Relevant Cases’ (n 83) 209-214 Also in his textbook Shieh, *Zhahui Caicanquan Fa* (智慧財產權法)=*Intellectual Property Law* (n 68) 43-60.

<sup>251</sup> Shieh, *Zhahui Caicanquan Fa*(智慧財產權法)=*Intellectual Property Law* (n 68) 274, 275.

seems to find its place in the law of things, ostensibly, the rules and principles arising from a physical thing transaction works equally well for a patent transaction. It only, however, exposes the slackness of Taiwanese academia and courts for favouring the use of ready-made rules rather than conducting a comparative study from scratch.

The next chapter starts with a comparative study from historical perspective. The popular view will be challenged by showing that a patent cannot be easily placed in the structure of Taiwanese civil law like it is in the common law property concept. There is no room for a patent in such a rigid structure in the law of things. Patents need to find a place elsewhere, which will be discussed in Chapter 5.

## CHAPTER FOUR

### A HISTORY OF PATENTS FOR INVENTIONS AND THE DIFFERENCES BETWEEN THE COMMON LAW ESTATE AND CIVIL LAW REAL RIGHTS

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4.4 Conclusion	151

The last chapter concerns the historical reasons why the rules in real rights are used for patents, as well as the neglectfulness of Taiwanese academia and the courts for using ready-made rules in the law of things to explain jural relations in a patent transaction. Following the hierarchy of interpretation in laws (intra-laws, customary law, and foreign jurisprudence) set forth in Article 1 of Taiwanese Civil Code, this research discussed intra-law explanations. Before moving onto to discuss Taiwanese customary law, English common law, as a foreign jurisprudence, will serve as the comparative basis for the discussion of Taiwanese customary law. This chapter thus sets out the goal of exploring the history and evolution of how patents have been categorised as property, whilst also aiming to answer the third question set out in Chapter 1—what are the substantial differences of real rights between English common law and Taiwanese civil law? This chapter begins by exploring the history of a patent in common law,<sup>252</sup> and seeing how a patent, which was originally a franchise, evolved into a property law as we

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<sup>252</sup> Common law of England in this thesis is refined to the common law of England and Wales, not including Scotland and Northern Ireland. Common law of America (if mentioned) in this thesis refers to the states where common law is implemented and does not include the state of Louisiana.

know it now.

This chapter starts with franchises. Franchises were assimilated in land law by applying the doctrine of seisin and doctrines of estates to incorporeal hereditaments during medieval times.<sup>253</sup> In the sixteenth century, choses of action extended from personal debt<sup>254</sup> to real estate, and franchises were absorbed into extending choses of action by the late sixteenth century. Franchises were then merged into an even bigger property concept in the seventeenth century by English jurist Holdsworth.<sup>255</sup> He extended the narrow concept of property from personal property<sup>256</sup> to include land and tenements. Due to these extensions, patents were eventually classified as choses in action or even under the personal property category as we see it today.

During the eighteenth century, natural law lawyers found Grotius and Pufendorf's theory an awkward fit in the aforementioned scheme. By using John Locke's labour appropriation theory, natural law lawyers explained that the nature of exclusive rights originated with occupancy.<sup>257</sup> Henceforward, the philosophical stands justifying the property status of patents was established. This conjunction was then consolidated by Blackstone's extension,<sup>258</sup> from things physical to copyrights in the theory of

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<sup>253</sup> Keith Michael Lupton, 'The Medieval Franchise and the Nature of Property in Letters Patent for Inventions and Copyright in Published Books' (DPhil thesis, University of London 2001) 107 'We have seen already that franchises were assimilated to land in the thirteenth century by applying to franchises the doctrines of seisin and estates'.

<sup>254</sup> *ibid* 248-249. The origin of a chose in action has always been a debt, but by the mid-sixteenth century, this concept expanded to include rights arising under real actions.

<sup>255</sup> *ibid* 133.

<sup>256</sup> In the fourteenth century, the word 'property' originally only referred to goods and personal property. *ibid* 120. 'As the early Year Book cases of replevin and trespass *de bonis asportatis* suggest, the subject matter of property was nearly always goods or cattle'. In *ibid* 123. 'In the common law, only goods and chattels personal were the subject of "absolute ownership"'.  
<sup>257</sup> *ibid* 199.

<sup>258</sup> Holdsworth, *A History of English Law vol VII* (n 209) 480 'Acquisition by occupatio was extended by Blackstone to cover a case like copyright in which the acquirer has himself created a new incorporeal thing... Probably chief justice Vaughan's view, that occupatio was only possible of corporeal objects, was in accordance with the Roman ideal for according to Roman law, occupatio, being founded on possessio, and only corporeal things being capable of possessio, it was corporeal things which could be thus acquired'.

possession. Roman law terminologies were widely adopted to explain the nature of a patent. Although the use of Roman terminology was not a modern fashion, it started with Bracton<sup>259</sup> and was followed by many English writers,<sup>260</sup> who often used Roman law ownership as a synonym for English fee simple.<sup>261</sup> As this chapter will show, ownership cannot be completely juxtaposed with the notion of fee simple because fundamentally, there are still many nuances between these two.

The above analysis offers a basis to answer the substantial differences of real rights in English common law and Taiwanese civil law. This chapter further makes a detailed comparison of real rights arising from ownership in Taiwanese civil law and the estate notion in common law. This chapter concludes that physical things in Taiwanese civil law cannot explain the property nature of a patent, because civil law ownership lacks two significant features. The first feature concerns Taiwanese civil law where the unitary notion restricts ownership from segmentation by different duration. Unlike an estate notion in English common law that can be divided by various durations, to own a patent under Taiwanese civil law means having it perpetually. To own a perpetual patent contradicts the current notion that we have now, therefore rights *in rem* under Taiwanese

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<sup>259</sup> Henry de Bracton, *Bracton on the Laws and Customs of England*, vol 2 (Samuel E Thorne ed, Belknap Press of Harvard University Press 1968) 122-123. ‘There is also possession that has much of possession and much of right, as where in some things one has the mere right and the and the property, the fee and the free tenement with seisin’. And in F W Maitland, ‘The Mystery of Seisin’ (1886) 2 *Law Quarterly Review* 481,494. ‘...for even to negative franchises, such as the right to be quit of toll, does Bracton apply notion of seisin or possession’.

<sup>260</sup> Example like Burn and Cartwright (n 11) 48 ‘English law, in analyzing the relation of the tenant to the land, has directed its attention not to ownership, but to possession, or, as it is called in the case of land, seisin’. And also Holdsworth in William Searle Holdsworth, *A History of English Law vol III* (3rd edn, Methuen & Co 1923) 88,89 said, ‘seisin means possession’. Noyes commented Blackstone for equating property as *dominium*. ‘When Blackstone defines property he seems to be thinking of *dominium*, calling it “that sole and despotic things of the world, in total exclusion of the right of any other individual in the universe.” Today this seems to us so extravagant as to be laughable’. See Noyes (n 42) 297.

<sup>261</sup> ‘English land law has made no contribution to the legal theory of ownership more striking, more brilliant and of more permanent value than the separation of the land from the estate in the land....What seems to be less appreciated is that this separation necessarily implies a penetrating analysis of the fundamental concept of ownership itself—of *dominium* and of the fee simple as the nearest equivalent to *dominium* in English land law’. A D Hargreaves, ‘Modern Real Property’ (1956) 19(1) *MLR* 14, 17. ‘Fee simple’ means ‘tenure of a heritable estate in land for ever and without restriction to any particular class of heirs; and estate so held; equivalent to freehold’. See Christopher Corèdon and Ann Williams, *A Dictionary of Medieval Terms and Phrases* (D S Brewer 2004) 121.



civil law cannot explain the property nature of a patent.

The second feature is that Taiwanese civil law lacks the characteristics that common law has: everyone is free to use land in principle, with the law vesting the right to exclude with the owner(s). In sharp contrast to the common law model, under the Taiwanese civil law legal structure, no one is free to use the land in the first place, with only the owner granted real rights to use the land. The prerequisite is precisely the converse. This nuance has a significant impact on the definition of what sorts of right patent owners have for their patents and that will be further addressed in Chapter 5.

As the following passages will show, the key factor is a different technique of classification. Civil law classification begins with the ‘thing itself’ instead of the ‘interests’ in things, whilst the common law classification starts with interests in things, with jural relations dealing with intangible objects. Therefore, civil law cannot explain the property nature of a patent because ‘ownership’ means to ‘perpetually own a thing’ and that contradicts the current notion we have now. Before venturing into a comparative study on the notion of estate and ownership, an overall understanding of how a patent becomes property is necessary. The following presents a brief history of how a patent becomes a property under the common law system.

## **4.1 Franchises vis-à-vis the doctrine of estates and seisin**

### **4.1.1 What are franchises?**

The word ‘franchise’ was adapted from the French word *franchise*.<sup>262</sup> In medieval

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<sup>262</sup> Lupton (n 253) 12. Lupton cited from RE Latham, *Revised Medieval Latin word-list from British and Irish sources* (Published for the British Academy by Oxford U.P 1965) 275.

times it was spelled the same as the aforementioned French word<sup>263</sup> and indicated valuable economic rights.<sup>264</sup> According to Sir Henry Finch, a franchise is a royal privilege in the hands of a common person; the categories of franchises were almost infinite and diverse.<sup>265</sup> By the end of the feudal period, it was customary to grant open letters, or a so-called letters patent, to ‘churches, bishops, public servants, eleemosynary institutions, and municipalities, as well as to explorers, artisans, manufacturers, and the like’.<sup>266</sup> These letters patent could grant rights to a wreck at sea, treasure trove, toll, warren, market or fair.<sup>267</sup>

In 1565, the first monopoly granted for industrial purposes was issued to a foreign craftsman.<sup>268</sup> In 1766, Sir William Blackstone adopted Sir Henry Finch’s definition and reassured that a franchise was ‘a royal privilege or branch of the king’s prerogative, subsisting in the hands of a subject’.<sup>269</sup> It is substantiated both Finch and Blackstone understood franchises in the wider sense, in that franchises were diverse and infinite.<sup>270</sup> Blackstone further grouped and classified franchises as the seventh species of incorporeal hereditament.<sup>271</sup> This type of incorporeal hereditament was categorised

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<sup>263</sup> Hans Kurath and Sherman M Kuhn, *Middle English Dictionary* (University of Michigan Press 1952) 866. According to the definition in the dictionary, the word ‘franchise’ has the legal meaning of ‘a special right or privilege: (a) the right to land, property, rent, income, etc.; exemption from a tax, a service, etc.; jurisdiction over courts of law, etc.; (b) the right to buy or sell; also, the right to exclude others from buying or selling, a monopoly; (c) the privilege of living in a place; right of sanctuary; also, a place where criminals may not be arrested;(d) any of the privileges(e.g. that of electing a mayor) granted to a city or town; (e) a spiritual privilege or benefit; (f) day of ~, a day on which no legal action may be taken against a person, day of immunity’.

<sup>264</sup> Lupton (n 253) 23.

<sup>265</sup> *ibid* 13 cited from Henry Finch, *Law; or A Discourse Thereof* (London: printed for the Societie of Stationers 1627) bk2 ch14, 164-167, ‘a royall priviledge in the hands of a common person: so we call every subject; and is forfeited by misusing of it...The kinds of franchises are divers and almost infinite. Of such sort are the libertie of having a Court of ones owne... Also warrens... Markets, fayres, tolle of everie buyer for things he buyeth there, not being for his own expences...And whatsoever liberties and commodities else that (created by the kings special grant, or of their own nature belonging to him) are giver to common persons to have any manner of estate in’.

<sup>266</sup> E Burke Inlow, *The Patent Grant* (Johns Hopkins Press 1950) 12.

<sup>267</sup> Lupton (n 253) 12. Lupton cited from Bracton bk1 ch20 fol 30, and bk2 ch2 fol 85b.

<sup>268</sup> Inlow (n 266) 18.

<sup>269</sup> William Blackstone, *Blackstone's Commentaries on the Laws of England: Volume II* (Wayne Morrison ed, first published 1765-1769 Cavendish Publishing 2001) 29 (original page no 37)

<sup>270</sup> Lupton (n 253) 16.

<sup>271</sup> Blackstone (n 269) 29 (original page no 37). Also in Lupton (n 253) 15.

under real estate rather than personal goods or chattels. How franchises were classified under incorporeal hereditaments and further listed under the category of estate will be presented in 4.1.3 and 4.1.4.

#### 4.1.2 What is the doctrine of estates and seisin

Simply speaking, the doctrine of estates is a land-holding mechanism<sup>272</sup> that originated from an old English rule that a person cannot own 'land *per se*', but merely owns the 'estate in the land' for a period of time. The word 'estate' under the doctrine of estates does not mean the land itself but refers to an interest that a tenant holds inside the land.<sup>273</sup> The main classification of estates depends upon the quantification that 'depends upon their duration',<sup>274</sup> put simply, the estates were classified by time. Littleton describes that the word estate 'comes into use by 1285 to describe the tenant's interest in land and tenements'.<sup>275</sup> In other words, from the thirteenth century onwards, an estate meant the duration that the land interest was held.

The distinguishing characteristic of the English doctrine of estates is the capacity for simultaneous coexistence of estates in the land.<sup>276</sup> Various interests might coexist on the same piece of land under the operation of the tenure system. In medieval society, 'feudal law and local customary law intermingled or coexisted with Roman law survivals and ecclesiastical law'.<sup>277</sup> This feudal system was formed in the ninth and

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<sup>272</sup> Clarke and Kohler (n 31) 213.

<sup>273</sup> CT Onions and G W S Friedrichsen, *The Shorter Oxford English Dictionary on Historical Principles: on historical principles* (Clarendon 1973) 683 'The interest which any one has in lands, tenements, or other effects'. Also in Lupton cited 1573 Walsingham's Case, '...the land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time, for he who has a fee-simple in land has a time in the land without end'. See Lupton (n 253) 100.

<sup>274</sup> Burn and Cartwright (n 11) 52.

<sup>275</sup> Lupton cited from the Statute of Westminster II 1285 and 1292 Year Books. See Lupton (n 253) 98.

<sup>276</sup> Holdsworth, *A History of English Law vol VII* (n 209) 468, 469.

<sup>277</sup> Brian Z Tamanaha, *On the Rule of Law* (Cambridge University Press 2004) 16.

tenth centuries. With little active markets or either land and labour, a social order came into being that revolved around a complex set of relationship tied to who owned or had rights over the land and who worked the land. The society was constituted by three difference classes: the nobility, clergy and serfs. The nobility and their vassals, or knights, possessed substantial land holdings that were divided up and allocated in various way. Through the practice of sub-infeudation, the vassals ‘further divided up the land among subordinate vassals, and so forth’.<sup>278</sup> A multi-layered network of relationship was created. At the pinnacle was the leading noble, with everyone linked in a descending hierarchy of obligations. The lower level provided services including manual labour or military service, or tributes including produce or monetary rent to their immediate superior in exchange for the use or control of the land. The lords distribute the land this way: some land (demesnes) the lords held themselves, with their own serfs doing the cultivation, with some others distributed to vassals in exchange for armed soldiers in times of need. The lord and the vassals had the responsibility of defending the serfs from outside attack, presiding over the resolution of disputes and providing for them during times of drought or calamity.<sup>279</sup>

Following the decline of the old Roman Empire, the vacuum was filled by the creation of a feudal hierarchy. At the top of this hierarchy was the king, with the lowest level of this hierarchy being the serf; a peasant protected by the lord of the manor. The lord of the manor was protected by a higher overlord. Seeking protection, the lower lord provided money, food and labour to the overlord, whilst in return, the overlords granted the fief to their vassals.<sup>280</sup> The higher provides the army, the middle provides the money and necessity, whilst the bottom serf and peasant tilled the land.

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<sup>278</sup> ibid 16.

<sup>279</sup> ibid.

<sup>280</sup> E K Hunt, *Property and Prophets: the evolution of economic institutions and ideologies* (7th edn, M E Sharpe 2003) 5.

As Palmer summarises,

[ T ] he initial situation was that of the “truly feudal world”, characterized by obligations, legal simplicity of title to land, discretion, and almost absolute seigniorial control. The truly feudal society knew nothing of property rights, only of mutual obligations. Land was held—not owned—in return for services. If the services were not performed, the tenants would be evicted: the land would escheat. If the tenant was threatened from outside, it was the lord’s obligation—not the state’s—to maintain him. The tenant’s right was thus a right against an individual, not a property right good against the whole world. The tenant’s “title” to the land, if it can be called that, flowed only from the lord’s acceptance. That acceptance was shown by the lord taking the man’s homage and then seising him of the land. Thereafter they were strictly bound to each other; no normal outsider could break that bond. Since that bond was a relationship, however, there was always discretion in the initial determination of who would become the lord’s man.<sup>281</sup>

Therefore, the law of real property was formed by being based on multiple forms of ownership: there might be ‘a tenant in fee simple holding of the crown; there might be a copyhold<sup>282</sup> tenant holding of such tenant in fee simple; and if the custom of the manor allowed, there might be a tenant for years holding of the copyhold tenant’.<sup>283</sup> Even though such a tenant was not entitled to possession in the Roman law sense or seisin,

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<sup>281</sup> Robert C Palmer, ‘Recent Books: the feudal framework of English law’ (1981) 79(4) *Mich L Rev* 1130,1134-35.

<sup>282</sup> ‘Copyhold’ here means those unfree tenures were protected by feudal court, originally held by common serfs, and the common form was known as the villeinage. For the transaction of this type of unfree tenure was recorded on the court rolls and the transferee was given a copy to prove his title, unfree tenures were also known as ‘copyhold’, in contrast with free tenures’ freehold who were protected by the royal courts. See Oakley (n 11) 25-26.

<sup>283</sup> Holdsworth, *A History of English Law vol VII* (n 209) 468.

they could be regarded as the ‘owner’ of an actually existing interest, with the ‘estates’ that all these simultaneous co-existing owners owned only ‘deferred in point of time’.<sup>284</sup> Moreover, the doctrine of estates in feudal society knew ‘nothing of property right, only of mutual obligation’.<sup>285</sup> The tenant’s right was a right against another individual, but not a property right against the world as we understand it now.

The word ‘seisin’ used in the doctrine of seisin was a term representing being in possession of, like the above stated feudal tenant notion, and was originally associated with ‘the act of homage which clinched the lord’s acceptance of his man’.<sup>286</sup> Pollock and Maitland cited by Holdsworth, stated ‘The man who is seised is the man who is sitting on land; when he was put on seisin he was set there and made to sit there’.<sup>287</sup> During the thirteenth century in England, ‘seisin’ and ‘possession’ were synonymous terms,<sup>288</sup> and it was not until the mid-fifteenth century that the custom developed to separate these two apart. ‘Seisin’ was used in relation to land and ‘possession’ in relation to goods and chattels.<sup>289</sup> However, it was impossible to physically possess

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<sup>284</sup> *ibid* 469.

<sup>285</sup> Palmer (n 281) 1134. ‘The initial situation was that of the “truly feudal world,” characterized by obligations, legal simplicity of title to land, discretion, and almost absolute seigniorial control. The truly feudal society knew nothing of property right, only of mutual obligation. Land was held-not owned-in return for services.....The tenant’s right was thus a right against an individual, not a property right good against the whole world’.

<sup>286</sup> John H Baker, *An Introduction to English Legal History* (4th edn, Oxford University Press 2007) 229. Simpson cited Milsom’s explanation of ‘seisin’, as the noun, it ‘denotes a condition rather than an event, a relationship between person and land’. See AWB Simpson, *A History of The Land Law* (2nd edn, Clarendon 1986) 40.

<sup>287</sup> Holdsworth, *A History of English Law vol III* (n 260) 88. Holdsworth cited from Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I* (University Press: Cambridge 1895) 29,30.

<sup>288</sup> Maitland (n 287) 481. ‘... as I have convinced myself and tried to convince others, that the further back we trace our legal history the more perfectly equivalent do the two words *seisin* and *possession* become’. Also in Lupton (n 253) 80 ‘Maitland has shown us that “seisin” and “possession” were synonymous terms in the thirteenth century’.

<sup>289</sup> Lupton (n 253) 80. Lupton cited Littleton, ‘It was only later, by the time of Sir Thomas Littleton’s *Tenures* around the year 1450, that the custom had developed of using “seisin” in relation to freehold land, and “possession” in relation to goods and chattels’. Also in Holdsworth, *A History of English Law vol III* (n 260) 88. Holdsworth cited Littleton, ‘We have seen that it was just about the time when Littleton was writing his *Tenures* that the term “seisin” was appropriated to describe the possession of freehold estates in land, while the term “possession” was appropriated to chattels. This separation shows that the seisin of freehold estates in land, which was protected by the real actions, had come to differ from the possession of chattels, protected only by personal actions’. Also in Holdsworth, *A History of English Law vol VII* (n 209) 465, 467.

incorporeal things such as a franchise, or transfer a franchise by livery like the mode of freehold land.

To solve this dilemma, Bracton began to speak of ‘quasi-possession’ in the thirteenth century.<sup>290</sup> For Bracton, when a franchise was granted, the granted franchise was at once quasi-possessed.<sup>291</sup> The user will lose the franchises by non-use.<sup>292</sup> As Maitland further states, Bracton did not seek to contrast the notion of seisin and possession.<sup>293</sup> Subsequent writers like Holdsworth linked seisin directly with possession,<sup>294</sup> with the seisin of a franchise thus maintained by use through constant possession<sup>295</sup> and lost by non-use resulting in non-possession. In other words, the owner enjoys temporary possession of his/her franchise when he/she uses it but loses that enjoyment to the public if he/she leaves it unused.

The shaping of English seisin was closely related to the method of cultivation. In the past, the method of cultivation that prevailed over the greater part of England was known as ‘the common or open-field system’.<sup>296</sup> All the land of a township was divided up into ‘two or three open and enclosed fields, which was cultivated in a certain rotation. Each of these fields was divided up into a number of strips. The average strip was often about the size of an acre’.<sup>297</sup> Sir Holdsworth further described it as follows:

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<sup>290</sup> Bracton (n 259) 121. ‘What is possession? It is clear that possession is the detention *corpora* and *animo* of a corporeal thing, with the concurrent support of right. Of a “corporeal” thing, it is said, because incorporeal things cannot be possessed or be the subjects of usucapio or be transferred apart from some corporeal things, since they do not admit of livery by themselves. They therefore are said to be *quasi*-possessed and can be transferred or *quasi*-transferred by acquiescence and use’. Also in Lupton (n 253) 81-82.

<sup>291</sup> Lupton (n 253) 82. Also in Maitland (n 287) 494. ‘...even to negative franchises, such as the right to be quit of toll, does Bracton apply notion of seisin or possession?’

<sup>292</sup> Lupton (n 253) 82.

<sup>293</sup> ‘In Bracton’s book the two ideas are as distinct from each other as they can possibly be. He is never tired of contrasting them...he insists that *seisina* or *possessio* is quite one thing, *dominium* or *proprietas* quite another’. Maitland (n 287) 481.

<sup>294</sup> Holdsworth, *A History of English Law vol III* (n 260)88. ‘Seisin means possession’.

<sup>295</sup> Lupton (n 253) 83.

<sup>296</sup> William Searle Holdsworth, *A History of English Law vol II* (3rd edn, Methuen & Co 1923) 56.

<sup>297</sup> *ibid* 56.

Attached to the holdings were certain common rights. (1) If there were three open fields, one, and sometimes two, remained fallow in each year. After the crop was cut, and while the field was fallow, the cattle of the villagers could pasture over the common field. In many places we get what are called Lammas meadows. They are meadows upon which hay is grown, which are divided into strips and subject to individual ownership while the hay crop is growing, but common to the township after the crop has been gathered in.<sup>298</sup>

[W]e can trace its presence at all periods of our history almost up to the present day.<sup>299</sup>

The land was common owned by villagers, with everyone free to use the land. The ‘owner’ meant the person who ‘has the right to...keep all others off it, holds the land of the King either immediately or mediately’.<sup>300</sup> When the crop growing season arrived, one of the stripes would be used to grow crops, with the owner of the stripe having the right to exclude other villagers from entering the field with the crop. Unlike the absolute, central all-embracing notion of ownership that only the owner exclusively enjoys all the rights and interests of this crop field, under this open-field system, meant that the owner was not granted authority with any positive rights. The owner merely had the negative right to ask the trespasser to leave the field. In other words, the field was seised<sup>301</sup> for a certain period of time but not owned in an absolute sense.<sup>302</sup> The whole mechanism

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<sup>298</sup> *ibid* 57.

<sup>299</sup> *ibid* 58.

<sup>300</sup> Frederick Pollock and Frederic William Maitland, *The History of English Law Before the Time of Edward I*, vol II (2nd edn, Cambridge University Press 1898) 232-233. Also in Burn and Cartwright (n 11) 33-34.

<sup>301</sup> ‘Seise’ here means quiet possession of land. ‘To medieval lawyers it suggested...: peace and quiet. A man who was put in seisin of land was “set” there and continued to “sit” there. Seisin thus denotes quiet possession of land, but quiet possession of a particular kind’. See Oakley (n 11) 35.

<sup>302</sup> Baker (n 286) 230. In the feudal world, the tenant was ‘seised of the land in demesne, and the lord was seised of the tenant’s services, but neither of them “owned” the land in any absolute sense’.



was built on an exclusionary norm.

After the Norman Conquest (1066), tillers continued to follow those habits customary from generation to generation; they were gradually absorbed into the above stated feudal system.<sup>303</sup> An overlord appeared and the basic unit of that society was called the manor. It was a new concept by imperceptible degrees that even ‘the humble tillers found themselves part of the manorial organization, no longer free owners, but instead subservient to an overlord’.<sup>304</sup> The granting of benefices led to the creation of ‘great estates or manors vested in the grantees from the Crown’,<sup>305</sup> and therefore, topographically, a manor denoted a certain area of land ‘consisting of a number of houses, strips of arable and pasture land and waste lands, all of which were within the domain of the lord of the manor’.<sup>306</sup> Only one type has survived from feudal tenures—the freehold tenure. As far as estates are concerned, there are still two types that have survived: the fee simple estate (sometimes called the freehold estate) and the life estate.<sup>307</sup> The freehold estate in the olden days can be further subcategorised into a fee simple (for as long as the tenant or any of his heir lives), a fee tail (for as long as the tenant or any of his descendants lives, which remained possible until 1996) and a life estate (for as long as the tenant lives).<sup>308</sup> In fact, the modern expression of the word ‘freehold’ (sometimes used to express the quality of the tenure and sometimes the quantity of the estate<sup>309</sup>) originated from ‘free tenures’,<sup>310</sup> in contrast with unfree tenure

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<sup>303</sup> Burn and Cartwright (n 11) 42 ‘In remote days the actual tillers of the English soil were almost certainly members of free village communities who owned in common the land that they farmed; but after the Conquest, although they still continued to follow those precept and habits of agriculture that had been customary for generations, they were gradually absorbed into the feudal system’.

<sup>304</sup> *ibid* 42.

<sup>305</sup> *ibid* 31.

<sup>306</sup> *ibid* 31.

<sup>307</sup> Clarke and Kohler (n 31)309.

<sup>308</sup> Oakley (n 11) 26. For more information about the doctrine of estates, see *ibid* Chapter 2 Estates, 31-37.

<sup>309</sup> *ibid* 31.

<sup>310</sup> *ibid* 25. Also in Butt (n 9) 87 ‘... freehold land was originally held only by one whose status was free; and so his and her interest in the land was called an “estate of freehold”’.

like villeinage.<sup>311</sup> All land, because of a dramatic simplification in tenure, is now held by freehold tenure.<sup>312</sup> Because of this long history of tenure, a landowner today does not ‘own’ the land but ‘holds the land of the Crown by freehold tenure’ yet ‘does not have to make any payments or perform any services to the Crown’ anymore.<sup>313</sup>

The character of English feudalism was that every person with an interest in land was a mere holder of it, and that the holder was a tenant but not an absolute owner.<sup>314</sup> The doctrine of estates involves a recognition not simply that ‘the sum of possible interest—the fee simple—may be cut up into slices like a cake and distributed amongst a number of people by different durations, but that all of them will obtain present existing interests in the land, through their right to actual enjoyment’.<sup>315</sup> English tenure somehow differed from its European counterpart. In England, this doctrine applied to ‘every holder’, no matter who holds the land by military service or not, or whatever the nature of the duties that he had agreed to perform might be,<sup>316</sup> but on the European Continent, tenure applied ‘only to those who held lands in return for military services’.<sup>317</sup> The doctrine of estates reached deeper into English society (England and Wales)<sup>318</sup> than its European counterpart in this regard.

### 4.1.3 Franchises and fee simple

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<sup>311</sup> Those who held the land by knight services or performed some honourable service for the King in person (also called grand serjeant), and those basic tenures who had no non-military service (also known as socage, needed to perform agricultural services of a fixed type and duration), together with those tenures by which land was held by ecclesiastical corporations, were called free tenures. Oakley (n 11) 25.

<sup>312</sup> Clarke and Kohler (n 31) 309.

<sup>313</sup> *ibid.*

<sup>314</sup> Burn and Cartwright (n 11) 14. As Cheshire and Burn explained, the word feudalism comes from ‘the word *fief* which becomes *feudum* in Latin, and *feud*, and later *fee* in English’.

<sup>315</sup> Simpson, *A History of The Land Law* (n 286) 86-87.

<sup>316</sup> Burn and Cartwright (n 11) 16.

<sup>317</sup> *ibid.* Also in GC Cheshire, *The Modern Law of Real Property* (10th edn, Butterworths 1967) 14. ‘On the Continent tenure applied only to those who held lands in return for military services, but in England it applied to every holder whatever the nature of the duties that he had agreed to perform might be’.

<sup>318</sup> Oakley (n 11) 1. ‘English law of real property applies to all land in England and Wales. It has never applied to any other part of the United Kingdom, although it has provided basis for the systems of many countries in the common law world, from Ireland and the common law jurisdictions of the United States of America to Australia and New Zealand’.

Substantiated by Lupton, of all of the thirteenth century granting of franchises, nearly all the franchises were granted in fee simple, with most of them granted in fee simple for life and a few granted in fee tail.<sup>319</sup> The franchises were classified in incorporeal hereditaments,<sup>320</sup> under the category of things real.<sup>321</sup> The reason why franchises were so categorised will be further addressed in 4.1.4. By any means, franchises had been assimilated into land law from the thirteenth century and were ‘still treated as land in the eighteenth century’.<sup>322</sup> Just as Lupton described, ‘the thirteenth century franchises had effectively become frozen in time as things real, and remained as medieval anachronisms, in much the same way that the concept of an estate in fee simple persists as a medieval anachronism in modern land law’.<sup>323</sup>

Below (Figure 4-1) is a summary chart of the above stated categorisation, which is convenient to understand the following section that considers the connection between franchises and the doctrine of estate.

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<sup>319</sup> ‘Of all the thirteenth century grants of franchises that I have seen, nearly all of the grants were made in fee simple to “A and his heirs”, and the rest were life estates’. See Lupton (n 253) 101.

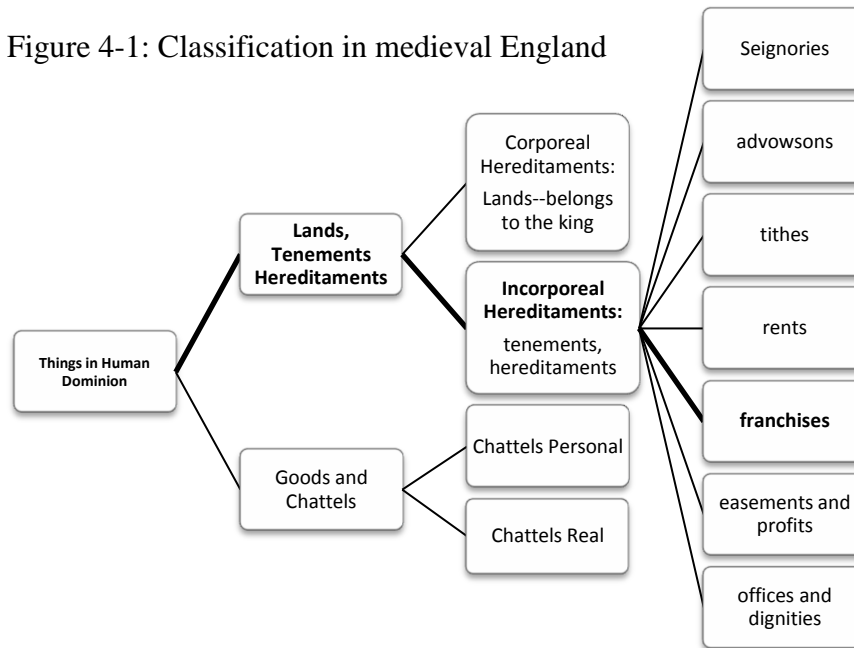
<sup>320</sup> Baker (n 286) 380. Also in Richard Preston, *An Elementary Treatise on Estates: with preliminary observation of the quality of estates* (J & W T Clarke 1820) 10,11. ‘An hereditament extends to everything corporeal and incorporeal, whether real, personal, or mixed, which may be taken in hereditary succession...In this sense, the term is understood to include all lands and tenements, and all personal duties (as an annuity, corrody, and personal privileges...) in which there is an estate of inheritance...Lands, in their own nature, are the subject of hereditary succession; but rents, and personal duties and privileges are of that description only, when, from the nature of the estate for which they are granted’.

<sup>321</sup> Lupton (n 253) 111. ‘The classification of franchises as incorporeal hereditaments, and of incorporeal hereditaments as things real, has endured’. The basis of this connection is that ‘franchises were classified as incorporeal hereditaments’ in Coke’s *Commentary upon Littleton*, and incorporeal hereditaments were classified as things real in the works of Finch, Wood, and Blackstone’. A similar statement can be found in Simpson, *A History of The Land Law* (n 286) 106. ‘Bracton thought of all incorporeal rights as rights in the nature of servitudes...it is true that of the incorporeal hereditaments which the common law came to recognize in its developed form (listed by Blackstone as advowsons, tithes, commons, ways, office, dignities, franchises, corrodies, annuities, and rents) all are in some respects analogous to servitudes, whilst of course most of them are servitudes’.

<sup>322</sup> Lupton (n 253) 111.

<sup>323</sup> *ibid* 111-112.

Figure 4-1: Classification in medieval England



Reproduced from John H Baker, *An Introduction to English Legal History* (4th edn Oxford University Press, Oxford 2007) 246, and amended based on Richard Preston, *An Elementary Treatise on Estates: with preliminary observation of the quality of estates* (J & W T Clarke 1820) 7-19.

#### 4.1.4 The connection between franchises, patents for inventions and the doctrine of estates

The linkage between franchises and patents for inventions was first found in English common law literature in the case *Darcy v Allin*, the *Case of Monopolies*, in 1602.<sup>324</sup> As mentioned in 4.1.1, the types of franchises were infinite, with the range of franchises covering franchises for a ‘treasure trove, waifs, strays, wreck of the sea, royal fish, the game franchises of chase and warren’<sup>325</sup> to many others that had economic interests. Among all franchises, the letters patent for inventions has proved to be one of those

<sup>324</sup> According to Lupton, *Darcy v Allin* showed the linkage between franchises and patents for inventions, but neither *Darcy v Allin* nor the *Statute of Monopolies* said anything about the property nature of the patents. ‘Both *Darcy v Allin* and the *Statute of Monopolies* were silent on the subject of property in patents’. See *ibid* 37. The linkage between the property and the patents was more inclined to the changing trend in land law in the sixteenth century, rather from the case law or the statutory laws originating from patent cases.

<sup>325</sup> *ibid* 23-24.

infinite types of franchises.<sup>326</sup> This practice in granting monopolies by letters patent was ‘entirely consistent with what had been the practice in granting franchises since the eleventh century’.<sup>327</sup> It is said the remnants of these feudal franchises were still known in common law until Blackstone’s time in the eighteenth century.<sup>328</sup>

As stated in 4.1.3, throughout medieval times to the eighteenth century, despite franchises not being subject to tenure, franchises were categorised as real property. The reason why franchises were so categorised (under real, rather than personal property) has a close connection to rules of succession.<sup>329</sup> From the thirteenth century onwards, the goods and chattels of the deceased were established to be vested by law in the executor, while land and tenements descended by law to the heir directly, without the interference of an executor. We have already seen that from the thirteenth century onwards, franchises were assimilated as land, and granting franchises under fee simple or for life being used. Bracton stated, ‘there is another *causa* for acquiring dominion called succession, which entitles every heir to everything of which his ancestors die seised as of fee’.<sup>330</sup> Franchises fit in what Bracton described as ‘those things of which a man could die seised as of fee’, and thus franchises descended to the heir without an executor or administrator until 1897 when this descent of real estate directly to the heir was abolished.<sup>331</sup> The way franchises descend to the heirs strengthened their position on the real estate side.

Another reason why franchises were treated as things real rather than personal goods or

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<sup>326</sup> Justice Pollock relied on the authority of Finch and Blackstone, and a passage from the judgment of the Court of Queen’s Bench in *Darcy v. Allin*, to reach the conclusion that ‘letters patent for inventions were franchises’ for the purposes of the section. His opinion was unanimously upheld by the Court of Appeal. For the whole analysis of the judgment, see *ibid* 17-18

<sup>327</sup> *ibid* 26.

<sup>328</sup> *ibid* 3.

<sup>329</sup> *ibid* 108.

<sup>330</sup> *ibid* 107. Lupton cited from Bracton (n 259) 184.

<sup>331</sup> Lupton (n 253) 107-108.

chattels, was that the estate in land was sustainable, whereas the goods and chattels ‘can be destroyed, consumed or can perish’.<sup>332</sup> The *Statute of Monopolies* enacted in 1624 maintained this old practice and did not create any new statutory rights for a patent but merely restricted the patent term to fourteen years.<sup>333</sup> If we understand franchises from their historical roots that they had always been associated with seisin closely, it is not difficult to understand why the patent term was limit to a fix term, with modern writers constantly using real property as metaphors.

#### **4.1.5 An extension of choses in action in the sixteenth century**

The previous paragraph discussed franchises being classified as real property during medieval times, but today we see patents are often categorised either under personal property,<sup>334</sup> or as choses in action<sup>335</sup> in commentaries. This classification of patents as choses in action was ‘in fact, only a development of the late nineteenth and early twentieth centuries’.<sup>336</sup> Before that, it was a slow process of expansion of choses in action, from a purely personal action, to a real right action. Simply speaking, franchises, which were originally on the real property side, were then absorbed into this newly enlarged category because of the extension of personal property from the other side.

During medieval times, the division of actions into real and personal property was fundamentally clear.<sup>337</sup> The rights that fell within the sphere of one class of actions

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<sup>332</sup> *ibid* 103.

<sup>333</sup> *ibid* 36-37. The *Statute of Monopolies* made two creative limitations: one is to limit the patent term to fourteen years, and the other is to control the power of the Crown in the granting of patents.

<sup>334</sup> Jones and Cole (n 54) 455. ‘Section 30 provides that patents and patent applications are “personal property” and prescribes how much property rights may be transferred or licenced’. ‘As mentioned above, under the 1977 Act patents are “personal property”, that is they can be considered as moveable incorporeal (intangible) property’.

<sup>335</sup> *ibid* 431. ‘Subsection (1) changed the position at common law under which Letters Patent were regarded as choses (or things) in action’.

<sup>336</sup> Lupton (n 253) 250.

<sup>337</sup> W S Holdsworth, ‘The History of the Treatment of Choses in Action by the Common Law’ (1920) 33(8) *Harvard L Review* 997, 1001.

would be treated somewhat differently from the rights that fell into another category. Originally, chose in action ‘was applied to a right to bring a personal action’.<sup>338</sup> According to Holdsworth cited in the Book of Assizes and Year Books,<sup>339</sup> the phrase ‘chose in action’ is used mainly ‘in connection with rights arising under some one of the personal actions, such as debt, detinue, or trespass’.<sup>340</sup> It was not until the sixteenth century that a chose in action was extended to cover rights arising from real actions.<sup>341</sup> Before that, not much had changed and this phrase was regarded as ‘primarily connected with the personal actions’.<sup>342</sup> It was intended to concern a relationship between two individuals.

The ‘choses in action’ category, according to Holdsworth, reaches ‘enormously wide’ in the sixteenth century.<sup>343</sup> It is a known legal expression used to describe ‘all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession’.<sup>344</sup> A chose in action is basically a legal action filed by a person against another person, with the compliant implying ‘a corresponding duty in another to perform an agreement or to make reparation for a tort’.<sup>345</sup> A chose in action ‘always presupposes a personal relation between two individuals’<sup>346</sup> and includes all rights ‘which are enforceable by action—rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach... and rights to recover the ownership or

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<sup>338</sup> *ibid* 1001.

<sup>339</sup> Year Books were written in the Anglo-French dialect spoken in court. Their authorship is unknown but roughly developed during the reign of Henry III (1216-1272) and Edward I (1272-1307), as well as during the reign of Henry VII (1485-1509) and Henry VIII (1509-1547). The first year-books were obviously the creature of the new legal profession, and the purpose must have been to record the intellectual aspect of litigation, either to circulate or preserve for future learning both by students and by their practicing elders. For more detailed information, see Baker (n 286) 179-181.

<sup>340</sup> Holdsworth, ‘The History of the Treatment of Choses in Action by the Common Law’ (n 337) 1001.

<sup>341</sup> *ibid* 1001.

<sup>342</sup> *ibid* 1001.

<sup>343</sup> *ibid* 997.

<sup>344</sup> *ibid*. Holdsworth cited the definition given by Channel J., in *Torkington v Magee*.

<sup>345</sup> James Barr Ames, ‘Lecture XVIII: the inalienability of choses in action’ in *Lectures on Legal History and Miscellaneous Legal Essays* (Harvard University Press 1913) 211.

<sup>346</sup> *ibid* 211-212.

possession of property real or personal'.<sup>347</sup> Hence, as Holdsworth noted, 'it was not difficult to include in this category things which were even more obviously property of an incorporeal type, such as patent rights and copyrights'.<sup>348</sup> In other words, for those rights which can only be claimed by action, filed by the complainant against another person, they are all covered by the wide ranging chose in action concept.

Choses in action had such wide coverage due to the tendency of treating any intangible right as a chose in action if this right did not clearly belong to incorporeal hereditaments.<sup>349</sup> Patents for inventions, which were new to old franchises such as treasure troves, were naturally drawn into the chose in action category by this trend. If patents for inventions 'had arisen at an earlier stage in the history of the law they would have been regarded as franchises, and therefore as incorporeal hereditaments'.<sup>350</sup> There was no doubt that patents for inventions were not precisely one of those old incorporeal hereditaments, like advowsons where the grantee could hold a lordship paramount,<sup>351</sup> patents for inventions, however, still keep the real right characteristics in their substance that make them closer to franchises rather than chose in action.<sup>352</sup>

It was an awkward fit to put invention patents into the chose in action concept because

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<sup>347</sup> Holdsworth, 'The History of the Treatment of Choses in Action by the Common Law'(n 337) 997-998.

<sup>348</sup> *ibid* 998.

<sup>349</sup> *ibid* 1013.

<sup>350</sup> *ibid*.

<sup>351</sup> The old franchises cover the range widely, including, 'To be a county palatine is a franchise... Other franchises are, to hold a court leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas, and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the country, wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, and the like; which tolls must have a reasonable cause of commencement (as in consideration of repair, or the like), else the franchise is illegal and void, or lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty'. See Blackstone (n 269) 30 (original page no 37-38).

<sup>352</sup> Holdsworth, 'The History of the Treatment of Choses in Action by the Common Law'(n 337) 1013. 'In the case of the patent, and of that species of copyright which depended upon royal grant, the analogy to the franchises is close'.



during medieval times, the protection of seisin, like a writ of right, had always been asserted by a person against another person, as was a chose in action. Exercising the right was not an exercise of a ‘right *in rem*’ in the civil law sense, but rather a ‘right in personam’ in the Roman law sense. It was a remarkable two way movement: on one side, choses in action extended to real estate,<sup>353</sup> while and on the other, franchises extended to monopolies for industrial purposes. The watershed for real and personal property during medieval times began to blur from the sixteenth century onwards.

Franchises changing from the real property category to choses in action are particularly important to a comparative law lawyer because without understanding the history, as stated above, a civil law lawyer can make a mistake by grasping the literal meaning of choses in action and further understand it as an action in relation to movable things in the civil law sense.<sup>354</sup> Many scholars have made this mistake.<sup>355</sup> As a matter of fact, franchises and patents remain, sharing many similar characteristics with estates; however, they are dissimilar to personal goods. Another confusing category is ‘property’. The following section concerns the development of property and patents after choses in action, which will also be helpful for a comparative lawyer to understand how a patent

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<sup>353</sup> ‘Here I wish to point out another of its effects—its contribution to the making of a common-law conception of a chose in action. It seems to me that it was the influence of this idea which led to the extension of the conception of a chose in action to cover rights to being not only personal but real actions, and therefore to include in this conception not only rights which depended on a contractual or delictual obligation, but also rights which depended upon a claim to the ownership of property’. See *ibid* 1009.

<sup>354</sup> An example: like Matthew Fisher said, ‘As already noted, it is now universally accepted that the patent right, as other categories of intangible rights falling under the umbrella of intellectual property creates a form of personal property’. That personal property claim could be misunderstood as movable things in the eye of civil law lawyers. See Matthew Fisher, *Fundamentals of Patent Law: Interpretation and Scope of Protection* (Hart 2007) 64.

<sup>355</sup> A typical example is Professor Zheng classifying patents as intangible movables, by stating the reason that ‘the common law jurisdiction normally named intangible movables as being “Choses in Action”’. See Zheng Chengsi(鄭成思), *Zhishi Chanquan Lun(知識產權論)=On Intellectual Property* (3<sup>rd</sup> edn, Law Press 2003) 32-33. A similar statement is found in Wu Hangdong(吳漢東)and Hu Kaizong(胡開忠), *Wuxing Caichanquan Yanjiu(無形財產權研究)=A Study on Intangible Property Rights* (Law Press 2005) 19-20, 38. Professor Wu and Hu suggest that in considering that common law jurisdiction classifies patents as intangible personal property, an intellectual property should be understood in a broader sense of things. They state, ‘Apparently, intellectual property and intangible property are law created intellectual products, the same as [civil law] rights *in rem*, with ownership being absolute and exclusive.’ [translation by this author]

becomes property.

#### 4.1.6 A further extension of the word ‘property’ in the seventeenth century

The definition of ‘property’ emerged very late in English legal history. The first appearance was in Rastell’s 1624 edition, renamed *Les termes de la ley: or Certaine Difficult and Obscure Words and Terms of the Common Laws of this Realme Newly Printed*,<sup>356</sup> which provided a definition for ‘propertie’ as ‘the highest right that a man hath or can have to any thing, which no way dependeth upon another mans courtesie’.<sup>357</sup> Sir Henry Finch only divided possessions into estates and chattels, saying nothing about property in an absolute sense in his book *Law* published in 1613.<sup>358</sup> Law professor William Welwood at that time even avoided defining property.<sup>359</sup> William Noy, a leading critic of the court in the 1620s, applied the word ‘property’ only to movable things.<sup>360</sup> David Seipp points out that the word ‘property’ referred to ‘interests in domestic animals and goods and on a few occasions to interests in less tangible entities assimilated to those paradigm categories’ prior to the seventeenth century.<sup>361</sup> People did not say ‘this is my property’ as we use it now, and instead said ‘I have property in it’ during medieval times.<sup>362</sup> Although English lawyers made increasingly frequent use of

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<sup>356</sup> G E Aylmer, ‘The Meaning and Definition of “Property” in Seventeenth-Century England’ (1980) 86(1) *Past and Present* 87 at 90.

<sup>357</sup> *ibid* 90.

<sup>358</sup> *ibid* 91. ‘Sir Henry Finch’s *Law* (1627), first published in French in 1613, defines “possessions” much as Rastell had already done, as being divided into “Estates” (or, in modern terminology, real estate) and “Chattels” (more or less corresponding to movables); but there is nothing about property, or—in our sense—absolute individual ownership’. Aylmer cited from Finch (n 265) bk2 chs 2-3, 15.

<sup>359</sup> Aylmer (n 356) 91.

<sup>360</sup> *ibid* 92.

<sup>361</sup> See David J Seipp, ‘The Concept of Property in the Early Common Law’ (1994) 12(1) *Law & Hist Rev* 29 at 33. Also in Lupton (n 253) 118 and Baker (n 286) 389.

<sup>362</sup> Seipp (n 361) 33. Seipp said, ‘When lawyers did speak of “property” in the Year Books—and in the first hundred years of these reports the term was genuinely scare-“property” referred to interests in domestic animals and goods and on a few occasions to interests in less tangible entities assimilated to those paradigm categories. One did not say “this is my property,” as we use the terms now. Rather, one said “I have property in it” or “the property of it is to (or with) me.” Property was thus a characteristic or attribute (or “property” of a cow or a jewel or a sum of money, not a shorthand referent to the thing itself’.

the term ‘property’ in the fifteenth century, they still referred to this word as personal goods and animals only, and not to land.<sup>363</sup> Therefore, whether the absolute concept of ownership of the word ‘property’ had fully extended to land and widely accepted by seventeenth century English lawyers remains disputed.<sup>364</sup> Holdsworth supported that English law had been infiltrated by the absolute ownership concept that emerged in real property litigation, such as actions of trover and ejectment, whereas the parties in dispute were not only restricted to proving who had a better right, but also, when there was a third party who had an even better right, the defendant was open to attack the plaintiff’s claim.<sup>365</sup> However, this assertion was challenged by Reeve. By stating the defendant could plead *jus tertii* the plaintiff might be required to show that his title was stronger than that person other than the defendant himself, does not mean that the court has established an absolute concept of ownership for the defendant.<sup>366</sup> This author agrees with Reeve.

Aylmer, on the other hand, states that the word ‘property’ appears earliest in John Cowell’s law dictionary, *The Interpreter*, published in 1607, which initiated the ‘highest right’ to the concept of property.<sup>367</sup> How many authors then cited and made use of his definition, leading to it becoming a standard term from the 1650s onwards remains a mystery. ‘If he (note: refers to John Cowell) is correctly portrayed here as the originator of the definition of absolute individual ownership, then his Roman-law training made him in a curious way a bourgeois Whig before his time, as well as a would-be absolutist

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<sup>363</sup> *ibid* 33.

<sup>364</sup> The support opinion see Aylmer (n 356) 88-89, the opposition see Andrew Reeve, ‘Debate: the meaning and definition of “property” in seventeenth-century England’ (1980) 89(1) *Past and Present* 139.

<sup>365</sup> Reeve (n 364) at 139.

<sup>366</sup> *ibid* 140.

<sup>367</sup> Aylmer (n 356) 88-89. ‘... the earliest explicit definition seems to be that given in John Cowell’s law dictionary, *The Interpreter* (first edition, 1607). Cowell had already published a treatise in Latin on the relationship between English law and Roman or civil law, in which he discussed the nature of *dominium*’. And he goes on, ‘our concern here is with what happened to Cowell’s definition of property. This read as follows: *Propertie* signifieth the highest right that a man hath or can have to any thing; which is in no way depending upon any other means courtesie’.

out of his time’.<sup>368</sup> Hence, who was the first author to define ‘property’ as an absolute or highest right remains an issue of intriguing speculation, even though one thing is clear, that the phenomenon of property being extended from goods to real estate emerged in the seventeenth century.

Lupton substantiated that licenced stationers began to speak of ‘property’ in the mid-seventeenth century. In the past, the stationers only thought of ‘privilege’, but for this new trend, they began to speak of property for their patent grants. Comparing the Stationers’ petition of 1586 with the 1643 petition, the former shows no sign of linking privilege with property, while in the seventeenth century the word ‘property’ emerged in the 1643 petition in an absolute sense.<sup>369</sup> It is apparently influenced by the enlargement phenomena where not only can personal goods and estates be owned in an absolute sense but the intangible things such as patents and copyrights can also be owned in an absolute sense.

Henceforward, patents started being treated as property in an absolute sense. However, this ‘absolute sense’ has been equated with a right to exclude for a long time and is distinct from the civil law meaning of ‘right to exclude’ under Taiwanese civil law. Many jurists have made this mistake.<sup>370</sup> This issue will be returned to in 4.3.1.

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<sup>368</sup> *ibid* 97.

<sup>369</sup> In the 1586 petition, the stationers regarded themselves as the recipients of privileges rather than as the owners of intangible property. However, when it comes to the Stationers’ petition to Parliament in April 1643, entitled *The Humble Remonstrance of the Company of Stationers, London*, the stationers began to argue that grants were their property. See Lupton (n 253) 173, 179, 180.

<sup>370</sup> Examples include Taipei Civil District Court stating, ‘Section 1 of Article 56 of the Patent Act... is the same with Article 765 of the Civil Code, and regulates the scope of ownership. The legislative purpose of these two laws is to create, to set the boundaries of ownership and the scope of patent rights.’ See [2007] Difang Fayuan Zhizi number 28 (地方法院智字第 28 號). Jurists like Rui Mu (芮沐) see intellectual property rights as absolute rights, like real rights. See Rui(n 68)7-8. Also in Wu and Hu (n 355) 38. ‘Apparently, intellectual property and intangible property are law created intellectual products, just the same as [civil law] rights *in rem*, with ownership being absolute and exclusive.’ [translation by this author]

#### 4.1.7 An extension of Roman law possession to intangible property in the eighteenth century

A further extension was made by the paradoxical use of applying Roman law terminologies to copyright in the eighteenth century. Using Roman law terminologies to express the common law concept was not a modern appearance in English legal history. It can be traced back to the twelfth and thirteenth centuries when the legal renaissance of the Roman law arrived in England.<sup>371</sup>

In fact, Roman law was never completely acclimatised into common law. Between 1290 and 1490, the written language of the professional advocates in England was Anglo-Norman French,<sup>372</sup> with many Roman terms thus captured during this period of time.<sup>373</sup> However, some common law concepts were simply unable to fit well into Roman law vocabulary. An example, like the Roman term *dominium*, expresses the nuance of the original Roman meaning and the translation of that in the common law scheme. English writers like William Blackstone<sup>374</sup> and Hargreaves<sup>375</sup> favoured the

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<sup>371</sup> See Holdsworth, *A History of English Law vol VII* (n 209) 510. On page 510, ‘The Roman conception of ownership, as an abstract right, was made familiar to English lawyers by the legal renaissance of the twelfth and thirteenth centuries; and though, as we have seen, that conception has never been completely acclimatized in the common law, yet the common law has acquired a conception of ownership which is different from that better right to possess which as the dominant theory in the Middle Ages’. Maitland, however, has a different opinion about the Roman ownership concept that arrived in England. Maitland cites Dr. Murray and says the word ‘ownership’ is not known to have occurred before 1583 in England, with the earliest known use of the word ‘owner’ being in 1340. See Pollock and Maitland, *The History of English Law Before the Time of Edward I* (n 300) 153 note 1. However, the usage of *possession* is very ancient. As Maitland points out, the usage of *possessions* runs through the middle ages. Concerning *property*, Maitland and Pollock believed that until the eighteenth century it was ‘far less frequent than would be supposed by those who have not looked for it in the statute book’. Instead of the word *property*, Englishmen used *possessions* and *estate* more often.

<sup>372</sup> Seipp (n 361) 33.

<sup>373</sup> Tamanaha (n 277) 18. The rediscovery of Aristotle’s work and Justinian Code, coincided with a substantial rise in the number of educated men and the beginnings of Oxford and Cambridge Universities, when Roman terms begins to adopted in the common law concept by English lawyers.

<sup>374</sup> An example, such as Noyes, commented on Blackstone for equating property as *dominium*. ‘When Blackstone defines property he seems to be thinking of *dominium*, for he calls it “that sole and despotic things of the world, in total exclusion of the right of any other individual in the universe.” Today this seems to us so extravagant as to be laughable’. See Noyes (n 42) 297.

<sup>375</sup> ‘English land law has made no contribution to the legal theory of ownership more striking, more brilliant and of more permanent value than the separation of the land from the estate in the land....What seems to be less appreciated is that this separation necessarily implies a penetrating analysis of the

equivalent modern concept of ‘ownership’ to the ancient concept of ‘fee simple’ when using the Roman term *dominium* in context. It was however an anachronism to use ownership to explain fee simple because civil law ownership is attached to physical things, while common law fee simple is attached to something intangible like an ‘estate’ that is basically a leasehold. Leasehold, however, in the civil law concept, is a personal commitment but not a real right. Under the civil law scheme, a freehold to a personal commitment is far from a physical owning of a ‘physical thing’ because the fee simple owner cannot claim *rei vindicatio* (a claim that requires the illicit possessor to return the thing one possessed by the true owner) like any other civilian owner. Therefore, to equate civil law ownership to fee simple is an inappropriate representation. As shown by Maitland, the use of the word ‘ownership’ came fairly late into English history when compared to the term ‘fee simple’. The first recorded instance of the word ‘ownership’ in medieval England was in 1583.<sup>376</sup> Before this time, there is no record of referring to fee simple in relation to the ownership concept as we know it now.

There is no supporting literature that medieval people used ownership and fee simple interchangeably. However, today, it is commonly seen in modern literature because English writers craved for similarity between these two concepts by overstating the function and superordinate norm of *dominium*. The word and function of *dominium*, as Ankun points out, was wrongfully overstated by many English writers as a specialized term from the Romans.<sup>377</sup> In his opinion, ‘Roman law certainly did not inhere in

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fundamental concept of ownership itself—of *dominium* and of the fee simple as the nearest equivalent to *dominium* in English land law’. Hargreaves (n 261) 17.

<sup>376</sup> See Pollock and Maitland, *The History of English Law Before the Time of Edward I* (n 300) 153 note 1. ‘As to the words *owner* and *ownership*: –Dr Murray has kindly informed us that the earliest known example of the former occurs in 1340’. They continue, ‘The verb to own, can be traced much further back and, says Dr Murray, “there is no etymological reason why owner, should not have been formed from it and used in Old English, but no examples appear to be known.” After 1340, it is increasingly common.’ And then they continue citing Murray and say, ‘Of *ownership*, which might, etymologically, have been formed so soon as *owner* existed, had there been a want felt for it (since *-ship* has been a living movable suffix for a thousand years or more), we have no instance before 1583’. Also in J W Cecil Turner, ‘Some Reflections on Ownership in English Law’ (1941) 19 Can Bar Rev 342,344.

<sup>377</sup> ‘Scholars, in particular British Romanists, seem to have overrated the significance of the words

them'.<sup>378</sup> *Dominium* was used to refer to situations where a possessor's contemporary title became a full title because of the lapse of a certain period of time in possession.<sup>379</sup> It is distinct from the modern meaning of unitary ownership in civil law and certainly cannot be equated with the medieval concept of 'fee simple' in English law. *Dominium* is however, widely used and cited by English writers in many textbooks and commentaries, like Blackstone using Roman law terminology that defined 'ownership' as 'that sole and despotic *dominium* which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe'.<sup>380</sup> Another example is the Roman term '*possessio*' (possession in English). How English lawyers view it is different from the Romans, which can be seen in an example like the bailee-bailor relationship. Strictly speaking, a bailee was not a possessor in Roman law. However, in English law, a bailee is a possessor and sometimes the owner of the property.<sup>381</sup> Many aspects demonstrate that English law persisted more with its native traditions, rather than being penetrated by Roman law,<sup>382</sup> even though practitioners in medieval England were Anglo-Norman French.

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*dominus* and *dominium* as specialized term of the *ius civile*...It should be remembered that both words, and in particular *dominium*, developed as legal terms for ownership at a time at which the division between a praetorian and a civil ownership had already begun'. See Ankum and Pool (n 37) 37.

<sup>378</sup> *ibid.* According to Pollock's note on Maine, Blackstone did not understand the meaning of occupation but intended to impose it on his readers by playing with verbal ambiguity. See Maine (n 35) 324. 'Blackstone's account of the origin of property is loose enough to deserve nearly all of Maine's criticism. He wholly fails to distinguish between physical control or "detention", possession in law, and ownership...Blackstone either did not understand the technical meaning of Occupation or intended to impose on his reader by playing with a verbal ambiguity. The word *occupare* is, after all, not purely technical in Latin; it certainly has no technical meaning in the passage of Cicero which Blackstone quotes'.

<sup>379</sup> Ankum and Pool (n 37) 37. 'We should not be surprised to find *dominus* and *dominium* used by Gaius (and by later jurists) to refer to bonitary ownership'. In the same page, in note 182, '*dominus*...embraces both the full owner and the bonitary owner but certainly not the bare owner at law. This inference is inescapable after the foregoing...*dominium* used for bonitary ownership in Ulp.D.37.1.1'.

<sup>380</sup> Blackstone (n 269) Book II, Chapter 1, 2. Also in Clarke and Kohler (n 31) 183 cited by Clarke.

<sup>381</sup> Holdsworth, *A History of English Law vol VII* (n 209) 450. On page 450, '...in the thirteenth century, under the influence, partly of Roman doctrines of ownership and possession, and partly of Roman doctrines as to the basis of liability, both parts of the older doctrine came to look a little anomalous. A bailee's position was different from that of a taker or a finder in that he acknowledges the better title of his bailor - was it reasonable therefore to allow him the rights of an owner by virtue of his possession? He was not even a possessor according to the rules of Roman law'.

<sup>382</sup> It is said that English law was more influenced by Germanic customary law than by Roman law in the medieval period. See Tamanaha (n 277) 23. 'Germanic customary law influenced broad swaths of Europe beyond the native German-speaking lands, including substantial parts of modern England, France, and Spain, owing to the spread of the expansionary and settling German tribes, though its actual degree of

The slippery relationship between language and conceptual structure gave English jurists interpretative flexibility, with the Roman law concept of ‘possession’ being a good example. In Roman law, possession denotes a possessor gaining possession of an un-owned thing by occupying (*occupatio*, occupation) this thing for long time. The object that Roman law possession refers to is always tangible,<sup>383</sup> for the fair reason that an intangible thing is impossible to acquire by delivery or by an expiration of a given time.<sup>384</sup> English jurists Blackstone<sup>385</sup> and Epstein<sup>386</sup> grasped the meaning of possession and enlarged it to include intangible things. By connecting natural law philosopher John Locke’s labour theory with occupation,<sup>387</sup> Blackstone extended the original meaning of the Roman term *occupatio* (occupation)—an attachment of a person to a physical thing only—to labour. When occupying his labour for a long time,<sup>388</sup> this person eventually possesses this labour as his own. Blackstone successfully explained why copyrights can be owned by individuals.

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penetration varied, weakest in the Latinate (Romance language) regions. The bulk of law during the medieval period was customary law, not statutory or positive law’.

<sup>383</sup> Ankum and Pool (n 37) 11 ‘...the only specific assets that are found in combination with *i.b.(meis) esse* and *i.b. habere* are corporeal things. The jurists do not use these expressions in combination with say, *ususfructus, actio, nomen*’. Although Ankum and Eric drew a fine line between ‘a thing in my possession’ and ‘a thing is among my possession’, both of them refer to a corporeal thing possession only. See also *ibid* 13 ‘Could this (meaning ‘things among my *bona*’) be any entitlement at all, including even restricted real rights or the rights implicit in *bona fide* possession? Again the answer is No’.

<sup>384</sup> Nicholas (n 50) 106-107. ‘Gaius expresses the distinction in the terms *res corporals* and *res incorporales*. It is practically important for only one reason. Incorporeal things cannot be possessed, since possession requires essentially a physical holding, and they cannot therefore be acquired or transferred by any method which involves the transfer or acquisition of possession. In short, incorporeal things can neither be acquired by *usucapio* nor conveyed by *traditio*’. For the definition of *usucapio*, see Terminology.

<sup>385</sup> See Holdsworth, *A History of English Law vol VII* (n 209) 480. ‘Acquisition by *occupatio* was extended by Blackstone to cover a case like copyright in which the acquirer has himself created a new incorporeal thing’. See also Becker, ‘The Moral Basis of Property Rights’ 122. ‘The common law with respect to literary property was a matter of uncertainty and growth in Blackstone’s time; he himself served as an advocate on behalf of property in copyright in an important case’.

<sup>386</sup> Justin Hughes, ‘The Philosophy of Intellectual Property’ (1988) 77(2) *Geo L J* 298.

<sup>387</sup> See Blackstone (n 269) 331-332(original page number 406-407) ‘There is still another species of property, which (if it subsists by the common law) being grounded on labour and invention, is more properly reducible to the head of occupancy than any other; since the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant’. Also in Henry Winthrop Ballantine, *Modern American Law: Blackstone's Commentaries volume XV* (Blackstone Institute 1915) 156.

<sup>388</sup> See Holdsworth, *A History of English Law vol VII* (n 209) 480. ‘Acquisition by *occupatio* was extended by Blackstone to cover a case like copyright in which the acquirer has himself created a new incorporeal thing. Blackstone held that he became the owner of it by *occupatio*’.



Blackstone's enlargement has two significant meanings in law. Firstly, the meaning of occupation was extended from the acquisition of an existing thing, to the acquisition of a thing that previously had no existence.<sup>389</sup> Secondly, in Roman law, occupation is founded on possession, where only physical things were capable of being *possessio*, but now it has been extended to intangible things like copyrights.<sup>390</sup> Successors can thus analogize a patented idea and even other types of intellectual property. These two extensions, just as Holdsworth observed, has made modern English law a wide departure from Roman law.

#### **4.1.8 Fill in John Locke's theoretical gap from the eighteenth century onwards**

John Locke, as Whelan points out, 'offers virtually no guidance concerning the status of property as regulated in civil society' and 'left a very large theoretical gap for his eighteenth-century successors to fill'.<sup>391</sup> Locke used the phrase 'right of use' to express that nothing can be taken from a man without his consent, even though he was almost completely silent on the details of what 'rights' people thereby get.<sup>392</sup> Locke did not expressly indicate one's possession of one's body as the basis of one's property in one's body either.<sup>393</sup> The gap remains left for David Hume, William Blackstone and many other theorists to fill in.

When progressing to the eighteenth century, the natural law lawyers found that 'by

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<sup>389</sup> *ibid.*

<sup>390</sup> *ibid.*

<sup>391</sup> Frederick G Whelan, 'Property as Artifact: Hume and Blackstone' in J Roland Pennock (ed), *Nomos XXII: Property* (New York University Press 1980) 103.

<sup>392</sup> Gopal Sreenivasan, *The Limits of Lockean Rights in Property* (Oxford University Press 1995) 97.

<sup>393</sup> Hughes, 'The Philosophy of Intellectual Property' (n 386) 298. 'It is unclear why Epstein should reach this conclusion. Locke never mentions one's possession of one's body as the basis for one's property in one's body; he begins simply by asserting one's body is one's property. Yet Epstein connects property to possession by saying, "the obvious line for justification is that each person is in possession of himself, if not by choice or conscious act, then by a kind of natural necessity"'.  
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showing such proprietary rights originated in occupancy, and that concept was understood by Grotius and Pufendorf”,<sup>394</sup> the gaps in patent and copyright grants can then be filled by John Locke’s labour theory. By connecting John Locke’s labour appropriation theory with Grotius and Pufendorf’s philosophy,<sup>395</sup> Roman terms can then be used for explanation. Although it was not very welcomed by the Scottish Court, the Scottish Court was in favour of the franchise model of property in published works more than the above stated natural law model,<sup>396</sup> with attitude being in a minority. There being a trend for court decisions in favour of the natural law model of property in the eighteenth century.<sup>397</sup> The natural law model was eventually supported by the majority of advisory opinions in *Donaldson v Beckett*.<sup>398</sup>

Property theory under this setting then had an historical antecedent, with the natural right to property being traced back to Aristotle, Hugo Grotius and Pufendorf, with writers beginning to discuss natural law theory widely in relation to the intellectual property field. Examples like, Henry Mitchell’s *The Intellectual Commons*,<sup>399</sup> Abraham Bell and Gideon Parchomovsky’s *A Theory of Property*<sup>400</sup> and Karl Olivecrona’s

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<sup>394</sup> Lupton (n 253) 199.

<sup>395</sup> ‘Philosophers throughout history, particularly the seventeenth- and eighteenth-century natural-law theorists, have had a great deal to say about appropriation as a source of property rights’. See Mitchell (n 41) 2.

<sup>396</sup> Lupton (n 253) 214-219. ‘We have seen that printing patents, comprising the sole right to print and publish named literary works, had been granted by the Crown since 1518. The prerogative of the Crown to make such grants was expressly saved in the Statute of Monopolies, and in the Licensing Act 1662’. He continues, ‘The relevance of authors’ patents in a line of reasoning was taken up by each of Lord Coalston, Lord Kennet, Lord Hailes, Lord Kames, and the Lord Justice-Clerk in the judgment of the Scottish Court of Session in *Hinton v Donaldson*’. ‘However, the Court of Session rejected the concept of perpetual literary property by a majority of eleven judges to one’. ‘The obvious conclusion was that such rights could only be derived from the Crown. The point was made repeatedly in all of the majority judgments in *Hinton v Donaldson*, which represented an emphatic re-assertion of the franchise model of property in published works’.

<sup>397</sup> *ibid* 214. ‘As the judgments in *Millar v Taylor*, *Donaldson v Beckett* and *Jeffreys v Boosey* all show, opinion was almost unanimously in favour of the natural law model of property in the case of unpublished works’.

<sup>398</sup> *ibid* 225. ‘Nevertheless, all of the reports are consistent in showing that an overall majority of the judges favoured the existence of perpetual literary property at common law, apart from the *Statute of Anne*, both before and after publication’.

<sup>399</sup> Mitchell (n 41) 72.

<sup>400</sup> Abraham Bell and Gideon Parchomovsky, ‘A Theory of Property’ (2005) 90(3) Cornell L Rev 531.

*Appropriation in the State of Nature: Locke on the Origin of Property*<sup>401</sup> all follow this setting. No matter how the time scale stretches ahead, the writers returned to Locke's justification at the end.

Locke's justification is closely linked to the land-holding mechanism stated in 4.1.2. Locke talks about the world and its resources being given to mankind 'in common'. Although what exactly he meant by 'in common' remains in dispute, currently there are two ways of interpreting it: one is that he meant that the unallocated natural resources are open access communal property, and the other is that he meant the unallocated natural resources are no-property and that everyone has a Hohfeldian privilege to use them and no right to be excluded from it.<sup>402</sup> No matter which way it is interpreted, using unallocated natural resources is not a grant from the government. What Locke exactly meant is not an issue in need of exploration here, but as Clarke suggests, we can assume that 'what requires justification is an appropriation of a thing which removes everyone else's right not to be excluded from that thing or their privilege to use and enjoy it for their own self-preservation'.<sup>403</sup> This study will return to this in a deeper comparative study with the real rights notion in the civil law of Taiwan in 4.3.1.

Natural law theory itself is less related to the issues in dispute, so discussion will be stopped here by pointing out the linkage of the natural law model and the development of the property concept of a patent. The consequence of this development is worth attention. Common law jurists began to allocate the rights by using civil law terms, such as rights *in rem*. However, the way the common law writer uses these terms are sometimes not the same as civil law lawyers understand them. The following section is

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<sup>401</sup> Karl Olivecrona, 'Appropriation in the State of Nature: Locke on the Origin of Property' (1974) 35(2) *Journal of the History of Ideas* 211.

<sup>402</sup> Clarke and Kohler (n 31) 84.

<sup>403</sup> *ibid.*

a clarification of ‘rights *in rem*’ that has puzzled civil law lawyers for many years.

## 4.2 Clarification of some paradoxical terms

### 4.2.1 The ‘rights *in rem*’

Except for natural law theory, the nature of a patent is often associated with the ‘bundle of rights’ theory and also ‘rights *in rem*’. This linkage is attributed to Hohfeld who was the first person to analyse common law jural relationship, using the Roman law concept rights *in rem* to explain the common law property structure.

It is paradoxical because Hohfeld’s analysis is primarily based on bilateral legal relationships between two individuals,<sup>404</sup> rather than on the unilateral relationship of a person with a thing like the original setting under the civil law system. According to Hohfeld, a right *in rem* is defined as ‘a multital right’, which is one of a large class of fundamentally similar but separate rights. It resides in ‘a single person but availing respectively against persons’ whom are ‘constituting a very large and indefinite class of people’.<sup>405</sup> Hohfeld illustrates an example that clearly states his opinion towards property.

Suppose that A is the owner of Blackacre and X is the owner of Whiteacre. Let it be assumed, further, that in consideration of \$100 actually paid by A to B, the latter agrees with A never to enter on X’s land, Whiteacre. It is clear that A’s right against B concerning Whiteacre is a right *in personam*, or paucital

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<sup>404</sup> See *ibid* 19. Further explanation on Hohfeld’s system, see Suri Ratnapala, *Jurisprudence* (Cambridge University Press 2009) 300-317.

<sup>405</sup> Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ 26(8) Yale L J 710,718.

right; for A has no similar and separate rights concerning Whiteacre availing against other persons in general. On the other hand, A's right against B concerning Blackacre is obviously a right *in rem*, or multital right; for it is but one of a very large number of fundamentally similar (though separate) rights which A has respectively against B, C, D, E, F, and a great many other persons. It must now be evident, also, that A's Blackacre right against B is, *intrinsically considered*, of the same general character as A's Whiteacre right against B. The Blackacre right differs, so to say, only *extrinsically*, that is, in having many fundamentally similar, though distinct, rights as its 'companions'. So, in general, we might say that a right *in personam* is one having few, if any, 'companions'; whereas a right *in rem* always has many such 'companions'.<sup>406</sup>

For Hohfeld, the classification is simple. A right *in personam* means a right against only one person (in the above example it is A against B), with a right *in rem* meaning a right against many people (in the above example it is A against B, C, D, E and F). He said a right *in rem* 'is not a right against a thing',<sup>407</sup> but rather a right against many individuals. A right *in rem* should not be distinguished from a right *in personam* by being thought of as rights over things because every legal conception must be reduced to combinations of bilateral relations.<sup>408</sup> Hohfeld's analysis of rights has been widely accepted by most commentators, such as Honoré's analysis of ownership,<sup>409</sup> Waldron's analysis of property,<sup>410</sup> Penner's comments on Honoré<sup>411</sup> and Becker's comments on Munzer and

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<sup>406</sup> *ibid* 723.

<sup>407</sup> *ibid* 720. Also in Ratnapala (n 404) 304. 'Hohfeld aimed to break down laws into their basic elements to see how the law actually works. He found that the law works through legal relations between individuals in relation to single actions or omissions'. He continues, 'There are important implications of the basic premise of the Hohfeldian analysis. First, a jural relation exists between two individuals. It is never between a person and a thing. I have no jural relation with my motor car, although I claim to own it'.

<sup>408</sup> J W Harris, *Property and Justice* (Clarendon 1996) 121.

<sup>409</sup> See T Honoré, *Making law bind : essays legal and philosophical* (Clarendon, Oxford 1987).

<sup>410</sup> See Jeremy Waldron, *The Right to Private Property* (Clarendon 1988) 68-73.

<sup>411</sup> J E Penner, 'The " Bundle of Rights" Picture of Property' (1996) 43(3) UCLA Law R 711.

Waldron.<sup>412</sup> ‘Bundle of rights’ has become the most popular content in relation to property rights that most common law commentators subscribe to. As Justin Hughes described, even without debates, intellectual property, like all property, ‘remains an amorphous bundle of rights’.<sup>413</sup>

#### 4.2.2 Different understanding of rights *in rem*

In Taiwanese statutory laws, rights *in rem* signify real rights an owner has to his/her thing<sup>414</sup> and is a term that can be used interchangeable with real rights.<sup>415</sup> It is a relationship axis, with at one end being a person and the other end a thing. The concept of rights *in rem* is different from an action *in rem*. Rights *in rem* refer to a person-thing relationship, whereas an action *in rem* means ‘an action for the recovery of a thing itself’.<sup>416</sup> Put simply, an action *in rem* is an action by which a person, based on a right *in rem* (a person-thing relationship) (s)he has, asserts to another or many other individuals. An action *in rem* is an axis from a person to another person, whilst a right *in rem* is an axis from the owner to his/her thing. Hohfeld said a right *in rem* is a right against many individuals, even though he apparently misplaced rights *in rem* with an action *in rem*.

This is due to common law lawyers being encouraged to think of ‘no action *in rem*’ in their legal system.<sup>417</sup> One crucial piece of evidence supports the action that *in rem* does

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<sup>412</sup> Lawrence C Becker, ‘Too Much Property’ (1992) 21(2) *Phil & Publ Aff* 196.

<sup>413</sup> Hughes, ‘The Philosophy of Intellectual Property’ (n 386) 295.

<sup>414</sup> Wang, *Minfa Wuquan 民法物權=The Law of Things in The Civil Code* (n 43) 36.

<sup>415</sup> See Garner (n4) 1437. According to the dictionary definition, the term ‘real right’ is interchangeable with ‘right in rem’. Real rights include ownership, use, habitation, usufruct, predial servitude, pledge and real mortgage. See a further explanation in Terminology attached to this thesis.

<sup>416</sup> Abbott (n 64) 22.

<sup>417</sup> ‘The common lawyer is encouraged in this way of thinking by having (since the disappearance of the early writ of right) no action *in rem* in his own system. If a common lawyer wishes to assert ownership of his book he must assert that the defendant is wrongfully detaining or concerting it, in short that he is committing a tort’. Nicholas (n 50) 101 note 1. The same opinion can be found in Clarke and Kohler (n 31) 282-283. ‘English law protects property rights by protecting possession rather than by protecting

not exist in the common law system and is a recovery action asserted directly to a thing called *rei vindicatio* that cannot be found in English law.<sup>418</sup> Therefore, when civil law lawyers went through Hohfeld, Honoré, Waldron and Penner's work, one should not be confused by the term 'rights *in rem*' they used in their representations.

Whether an object is tangible or intangible is not important in Hohfeld's model because this model structures the rules based on a person to person relationship, even though it is extremely significant in the civil law system. In the civil law concept, all the rules are founded on a thing, with any alienation of such a thing being a movement of the thing. Sales, for example, remove the thing away from its personal connection.<sup>419</sup> Eventually, alienation is the denial of a personal link.<sup>420</sup> When this alienation happens, the nuance in common law and civil law are significant: common law deals with the changing of relationship, whilst civil law denies a personal link and deals with the movement of a thing. The person-person model, apparently, favours patents because it deals with a change of relationship, whereas the person-thing model deals with the 'movement' of an object. Unlike a physical thing, it is beyond imagination to move a patent, because a patent is intangible. Therefore, whether this civil law person-thing model remains feasible for patent transactions is an open issue. This issue will be returned to in Chapter 6.

#### **4.2.3 Fee simple is not equivalent to absolute ownership in real rights**

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ownership'. '...for dealing with complaints about infringements of property rights is the law of tort'.

<sup>418</sup> Andreas Rahmatian, 'A Comparison of German Moveable Property Law and English Personal Property Law' (2008) 3 *Journal of Comparative Law* 204. The advantage of having *rei vindicatio* is, when the property fails on the hand of someone who has no right to have it (like a thief), the owner can file his/her *rei vindicatio* against the thief, and also to the thief's heir if the thief is dead; unlike the delictual action, the owner is permissible to assert his/her claim to the wrong doer only.

<sup>419</sup> Hughes, 'The Philosophy of Intellectual Property' (n 386) 287, 345.

<sup>420</sup> *ibid* 345.

Another confusing term is the word ‘ownership’. Bracton<sup>421</sup> and others<sup>422</sup> used possession and seisin interchangeably but left fee simple and ownership in doubt because the underlying concept of fee simple is very different from the Roman law of ownership. The notion of seisin<sup>423</sup> has no concentrated, absolute ownership at the top and above the seisin, while in Roman law, there was a clear separation between possession and ownership. At the level of seisin, it may be equivalent to possession, but at the level of fee simple, it cannot be equivalent to ownership because in the realm of seisin, there was no legal action like the Roman *vindicatio*,<sup>424</sup> as this author has stated in 4.1.7.

Substantiated by Holdsworth<sup>425</sup> and Maitland<sup>426</sup>, English law ‘knows no *dominium*’ and only acknowledged ‘various rights to seisin’ or ‘hold the land of the king’. In the realm of seisin, it was a comparison of recent, more recent or less recent accounts. Seisin can be compared with another seisin, but it cannot be compared with *possessio* because Roman law has the concept of ownership on top of *possessio*, which seisin did not. The writ of right under the common law of England, the mechanism that protects seisin later developed during the reign of Henry II and onwards,<sup>427</sup> simply decided the

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<sup>421</sup> Holdsworth, *A History of English Law vol III* (n 260) 89. Maitland said even the negative franchises like the right to be quit of toll ‘does Bracton apply the notion of seisin or possession’. See Maitland (n 287) 494.

<sup>422</sup> Coke said seisin signifies possession. See Maitland (n 287) 481.

<sup>423</sup> It is said that the origins of seisin can be traced back to the common basis of Germanic custom where Anglo-Saxon laws referred seisin to the possession of chattels; if we trace back to Germanic law, we can find similar concepts. Holdsworth, *A History of English Law vol III* (n 260) 95. English law is more influenced by Germanic customary law than by Roman law in the medieval period. See Tamanaha (n 277) 23. ‘Germanic customary law influenced broad swaths of Europe beyond the native German-speaking lands, including substantial parts of modern England, France, and Spain, owing to the spread of the expansionary and settling German tribes, through its actual degree of penetration varied, weakest in the Latinate (Romance language) regions. The bulk of law in the medieval period was customary law, not statutory or positive law’.

<sup>424</sup> Holdsworth, *A History of English Law vol III* (n 260) 89.

<sup>425</sup> *ibid* 91.

<sup>426</sup> Maitland (n 287) 482.

<sup>427</sup> Started by Henry II, the writ of right brought about a substantial change of legal thought. A right to seisin was no longer just a right to be chosen by the lord when a vacancy occurred. The writ of right was to give the rightful claimant to land more than just a contractual or moral claim against his lord. ‘The effect of the writ of right was to give him a proprietary claim....In non-feudal language, seisin has become the bare fact of possession, as against the hereditary legal right of the owner’. See Baker (n 286)



question of who had the better right to possess between the complainant and the tenant.<sup>428</sup> The writ of right, apparently, cannot be equated with the Roman concept of *vindicatio*, simply because the writ of right in England was designed for settling disputes between two litigants,<sup>429</sup> it ‘did not decide the abstract question of ownership’.<sup>430</sup> The Roman law *vindicatio* was to establish and certify the ownership of the complainant, so the teleology of the law was different.<sup>431</sup> In the old English court, it was the seisin protected by the writ of right fighting against the seisin protected by the writ of entry, or the seisin protected by the writ of entry compared with that of novel disseisin.<sup>432</sup> It was a horizontal design in English law jurisprudence, contrary to the Roman law and the vertical relationship between *possessio* and ownership.

Therefore, it is conceptually wrong to use Roman law ownership to explain the nature of a patent. Despite Bracton and many others using the notion of seisin and possession interchangeably, it is improper to refer to fee simple as Roman law ownership because the structure stated above is different in essence.

#### **4.2.4 Vast expansion of the property notion to patents in the common law of the USA**

Despite Hohfeld’s rights *in rem* as well as the word ownership used by the common law writers being different from civil law lawyers’ understanding, Hohfeld’s term rights *in rem* swept through contemporary property theory. Moreover, the bundle of rights theory

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<sup>428</sup> Holdsworth, *A History of English Law vol III* (n 260) 89.

<sup>429</sup> *ibid* 89.

<sup>430</sup> *ibid* 90.

<sup>431</sup> In English law, the complainant needed only to prove that (s)he had a better right to possession, rather than absolute *dominium*. Therefore, if there was a third party with an even better right to possession than the complainant and tenant during such a dispute, it would be regarded as irrelevant by the court. *ibid* 90.

<sup>432</sup> *ibid* 91.

currently predominates in the courts of the United States of America.<sup>433</sup> It has already become a paradigm in today's property law in the common law system,<sup>434</sup> with the only difference being that U.S. writers focus more on the *in rem* nature of property,<sup>435</sup> whereas as British writers focus more on the analysis of this theory. The U.S. courts, whose decisions have had a significant impact on Taiwanese academia since 1945, have frequently treated patents as property in many significant patent case decisions.

The emphasis of a patent as property in an absolute sense by U.S. courts is due to its social and economic history. The U.S. Supreme Court were conservative, and 'found the old assumption that the "right" of the patentee was more in the nature of the franchise than of a full substantive right'.<sup>436</sup> However, after *Millar v Taylor* and *Donaldson v Beckett*, the idea of 'incorporeal possession' in the English courts' decision, went to U.S. and changed the previous conservative view. In the mid-nineteenth century, American society had a more favourable business climate for lifting the concept of intangible property to its logical culmination.<sup>437</sup> Commercial and manufacturing enterprises were dealing with more abstract things than physical things and it was no longer enough to talk about land and urge continuous acceptance of Justice Yates attitude that 'all property must be founded upon occupancy'.<sup>438</sup> *Gayler v Wilder* in 1850 was the first

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<sup>433</sup> Michael A Carrier, 'Cabining Intellectual Property through a Property Paradigm' (2004) 54(1) Duke Law Journal 1 at 53. Carrier illustrated many court cases including *Lucas v S.C. Coastal Council*, *Pruneyard Shopping Ctr. V Robin* and *United States v Gen Motors Corp.* as examples.

<sup>434</sup> An example is *Festo Corp v Shoketsu Kinzoku Kogyo Kabushiki Co* [2002] 535 US 722 722, 730(2002), the court says 'The patent laws "promote the Progress of Science and useful Arts" by rewarding the innovation with a temporary monopoly. U. S. Const., Art. I, § 8, cl. 8. The monopoly is a property right; and like any property right, its boundaries should be clear'. In *Florida Prepaid Postsecondary Education Expense Board v College Savings Bank et al* [1999] 527 US 627 627, 642(1999), the court says, 'Patents, however, have long been considered a species of property'. Also in *Hartford-Empire Co v United States* [1945] 323 US 386 at 386, 415, the court says, 'a patent is property, protected against appropriation both by individuals and by government, has long been settled'. Many more examples can be found in Carrier (n 433) 20 at footnote 14.

<sup>435</sup> An author like Inlow who focuses more on the *in rem* nature is a good example. He says, 'In England, the patent is usually looked upon as a chose in action', while in the United States of America, 'the patent is more apt to be considered either a contract or a right *in rem*', by which it means presumably, a 'higher types of property that possess more substantive rights'. See Inlow (n 266) 11.

<sup>436</sup> *ibid* 73.

<sup>437</sup> *ibid* 68.

<sup>438</sup> *ibid* 72.

case that where the U.S. Supreme Court seriously considered the property basis when granting a patent.<sup>439</sup> *Gayler v Wilder* was a case disputing whether an invention could be assigned before the patent right was granted. Chief Justice Taney agreed with the validity of such an assignment by stating,

The act of 1836 declares that every patent shall be assignable in law, and that the assignment must be in writing and recorded within the time specified. But the thing to be assigned is not the mere parchment on which the grant is written. It is the monopoly which the grant confers—the right of property which it creates. And when the party has acquired an inchoate right to it, and the power to make that right perfect and absolute at his pleasure, the assignment of his whole interest, whether executed before or after the patent issued, is equally within the provisions of the act of Congress.<sup>440</sup>... Fitzgerald sets up no claim against the assignment, and to require another to complete the transfer would be mere form. We do not think the act of Congress requires it, but that when the patent issued to him, the legal right to the monopoly and property is created was, by operation of the assignment then on record, vested in Enos Wilder.<sup>441</sup>

(Underlined emphasis added by this author)

Justice Daniel disagreed that an invention could be assigned before the patent right was granted, based on the aforesaid property assumption, and dissented Justice Taney's opinion stating,

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<sup>439</sup> *Gayler v Wilder* [1850] 51 US 477 at 477 'An assignment of a patent right, made and recorded in the Patent Office before the patent issued, which purported to convey to the assignee all the inchoate right which the assignor then possessed, as well as the legal title which he was about to obtain, was sufficient to transfer the right to the assignee, although a patent afterwards was issued to the assignor'. For comments on this case, see Inlow (n 266) 78-79.

<sup>440</sup> *Gayler* (n 439) 493.

<sup>441</sup> *ibid* 494.

To hold that the single circumstance of invention creates an estate or property at law and an estate and legal title transmissible by assignment appears to me a doctrine not merely subversive of the common law, but one which contravenes the origin and course of legislation in England in relation to patent rights...I hold it, then, to be true, that the circumstance of invention invests no such perfect estate or right of property as can be claimed and enforced at law or in equity against the user of the same invention... It is the patent alone which creates an estate or interest in the invention known to the law, and which can be enforced either at law or in equity... Down to the Act of Congress of 1837, nothing but the estate, interest, or property created or invested by the patent itself was made assignable.<sup>442</sup> (Underlined emphasis added by this author)

Both judges recognised that when a patent is granted, the rights of property are henceforth created, despite them both having different opinions on the validity of assignment before the patent right was granted. This case was the first time the Supreme Court of America turned to the rights of property, rather than the claim of equity, in establishing the basis for the intangible right.<sup>443</sup> Henceforward, the Supreme Court's attitude split wide open. In 1869, in the case of *Simpson v Woodman*,<sup>444</sup> dissenting Justice Clifford expressly supported 'inventions secured by letters patent are property',<sup>445</sup> which was a turning point in Clifford's career on the bench. In order to prove his ability to face the challenge, Clifford never again lost control of the Court between 1870 and 1876 in relation to the concept of property when granting a patent.<sup>446</sup>

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<sup>442</sup> *ibid* 504.

<sup>443</sup> Inlow (n 266) 79. 'Taney himself presumed to set the limits of the discussion in his opinion for the Court when he turned, not to the Statute, not to the claim of equity, but rather to the rights of property themselves, in establishing the basis of the intangible right'.

<sup>444</sup> *Simpson v Woodman* [1869] 10 Wall 117 at 117.

<sup>445</sup> *ibid* 121.

<sup>446</sup> Inlow (n 266) 99.

In the case of *Seymour v Osborne*,<sup>447</sup> Clifford even refers patents to public franchises by stating,

Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises granted to the inventors of new and useful improvements for the purpose of securing to them...<sup>448</sup>

Inlow commented that Clifford's 'patents as public franchises' was clearly an anomaly of Clifford's past opinion. Another interpretation is possible though. From an historical perspective, a letter patent closely originated from the concept of franchises and treated as real rights under the category of incorporeal hereditaments. Clifford seems to be aware that his property allegation does not refer to property in the sense of personal goods, but to franchises arising from the doctrine of estates. From 1870 onwards, Clifford never stopped emphasising that a letter patent is property,<sup>449</sup> even before being patented.

In 1897, Justice Brewer further made the patent for land and patent for invention distinct in the *United States v American Bell Tel. Co.*<sup>450</sup> Concerning an immovable property, he stated,

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<sup>447</sup> *Seymour v Osborne* [1870] 11 Wall 516 at 516.

<sup>448</sup> *ibid* at 533.

<sup>449</sup> In *Cammeyer v Newton* [1876] 94 US 225 at 225, 226 Justice Clifford delivered the opinion of the Court by saying, 'Holder of valid patent enjoy.....the exclusive right and liberty of making and using the invention.....as provided by the act of Congress, and the rule of law is well settled that an invention so secured is property in the holder of the patent, and that as such the right of the holder is as much entitled to protection as any other property, during the term for which the franchise or the exclusive right or privilege is granted'.

<sup>450</sup> *United States v American Bell Tel Co* [1897]167 US 224 at 224, 238.

The patent for land is a conveyance to an individual of that which is the absolute property of the government, and to which, but for the conveyance, the individual would have no right of title. It is a transfer of tangible property; of property in existence before the right is conveyed; of property which the government has the full right to dispose of as it sees fit, and may retain to itself or convey to one individual or another, and it creates a title which lasts for all time.<sup>451</sup>

With respect to the patent for invention, he continued,

On the other hand, the patent for an invention is not a conveyance of something which the government owns. It does not convey that which, but for the conveyance, the government could use and dispose of as it sees fit, and to which no one save the government has any right or title except for the conveyance. But for the patent, the thing patented is open to the use of anyone. Were it not for this patent, anyone would have the right to manufacture and use the Berliner transmitter. It was not something which belonged to the government before Berliner invented it....After his invention, he could have kept the discovery secret to himself....But in order to induce him to make that invention public, to give all a share in the benefits resulting from such an invention, Congress, by its legislation made in pursuance of the Constitution, has guaranteed to him as exclusive right to it for a limited time, and the purpose of the patent is to protect him in this monopoly, not to give him a use which, save for the patent, he did not have before, but only to separate to him an exclusive use. The government parted with nothing by the patent. It lost no property. Its possessions were not diminished. The patentee, so far as a personal use is concerned, received nothing which he did not have without the patent, and the monopoly which he did receive

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<sup>451</sup> ibid 238.

was only for a few years.<sup>452</sup> (Underlined emphasis added by this author)

Justice Brewer correctly caught the fundamental concept of patents for invention. He developed the statement according to assimilation under the doctrine of estate and doctrine of seisin, as stated in 4.1.2 and 4.1.3. Patents are like those ‘estates’ or ‘interests’ with time limits on commonly owned land. According to Justice Brewer, the idea of invention is commonly owned by a society, with the granting of a patent not the granting of a positive right to use, but a negative right to exclude. As Hall points out, the patent owner can enjoy ‘only the debarment in fact of making using and vending the invention without his authority, throughout the patent territory, during any momentary time’.<sup>453</sup> The patent system ensures the patent owner has the right to exclude others from entering into his patent claims, like the farmer excluding other villagers from entering into his crop field without his permission. Contrary to the inclusion rules regulating the use of physical things, the patent system is governed by exclusion rules. A patent owner was not granted with any positive right to use by the authority, but merely had the negative right to ask the trespasser to leave the field that the owner preserves for their own exclusive use.<sup>454</sup>

Concerning exclusive use, when a manufacturing factor was involved, the Anglo-American law moved towards a more aggressive ‘absolute’ property allegation

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<sup>452</sup> *ibid* 238-239.

<sup>453</sup> Thos B Hall, *Treatise on Patent Estate Comprehending Nature, Conditions and Limitations of Interest in Letters Patent* (Ingham, Clarke & Co Law Publishers 1888) 47.

<sup>454</sup> Hall explained the nature of a patent this way. The negative right is the primary product of a patent, and the money is the secondary product of a patent. He stated, ‘The debarment in law of making, using and vending an invention, which constitutes the property of a patent, produces more or less a like debarment in fact. This debarment in fact, is the primary product of a patent, and constitutes the first medium by which patent property may be recognized outside of mental contemplation. This primary product, though incorporeal and negative, yet being a debarment in fact, is more appreciable by bodily sense than is the legal abstraction that produces it. It is capable of being directly converted into a secondary product, of corporeal and positive existence, in the form of money, The bare debarment in fact of making, using and vending inventions, being of no consideration; our patent system would be without meaning, if contemplation rested in the abstraction of the incorporeal right and its primary product. But the view extends to the money, which such incorporeal right brings as secondary product....Money, as the profit of patents, give the qualification of value to the latter, ranking them as property’. *ibid* 50,51.

by the end of the nineteenth century. In 1896, Justice Lurton ‘found himself unable to accept any limitation upon the rights of the patentee in this particular case’,<sup>455</sup> and began to equalise the patent right with general property rights. Lurton stated,

This exclusive right of use is a true and absolute monopoly, and is granted in derogation of the common right, and this right to monopolize the use of the invention or discovery is the substantial property right conferred by law, and which the public is under obligation to respect and protect...<sup>456</sup> The property right of a patentee is, after all, but a property right, and subject, as is all other property, to the general law of the land.<sup>457</sup> (Underlined emphasis added by this author)

Henceforward, the common law jurisdiction of the United States of America inclined more towards absolute property associated with rights *in rem* (a thing in possession) than its English counterpart, which prefers a lesser absolute chose in action (a right of action for possession).<sup>458</sup> The U.S. courts in the twentieth and twenty first centuries continually strengthened intellectual property and now characterise a patent as a type of property.<sup>459</sup>

However, the term ‘property’ that the Americans use today is not necessarily the same meaning as before and may ‘very well not be the same type of property tomorrow’ as Inlow highlights.<sup>460</sup> Nevertheless, the above history makes us realise that the literary

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<sup>455</sup> Inlow (n 266) 124.

<sup>456</sup> *Heaton-Peninsular Button-Fastener Co v Eureka Specialty Co et al* [1896]77 F 288 at 288, 291.

<sup>457</sup> *ibid* 293.

<sup>458</sup> Inlow (n 266) 11.

<sup>459</sup> *Carrier* (n 433) 10. *Carrier* provides many cases to support this allegation, including but not limited to *Myers v United States* [1980] 613 F 2d 9th Cir at 230, 231, *Hartford-Empire Co v United States* 415, *Patlex Corp v Mossinghoff* [1985] 758 F 2d 594 at 594, 577, even to the twentieth first century in the case *Zoltek Corp v United States* [2003] 58 Fed Cl 688 at 688, 700 and *Festo Corp v Shoketsu Kinzoku Kogyo Kabushiki Co* 730.

<sup>460</sup> Inlow (n 266) 151.



meaning of the word ‘property’ used in the patent concept is not helpful to clarify the concept, but when thinking historically, we can understand the nature of the patent better. The passage below shows the fundamental difference of a ‘property’ concept in the common law of England and Taiwanese statutory law. The next section further explains why real rights in Taiwanese statutory law are not feasible for patents, and why legal society in both Taiwan and Japan understand it wrongly.

### **4.3 The differences between English common law and Taiwanese statutory law**

#### **4.3.1 Allocating rights**

The first issue that troubles a comparatist is no matter what a patent is called, whether a monopoly, a franchise, a right *in rem*, a chose in action, or even a property, what sorts of rights does that the owner have on his patent? Is there, however, any difference in the understanding real rights between the common law of England and civil law of Taiwan?

In fact, there is. As stated in 4.1.2, the common law of England builds a concept of estate on exclusionary rules. The significant characteristic of exclusionary rules is, in principle, that everyone is free to use the property. This right to use is not a positive right granted by the authority (government), it naturally exists in a society. Locke’s theory reflects the same notion.<sup>461</sup> The law of property is a set of rules stating, ‘what other people may or may not prevent the owner from doing to the thing, and what the owner may or may not prevent them from doing to the thing’.<sup>462</sup> The law of property

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<sup>461</sup> See section 4.2 above. Locke talks about the world and its resources being given to mankind in common. An appropriation to a thing removes everyone else’s right not to be excluded from that thing, or removes everyone else’s privilege to use and enjoy that thing. To use and enjoy a thing naturally exist in a society.

<sup>462</sup> Turner (n 376) 343. Also in Wendy J Gordon, ‘A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property’ (1993) 102 Yale L J 1533,1552. ‘A property owner ordinarily has a claim right to have others refrain from entering or otherwise interfering with the

under exclusionary rules is a set of rules that the social anthropologist calls ‘negative etiquette’, meaning that it is a set of rules concerned with other people’s need not to be intruded or imposed upon.<sup>463</sup> In sharp contrast to exclusionary rules, inclusionary rules are sets of rules where every positive right (right to use, capital and disposition) is granted by the authority and the law of property is a set of rules stating what the owner may or may not do to a thing, only the owner has the right to use that thing. No one else has the same use right like the owner has in this set of inclusionary rules.

The rights that an owner has in their patents can be analogized to the above stated notion. Everyone is free to use the idea in the patent in principle but the law vesting the right to exclude only resides with the owner(s) who has exclusivity. In a way, the law does not grant the owner positive rights to use, but instead, the law grants a right to exclude other people’s use, or a right to remove others’ right not to be excluded. It is fundamentally different from the civil law of Taiwan where only the owner is granted positive rights to use, with no one else capable of using. This is the reason why there is no common owned land in Taiwanese statutory law: the land is either privately or government owned. Therefore, the concept that ‘everyone is free to use except for those things which belong to the owners who have a right to exclude’ does not exist in the statutory law of Taiwan.

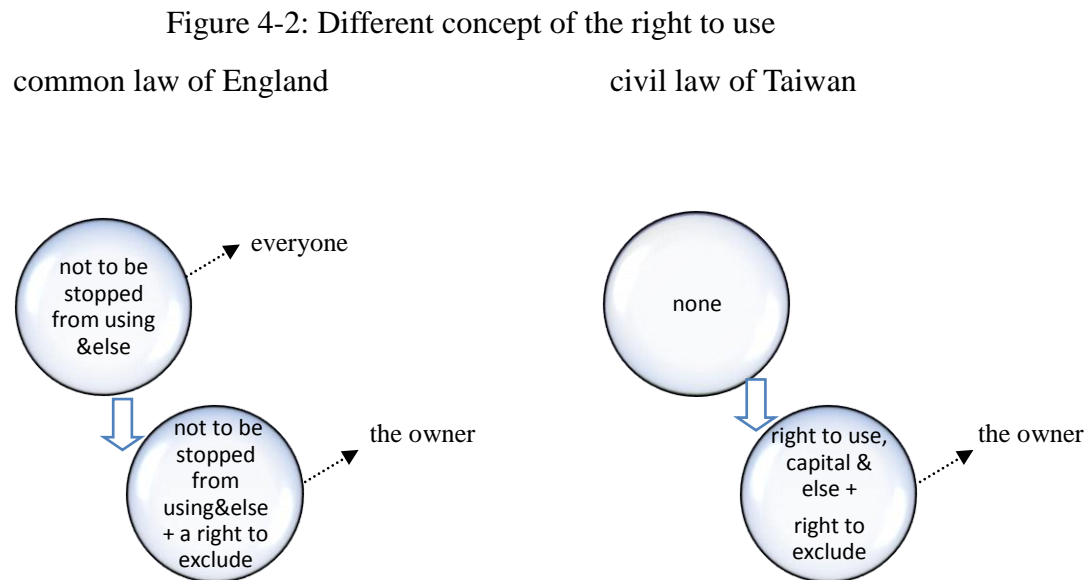
This nuance is demonstrated in two figures below. The left hand side of Figure 4-2 shows the common law of England, with the civil law of Taiwan is on the right hand side. The right (some would say privilege) to use in the common law of England is vested to everyone, with the right to exclude granted to the owner on the left hand side.

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property’. ‘It is often argued that the “essence” of property is “the right to exclude others”’. ‘For intangibles, the parallel entitlement to the right to exclude physically is the right to forbid others’ use of one’s product’.

<sup>463</sup> Kate Fox, *Watching the English: the hidden rules of English behaviour* (Hodder 2005) 147,407.

In sharp contrast to the left hand side, on the right hand side, there is no right to use granted to everyone in the first place, with both the rights to use and exclude vested in the owner after the law and government recognize ownership.



This nuance has a great impact on the definition of what sorts of right a patent owner has over his patent in the Taiwanese Patent Act. Without knowing the above differences, the legislators copied and borrowed the wordings from Anglo-American law,<sup>464</sup> with a negative tone stating the owner has the right to exclude others from using. With a further extension by scholars and judges already stated in Chapter’s 2 and 3, the patent

<sup>464</sup> Legislative Yuan, *Lifayuan Gongbao* 立法院公報(*Legislation Communique*):*Weiyuanhui Jilu* 委員會紀錄(*Committee Meeting Minutes*) (Folio 82, Issue 42, Number 2641, 1993) 329. Convener Su Huan-chih (蘇煥智) briefed the proposed bill. When mentioning Article 56, he stated, ‘[This clause] was proposed in accord with the draft Article 28 of the Agreement on Trade-related Aspects of Intellectual Property Rights...many jurisdictions formed their clauses this way, for example Article 154 of the U.S. Patent Act.’ The original Patent Office’s version was, ‘The patentee of a patented article shall have the exclusive right of manufacture, sale and use of the innovation.’ [translation by this author] After this discussion in the committee, the Patent Office agreed to adopt Legislator Su Huan-chih’s version. See Legislative Yuan, *Lifayuan Gongbao* 立法院公報(*Legislation Communique*):*Weiyuanhui Jilu* 委員會紀錄(*Committee Meeting Minutes*) (Folio 82, Issue 48, Number 2647, vol.2, 1993) 401-403. Eventually, section 1 of Article 56 in the Patent Act became, ‘Unless otherwise provided for in this Act, the patentee of a patented article shall have the exclusive right to preclude other persons from manufacturing, selling, using, or importing for above purposes the patented article without his/her prior consent’. [translation by Lawbank] The wording was changed from ‘the exclusive right’ to ‘the exclusive right to preclude’, with the legislators, however, only explaining that it was to be confined to TRIPS and Anglo-American law, and mentioning the exerting of U.S. pressure on many occasions.

owner's rights are misconnected with physical things. They allege that the patent owner has the same positive rights (right to use, capital and disposition) like a physical thing owner, creating those rights for a patent owner that he/she did not have before.

These newly created rights have had a negative impact on patent licensing because the licensee then has a legal basis to claim once they obtain the licence they have a positive right to use. With these positive rights being created, the licensees naturally claim they have a right to exclude others because a right to exclude is the other side of the coin of positive rights. It is completely untrue under a non-exclusive licence because the non-exclusive licensee does not have a right to exclude others. This is the reason why this author challenges the decision made by the Japanese Supreme Court that uses surface rights to understand an exclusive licence (as in 3.2.4), and the Taiwanese Intellectual Property Office and Civil High Court from using physical things to understand patents (as in 2.3.3). All the misconceptions arise from the creation of the positive rights that a patent owner shall not have, due to mistaking those rights under physical things as being the same 'rights' as those for patents.

#### **4.3.2 The concept of ownership**

The object of an ownership, in the common law of England and the common law jurisdiction of the United States of America, has a wider range than the civil law of Taiwan. The common law's objects cover material objects and sometimes rights. This wider range is attributed to the history of real estate developed earlier in England. As addressed in 4.1.2, the estate concept in the common law of England sees two strong characteristics differ from the civil law system. The first characteristic is the segmentation of ownership by different durations among various individuals. The second characteristic is that, in principle, everyone is free to use under these

exclusionary rules, with the law vesting the right to exclude only to the owner(s) who has exclusivity.

At large, real property under common law is divided into two classes, estates and interests. This classification is, from first sight, very similar to the civil law separation of ownership and usufruct, with the devil being in the details. Common law estate covers leaseholds and tenancy,<sup>465</sup> whilst under the civil law of Taiwan, leaseholds and tenancy are excluded out of the law of things (they belong to the law of obligations). Fee simple, which most writers call ownership,<sup>466</sup> can further be segmented by durations or conditions like a spectrum, such as a fee simple absolute, a fee tail,<sup>467</sup> a fee simple for life,<sup>468</sup> and upon condition or as a determinable fee.<sup>469</sup> Ownership in the civil law of Taiwan is a unitary concept that cannot be further segmented by different durations and conditions. This ‘segmentation by time or condition’ concept has no equivalence in the civil law of Taiwan.

Figure 4-3 shows the structure of proprietary rights and interests in the common law of England, with Figure 4-4 manifesting rights *in rem* arising from physical things in the civil law of Taiwan. The co-ordinates for fee simple and forever in the time axis are the

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<sup>465</sup> By the sixteenth century, terms of years has become recognised as legal estates. Like freehold estates, leasehold estates may be held in possession, in reversion or in remainder. See Oakley (n 11) 34.

<sup>466</sup> An example is Oakley, who states, ‘The fee simple is the most ample estate which can exist in land. Although in theory it still fall shorts of absolute ownership, in practice it amounts to this, for nearly all traces of the old feudal burdens have disappeared’. See *ibid* 40. Cheshire and Burn did the same in their chapter on the legal position of a tenant under fee simple, with ownership equated with fee simple being absolute. See Burn and Cartwright (n 11) 158.

<sup>467</sup> A fee tail lasts for as long as the tenant or any of his descendants lives, which remained possible until 1996, but is now moved to equity and called an entailed interest. See Burn and Cartwright (n 11) 151.

<sup>468</sup> Since 1925 a fee simple for life has been unable to do so, and therefore it has to take effort as an equitable interest. See Oakley (n 11) 47.

<sup>469</sup> *ibid* 41-42. A determinable fee is a fee simple ‘which will automatically determine on the occurrence of some specified event which many never occur’. An example is ‘A grant to X and his heirs as long as such a tree stands’. If the tree falls, then the land reverted to the original grantor. A fee simple upon condition is a grant of a fee simple when a clause is added, providing that ‘the fee simple is not to commence until some event occurs’. An example of the fee simple is not to commence until some event occurs is, ‘A grant to X in fee simple if he attains 21’. This determinable fee form a limitation and a fee simple upon condition merely form a condition. Therefore, the former marks the bounds or compass of the estate, while the latter defeats the estate before it attains its boundary.

fee simple absolute in Figure 4-3, reflecting the co-ordinate of the same kind in Figure 4-4, the ownership. Comparing these two diagrams, two details in Figure 4-4 are missing: the scale points in the time axis that marks different durations is absent, and the term of years absolute which represents a fix term of leasehold or tenancy is not in the real rights of Taiwanese civil law. The two missing scale points manifest the limitations of analogizing civil law ownership to a patent. A detailed analysis is presented in the next passage.

Figure 4-3: Estates in the common law of England

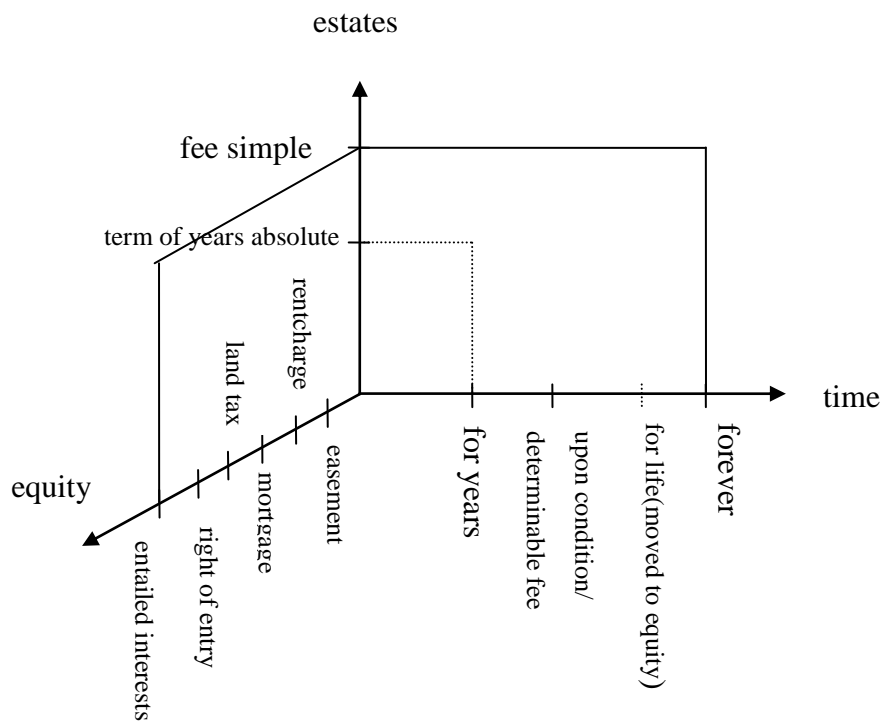
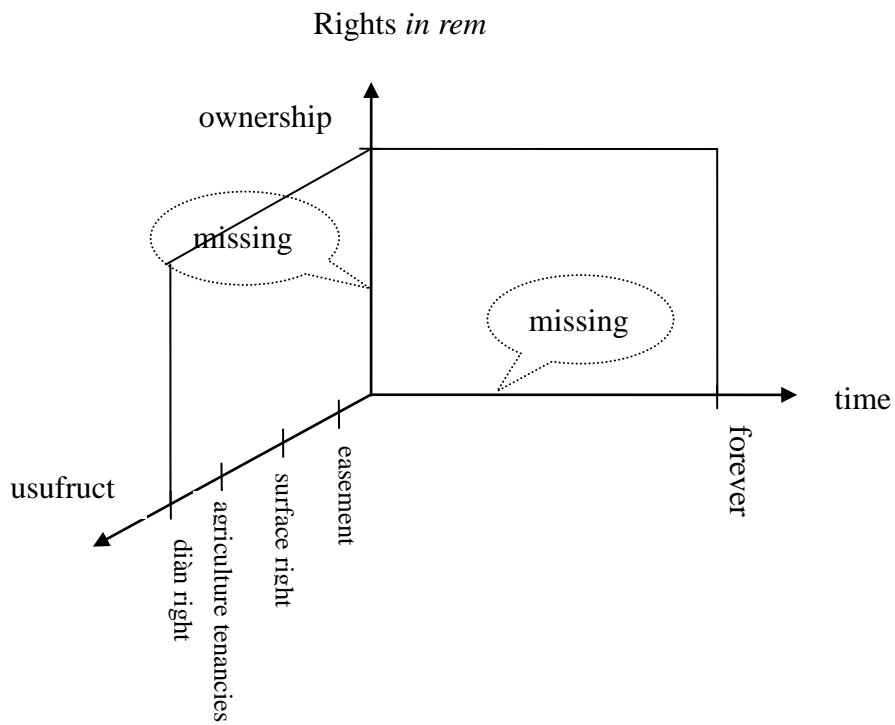


Figure 4-4: Rights *in rem* in the civil law of Taiwan



As stated in 4.1.2 and 4.1.3, throughout medieval times to the eighteenth century, franchises were categorised under real property, with nearly all grants of franchises made in fee simple. Therefore, it is reasonable to assume that if a patent is regarded as property, the interests that a patentee holds must be proprietary.

Figure 4-5 shows the theoretical position that a patentee has to his/her patent, with Figure 4-6 manifesting that this idea is not mirrored in the civil law of Taiwan. Comparing these two diagrams, there is a missing scale point in Figure 4-6—a fixed term for fee simple in Figure 4-5 is not mirrored in Figure 4-6. Unlike the common law real rights structure allowing a duration spectrum on the time axis, civil law ownership is restricted by the unitary concept, so it is impossible to segment ownership using different terms. Therefore, we cannot use Taiwanese civil law ownership to explain the property nature of a patent.

If the ownership notion in the civil law of Taiwan cannot explain the nature of a patent, could rights *in rem* less than ownership (like usufruct) explain the property nature of a patent? If the answer is positive, then we have to further assume that the government holds the patent under fee simple and that the patentee holds proprietary interests with time limitation just like a tenant holds a leasehold or tenancy.

In Figure 4-5, the co-ordinate for proprietary interests in land likewise explains the estate status that a patentee holds in his/her patent. However, the same concept cannot be mirrored in Figure 4-6 because, proprietary interests with time limitation like a leasehold or tenancy, is not regarded as being a right *in rem* in the civil law of Taiwan. It belongs to the law of obligations (like a personal debt or liability). Again, there is a missing scale point in the real rights axis in Figure 4-6. We cannot use civil law leasehold or tenancy to explain the property status that a patentee holds to a patent in the



civil law structure.

From the above analysis we learn that because of these two missing points, no matter whether common law writers classified a patent as quasi-property, property, or right *in rem*, the property character cannot be equally mirrored in the civil law of Taiwan. This analysis further proves that those Taiwanese jurists and judges who think that physical things' notion works well in explaining the nature of a patent (as presented in Chapter 2) are fundamentally mistaken.

Figure 4-5: Patents in the classification of common law of England

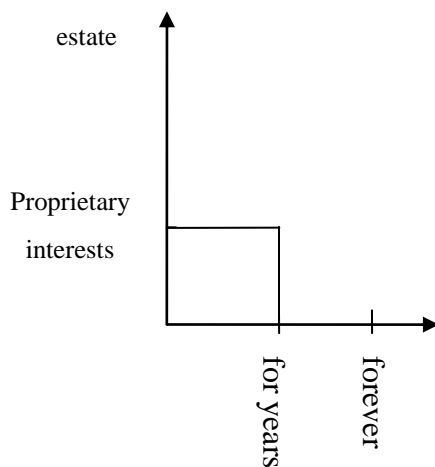
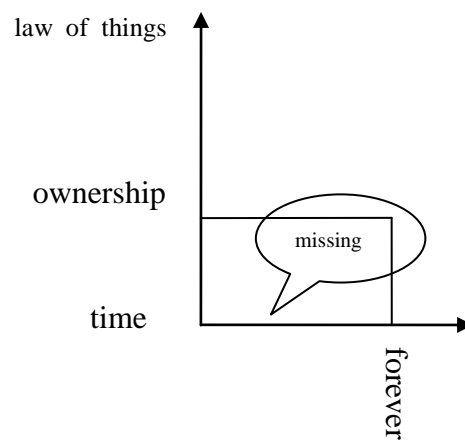


Figure 4-6: Patents in the classification of civil law



#### 4.4 Conclusion

William Martin stated that 'The English Patent System is no sudden growth; its roots lie hidden beneath the tickets of medievalism'.<sup>470</sup> Early in the thirteenth century, franchises

<sup>470</sup> William Martin, *The English Patent System* (J M Dent & Co 1904) 9.

were already assimilated as land by applying them to the doctrine of estate.<sup>471</sup> Concerning the rule of succession, franchises were stuck in the real rights category throughout medieval times.<sup>472</sup> Coke and Blackstone<sup>473</sup> classifying franchises as incorporeal hereditaments, medieval lawyers treated incorporeal hereditaments equally to real rights through the analogy of the doctrine of estate.<sup>474</sup> Franchise classification in real rights stayed in the real rights category before the extension movement of choses of action emerged in the late sixteenth century. As Lupton highlights, it was ‘no longer necessary for the common law to assimilate these things with land in the same way’ because franchises ‘had been assimilated with land in the thirteenth century’.<sup>475</sup>

A patent for inventions was re-categorised twice by two driving forces: the expanding choses in action in the late sixteenth century and the enlarged property meaning in the seventeenth century. A patent for inventions was firstly classified in choses in action because there was a tendency to treat any intangible right as a chose in action, as long as this right did not clearly belong to old types of incorporeal hereditaments. A patent for inventions, which was new to the old type of incorporeal hereditaments, was placed into the category of chose in action, despite in substance, its character being closer to real estate than personal goods. A patent for inventions was then again re-categorised as ‘property’ during the seventeenth century, because the ‘property’ notion began to expand from personal goods to real estate and covered a patent into this category. In the

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<sup>471</sup> Lupton (n 253) 97.

<sup>472</sup> *ibid* 3.

<sup>473</sup> Coke classified franchises as incorporeal hereditaments, while Blackstone listed them as incorporeal hereditaments as well. See Simpson, *A History of The Land Law* (n 286) 106, cited from William Blackstone, *Commentaries on the Laws of England* (15th edn, London 1809) II 21. ‘Incorporeal hereditaments’ here means interests that are ‘incorporeal, or intangible, heritable in land that were recognized historically by the common law’. See Burn and Cartwright (n 11) 633. Unlike the freehold or leasehold estate, ‘they do not constitute rights to the land itself, but only rights over or in respect of the land’.

<sup>474</sup> Simpson, *A History of The Land Law* (n 286) 115. Simpson accepts there is some connection between the development of a doctrine of estates in the fourteenth century and the treatment of incorporeal hereditaments by early medieval lawyers, but he objects to those modern writers using ownership to overstate the medieval fee simple by concluding Englishman owned an incorporeal thing called an estate. See *ibid* 115-116.

<sup>475</sup> Lupton (n 253) 138.

past, stationers in the sixteenth century showed no sign of using property as their defence base, but from the seventeenth century onwards, such a use largely emerged.

Blackstone, in the eighteenth century, enlarged the meaning of possession from physical things to copyrights. Meanwhile, natural law lawyers found that Grotius and Pufendorf awkwardly fit this scheme by showing the nature of a grant originated in occupancy. The gap between a patent grant and philosophy was then redressed by the eighteenth century natural law lawyers, using John Locke's labour theory. Roman law terminologies were henceforward widely adopted for explanation, in spite of many Roman law terminologies understood by the English writers not being the same as civil law lawyers. The phrase 'rights *in rem*' is a good example.

Before the nineteenth century, courts in the United States of America mainly followed the principle established by English courts. Things started to change from the mid-nineteenth century onwards. American commercial and manufacturing enterprises were dealing with more abstract things than physical things than its English counterpart, and it was no longer enough to talk about land. Before the nineteenth century they also held the conservative attitude that all property must be founded upon occupancy. By the end of the nineteenth century, U.S. courts moved towards a more aggressive step to recognise the absolute property status for a patent grant when a manufacturer was involved. Compared to its English counterpart, U.S. courts inclined more towards rights *in rem* when justifying the property nature of a patent grant. The bundle of rights theory currently dominates the courts' significant decisions for patent cases.

Taiwanese jurists and judges were, however, confused by the term 'rights *in rem*' and 'property' used by common law writers. Without a complete understanding of the nuances in the usage of terms in the common law and civil law system, they believe that

real rights and a civil law ownership concept arising from physical things explain the nature of a patent well, but in fact, they are wrong. The common law estate notion can be segmented by different durations, whilst ownership in Taiwanese civil law cannot. The lesser rights of ownership—civil law real rights cannot explain the nature of a patent either because of the corresponding concept in the common law—leaseholds or tenancy are not regarded as real rights in the civil law of Taiwan.

The right to exclude has a different understanding in an exclusionary law system like English common law and an inclusionary law system like Taiwanese civil law. The former welcomes all commoners to use a property, while the latter enjoys the right to use a property only when (s)he is granted to do so by the government. The right to exclude in the former system empowers the owner with a negative right to evict the infringer, while the right to exclude in the latter system is the other side of the coin of positive use rights. In the civil law of Taiwan, only when the owner obtains ownership granted by the government do they enjoy the right to exclude the infringer. In other words, if the patentee does not obtain recognition of his/her positive rights (ownership) from the government, (s)he cannot enjoy the right to exclude the infringer. This civil law ownership notion, however, as stated above, cannot be granted by different durations of time. It is either owned perpetually or not at all. The perpetually ownership of a patent does, nevertheless, contradict the current concept of patents fixed to a specific term.

Taiwanese jurists and judges, as stated in Chapter 2, inappropriately applied the direct analogy of civil law real rights to patents without acknowledging the nuance in both common and civil law. This chapter has substantiated this assumption—real rights work well in explaining the nature of a patent, is mistaken. The next chapter explores the traditional Taiwanese tenure system. This traditional real rights notion was founded on

exclusionary rules and survives in today's flat leasehold practice. A part of Taiwanese tradition remains and has survived many reforms.

## CHAPTER FIVE

### A METAPHOR FOR LANDED PROPERTY: TOWARDS A TRADITIONAL REAL RIGHTS CONCEPT

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Rules and regulation in land law are valuable sources of reference for patent law. Harris states that intellectual property law ‘takes an intangible thing and builds around it a property structure modelled on the structure which social and legal systems have always applied to some tangible things’.<sup>476</sup> His comment echoes one barrister’s testimony in an 1851 House of Lords report, that if the patentee of a reinvention and the patentee of the original invention cannot agree on the licence terms, let them ‘apply the Lands Clauses Act, and follow a similar process to that which is in use when lands are taken for public purposes’.<sup>477</sup> Patent cases often largely resemble land law.

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<sup>476</sup> Harris (n 408) 44. Not only does Harris make this comment, David Vaver cites House of Commons reports and states the same. ‘A 1985 parliamentary sub-committee report on copyright reform took as its lodestar the assertion “that ‘ownership is ownership is ownership’: the copyright owner owns the intellectual works in the same sense as a landowner owns land”’. See David Vaver, *Intellectual Property Law: Copyright, Patents, Trade-marks* (2nd edn, Irwin Law 2011) 6-7.

<sup>477</sup> Select Committee of The House of Lords, *Report and Minutes of Evidence Taken before the Select Committee of The House of Lords Appointed to Consider of The Bill Intituled, "An Act Further to Amend*

This chapter answers two questions. Firstly, insofar as the statutory laws do not solve the problem completely, is there any customary law in Taiwan that can help replenish the gap? Secondly, how similar is this customary law to that in English common law? Section 5.1 explores the classification of property in Taiwanese customary law, with 5.2 demonstrating the rules of conveyance, and a clear distinction between Taiwanese customary law and Chinese customary law provided in 5.3. These three sections demonstrate that there is customary law in Taiwan that can replenish the gap. Section 5.4 presents a comparative study on property taxonomy in English common law and Taiwanese customary law. Using the results of the comparison, section 5.5 rebuilds a property model for patents to explain the position of patents in Taiwanese customary law taxonomy. Section 5.6 further explores the meaning of assignment and licence in the map of such taxonomy, with 5.7 demonstrating that such customary law can successfully explain the nature of patents and the meaning of non-exclusive and exclusive licences in real practice. This chapter concludes that Taiwanese customary law is an ideal analogy that can overcome the structural flaws and substance imperfection of civil law in 5.8.

This chapter commences with an overall review of the traditional Taiwanese landholding system. By comparing Taiwanese tenure with English tenure,<sup>478</sup> this chapter highlights the similarities and differences of landholding in Taiwan and England. The similarities in both tenure systems will help establish a new model for patents by the end of this chapter. No literature has yet conducted a thorough comparative study of

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*the Law Touching Letters Patent for Inventions;" and also of The Bill Intituled,"An Act for the Further Amendment of the Law Touching Letters Patent for Inventions;" and to report Thereon to the House (HC 1851, 278) paras 1994.*

<sup>478</sup> The customary practice is limited to customs that were practiced in Taiwan in the Qing dynasty. Qing dynasty (1684-1895) was the period when Taiwan was connected to the Qing dynasty of mainland China. Before that, Taiwan was neglected by the Asian political powers prior to 1684. The spotted deers trade attracted the Dutch East India Company, with this company running a deerskin export business for 38 years (1624-62) in Taiwan. After 1895 was the period when Taiwan was ruled by Japan until 1945.

Taiwanese and English tenure in relation to building a property structure that suits patents,<sup>479</sup> therefore this chapter provides an original contribution to this research area.

## 5.1 The traditional landholding system in Taiwan

### 5.1.1 Reason for choosing the landholding system

This study chooses the landholding system because customary Taiwanese practice treats real property and personal goods differently. Holding personal goods in Taiwan was an outright, absolute and perpetual holding without any conditions or restrictions. In Qing dynasty (1644-1911) when all land belonged to the emperor, no one else could own land. All tenants held ‘rights to manage’ the land, with the rights they held varying by different gradations.<sup>480</sup> Concerning holding a right to manage the land, traditionally people used the phrase *yeh-zhu-quan* (業主權) to show a non-categorical holding of the land. But for personal goods, people used the phrase *wu-zhu-quan* (物主權)<sup>481</sup> to show an outright ownership of personal goods. Unlike civil law ownership that uses the word ‘ownership’ to describe personal goods and real property, customary law clearly differentiates land from personal goods, so the first word *yeh* (業) is only used in association with real property, including the premises. This key word ‘*yeh*’ (業),

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<sup>479</sup> Japanese scholars focus more on an introduction and historical explanation of the multi-tiered tenure system in Taiwan, with Taiwanese professors focusing more on the impact of this tenure system for land development. However, none of them stretching out to the intellectual property field. For an example of Japanese scholars, see Yoshiro Matsuda (松田吉郎), *Meiseizidai Kanan Chiikitekishi Kenkyuu* (明清時代華南地域史研究)=*A Regional History of Southern China* (Kyuko 2002), and for Taiwanese researchers see Chen Qiu-kun (陳秋坤), *Qingdai Taiwan Tuzhu Diqun: Guanliao Handian yu Anlisheren de Tudibianqian 1700-1895* (清代臺灣土著地權：官僚、漢佃與岸裡社人的土地變遷 1700-1895)=*The Land Rights of Taiwanese Aborigines in Qing Dynasty: the impact and change of rights among the bureaucrat, Han Chinese tenants and aborigines in Anli area* (Institute of Modern History Academia Sinica 1994). Taiwanese law professors concentrated more on understanding traditional terms by means of civil law terminologies, but it is only limited to the land law field. See Wang, *Taiwan Falushi Gailun* (台灣法律史概論)=*Concise Taiwanese Legal History* (n 189) 83.

<sup>480</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 3* (臺灣私法第三卷)=*Taiwanese Private Law vol 3* (Historical Records Committee of Taiwan Provincial Government 1993) 11.

<sup>481</sup> *ibid* 11-12.



substantiated by Japanese government survey findings, was ‘closed to the English estate concept, represents any and all rights a person has to a real property’.<sup>482</sup>

The property nature of patents originated from holding an estate in England but not from owning personal goods. For this reason, this chapter excludes a discussion of owning personal goods. Another reason for not discussing owning personal goods is because Chapter 2 has already proven that outright perpetual ownership is unsuitable for patents, therefore *wu-zhu-quan*, which is also a perpetual, absolute and outright owning, is no longer needed for further discussion. This chapter focuses on *yeh-zhu-quan* (業主權) holdings that are close to the English estate concept.

### 5.1.2 The concept of *yeh*

The word *yeh* (業) originally means ‘to manage a business or a parcel of land’.<sup>483</sup> Like the English concept of estate,<sup>484</sup> *yeh* (業) detaches the concept of ownership from land itself, and attaches it to an imaginary object called *yeh*(業). It is an intangible real right,<sup>485</sup> and it has been majorly used in this abstract sense indicating ‘the power of management’ of the land. Hence, the combination of for ever (*yong* 永) and *yeh* (業) as *yong-yeh* (永業) means ‘the power to manage a real property for ever’.<sup>486</sup> *Yeh* (業) is a concept substantially intangible and ethereal.

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<sup>482</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷)=*Taiwanese Private Law vol 1* (Historical Records Committee of Taiwan Provincial Government 1990 reprint) 141 [translation by this author]

<sup>483</sup> *ibid* 139 [translation by this author] Also in Wang, *Taiwan Falushi Gailun* (台灣法律史概論)=*Concise Taiwanese Legal History* (n 189) 83.

<sup>484</sup> ‘The English lawyer...first detaches the ownership from the land itself, and then attaches it to an imaginary thing which he calls an estate’. Simpson, *Land Law and Registration* (n 58) 30. Simpson cited it from William Markby, *Elements of Law Considered with Reference to Principles of General Jurisprudence* (6th edn, Clarendon 1905) 166 para 330.

<sup>485</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482) 139, also in Wei (n 228) 77. Sometimes *yeh* 業, as a verb, is used as a noun and refers to the land itself, or a business in relation to the land.

<sup>486</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n482) 139 [translation by this author]

### 5.1.3 The concept of *yeh-zhu* (業主) and *yeh-zhu-quan* (業主權)

‘*Yeh-zhu*’ (業主) means an ‘owner’.<sup>487</sup> A compound noun to express the rights an owner has over his real property is *yeh-zhu-quan* (業主權). *Yeh-zhu-quan* (業主權) was a combination of three words: *yeh* (業) that signified an estate, *zhu* (主) that referred to a master, and *quan* (權) that denoted a right to seize. Literally speaking, it means all proprietary rights an owner holds in relation to managing his real property.

The definition of *yeh-zhu* (業主) varies in both the state’s and people’s eyes. A Japanese government survey report pointed out, for the purpose of taxation, that the Qing Code only recognised ‘one owner’ of a piece of land, and expressly forbid ‘one land with two owners’.<sup>488</sup> From a state authority perspective, an owner means ‘the person who has the substantial and largest rights to a specific real property’.<sup>489</sup> To be more specific, owner refers to the ‘large-rent landlord’ (*da-zu-hu* 大租戶), whilst others who are not large-rent landlords do not count as an owner under the Qing Code. A person like a ‘small-rent landlord’ (*xiao-zu-hu* 小租戶) who controls the power to manage the land is not regarded as a true owner under this definition.<sup>490</sup> This concept is very different from

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<sup>487</sup>For the definition of this term ‘*yeh-zhu*’ (業主), see Hsu Hsueh-chi (許雪姬), *Taiwan Lishi Cidian* (臺灣歷史辭典) = *Dictionary of Taiwan History* (Yuan-liou Publishing 2004) 961. *Yeh-zhu* (業主) refers to the person who acquired a reclamation permit from the government and reclaimed land with hired labour. When the land was converted into a paddy, this reclaiming person acquired ownership and in return provided reports about the land back to the state authorities ready for taxation within a certain number of years (3 years for a paddy, 6 years for dry land). This person then acquired owner status in law by having his/her name registered in the book kept by the local authority. See also John R Shepherd, ‘Rethinking Tenancy: explaining spatial and temporal variation in late imperial and Republican China’ (1988) 30(3) *Comparative Studies in Society and History* 403 at 415.

<sup>488</sup>Qing Code expressly states one piece of land can only exist under one owner; for those who have *yeh* (estates) less than *yeh-zhu-quan* they were not recognised as an owner under Qing Code. See Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1* (臺灣私法第一卷) = *Taiwanese Private Law vol 1* (n 482) 141.

<sup>489</sup>*ibid* 141, 142 [translation by this author] Also in Wang, *Taiwan Falushi Gailun* (台灣法律史概論) = *Concise Taiwanese Legal History* (n 189) 84.

<sup>490</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1* (臺灣私法第一卷) = *Taiwanese Private Law vol 1* (n 482) 142.

people's perception of an owner though, with both large-rent and small-rent landlords seen as owners, so the scope of *yeh-zhu* (業主) is larger than the strict definition set forth in the Qing Code where the state authorities had taxation interests. To most people, small-rent landlords are more like owners than large-rent owners most of the time.<sup>491</sup>

The above stated *yeh* (業), *yeh-zhu* (業主) and *yeh-zhu-quan* (業主權) in Taiwanese customary law originated from a multi-tiered landholding structure. This multi-tiered landholding ranged from two to four tiers,<sup>492</sup> with the most commonly seen being a three-tiered landholding. According to Professor Dai, this structure emerged from 1723 onwards.<sup>493</sup> Although this multi-tiered landholding system was not officially recognised by the Qing Code<sup>494</sup> because it caused confusion in taxation and was not favoured by the emperor, the three-tiered landholding system and multiple owners and ownerships, nevertheless, remains strong in Taiwanese customary practice.<sup>495</sup>

The power to control and manage land gradually shifted from large-rent landlords

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<sup>491</sup> A person holding a large-rent was named a large-rent landlord and the right held was known as *da-zu-yeh* (大租業, large-rent estate). A small-rent owner was also viewed as a landlord (but was in fact a tenant) and held the right called *xiao-zu-yeh* (小租業, small-rent estate). Dai Yan-hui (戴炎輝), 'Qing Dai Taiwan Zhi Da Xiao Zu Ye (清代台灣之大小租業)=The Large and Small Rent Landholdings in the Qing Dynasty Taiwan' (1963) 4 Taipei Wen Hsien (台北文獻)=Journal of Local Historical Research of Taipei City 467, 488.

<sup>492</sup> The three-tiered structure was also named *yi-tian-er-zhu* (一田二主 one field with two owners) and the four-tiered structure was named *yi-tian-san-zhu* (一田三主 one field with three owners). See Hsu (n 487) 41-42.

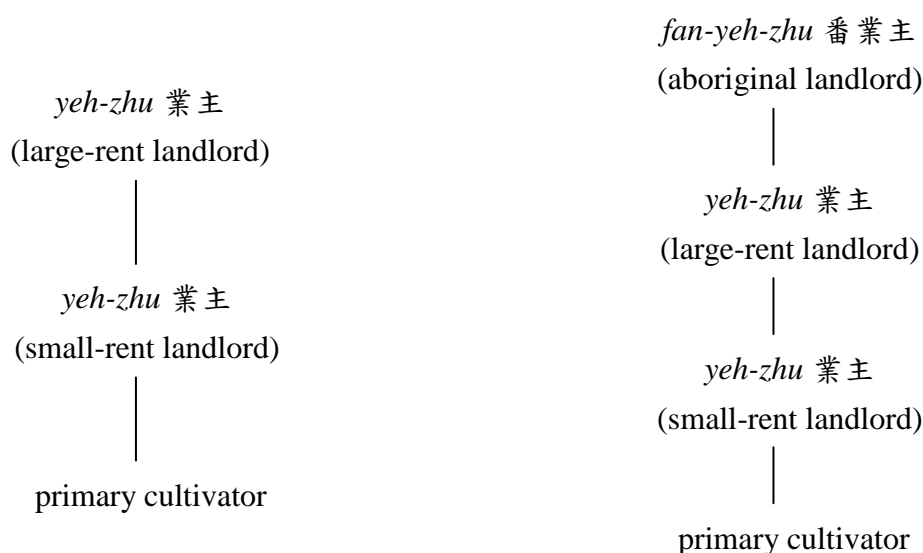
<sup>493</sup> Dai (n 491) 470. But according to Allee, 'a three-tier system of landlord-tenant relations had evolved' by the nineteenth century. See Mark A Allee, *Law and Local Society in Late Imperial China: northern Taiwan in the nineteenth century* (Stanford University Press 1994) 52-53. This author thinks Professor Dai is more correct than Allee because according to an official record in Japanese research report *Taiwan Shiho* (臺灣私法), the power to control and manage the land gradually shifted from the large-rent landlord towards the small-rent tenant from 1800 onwards. The emergence of a three-tier system could not have been later than when the shifting phenomenon started; therefore, this author thinks Allee's assertion that a 'three-tier system emerged in the nineteenth century' is inaccurate.

<sup>494</sup> The Qing Code, also known as *da-qing-lu-li* (大清律例), was applied to western Taiwan for 211 years (1684-1895). During 1624-62, it was the 'Poster for Formosa' (Plakaatboek Formosa) that ruled the southern part of Taiwan, with the multi-tiered system not having evolved yet. The Zhen Shi Empire won the battle against the Dutch company and ruled Taiwan for 21 years (1662-83) afterwards. During this period of time, the troops tilled most of the land themselves, so the two-tiered system emerged. Also in Dai (n 491) 470.

<sup>495</sup> Why the state authorities eventually allowed and even encouraged a split of ownership to occur in Taiwan will be discussed in detail in Section 5.3.

towards small-rent tenants from the 1800 onwards.<sup>496</sup> During this shift, two owners sat on the same parcel of land with their rights to collect rent from actual tillers *xian-geng-diàn-ren* (現耕佃人 primary cultivator). These two owners were a large-rent owner and a small-rent owner. In some areas, when land belonged to an aboriginal community,<sup>497</sup> this three-tiered system even grew to a four-tiered structure, with the aboriginal community having the right to collect rent. As per a large-rent landlord, the aboriginal landlord (番業主 *fan-yeh-zhu*) also held a right to collect rent (番大租 *fan-da-zu*) from his lower tenants. The landholding structures are set out in the following figure for the convenience of further discussion.

Figure 5-1: The doctrine of estate



<sup>496</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482) 161. Also in Dai (n 491) 489,492. According to Professor Dai, the power to control the land began to shift from large-rent landlord towards small-rent landlords because the system allowed them to live off rent without directly managing the estate, so large-rent landlords became absent owners who held a right to collect large-rent. See Ka Chih-ming (柯志明), *Japanese Colonialism in Taiwan: Land Tenure, Development, and Dependency, 1895-1945* (Westview Press 1995) 22. Eventually, this right to collect large-rent was repealed by the Formosa government (Japanese government in Taiwan) on the 20 May, 1904, with Taiwanese tenure becoming a two tiered and three tiered (if there was an aborigine owner) structure. See Yeh Shu-jen (葉淑貞), 'Taiwan Rizhishiqi Zudian Zhidu Zhi Yunxing (臺灣日治時期租佃制度之運行)=The Operation of Taiwan's Land Tenure System During the Japanese Colonial Period' (1995) 2(2) *Taiwan Historical Research* (台灣史研究) 87at 92.

<sup>497</sup> The reason why aborigines were willing to lease their land to the Han tribes was due to the declining amount of over hunted spotted deers. The aborigines needed rental income to sustain their living outside of hunting. See Yang Guo-zhen (楊國楨), *Ming Qing Tudi Qiyue Wenshu Yanjiu* (明清土地契約文書研究)=*A Study on the Land Deeds of Ming and Qing Dynasty* (China Remin University Press 2004) 257.

#### 5.1.4 The extension of the *yeh* concept

This *yeh* concept was not only used for land but also extended to fishing grounds. Penghu County, as an off-shore island, had an exclusive enclosed area for fishing called *ān* (塹). The owner of *ān* (塹) does not ‘own’ the right to use the sea and capital from the resources, but merely has the right to exclude others from using the *ān* (塹). This ‘right to exclude’ and occupy the exclusive fishing area was called *yeh* (業),<sup>498</sup> the same word as *yeh* (業) used for the land. Everyone is free to use and catch fish from the sea, with the owner needing to get permission from the state authorities to acquire *yeh* (業)—a power to manage, over the enclosure *ān* (塹). Anyone wanting to fish within the enclosed *ān* (塹) must pay the owner a certain amount of catch or money. The state authorities tax the owner of *yeh* (*yeh-zhu* 業主) but not the fishermen who use the *ān* (塹).<sup>499</sup> From this extension of *yeh* (業), the substance of *yeh* (業) clearly reveals that *yeh* (業) is merely ‘a right to exclude’ those who have not obtained permission of use. It is not ‘a right to use’ the sea’s resources because everyone is eligible to use them. In contrast to civil law ownership, *yeh* shows a negative, exclusivity characteristic.

#### 5.1.5 The concept of *diàn*(佃)

Just like ‘estate’ and ‘tenure’ sometimes being used interchangeably, *yeh* (業) and *diàn* (佃) are used interchangeably in literature as well. To be more concise, *yeh* (業) normally signified the superiority of holdings, with *diàn* (佃) implying subordination. The use of the term depends upon the position a person is in this hierarchical landholding system. *Diàn* (佃) means that one man is deliberately made inferior to another, either by way of signing a contract with or leasing the land from the owner

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<sup>498</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 3*(臺灣私法第三卷)=*Taiwanese Private Law vol 3* (n 480) 18.

<sup>499</sup> *ibid* 18.

*yeh-zhu* (業主).

The origins of this landlord and tenant structure was three hundred years ago when Taiwan had many parcels of land that remained untilled. Wealthy individuals obtained either land reclamation permits (*k'en-chao* 墾照) from the government or contracts from aborigines to farm the land themselves, or find someone else to farm the land instead. To find someone else to farm the land was more popular than farming the land themselves. The wealthy individuals were normally absent owners. Concerning their good relationships with state authorities, it was easier for them to obtain land reclamation permits from the government.<sup>500</sup> On very few occasions did poor farmers obtain ownership directly from the government. However, if poor farmers occupied the land before the national measurement, state authorities tolerated some occupiers by granting reclamation permission retrospectively.<sup>501</sup>

Late comers had to acquire permission to farm from the first owners who held reclamation permission (if the land was untilled) or to lease the land (if the land was tilled or partially tilled) from the first owners. Late comers made themselves inferior to *yeh-zhu* (業主) by calling themselves *diàn-hu* (佃戶). When *diàn-hu* (佃戶) gradually accumulated their wealth by tilling the land,<sup>502</sup> they further leased their land to even latter comers (primary cultivators) to manage the land. The primary cultivators

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<sup>500</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷)=*Taiwanese Private Law vol 1*(n 482) 160. According to records started from 1683 onwards, the Qing government encouraged people to immigrate to Taiwan to farm the untilled land. The land reclamation procedure was not so ready, so many wealthy mainland individuals required land reclamation permits from the government or contracts from the aborigines to monopolise the right to till the land and in the future they could collect rent from the tenants. Land in the southern part of Taiwan was normally obtained by granted permits, while the land in the northern part was acquired from the hand of aborigines. The land reclamation permits only granted rights on untilled land, but sometimes the wealthy individual applied the permits on the tilled land and forced the poor tiller to give wealthy individuals large rental incomes. See *ibid* 168. See also Shepherd (n 487) 415.

<sup>501</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷)=*Taiwanese Private Law vol 1*(n 482) 93.

<sup>502</sup> *ibid* 161.

were tenants of their overlords *diàn-hu* (佃戶), while *diàn-hu* (佃戶) were tenants of their own overlords *yeh-zhu* (業主). This tenure relationship was called a *yeh-diàn* (業佃) relationship because landlords were, at the same time, other people's tenants. This is why *yeh* (業) and *diàn* (佃) were used interchangeably.

Taiwanese tenure was, however, slightly different from English tenure as we can see when looking into the services provided by a tenant to their overlord. Unlike English tenure where tenants needed to provide various services to their overlords according to their individual abilities (for example, one tenant had to fight, another had to look after a household or to provide arms), services provided by Taiwanese tenants to their overlords were very simple. It was purely monetary—harvest or money, in exchange for the use of land.<sup>503</sup> All tenants were free to leave if they were incapable of paying.<sup>504</sup> Each level was the same: the first owners paid land tax and poll tax to the state authorities; the second owners paid large-rents to the first owners, and primary cultivators paid small-rents to the second owners. Usually, the second owners 'do not personally deliver large-rents to the initial owners themselves, but instead, ask their lower tenants (meaning primary cultivators) to do that for them'.<sup>505</sup> Hence, primary cultivators paid twice for his lease, to the first and second owners respectively.

In this hierarchical system, the second owners benefited the most because they did not pay rent to their overlords, whilst in the meantime collecting rent from primary cultivators. The first owners could not charge the second owners too much because the second owner brought their own tools and supplies (oxen, tools, seeds) to farm the

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<sup>503</sup> If it was rice field, the tenants can choice from harvest to money as rent. If it was not rice field, like vegetable garden or sugarcane farmland, then the rent had to be a fix amount of money according to the classification of farmland. Mainland China did not separate rice field (*tien* 田) and non-rice field (*luan* 園) like Taiwan did. See *ibid* 53,177,179.

<sup>504</sup> *ibid* 169. The tenant can simply ask to leave or give up the right to till the land if he cannot afford the rent, it was called *tui-diàn* (退佃). Also in Dai (n 491) 476.

<sup>505</sup> Allee (n 493) 54.

untilled land,<sup>506</sup> and the value of untilled land was usually low. When the second owners accumulated some wealth after tilling the land for a while, they could lease out the land, wholly or partially, to primary cultivators and become their overlords. The second owners could charge a higher rent because the land was more fertile than before. During the Qing Dynasty Dao Guang (道光) period (1821 -1850), the rents that were charged were two to six times more than the rents the second owners paid to the first owners.<sup>507</sup>

Tenure also happened in house holdings. Before building was completed, a primary cultivator needed to pay an upfront amount of money (*xian-xiao-yin* 現銷銀) to the first owner (*yeh-zhu* 業主) after getting construction permission.<sup>508</sup> This money was normally lower than the market price if the building ground was sold, with the intension of doing so being to show that the building ground was not sold but instead leased to the primary cultivator. When the building structure was finished, the primary cultivator became *cuo-zhu* (戶主 the house owner). As the owner of the house he needed to pay ground rent (*di-ji-zu* 地基租) per annum to the second owner (*diàn-hu* 佃戶).<sup>509</sup> The second owner paid a large-rent to the first owner based on the size of the ground.<sup>510</sup> If the first owner was an aboriginal, the first owner had to pay the aboriginal landlord another large-rent based on the size of the ground.<sup>511</sup>

Tenure usually has a time limitation, no matter whether for house ground or land. The

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<sup>506</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I*(臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482) 177.

<sup>507</sup> Liu Yong-cheng(劉永成), *Zhonggou Zudian Zhidu Shi*(中國租佃制度史)=*The History of Chinese Tenure System* (Wen Jin 文津 1997) 287.

<sup>508</sup> Wang, *Taiwan Falushi Gailun* (台灣法律史概論)=*Concise Taiwanese Legal History* (n 189) 88.

<sup>509</sup> *ibid* 88. Also in Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I*(臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482) 90.

<sup>510</sup> *ibid* 90-91. Also in Wang, *Taiwan Falushi Gailun*(台灣法律史概論)=*Concise Taiwanese Legal History* (n 189) 88.

<sup>511</sup> See Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I*(臺灣私法第一卷)=*Taiwanese Private Law vol 1*(n 482) 91.



terms spanned from one year to perpetual like a spectrum, with the most popular duration being a term between three to six years.<sup>512</sup> Terms above ten years were rare and only happened for waste land.<sup>513</sup> If overlords did not negotiate a fixed term with tenants, they usually had an oral agreement that the overlord had the right to change tenants one year after.<sup>514</sup> This type of tenure was called *xian-nian-pacht-geng* (現年贖耕 one year tenure).<sup>515</sup>

Despite both English tenure and Taiwanese tenure having a time limitation, there are some differences in the details. English tenure separates estates into present and future estates, while Taiwanese tenure does not. As Hayes points out, in its primitive state, tenure was only held for a short term.<sup>516</sup> Afterwards, tenure was granted for life, with the lord 'resuming the land on the death of the tenant, and granting it out anew'.<sup>517</sup> The son of the tenant was then permitted to succeed and thus caused indulgence followed by the extension of the grant—the fee-tail (to the tenant and his issue) then emerged.<sup>518</sup> Finally, the lord accepted the extension of the grant stretch to the tenant and his heirs, with the concept of fee-simple arising.<sup>519</sup> The law 'making out a course of descent, which enlarging by degrees, embraced his relations, lineal and collateral, male and female',<sup>520</sup> led to the duration of English estates being longer and longer, with tenure and ownership evolving hand in hand with the law of succession.

Taiwanese tenure had no such history, so unlike England that classified tenure as

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<sup>512</sup> Wang, *Taiwan Rizhi Shiqi de Falu Gaige* (台灣日治時期的法律改革)=*Legal Reform in Taiwan under Japanese Colonial Rule* (n 227) 322.

<sup>513</sup> *ibid.*

<sup>514</sup> *ibid.*

<sup>515</sup> *ibid.* Also in Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1* (臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482) 315.

<sup>516</sup> William Hayes, *An Introduction to Conveyancing and The New Statutes Concerning Real Property With Precedents and Practical Notes*, vol I (5th edn, Sweet 1840) 7.

<sup>517</sup> *ibid.*

<sup>518</sup> *ibid* 7-8.

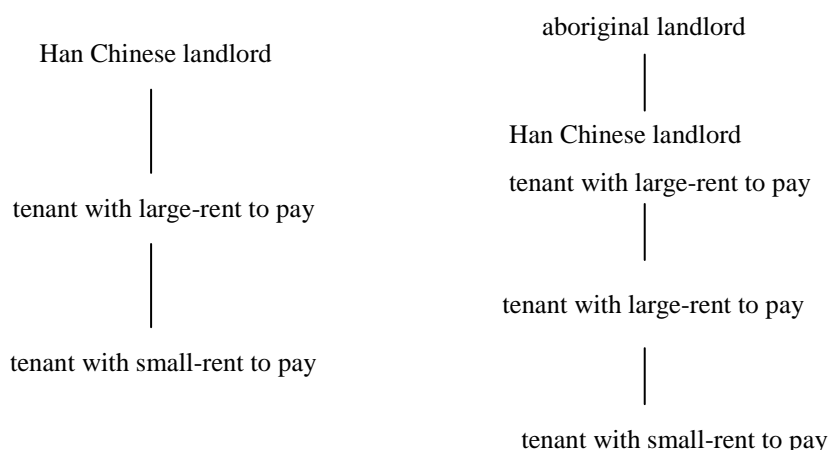
<sup>519</sup> *ibid* 8.

<sup>520</sup> *ibid.*

inheritable (fee simple, fee tail)<sup>521</sup> and non-inheritable (life estate), all types of tenure in Taiwan were inheritable,<sup>522</sup> with no discrimination to lineal or collateral heirs. As Taiwanese tenure was monetary oriented, the tenure relationship lasted until both parties agreed to terminate, with tenants in each level free to leave when they were unable or unwilling to pay the rent.

The structure of Taiwanese tenure (from the first owner's perspective) is presented in the following figures.

Figure 5-2: Tenure in land

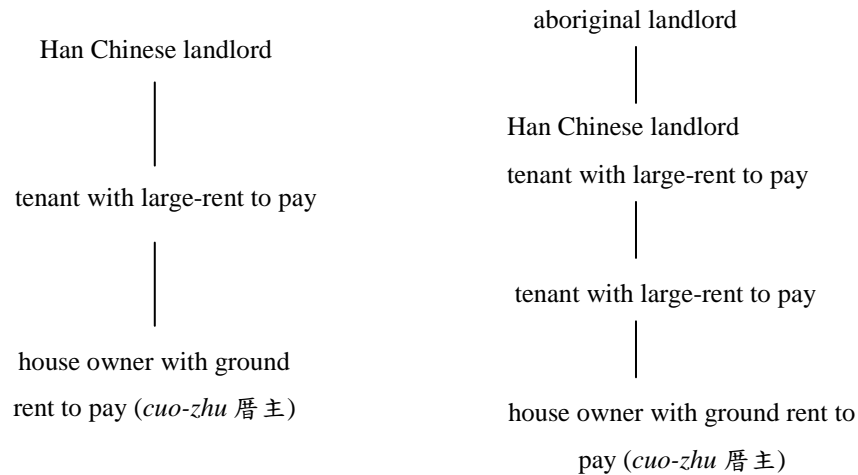


<sup>521</sup> Explained by Hayes, ‘...fee-simple, expressed in legal phraseology by the word *fee*, without more’, means the tenant and his heirs all have the *fee* (interest in land). Fee-tail, on the contrary, is a fee with a tail where only the tenant and his issue can have the *fee*. See *ibid* 8. Also in Simpson, *Land Law and Registration* (n 58) 30. The evolution of a short term tenure to fee simple, as stated in Hayes (n 516) 7-8, is that ‘In its primitive state, the possession was held at pleasure, or for a short term only; afterwards, the tenure was for life, the lord resuming the land on the death of the tenant, and granting it out anew. But at length the son of the tenant was permitted to succeed; an indulgence which was followed by the extension of the grant, first to the tenant and his issue (*i.e.* in fee-tail), and finally to him and his heirs (*i.e.* in fee-simple, expressed in legal phraseology by the word *fee*, without more), the law marking out a course of descent, which enlarging by degrees, embraced his relations, lineal and collateral, male and female’.

<sup>522</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1* (臺灣私法第一卷) = *Taiwanese Private Law vol 1* (n 482)150.

When the primary cultivator built the house on the farmland, the small-rent became ground rent (*di-ji-zu* 地基租):

Figure 5-3: Tenure in house



## 5.2 Conveyance of landholding

The flexibility of the Taiwanese tenure system provided two different kinds of conveyances, with it being important to make a comparison with the English concept of assignment, lease and licence later. One type of conveyance is *gei* (給), which created an estate for the receiver; the closest verb to this analogy in English is to ‘grant’,<sup>523</sup> to ‘vest’,<sup>524</sup> or to ‘assign’ (if made between two tenants).<sup>525</sup> Another type of conveyance is *pacht* (贖, in land) or *shui* (稅, in house or flat); the closest analogy in English being to ‘lease’, but it is not the same as a civil law lease (which belongs to the law of obligations). *Pacht* (贖) and *shui* (稅) were not Chinese, but Taiwanese. *Pacht* (贖) was a Dutch word meaning agricultural lease<sup>526</sup> that came into the Taiwanese language after

<sup>523</sup> For the definition of ‘grant’, see the Terminology section attached to this research.

<sup>524</sup> Simpson provided an example that A, the fee simple owner, made a grant to B for life and then to C in tail. B received a life estate in possession, C took an estate in remainder for he was only entitled to enjoy the land when B died. ‘It should be noted that all these estates were “vested”’. See Simpson, *Land Law and Registration* (n 58) 31.

<sup>525</sup> For a more detailed analysis, see 5.6.1 below.

<sup>526</sup> Lin Zheng-you (林政佑), ‘Rizhishiqi Caichanfa de Quanli Jiangou yu Gaizao: Yi Weidengji de Pacht-gen-quan Weili (日治時期財產法的權利建構與改造：以未登記的贖耕權為例) = The Rights Construction and Reform in Property Law under Japanese Ruling: unregistered pacht-gen right as an

1624 when individuals from the Dutch East India Company leased land from local aborigines. The rents paid under *pacht* (贖) could be money or goods from the harvest. *Shui* (稅) was only used in relation to house or flat leaseholds. Rents under *shui* (稅) were purely monetary.<sup>527</sup>

There is no clear evidence showing that *pacht* (贖) and *shui* (稅) were separated from the concept of licence: tenants could exclude their landlords but licensees could not. No literature indicates Taiwanese customary law making a clear cut distinction between lease and licence, but under Japanese rule, a short term *pacht* was treated as a licence and a long term *pacht* as a lease.<sup>528</sup> It is clear though that *gei* (給) and *pacht* (贖) were widely used for three different types of land: tilled, waste and aboriginal land. In general, when the first owners established tenure relationships with their lower tenants, the grants were made by *gei* (給). The second tenants' grants were usually called *pacht* (贖) because the second tenants normally preserved a portion of land for self-cultivation. In the four-tiered structure (see Figure 5-4(3) below), the second grant was still called *gei*, highlighting that this term was not only used between landlords and tenants but also between tenants and tenants. In contrast to *gei* (給), the word *pacht* (贖) was always used between landlords and tenants. This study will return to *gei* (給) in a further discussion about an analogy of assignment to *gei* (給) in Section 5.6.

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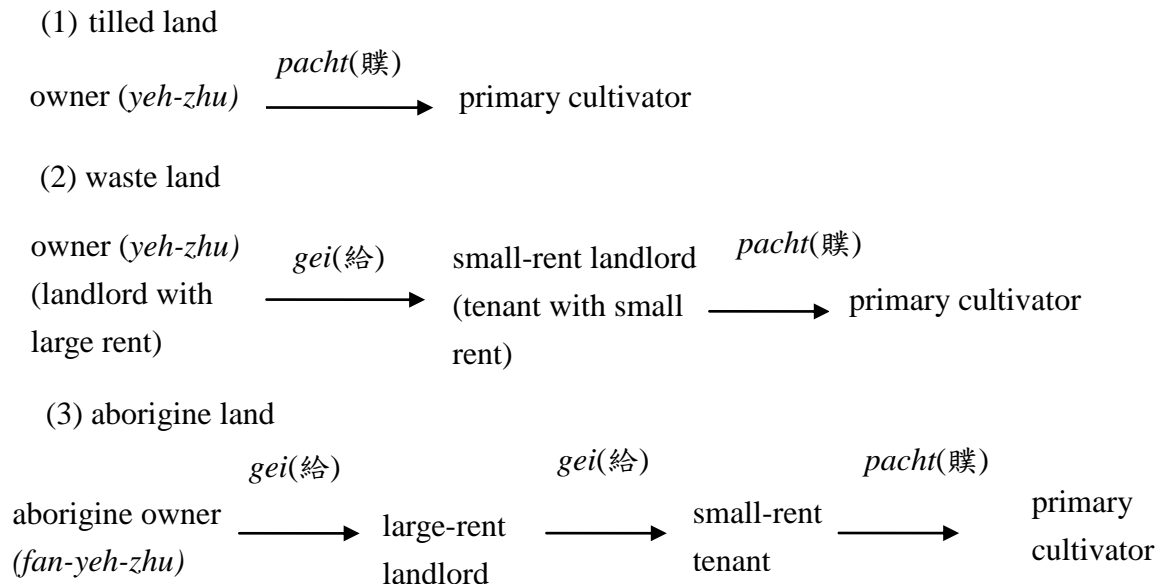
example' (Research Center for Digital Humanities of National Taiwan University, Taipei, 30 July) 70.

<sup>527</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷) = *Taiwanese Private Law vol 1* (n 482) 108-109.

<sup>528</sup> *ibid* 36. According to *Taiwan Shiho* (臺灣私法), if a lease is fixed to a term, such a lease is governed by a personal action; if a lease is a perpetual lease (like *yong-diàn* 永佃, a for ever lease) it is governed by a real action. See *ibid* 309. This perpetual lease was limited to one hundred years after 1900 under the rule of the Japanese government. Ordinance number 2 of 1900 regulated that '*yong-diàn* shall not exceed one hundred years'. See further *ibid* 322.

These two types of conveyances of estate (*yeh* 業) are presented in Figure 5-4 below.

Figure 5-4: Conveyance of estate



Reproduced from Wang Tay-seng 王泰升, *Taiwan Falushi Gailun* 台灣法律史概論 (Angle, 2004)84

No matter whether an estate was granted in the form of *gei* (給) or *pacht* (贖), registration was not essential to a valid transfer. The principle of registration stated in 2.5.1, where ownership is created by registration, did not exist in Taiwanese customary law. Unlike in England, the only way to transfer freehold land was the vendor handing over a piece of turf publicly to the purchaser in the presence of witnesses,<sup>529</sup> Taiwanese conveyance had no such public ceremony. According to local custom, some areas might have had a ceremony where ‘both parties step foot on the targeted field’<sup>530</sup> to signify real rights had been transferred to the receiver, but this symbolic ceremony was not an essential requirement of a valid transfer. There was no specific requirement for the formation of transfer, no matter whether it was an assignment or a lease, with oral and

<sup>529</sup> Hayes (n 516) 24. ‘The ordinary *assurances* were—First, a FEOFFMENT, which passed the immediate freehold, being a visible transfer of the possession or seisin of the feud, by the ceremony (technically called *livery of seisin*) of delivering upon the land, in the presence of witnesses, a detached portion of the soil, or some other symbol; a solemn investiture, which, while the art of writing was rare, supplied the only evidence of the transaction, and which, although written evidence was afterwards required by statute, still continued to be the essence of the conveyance’.

<sup>530</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷) = *Taiwanese Private Law vol 1* (n 482) 127.

written agreements both acceptable.<sup>531</sup> Despite customary law accepting oral agreements as binding contracts,<sup>532</sup> parties preferred to have agreements written down in their family members' presence.<sup>533</sup> The Qing Code did not require one 'to deliver a written contract' as an essential requirement for a valid transfer of ownership<sup>534</sup> because most farmers were illiterate. Besides, the subject that the farmers transferred was an abstract real right called *yeh* (業); it was meaningless to demand that farmers hand over something that was purely conceptual and intangible. It was not until the Japanese Civil Code was enacted in Taiwan that 'delivery as an essential requirement for ownership transfer' was introduced. It needs to be noted though that the delivery requirement was only applied to movable things. The registering and delivery requirement was a later creation designed for immovable and movable things that did not fit into an intangible property transfer. A patent transfer should take reference from *pacht*(贖) or *gei*(給) as stated in this paragraph, rather than civil law doctrines. This study will return to this issue further in Section 5.6 (assignments and licences in a map of Taiwanese tenure).

### 5.3 The similarities and differences between Taiwanese and Chinese tenure

Both Taiwanese and Chinese researchers agree that split ownerships originated from Fujian province,<sup>535</sup> but mainland Chinese and Taiwanese researchers hold contrasting

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<sup>531</sup> According to Yeh Shu-jen's (葉淑貞) research, contracts before 1930 were normally made orally, but after 1936, written contracts became common. Yeh Shu-jen thinks it was because of economic recession in the first half of 1930 that heightened the landlord and tenant's willingness to reduce disputes by written contracts. And another reason why written contracts became popular was due to the encouragement of *yeh-diàn-hui* (業佃會, a mediation group that helped landlords and tenants settle disputes). See Yeh (n 496) 88, 90-91, 93.

<sup>532</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1*(臺灣私法第一卷)=*Taiwanese Private Law vol 1*(n 482) 220.

<sup>533</sup> *ibid* 127, 225.

<sup>534</sup> *ibid* 127.

<sup>535</sup> Yang (n 497) 274-275. Also in Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1*(臺灣私法第一卷)=*Taiwanese Private Law vol 1*(n 482) 160.

opinions about whether Taiwanese tenure is the same as Chinese tenure,<sup>536</sup> or Taiwanese tenure is actually a sui generis type. Taiwanese researchers overall think that Taiwanese tenure is the sui generis type, because in Fujian, China, it was large-rent owners that controlled the actual power over the land, but in Taiwan, it was small-rent owners that controlled the power.<sup>537</sup>

Taiwanese tenure, with a split-ownership at both landlord and tenant levels, was more complicated than Fujian's. Especially, a split-ownership at the landlord level marks a difference between Taiwan and Fujian due to the unique historical development of Taiwan. The first settlers in Taiwan were not from the Chinese Han tribe. The first settlers were Malayo-Polynesian aborigines from Austronesia.<sup>538</sup> Land, before Han Chinese farmers came, was either occupied by acculturated plains aborigines like the Pingpu (平埔) tribe, or by un-aculturated aborigines that lived in the mountains. Due to the lack of sophisticated large scale farming skills, many occupied lands remain untilled during Qing government rule. The state authorities wanted to proffer legal benefits to

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<sup>536</sup> Chinese researchers think that there is no difference between Taiwanese tenure when comparing south-east Chinese tenure because split ownerships happened in both areas, whether at the level of landlords or tenants. Example like Yang Guo-zhen (楊國楨) argues that the Taiwanese tenure system should not be a more special tenure than in south-east China. See Yang (n 497) 279.

<sup>537</sup> Ka Chih-ming (柯志明) points out that Knapp incorrectly applies the titles of land rights from South China, surface rights (*t'ien-mien* 田面) and subsoil rights (*t'ien-ti* 田底) to the land rights held by small-rent landlords and large-rent landlords in Taiwan respectively. In fact, it was the other way round. Since the mid-eighteenth century onwards, large-rent landlords held surface rights while the small-rent landlords held subsoil rights. In China, large-rent owners held the actual controlling power over the land, while in Taiwan, small-rent owners were those who held the actual power. See Ka (n 496) 25. Also in Kanako Miyahata (宮畑加奈子), 'Rizhi Shiqi Taiwan Hanren Shehui Dui 'Yeh' de Jianchi: Yi Shouyicai yu Shiyongcai Guannian de Xiangke Wei Zhuzhou (日治時期台灣漢人社會對『業』的堅持：以收益財與使用財觀念的相剋為主軸)=The Persistence of 'Yeh' by Han Chinese in Taiwan under the Era of Japanese Rule: on the Conflict of Property for Use and Property for Capital' (DPhil thesis, National Taiwan University 2005) 25.

<sup>538</sup> The details of migration route, see Peter Bellwood, 'The Austronesian Dispersal and the Origin of Languages' (1991) 265(1) *Scientific American* 88-93. Also in Li Jen-kuei (李壬奎), 'Taiwan Nandaoyuyan de Fenbu Han Zuqun deqianxi(台灣南島語言的分佈和族群的遷徙)=*The Language Distribution and Migration of the Formosan Natives*' in Chao Feng-fu and Tsai Mei-hui (eds)第一屆台灣語言國際研討會論文集=*Papers from the First International Symposium on Languages in Taiwan* (Crane 1995) 1-16. Pingpu tribe, the tribe with which sixty percent of Taiwanese people has genetic links, is a part of the Austronesian languages family, see Institute of Ethnology, 'Pingpu Zu Lishu de Dajianting: nandaoyu zu (平埔族隸屬的大家庭：南島語族)=The Big Linguistic Family that Pingpu Tribe belongs to: Austronesian languages' (*Academic Sinica*) <<http://www.ianthro.tw/p/46>> accessed 9 October 2012.

Han Chinese farmers in order to attract them to cultivate the untilled land.<sup>539</sup> By granting a reclamation permit assuring *yeh-zhu-quan* (業主權, ownership) to Han Chinese farmers, it attracted many farmers who wanted to have land of their own.

The creation of landlord split ownership was a carefully calculated political choice made by the state authorities of that time. In order to satisfy both sides, state authorities admitted both aborigines (番業主 *fan-yah-zhu*) and Chinese (*yah-zhu* 業主) to have ownership of the same piece of land.<sup>540</sup> This dual recognition was sustained when the land was untilled and located within an aboriginal community's domain. If the land had already been cultivated by the aborigines themselves, the aborigines were the sole owners of the land and Chinese farmers could not claim ownership. This cultivation model was permitted by the emperor himself in 1724 and excluded the 'one owner to one piece of land' restriction set forth in the Qing Code.<sup>541</sup> Henceforward, this split-ownership at the landlord level thrived and marked the difference of tenure in Fujian.

As explained earlier, state authorities had a political reason to make ownership splits. They wanted to control the conflicts between Chinese settlers and aboriginal communities on one hand, whilst on the other hand, maximize revenues from the land. The recognition of aboriginal ownership had a pragmatic concern of the state authorities wanting to levy taxes on those communities. In the past, levying a tax was difficult because land in aboriginal communities was commonly owned. It was difficult to

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<sup>539</sup> Yang (n 497) 258-259.

<sup>540</sup> *ibid.*

<sup>541</sup> The emperor announced an order in 1724: 'Demand local authorities to make an announcement that those untilled lands within deer hunting fields in Taiwan are opened up for cultivation through leases granted by aborigines'. [translation by this author] In Qing Empire, *Qinding Daqing Huidian Shili: Guangxu* (欽定大清會典事例：光緒)=Qing Code (Chunghwa 1991 reprint) book II, roll 166, p1111. The following year, the emperor further demand local authorities to tax untilled land entitled to Han Chinese farmers when the land was cultivated. In a way, the emperor excluded the law set forth in Qing Code that only allows one piece of land to have one owner. In contrast, the emperor permitted one piece of land to have two owners that were entitled to taxation separately.



collect tax from every individual because the land was not entitled to an individual. Recognition of aboriginal ownership introduced a private property notion into these communities. Aborigines had to accept it because their hunting areas were shrinking due to the development of paddies by Chinese farmers.<sup>542</sup> Accepting the private property concept allowed them to live off the steady rents collected from Chinese farmers. Meanwhile, state authorities created another ownership by granting reclamation permits to Chinese farmers. Through the control of granting reclamation permits, the government was able to levy taxes on these farmers.

Ownership was not only split between aborigines and Chinese but also further between Chinese and Chinese. When the power to control the land largely fell into the hands of small-rent owners in the nineteenth century, both aboriginal landlords and Chinese farmers became owners in name, leaving small-rent owners as actual owners. Ownership was further split into three, at the landlord level, whereas Fujian had nothing similar. From this perspective, this study concludes that Taiwanese tenure is a sui generis type.

For the above reason, this research does not suggest that the same result equally applies to China because the Taiwanese landholding system has a structure that has evolved from its own unique history. This research moves on to a comparative study of Taiwanese and English tenure and excludes a further discussion of whether China could use their tenure system to build a similar property structure for patents.

#### **5.4 A comparative study of English and Taiwanese tenure**

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<sup>542</sup> Shih Tien-fu(施添福), 'Qingdai Taiwan 'Fanli Buan Gengzuo' de Yuanyou: yi Zhuqian Diqu Weili(清代台灣『番黎不諳耕作』的緣由：以竹塹地區為例)=The Reason Why 'Aborigines Are Not Good at Farming': a case study of Hsin-chu region' (1990) 69 Bulletin of the Institute of Ethnology, Academia Sinica 67 at 77. Also in Wei (n 228) 30. The historian believes that this phenomenon happened widely at the middle and the northern part of Taiwan. See Chen (n 479) 27.

### 5.4.1 The similarities

From the discussion above in 4.1.2 (the doctrine of estates and seisin) and 5.1.5 (the concept of diàn), this study concludes that the first similarity between English tenure and Taiwanese tenure systems is that the owner did not own the land but merely held it as tenant of the king<sup>543</sup> or of the emperor (in Taiwan). English lawyers detached ownership from the land itself and attached it to an imaginary thing called an estate;<sup>544</sup> ownership in Taiwan was also attached to *yeh* (業), not to a physical thing. Estate and *yeh* (業) were able to be segmented by different durations that allowed ownership to be split over the same piece of land.

The second commonality is that in both English and Taiwanese tenure systems, there was a crown, an overlord, a state authority, or an non-individual unit like a commoner community that controlled the distribution of resources, with the source of the power not primarily vested to the land owner, but from a society, to the crown (or the emperor) and then to the land owner.<sup>545</sup> The owner did not obtain a primary, absolute right to use, but merely a right to exclude.

The third similarity is that the ownership of estate or *yeh* was not naturally perpetual,

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<sup>543</sup> Japanese research report *Taiwan Shiho* (臺灣私法) states that, '[Taiwanese] people think that the ownership of real property belongs to the emperor, and the ownership shall not be private owned by individuals. *Yeh-zhu-quan* (業主權) is the largest right to real property, so it is different from the ownership concept under civil law'. See Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1* (臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482)92.

<sup>544</sup> Simpson, *Land Law and Registration* (n 58) 30. A similar description can be find in Onions and Friedrichsen 683.

<sup>545</sup> It is the same with patentees. In the case of *Harmar v Playne* 1807, Lord Eldon states that the crown on behalf of the public grants patents to the patentees. He says, '...where the crown on behalf of the public grants letters patents, the grantee, entering into a contract with the crown, the benefit of which contract the public are to have'. See *Harmar v Playne* [1807] 1 CPC 257, also in Gubby (n 91) 254. Therefore, we can see the source of power is not primarily vested to the patentee, but from the public, to the crown and then to the patentee.

but had a time limitation. Life estate in English tenure was limited to the tenant's life and leasehold estate limits to a certain term of years. Life estate also existed under Taiwanese tenure but was a special type of tenure. *Gong-lao-zu* (功勞租) was granted by the emperor to a grantee, for his lifetime, upon their achievement to the state authorities. This type of ownership dissolved along with the death of the grantee. A fixed term leasehold could be found in *diàn* (佃)—the usual term ranged from three to six years.<sup>546</sup>

The fourth resemblance is, because the public or the crown (or the emperor) on behalf of the public controlled the source of power to use, everyone was free to use the land. The owners did not enjoy primary, outright ownership, but merely a right to exclude when ownerships were vested. The granting of an estate or *yeh* (業) was not a conveyance of something that was already there—it was not a conveyance of a usage right from the public to the individual, but to separate owners from others.<sup>547</sup> A *yeh* (業) grant was the granting of a right to exclude. English estate was the same. As stated in 4.1.2, English lands were held either commonly by villagers, by an overlord or by the crown with 'the right to keep all others off it'.<sup>548</sup> The landholding systems of England and Taiwan had no significant difference in its legal substance.

#### 5.4.2 The differences

In spite of many similarities between these two tenure systems, there are still some minor differences. To present an accurate comparative study, this study will list these

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<sup>546</sup> Wang, *Taiwan Falushi Gailun* (台灣法律史概論)=*Concise Taiwanese Legal History* (n 189) 88.

<sup>547</sup> The similarity becomes stronger when *yeh* is extended to the sea, as stated in 5.1.4. The owner of enclosed fishery area *ān* (塹) does not 'own' the right to use the sea. Since the sea is open to everyone, the source of the right to use did not originate from a government or emperor.

<sup>548</sup> Pollock and Maitland, *The History of English Law Before the Time of Edward I* (n 300) 232-233. Also in Burn and Cartwright (n 11) 33-34.

differences below. The first difference is that the Taiwanese tenure system did not create *yeh* (業) by separating *yeh* into present and future interest, descendible by lineage or descendible by collateral. Taiwanese *yeh* was all inheritable. An English estate grant, in contrast to Taiwanese *yeh* (業), combines the following two sets of factors: future or present interests, descendible or non-descendible estate, and turns them into four results: future and descendible (fee-simple estate in remainder), present and descendible (fee-simple estate), future and non-descendible (life estate in remainder), and present and non-descendible (life estate). However, under the Taiwanese tenure system, all estates were descendible and there was no special category for future interest. All grants were associated with present interests<sup>549</sup> and descendible to all kinds of heirs. English tenure, on the other hand, had the granting of future interest like a life estate in remainder, or even a limitation on the qualification of a grantee's heir like estates entail.

Secondly, there was no estate in fee tail and estate *pur autre vie* (owner holds an estate during another's lifetime<sup>550</sup>) in the Taiwanese tenure system. The closest estate *pur autre vie* that one could get was *yang-shan-zu* (養贍租), which was rent paid to and held by the owner's elderly relative in his/her lifetime.<sup>551</sup> However, *yang-shan-zu* (養贍租) is slightly different from an estate *pur autre vie* because an estate *pur autre vie* is an estate that an owner holds for the life of another person, instead of being their own. An estate held under *yang-shan-zu* (養贍租) was an estate held by a clan. The rent that a clan collected from the lease would pay for the living expenses of their elderly

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<sup>549</sup> Yeh Shu-jen (葉淑貞) summarised in the 1930s that four popular types of estate were granted by the landlord according to different lengths of time: 1) ten years or twenty years beyond if the land is uncultivated, 2) one year and automatically renew itself until the landlord terminates the tenancy (some called them yearly periodic tenancies), if the land or non-rice field is cultivated, 3) three to five years (this type was the most common one), and 4) an unlimited term with an implied renewal, unless the landlord expressly manifested that he/she wanted to take his/her grant back. A fix-term grant was much more popular than an implied, unfix term grant. These four types of grant were targeted on present interests in land, with no future interest grant found in the Taiwanese tenure system as it is in the English tenure system. See Yeh (n 496) 105.

<sup>550</sup> Burn and Cartwright (n 11) 54.

<sup>551</sup> See Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1* (臺灣私法第一卷) = *Taiwanese Private Law vol 1* (n 482) 308.

relatives, since there were always elderly relatives needing to be supported in a clan, so *yang-shan-zu* (養贍租) was not always fixed to the lifetime of one specific individual as an estate *pur autre vie*.

Thirdly, villain tenure did not exist in the Taiwanese tenure system. In some areas of China, like Anhui (安徽) and Jiangsu (江蘇) provinces during the Ming and Qing dynasties (Ming: 1368-1644, Qing: 1644-1911), villain tenants provided servile services to their overlord unwillingly because it was a descending hierarchy of obligations. If villain tenants tried to escape, the landlord had the right to punish them according to vassal law in the Qing Code.<sup>552</sup>

Villain tenure did not exist in Taiwan as, in contrast to mainland China, land on the island was comparatively newly-acquired by Chinese owners. The land in Taiwan was not concentrated on one wealthy individual or family's hand, on the contrary, Han Chinese landlords had to share ownership with the first comers—the aborigines. In Taiwan, overlords and tenants were parties to a business contract, not members of different classes based on feudal subordination.<sup>553</sup> Another reason why villain tenants did not exist in Taiwanese society is attributed to the supply and demand for land and labour in Taiwan being different from Anhui and Jiangsu provinces. Han Chinese tenants had to risk their lives to cross the dangerous Formosa Strait (also now known as the Taiwan Strait) and it was impossible for them to bring their wives and children, with only three out of ten successfully reaching Taiwan.<sup>554</sup> It was a society with land supply

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<sup>552</sup> Liu (n 507) 315.

<sup>553</sup> R H Tawney, *Land and Labour in China* (3rd edn, George Allen & Unwin 1964) 63. Tawney pointed out that tenure in China 'possesses no landed aristocracy, no dominant class of *junkers* or squires...not afflicted by the manorial estates worked by *corvees*'. However, what Tawney says is not completely true because there were *corvees* in some areas of China. Landed aristocracy and *corvees* remain in existence in Anhui, Jiangsu, Kwangtung, Zhejiang, Jiangxi, Hunan and Hubei provinces even until the Ming and Qing dynasty. See Liu (n 507) 217-222. This author thinks Tawney's description that 'landlord and tenant are parties to a business contract' is more like Taiwanese society, rather than Chinese society.

<sup>554</sup> See Sim Kiantek(沈建德), *Taiwan Xie Tong*(台灣血統)=*Taiwanese Descent* (Qian Wei 前衛 2003)

larger than demand; therefore, there were no social conditions allowing a Han Chinese overlord to abuse tenants in short supply.

Fourthly, unlike the manor system in England where the central government required soldiers and money from the manor and the manor supplied a fully equipped fighting force in exchange for immunity from legal and administrative control of the government,<sup>555</sup> tenure in Taiwan was not military orientated. Rent provision was not an exchange for immunity from the control of central government but more of a reward reflecting the overlord's previous investment in the land. Although this military orientated rent could be found in some mountainous areas where they had guardpost rent,<sup>556</sup> settlers needed to pay such a rent to the armed guards who would fend off attacks from unacculturated aborigines (*sheng-fan* 生番), even though this was not commonly seen. Despite settlers occasionally departing themselves from the control of central government,<sup>557</sup> it was a regional phenomena but not a national practice like the manor system deployed in England.

### 5.4.3 Why the similarities matter

Why are the similarities stated in 5.4.1 important to a property model for patents?

Firstly, franchises were assimilated in land law by applying the doctrine of seisin and doctrine of estates from the English tenure system.<sup>558</sup> If the similarity is proven, it

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<sup>555</sup> Burn and Cartwright (n 11) 32.

<sup>556</sup> For more detailed information about guardpost rent, see Allee (n 493) 61.

<sup>557</sup> 'The guardpost head was responsible for collecting the guardpost rent and, in the case of government guardposts, receiving the disbursement of government subsidies. When the remote locations of guardpost authorities was added to this consideration, it is unsurprising that in some instances the guardpost authorities came to assume a de facto governmental role in enforcing law and order'. See *ibid* 62-63.

<sup>558</sup> See Lupton (n 253) 51. Lupton presents a profound analysis of the history of franchises being granted as fee simple, in association with the doctrine of seisin and doctrine of estates, due to the rules of succession established by the statute *Quia Emptores* 1290. 'A partial solution to the problem was to

could be used to build a new property model for patents based on Taiwanese tenure system. Secondly, customary practice is a source of law. If judges cannot find a legal basis for a civil case in statutory laws, customary practice is their second choice. Earlier, Chapter 2 proved that the law of things in Taiwanese Civil Code does not work for patents, thus this void can only be filled by customary law. Thirdly, if it is proven that Taiwanese tenure is similar to English tenure, it will show Taiwanese people that it is easier to absorb the English property model rather than others that are dissimilar.

The proving of similarities also saves a lot of effort debating whether transplanting foreign jurisprudence is right and genuinely good for local communities because the similarities explain themselves. It is a commonality in both societies and thus it is possible to use Taiwanese tenure system to build a property model for patents.

## **5.5 A property model for patents based on Taiwanese tenure**

### **5.5.1 Prefatory**

Based on the similarities that both societies have, the following further discusses the possibility of using the Taiwanese tenure system to build a property model for patents. Earlier in 4.3.1, this research compared Taiwanese civil law and English common law, with two conclusions reached at the end of that section. In order to successfully build a property model for patents, (1) ownership over such a property has to be limited by duration and be able to be segmented, and (2) the law vests only a ‘right to exclude’ to the owner(s) with everyone free to use that property in principle.

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develop the idea that some franchises become “annexed” and thereby “appendant” or “appurtenant” to land, with the result that such franchises would pass with alienation of the land, to the extent that the land itself was alienable. The alienability of a tenant’s estate in fee simple in land has been established with qualifications by the statute *Quia Emptores* 1290.’ The primary source that Lupton cites is the statute reproduced in Harry Rothwell, *English Historical Documents, 1189-1327* (Eyre and Spottiswoode 1975).

The first and second conclusions can be extended to another commonality: a concept of ownership under this exclusionary structure must not be absolute and unitary. These three basic conclusions indicate that the ownerships that owners hold are not primary, absolute, outright ownerships and that they themselves are the source of law, and there must be overlords, commoners communities or a crown, emperor or state authority on behalf of the society that controls distribution.<sup>559</sup> The same rules reflect on patents because patentees do not obtain a primary, outright and perpetual ownership over their patents. It must be attributed to a paramount or theoretical human community of commoners that control the distribution of human intelligence where all resources are inherently commonly owned. State authorities, the crown or emperor, on behalf of a society, grant patents to patentees.

Concerning these commonalities above, this research proposes six points to help rebuild a property model based on the Taiwanese tenure system, other than a civil law model, as *seriatim*:

- a. The law of *yeh* (業) being more feasible than the law of things (see 5.5.2 below).
- b. The *yeh-zhu-quan* (業主權) concept is superior to Taiwanese civil law ownership *suo-you-quan* (所有權) (see 5.5.3).
- c. The principle of registration shall not be adopted in the patent registration (see 5.5.4)
- d. Patent ‘assignment’ should not be translated into *rang-yu* (讓與) to prevent any confusion with the existing usage of outright ownership alienation for physical things (see 5.5.5).

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<sup>559</sup> See *Harmar* (n 545). Lord Eldon says the crown ‘on behalf of the public’ grants patents to the patentees.



- e. 'Patent assignment' shall be translated as '*zhuan-li-zhuan-rang*' (專利轉讓) rather than the civil law term '*zhuan-li-rang-yu*' (專利讓與)(see 5.6.1).
- f. A licence is similar to the concept of *pacht*, thus licences can be envisaged as personal obligations made by grantors and grantees (see 5.6.4 and 5.6.5).

### 5.5.2 The law of '*yeh*' instead of the law of 'things'

Firstly, the segmentation of ownership by different duration is crucial for justifying patents as property because a patentee does not hold a patent perpetually but for a time limitation. It was associated with the property model built on English tenure that segmented ownerships by different durations: tenant in fee simple, tenant for life and leaseholder with a fixed term. As Burn states, English tenure is 'one slice of the perpetual time, one slice of the entire ownership'.<sup>560</sup> If the same or similar structure can be found in Taiwanese tenure, then it is possible to explain a patentee's ownership based on Taiwanese tenure regardless of the restricted definition in the law of things in the Taiwanese Civil Code.

As stated earlier, Taiwanese tenure has a time limitation. Except for the limitation on a tenant's heir like 'tenant in tail' and a granting of future interest like 'a life estate in remainder' not found in Taiwanese tenure, the other types of tenure have equivalencies in the Taiwanese tenure system. An aboriginal landlord (*fan-yah-zhu* 番業主) and Han Chinese landlord (*yah-zhu* 業主) could be equivalent to a fee simple owner<sup>561</sup> because they obtained a perpetual, descendible right to manage the land from the emperor.

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<sup>560</sup> Burn and Cartwright (n 11) 56.

<sup>561</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1* (臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482)175. The power to control and manage land gradually shifted from the large-rent landlord towards the small-rent tenant from 1800 onwards, as mentioned at 5.1.1, therefore the large-rent owner gradually lost the position as a tenant in fee simple, but merely held the right to the rent. See *ibid* 176-177, 183.

Absentee landlords could also be found in both systems: English landowners held Irish estates,<sup>562</sup> whereas wealthy Han Chinese landlords held Taiwanese estates. Slightly different from English tenure where power had always been controlled by the manor, in Taiwanese tenure, the lower tenants' statuses sometime preceded the aboriginal landlords and Han Chinese landlords' social statuses.

Tenure for life can be found in the Taiwanese tenure system as well but it only existed between the emperor and his grantee, thus was slightly different from English tenure where a fee simple owner rather than an emperor would grant a life estate to his tenant. Life estate in Taiwan was basically a grant from the emperor to a grantee that made a significant contribution to state authorities. This type of tenure was called *gong-lao-zu* (功勞租) and the estate that the grantee held was limited to his/her lifetime. This type of estate was not descendible to an heir.

A tenant in leasehold for a fixed term mirrors in the leasehold, between a primary cultivator and a small-rent tenant. Like the English doctrine of estate recognising leasehold for a fixed number of years as the smallest proprietary interest,<sup>563</sup> registered leasehold in Taiwan after 1905 was regarded as proprietary as well.<sup>564</sup> The longer that the duration of this leasehold went on for, the more proprietary interest it had.<sup>565</sup>

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<sup>562</sup> 'This, more than anything, was perhaps the problem underlying absentee landlords, most notably in Ireland. An English landowner's Irish estates were, all too often, merely a source of rental income'. See Tim Murphy, Simon Roberts and Tatiana Flessas, *Understanding Property Law* (4th edn, Sweet & Maxwell 2004) 142.

<sup>563</sup> Burn and Cartwright (n 11) 57, 'We will now conclude with a short description of the leasehold interest or term of years which, quantitatively considered, is the smallest proprietary interest recognised by English law'.

<sup>564</sup> According to Article 5 of the 1905 Registration Act, the rights arising from *pacht* relation shall be registered like *yong-xiao-zuo-quan* (永小作權) long term leasehold of cultivating another individual's land by paying a rental). See Lin (n 526) 71-72.

<sup>565</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho I* (臺灣私法第一卷) = *Taiwanese Private Law vol 1* (n 482) 327. 'A tenant in a relationship of *yong-dian* (永佃) normally invests capital and labour to improve the fertility of land, with planting woods, fruit trees, building farm houses, water channels and dikes and thus obtain the right to manage the land. This right is not influenced by the change of *yeh-zu* (業主 initial owner), the right to manage in this tenure is assignable and leasable, and thus it is a proprietary right to the land rather than a personal right to the *yeh-zu*'. [translation by this

Two types of English tenure can find reflections in Taiwanese tenure: a fee simple owner is *yeh-zhu* (業主), and a leasehold for a fixed number of years found in the lease between primary cultivators and small-rent tenants. Like English tenure, Taiwanese tenure splits ownerships by different durations to various individuals, thus equipping the first requirement of two characteristics mentioned above. The law of *yeh* (業) is a more appropriate property law model for patents than the law of things in civil law.

### 5.5.3 *Yeh-zhu-quan* (業主權) instead of Taiwanese civil law ownership *suo-you-quan* (所有權)

Civil law ownership under the law of things is fundamentally different from ownership under the law of *yeh* (業). Just like a metaphor illustrated by John Henry Merryman highlights, ‘Romanic ownership can be thought of as a box, with the word “ownership” written on it’.<sup>566</sup> Under this civil law structure, whoever owns the box is the owner. The owner can open the box and remove one or more real rights and transfer them to others. As long as the owner keeps the box, the owner still maintains ownership, even if the box is empty. It is different under the common law system though, because there is no box concept at all. Under the common law structure, there are various sets of legal interests that constitute a bundle of rights, and when the owner conveys one or more of them, a part of his bundle is gone.<sup>567</sup>

The common law bundle of rights theory originated from a historical fact that there was

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author] In *ibid* 327. The duration of *yong-dian* (永佃) ranges from ten years up to perpetual, but later limited to a hundred years after 1900. See *ibid* 322.

<sup>566</sup> John Henry Merryman, ‘Ownership and Estate (Variations on a Theme by Lawson)’ (1974) 48 *Tulane Law Review* 916, 927.

<sup>567</sup> *ibid* 927.

always a king controlling true ownership of real property,<sup>568</sup> so the citizens never own a ‘box’. The origin was that England used to have cooperative farming<sup>569</sup> where ‘all villagers with land in the common fields had grazing rights over the fallow, pasturing rights over the commons and a share in the available meadowland’.<sup>570</sup> It has always been a society with the land either community commonly-owned, owned by an overlord, or by the crown whom has the power to control the distribution of resources so that the owner does not obtain primary, outright ownership as a civil law owner does.<sup>571</sup> The exclusivity of land, just as Henry Smith describes, is a more economical way because ‘I need only know that it is not mine and to keep off’.<sup>572</sup> English tenure history tells us

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<sup>568</sup> All land was considered ‘held’ either directly or indirectly by the King after the Conquest in 1066. Simpson, *Land Law and Registration* 27. Also in John Rhys Morris, *Principles of Landlord & Tenant Law* (2nd edn, Cavendish 1999) 7 ‘...land in England and Wales is, strictly speaking, not owned, but held from the Crown’.

<sup>569</sup> Ben Baack, ‘The Development of Exclusive Property Rights to Land in England: an exploratory essay’ (1979) 22(1) *Economy and History* 63, 65. Ben provides a good explanation about the relation of exclusivity in this three field system. He states, ‘Here under the three field system each field was subjected to a fall planting, a spring planting, and then placed in fallow. As a general rule common grazing rights were only available on the fallow and the remaining two cultivated fields following the harvest until spring planting. Moreover the rights to the meadow land reverted to common for the winter grazing of livestock following the last crop of hay for the season. Subject to the results obtained by a group decision making process, usually at the parish level, farmers adhered to a host of regulations concerning what crops would be grown, when and where to plant them, and when to harvest. In sum, upon inspection of all of the restrictions and regulations making up the English land tenure system, it turns out that the exclusivity of rights to common land varied from those to excluded land only by a matter of degree’.

<sup>570</sup> Dr. Thirsk argues there is a difference between common-fields and open-fields. She argues that the term ‘common-fields’ should only properly be used when there is clear proof of communal control. However, Titow argues that it is inconceivable that a peasant in the open-fields system grows a spring crop on one of his strips in the middle of a furlong under a winter crop and ploughs it without the cooperation of his neighbours because common control is everywhere in the open-fields system. See J Z Titow, *English Rural Society 1200-1350* (George Allen & Unwin 1969) 20-21.

<sup>571</sup> As Ben Baack suggests, the history of English exclusive property rights to land merely varied by degree from Tudor times until now. Even in Tudor times, common rights ‘were in essence partially exclusive rights’. See Baack (n 569) 65. ‘...what has been traditionally termed “common rights” were in essence partially exclusive rights. Entry was restricted. Rights of common to a given area were claimed by a limited number of people and not the general public. Furthermore the exclusivity of these rights varies by degree. In the pastoral areas of England common rights to land were generally in effect the year round. In the arable region on the other hand common rights to the cultivated fields were restricted to certain portion of the year’. *ibid* 65.

<sup>572</sup> Henry E Smith, ‘Community and Custom in Property’ (2009) 10 *Theoretical Inquiries in Law* 5 at 17. Henry Smith raises a good point that using an exclusion strategy reduces the information cost more than an inclusion strategy. This author thinks Henry Smith’s inclusion strategy implies the civil law of things where the source of power to own the thing is important. Civil law of things concerns who is the true owner, where the legitimate power from and what right you own, etc., and these sort of ‘internal governance rules’ consume a great deal of communication costs. Exclusionary rules on the contrary, consider only whether you have more rights than others, then this thing belongs to you. He states, ‘We can hypothesize that in most cases it is easier to communicate an exception to the right to exclude rather than a norm of proper use, since the latter typically depends on contextual information. Using exceptions to the right to exclude to solve problems across community boundaries is easier than trying to

that if the common-owned element can be found in the Taiwanese tenure system there will be little difficulty concluding that Taiwanese society is equipped with the same or similar institutions to the English one. This would make ownership building based on the Taiwanese concept of ownership *yeh-zhu-quan* (業主權) easier.

Prior to the modern Taiwanese state, imperial Japan intervened systematically in the lives of Taiwan's native societies along with importing modern civil law outright ownership that further shaped Taiwanese people's self-perceptions, with Taiwan filled with communities applying a commonly-owned base, a hunter gatherer economy where aboriginal commoners relied on deers and wild boar hunting, fowling and small scale farming for living.<sup>573</sup> Before the Han Chinese farmers largely arrived in the eighteenth century, which brought in the private property notion, these plains aborigines worked as part of a joint enterprise for farming and lived in nucleated villages.<sup>574</sup> The land was divided into three rings in the shape of concentric circles: the nearest ring was village farm land, the next outlying ring was the public common hunting and gathering area and the farthest ring was an open field that the village was forced to share with other tribes and neighbouring villages.<sup>575</sup> The inner ward was the premises with a farming area. They burned down the trees and weeds around their premises and used hoes and digging sticks to grow millet, rice, taro and yams.<sup>576</sup> 'A larger area of shifting fields rotated

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communicate rules of proper use'. See *ibid* 22.

<sup>573</sup> For more detailed about the deformation of the tribal common property right to private property right, see Lin Chiung-hua (林瓊華), 'Taiwan Yuanzhu-min Tudichanquan Zhi Yanbian (臺灣原住民土地產權之演變 1624-1945)=The Change of Property Right on the Land of Taiwanese Aborigines 1624-1945' (DPhil, Soochow University 1996).

<sup>574</sup> John Robert Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800* (Stanford University Press 1993) 241.

<sup>575</sup> *ibid* 241. Also in Tsai Jui-lung (蔡瑞龍), 'Qingdai Taiwan Pingpuzu Diquan de Bianqian: yi tianliao diqu weili(清代台灣平埔族地權的變遷：以田寮地區為例)=Changes in the Land Rights of Pingpu People in Ching Dynasty Taiwan: a case study in Tianliao area' (MPhil thesis, National University of Tainan 2008) 10.

<sup>576</sup> Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800* (n 574) 29. There were no primitive large mammals on this island. Draft oxen were imported by Dutch traders from Java, Indonesia. It was recorded on 6 December, 1640 in De Dagregisters van het Kasteel Zeelandia (Diary of City Batavia) that over 1200 cattle were imported into Taiwan for sugar cane farming. Draft oxen were rare and precious power on the land that not every farmer could afford. See Chen Rou-jin(陳柔縉),

around the village according to a fallowing cycle. At the beginning of a new rotation, the men of the village would mark off a large sector and do the preliminary clearing. Then each kin group/domestic would delineate, physically and ritually, a smaller plot within the cleared sector, do more intensive preparation of the land, and plant crops'.<sup>577</sup> The tribes were small<sup>578</sup> and the land available for each was unlimited. This slash-and-burn cultivation allowed them to break fresh ground yearly and took the maximum advantage of stored-up fertility. John Robert Shepherd clearly points this out, 'Households in villages practicing shifting cultivation generally gained exclusive rights to the crops they planted and the fields they cleared only as long as they tilled them; more permanent allocations of land rights were unnecessary so long as uncleared land remained in plentiful supply'.<sup>579</sup> Since there was no need to acquire continuous occupation of the same parcel of farmland, the concept of permanent ownership and inheritance did not apply in Taiwanese society during this period.<sup>580</sup>

The notion of private property was first brought into this aboriginal Taiwan when Han Chinese farmers largely emigrated from China in the 1730s, with the enclosure idea emerging. The aborigines' native tenure system recognised temporary ownership claims established by the investment of labour reclaiming land,<sup>581</sup> provided that the tiller was also a member of the village, attracted Han Chinese farmers to obtain land ownership by marrying aboriginal village women. Despite land not deemed strictly to be the personal property of the owner but rather the heritage of the village community in China,<sup>582</sup>

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*Taiwan Xifang Wenming Chutiyan* (台灣西方文明初體驗)=*Taiwan's First Contact with Western Civilization* (Mai-tian 麥田 2005) 37.

<sup>577</sup> Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800* (n 574) 241.

<sup>578</sup> In 1650, the Dutch village census reported that fewer than 50,000 aborigines in the plains area were under Dutch control, so population density was low. See *ibid* 29.

<sup>579</sup> *ibid* 33.

<sup>580</sup> *ibid* 241.

<sup>581</sup> *ibid* 242.

<sup>582</sup> According to Edward Kroker, the exclusion of the neighbour was not complete or absolute in China. The land is 'not deemed strictly to be the personal property of the owner or of his family but rather the heritage of the village'. Kroker illustrates many examples where property rights suffer many restrictions because fields belonged to a village community. Therefore, the owner's power of domination over his

farmers arriving in Taiwan were all bachelors who had already disconnected their bonds and who were inclined towards privately owned rather than commonly owned land.<sup>583</sup> Arguments about ownership increased when the Han Chinese tillers largely turned the woods into paddies, with the shrinking of deer fields directly endangering the survival of a tribal community.<sup>584</sup>

This tension reached the governors who were under pressure to collect taxes from both sides. The shrinking deer fields reduced government income from taxing the deer fields. Aboriginal rotation farming with its unclear boundaries was not able to offset the shortage of taxation from deer fields. On the other hand, although Han Chinese farmer's permanent cultivation with a clear enclosure boundary made taxation easier, Han Chinese farmers were not title holders of the land. The state authorities struggled to manage Taiwan at the lowest administrative cost, whilst at the same time considering getting the best revenues out of land, they decided to admit both plains aborigines and Han Chinese farmers to have ownership of land. Ownership was then split at the landlord level. As most of these Han Chinese farmers were from Fukien, split ownerships at the tenant level was widely practiced by small-rent tenants. It thus created an extraordinarily complex system of split ownerships at the landlord level (aboriginal landlords and large-rent landlords) and also at the tenant level (large-rent landlords and small-rent landlords, but in fact they were all tenants of aboriginal landlords and state

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fields could therefore 'hardly be called limitless or absolute', but limited to the discretion of the village community. See Edward Kroker, 'The Concept of Property in Chinese Customary Law' in R Ampalavanar Brown (ed), *Chinese Business Enterprise*, vol IV (Routledge 1996) 375, 377, 381, 383-384. China's rural areas had a common-owned property system as well. Substantiated by Professor Dai, virtually every village had a common-owned paddy, pond, road, passage or temple. Like a Taiwanese tribal village, which has a community owned farmland and hunting area, a Chinese common-owned paddy, pond and passage 'was a common-owned property of the villagers; every member in this village has an equal right to this property. Residents from other villages do not have this right. Every member in this village can collect the produce or game from this property, and the produce and game that (s)he collects becomes his/her exclusive property'. See Dai Yan-hui(戴炎輝), *Ch'ingdai Taiwan Zhi Xiangzhi* (清代台灣之鄉治)=*The Governance of rural area in Taiwan during Ch'ing Dynasty* (5th edn, Linking Books 1998) 154-155.

<sup>583</sup> Wei (n 228) 28-30.

<sup>584</sup> Chen (n 479) 22.

authorities). No matter whether one views this system from the landlord or tenant perspective, except for the lowest level of primary cultivator who tilled other's land, split ownerships *yeh-zhu-quan* (業主權) penetrated throughout all levels and reshaped the common ownership in this native society henceforward.<sup>585</sup>

From the above discussion, it is apparent that Taiwanese society had a similar characteristic to English society where the land was co-owned by a society, with the owner being vested with an exclusivity concept—*yah*(業), to manage the land by evicting unwelcome people out of his territory. The holding of *yah* (業) had a time limitation, just like the holding of English estate, with the owner not obtaining primary, absolute and outright ownership of the land. *Yeh-zhu-quan* (業主權), as a relative exclusionary concept, played a significant role in harmonising interests among aborigines, large-rent owners and small-rent owners. *Yeh-zhu-quan* (業主權) enabled aborigines to collect ground rent from Han Chinese farmers which offset the aborigines' lost deer fields, while at the same time, Han Chinese's *yeh-zhu-quan* (業主權) enabled the state authorities to collect taxes from Han Chinese farmers. This customary-law split

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<sup>585</sup> Regarding the topic why plains aborigines lost their land to Han Chinese farmers, local researchers provide different explanations than western researchers. Shepherd, who focused on aborigines in the northern region of Taiwan, suggests that state authorities used policy making to reshape the tribal relationships between plains aborigines and Han Chinese farmers in order to lower the cost of management and levy more taxes. The plains aborigines were beneficiaries rather than victims, thus disagreeing with Shih Tien-fu's 'displacement scenario' and the 'neglect hypothesis'. See Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-1800* (n 574) 2-3, 8, 12-14, 239-243, 256, 295. Shih Tien-fu (施添福), however, reached his conclusion based on different regional research than Shepherd. Shih deployed his research in the Hsin-chu (新竹) region where he concluded that in this area, aborigines were deprived by heavy levies and villain services that forced them to abandon their land and migrate to other regions. They were the victims of ruling policies. See Shih (n 542) 67-92. As Shih and Shepherd looked into different areas, it is unfair to judge whether Shepherd was right and Shih was wrong. Ka Chih-ming (柯志明) combined these two opinions and took a different approach. He suggests that Qing authorities deployed the plains aborigines between Han Chinese farmers and uncultivated mountain aborigines, was a sophisticated arrangement by the state authorities. Plains aborigines played a role as a buffer between mountain aborigines and Han Chinese farmers, with recognition of aborigines' ownership of the land allowing them to charge ground rents from Han Chinese farmers that was a reward from the authorities for reducing the cost of military deployment for solving conflicts. See Ka Chih-ming 柯志明, *Fantoujia: Qingdai Taiwan Zuqun Zhengzhi yu Shufan Diqun* (番頭家：清代臺灣族群政治與熟番地權)=*The Aboriginal Landlord: ethnic politics and aboriginal land rights in Qing Taiwan* (Institute of Sociology, Academia Sinica 2001) 25, 61. Neither were plains aborigines simple beneficiaries like Shepherd says, nor simply as victims like Shih says, but were beneficiaries and at the same time victims in this tribal politics.



ownership model was perfect for state authorities in frontier management, with no one actually owning the land in an absolute sense but everyone was obligated to pay tax.<sup>586</sup> *Yeh-zhu-quan* (業主權) did not exclude the legal inheritance that some properties in the village were community owned. An example like a village owned pond<sup>587</sup> remains commonly-owned. The Taiwanese tenure system was an institution with exclusionary rules. These all show the compatibility of the English tenure and Taiwanese tenure systems, with relative ownership *yeh-zhu-quan* (業主權) no doubt being more suitable for patents than the outright, absolute ownership *suo-you-quan* (所有權) in civil law.

#### 5.5.4 Patent registration without the principle of registration

Registration serves a significant function in public and private, in both land and patent registration. The public function relates to the welfare of the state and community as a whole, whilst the private function relates to the advantage of the individual citizen, including establishing proof of ownership. It solves the problem of who is the creator, especially in patent cases, and also the boundaries of the property that to be determined.<sup>588</sup> The idea of registering for a land title came of age with the Royal Commission on Registration of Title in 1857,<sup>589</sup> which initially outlined the problems of the current title deeds system and proposed a central registry in London. The 1857 Report recommended three fundamental principles of registration: 1) showing a

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<sup>586</sup> Shepherd pointed out that this policy used by the Qing authorities was associated with control and revenues, and that the solutions adopted by the locals were not distinct from American colonial experience. Shepherd, *Statecraft and Political Economy on the Taiwan Frontier, 1600-180* (n 574) 398.

<sup>587</sup> Dai, *Ch'ingdai Taiwan Zhi Xiangzhi*(清代台灣之鄉治)=*The Governance of rural area in Taiwan during Ch'ing Dynasty* (n 582) 155.

<sup>588</sup> Brad Sherman and Lionel Bently, *The Making of Modern Intellectual Property Law: the British Experience, 1760-1911* (Cambridge University Press 1999) 185.

<sup>589</sup> Simpson, *Land Law and Registration* (n 58) 42. '...when a bill for the registration of assurances (i.e. deeds) was submitted to the House of Commons in 1853, the Select Committee, to which it was referred, recommended instead "the immediate Appointment of a Commission for the Purpose of considering the subject of Registration of Title with reference to the Sale and Transfer of Land." The new Commission produced the celebrated Report of 1857 which has been called "the classic on which the system of registration which obtains in England today is founded'.

marketable title, 2) defining boundaries, and 3) registering partial interests.<sup>590</sup> Eventually, Lord Chancellor Westbury got land registering onto the statute book through the Land Registry Act 1862.<sup>591</sup>

As with patents, there is no evidence showing that the emergence of patent registering was directly influenced by the land register development stated above. The patent register was developed independently from the land register, originating from a uniformity of the index system after 1852 when the Patent Law Amendment Act was enacted and the first official index system for patents was established.<sup>592</sup> Today's index and registering ideas all came from Bennet Woodcroft after he demonstrated his index at the select committee of the House of Lords,<sup>593</sup> with his index bought in by the nation and the chronological and alphabetical or patentee index published later in 1854, with the subject volume following in 1857.<sup>594</sup> Woodcroft's diligent clerks extended the printed series back to 1617. By the time when this task was completed in 1858, he had a series of abridgements of specifications chronologically arranged from 1617

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<sup>590</sup> *ibid* 43.

<sup>591</sup> *ibid* 43. 'The recommendation of the 1857 Commission that registration of title should be introduced was accepted by Parliament, and in 1862 an Act (later named the Land Registry Act) was enacted "to give certainty to the title to real estates and to facilitate the proof thereof and also to render the dealing in land more simple and economical"'. But this Act was not going to be successful. The Commissioners reported in 1870 that the failure is attributed to the fact that the 1862 Act departed from the three fundamental recommendations of the 1857 report.

<sup>592</sup> HI Dutton, *The Patent System and Inventive Activity: during the industrial revolution 1750-1852* (Manchester University Press 1984) 61. The 1852 Patent Law Amendment Act had the following changes: 'to lessen the delay and expenses of patenting, to vary the duration of patents... and to provide an accessible index of patents together with a register of proprietors which was to enumerate names of assignees, shareholders of patents, licensees, and the districts in which the licences were enforceable'.

<sup>593</sup> Lords Professor Bennet Woodcroft, 20th May 1851, 222-224. Also in John Hewish, *Rooms Near Chancery Lane: The Patent Office Under The Commissioners, 1852-1883* (The British Library 2000) 12 says Woodcroft demonstrated his indexing system and was eloquent in the cause of inventors generally in his testimony to the House of Lords select committee who heard evidence from April to June, 1851. An overall introduction to how the English government prepared the bill on parallel lines (Lord Brougham's Bill and Lord Granville's Bill), see H Harding, *Patent Office Centenary: a story of 100 years in the life and work of the patent office* (Her Majesty's Stationery Office 1953) 7-9.

<sup>594</sup> John Hewish, *The Indefatigable Mr Woodcroft: the Legacy of Invention* (The British Library 1980) 23. 'Woodcroft's indexes to the specifications were bought for the nation in 1853, for £1000. The first two parts, the chronological and alphabetical or patentee index, were published the following year; the subject volume followed in 1857'. 'Before glancing at the fulfilment of his early aim of publication of all the specifications, he should be given credit as the architect of patent publications in the general form that has existed until the present, such as the annual volumes of "new law" specifications, the indexes, library catalogues, and special-subject works'.

onwards.<sup>595</sup>

Early in the 1851 House of Lords' report, the 1850 resolution of the Committee for Legislative Recognition of the Rights of Inventors, suggested that the function of registering should be merely a record rather a creation of rights. It declared 'That the registration should be considered merely as a record of claims, and not as any determination of rights between parties'.<sup>596</sup> Supported by Section 32(9) of the Patents Act 1977, the UK register 'shall be *prima facie* evidence of anything required or authorised by this Act'.<sup>597</sup> To be registered as an applicant or a proprietor was not proof that the person registered was entitled to such a patent or in fact the proprietor of the patent,<sup>598</sup> it only demonstrated a person's interest or estate in a patent or application as what it was.<sup>599</sup>

The register was not even absolute evidence proving one's title. 'Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, Act of Parliament, or statutory declarations, twenty years old at the date of the contract, shall be taken to be sufficient evidence of the truth of such facts, matters and descriptions'.<sup>600</sup> The register overall was not absolute and overriding evidence proving one's proprietary status, and 'does not prejudice the enforcement of any right, estate or interest adverse to or in derogation of the title subsisting or capable of arising at the time of such registration'.<sup>601</sup> In fact, it was just one of many ways to prove an owner's security of

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<sup>595</sup> Christine MacLeod, *Heroes of Invention: technology, liberalism and British identity 1750-1914* (Cambridge University Press 2007) 252.

<sup>596</sup> Lords Professor Bennet Woodcroft, 20th May 1851, Appendix D, 408.

<sup>597</sup> Jones and Cole (n 54) 466. Also in Marcus Smith, *The Law of Assignment* (Oxford New York 2007) 69.

<sup>598</sup> Smith, *The Law of Assignment* (n 597) 69.

<sup>599</sup> See Richard Miller and others, *Terrell on the Law of Patents* (17th edn, Sweet & Maxwell 2011) 577 (para 16-122).

<sup>600</sup> Simpson, *Land Law and Registration* (n 58) 15. Cited from Law of Property (Amendment) Act 1926 s45(6).

<sup>601</sup> Ernest Dowson and VLO Sheppard, 'Part II A comparative analysis of the salient features of registration of title to land under various jurisdictions' in *Registration of Title to Land With Special*

holdings.

A question can then be asked: why would the principle of registration in land law be involved in Taiwanese patents registration since land registry history is not involved in patent registry development? English patent registry history manifests that the patentee cannot create ownership by means of registration, with there being many ways to prove one's proprietary status. The connection between the land register and patent register (as in 2.5.2) is obviously a misconnection with no historical grounds. Therefore, this research concludes that the principle of registration shall not be involved in patent registration, preventing a further misleading thought that the creation of land ownership by register equally applies to patents. The patent register should stay as a record of claims, and a propose amendment to the Taiwanese Patent Act as presented in 6.3.2.

#### **5.5.5 Different understanding of 'assignment' in English common law and Taiwanese civil law and a better translation of patent assignment**

Various misconceptions stated earlier also involve a paradoxical understanding of the term 'assignment'. Assignment is understood differently in English common law and Taiwanese civil law. The English word 'assignment' originated from the Latin *assignare*, meaning to appoint, distribute or assign.<sup>602</sup> It was first brought into use in England for illegitimate children because they could not inherit their father's real property under the

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*Reference to Its Introduction on the Gold Coast* (British government, 1946) 4. The whole sentence is 'England: Initial Registration is optional over the whole country but it is compulsory "on sale" in the countries of Middlesex, London, Surrey, and in the towns of Eastbourne and Hastings. Upon an application for initial registration being received, a final and authoritative examination of the title is carried out by a body of examiners of title, on behalf of the State. They report to the Chief Land Registrar, who decides whether the application shall be accepted or rejected, and if accepted, whether the title admitted shall be "absolute", "qualified" or "possessory"'. 'Thus "qualified" title is issued when it appears to the Chief Land Registrar that the title can be established only for a limited period... while "possessory" title is nothing more than the registration of title of the person in possession whatever that may be and as it were for what it is worth. Such registration does not prejudice the enforcement of any right, estate or interest adverse to or in derogation of the title subsisting or capable of arising at the time of such registration'.

<sup>602</sup> Ross (n 2) 177.

name of their heirs, therefore they were provided under the name of assignees.<sup>603</sup> Under the structure of English feudal tenure, the king and the lords kept the reversion if tenants failed to produce heirs; any right conveyed by the tenants was a lesser interest than the lord's freehold and thus conformed to the meaning of assignment.<sup>604</sup> Substantiated by Blackstone, assignment in England usually meant a transfer of a lesser interest for life or for years.<sup>605</sup> It could mean a transfer of 'any other interest less than freehold, already created' to a stranger.<sup>606</sup> In other words, it is a transfer that happens to the real rights' owner and assignee, not a transfer between the true freeholder and assignee.

This understanding of assignment is very different in Taiwanese civil law. An assignment in civil law means the owner, who has complete unitary ownership,

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<sup>603</sup> *ibid* 177-178. 'Britton (one of the oldest English writers) mentions that this word was first brought into use for the favour of bastards, because they cannot pass under the name of heirs, and therefore were and are provided under the name of assignees...in Scotland, to consider the word *assignee* as applicable only to personal rights. This, however, is a mistake; it was introduced originally in heritage, and only afterwards applied to denote that particular kind of attorneyship which the common law render necessary for the transmission of *choses in action* from one man to another'.

<sup>604</sup> Hudson criticised that modern scholars generally take assignment as substitution, even though it is not true because a father can assign a certain part of his land to his son and gives his son seisin in his son's lifetime. It did not require the Lord's participation, and it is clear that it is not substitution. See John Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Clarendon 1994) 226. 'Modern scholars generally take assignment to refer to substitution, in which case the lord's participation was needed, but it is uncertain that early mentions of "assigns" necessarily had such a particular meaning. *Glanvill* wrote that "a son can be 'forisfamiliated' by his father in his father's lifetime if the father assigns a certain part of his land to the son and gives him seisin of it in his lifetime.'" This clearly is not substitution. Early grants mentioning assigns could, therefore, simply be advance confirmations of a man's gifts'.

<sup>605</sup> Blackstone says assignment is 'usually applied to an estate for life or years'. See Blackstone, *Blackstone's Commentaries on the Laws of England: Volume II* 269 (original 326). Also in Alexander M Burrill, *A Treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors: adapted to the laws of the various states; with an appendix of forms* (James L Bishop ed, 3rd edn, Baker, Voorhis & Co 1877) 2 (note 1).

<sup>606</sup> Hayes (n 516) 25. Burrill provides a better explanation about this. He states, 'As applied to real estate, an assignment is properly a transfer, or making over to another, of one's whole interest in lands or tenements, whatever that interest may be, but in England it is usually applied to express the transfer of an estate for life or years'. See Burrill (n 605) 1-2. However, the law of Scotland has another different definition of assignment. 'The conveyance amongst the living, of *personal* rights, is by *assignment*, of *real* rights by *disposition*, and promiscuously of both by *confiscation*. Conveyance of right from the dead is by *succession*; in movables by *executry*; in heritable rights, by the *succession of heirs* and other like successors'. See John S More, *The Institutions of The Law of Scotland, Deduced From Its Originals, and Collated With The Civil, Canon, and Feudal Laws, and With The Customs of Neighbouring Nations by James, Viscount of Stair, Lord President of The College of Justice: a new edition, with notes and illustrations* vol II (Bell & Bradfute 1832) 518 (original page 380). In Scottish law, 'assignment' means a conveyance of personal rights, while real rights conveyance uses the word 'disposition', although sometimes assignment extended to the disposal of real rights. See *ibid* 539 (original 396-397). In contrast to Scottish law, English law uses assignment to indicate real rights conveyance.

alienates their real rights to an assignee. ‘Ownership assignment’ in the Chinese term ‘*suo-you-quan rang-yu*’ (所有權讓與) is outright alienation of whole and complete ownership. The Chinese translation of assignment as *rang-yu* (讓與) is used for both real and personal property<sup>607</sup> and refers to an alienation of real rights including an alienation of ownership as a whole. This alienation has to be the ownership owner to assignee and not a real rights holder who transfers an estate that has being created and carved out from the ownership, to the assignee. The difference is presented in Figure 5-5 and Figure 5-6.

Figure 5-5: Assignment in English common law

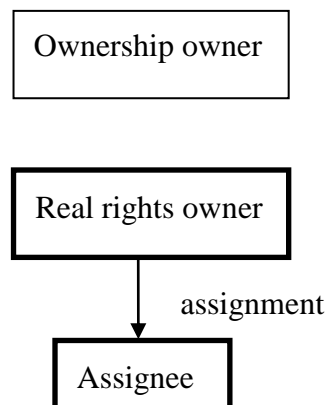
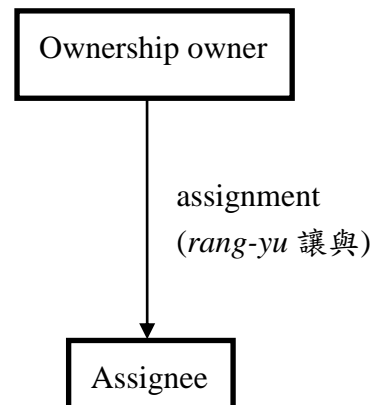


Figure 5-6: Assignment in Taiwanese civil law



<sup>607</sup> Despite what a conscientious usage would be, the word ‘disposition’ is applied to the alienation of real rights and ‘assignation’ is to the alienation of personal rights. The term assignment is occasionally extended to the disposal of real rights and refers to both real property and personal property alienation. The same phenomena can be found in Scottish law, see More (n 606) 539 (original page 396-397).

The nuance is clearer if John Henry Merryman's box metaphor is imported into this discussion. Earlier in 5.5.3, we understood from this metaphor that civil law ownership can be envisaged as a box where the owner can open up a box called ownership and remove some real rights for transfer. As long as the owner keeps the box, even if the box is empty, the owner retains ownership. Assignment refers to a transfer of this box and means that the owner loses his ownership as a whole, no matter whether it is empty or full. However, under the common law system, there is no box at all. The owner keeps a bundle of proprietary interests whereby transferring each of them counts as assignment. Assignment does not necessarily mean the owner loses his whole bundle of rights after assignment and whether the assignee owns this property depends on how much real rights have been transferred.

The diagrams above answer another question: does a patentee hold patent rights as being a physical thing owner? It is clear in Figure 5-5 that a patentee is not an 'ownership owner' who has perpetual, unlimited and complete ownership over a physical thing in the civil law conception. A patentee is like a surface right holder who holds a surface right for a limited time and condition, and within this limited time and condition, the surface right holder holds their real rights as a freeholder, so that they can alienate their real rights to any third party. This alienation is proprietary.

Apparently, the loanword *rang-yu* (讓與) is not an ideal translation for patent assignment. It not only mixes patent assignment with physical things alienation, but also leads Taiwanese lawyers astray to an improper connection of the law of things. By understanding the difference between civil law assignment and patent assignment from the above analysis, this study now moves onto a further discussion of what word a patent assignment should use to highlight a transfer of holding.

## 5.6 Assignments and licences in a map of Taiwanese tenure

### 5.6.1 Assignments in a map of Taiwanese tenure

An assignment in Article 761(1) of the Taiwanese Civil Code,<sup>608</sup> is the movement of an object. The subject (person) who has the right to exercise that assignment has to be the owner. The object this assignment moves is a physical thing; therefore the law says the transfer will not be effective unless the thing has been delivered. It is however, very different from a patent assignment because an assignment is a change of relationship rather than a movement of a thing. The patentee is the holder of a bundle of rights, just like an estate holder who does not actually ‘own’ the land, but instead, holds a right to manage the land for the king. An assignment is a change of that holding, no matter whether the transferred object is proprietary or not because it is insignificant in the conveyance rules. A patent assignment is similar to an estate assignment, with the transfer of a patent being like the transfer of an estate: it is a transfer of the right to hold, not from the owner, but from the right holder. The patent assignment is distinct from the civil law assignment where the source of the right comes directly from the thing owner.

In many ways, a patent assignment is more similar to a stock/option assignment. Taiwanese Company Act 2012 uses a neutral word ‘*zhuan-rang*’ (轉讓) to indicate a stock/option assignment.<sup>609</sup> This study believes that this word ‘*zhuan-rang*’ (轉讓) is better than the civil law assignment ‘*rang-yu*’ (讓與). The changing of the word makes a significant difference to the underlying meaning of the patent assignment. It not only

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<sup>608</sup> Article 761(1), ‘The transfer of rights *in rem* of personal property will not effect until the personal property has been delivered’. [translation by Lawbank] This research thinks a better translation would change ‘personal property’ to ‘movable thing’.

<sup>609</sup> For example, Article 163 of Taiwanese Company Act 2012 uses the word ‘*zhuan-rang*’ (轉讓) to express the meaning of stock assignment: ‘Assignment of shares of a company shall not be prohibited or restricted by any provision in the Articles of Incorporation of the issuing company.’ [translation by Lawbank]



disconnects patent assignment from civil law assignment but also avoids confusion about the peculiar delivery requirements in the law of things.

### 5.6.2 Leases and licences in a map of English common law classification

To accurately place licences in the map of English common law requires a clear separation of leases and licences. Leases are involved in this discussion because Taiwanese practitioners often use leases to explain licences.<sup>610</sup> However, using leases to explain licences is a misconception because under English common law classification, leases and licences are two separate concepts, even though the line is sometimes blurred.<sup>611</sup>

Apart from the traditional distinction by looking at the nature of the occupancy (exclusive possession), there are some other characteristics that mark the differences between licences and leases. Firstly, ‘leases’ have a hybrid nature that is partly property and partly contract,<sup>612</sup> whilst ‘licences’ are purely contractual.<sup>613</sup> Prior to the thirteenth

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<sup>610</sup> For example, Qin Hong-ji says in principle that a licensee who has general licences, restricted licences or sole exclusive licences cannot ‘sublease’ their rights to any third party. See Qin (n 68) 97. The same description can be found in the oral history of the only surviving patent agent when Taiwan was under Japanese rule. Mr. Sun Jiang-huai(孫江淮)states in his memoir that ‘Taiwanese people preferred to lease the designs to others rather than to assign to them’. See Wang and Lin, ‘Daishubi Shangrenfeng: Baisui Renrui Sun Jiang-huai Xiansheng Fangwen Jilu (代書筆、商人風：百歲人瑞孫江淮先生訪問紀錄)=Escrow Agent in Business: an oral history of Mr. Sun Jiang-huai in his age of 100’ (n 231) 63.

<sup>611</sup> This is because following both First and Second World Wars, there was a shortage of housing due to bomb damage in England. Limited housing contracture was due to a shortage of building materials, whilst at the same time the population increased. The protective statutory provisions was created to protect leasehold tenants from landlord’s taking advantage by charging excessive rents and by moving tenants out arbitrarily. The landlords therefore sought to create licences rather than leases so that they would be unfettered by statutory rent regulation. The blurred line of licences or leases gradually became a source of tension between landlords and tenants when landlords thought they had licenced their properties but tenants thought they had leased them. The courts gradually adopted the subjective approach in addition to the traditional objective approach, taking into account the intention of the parties rather than just looking at the nature of the occupancy (exclusive possession) alone. See Morris (n 568) 27-29. Also in Garner S and Frith A, *A Practical Approach to Landlord and Tenant* (5th edn, Oxford University Press: New York 2008) 23 para 2.01.

<sup>612</sup> Susan Bright, *Landlord and Tenant Law in Context* (Hart 2007) 27. Also in Burn and Cartwright (n 11) 182. ‘A lease is a hybrid, part contract, part property’. Burn cited from *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 108.

<sup>613</sup> ‘...a lessee has a wide range of property remedies available as well as contractual remedies such as

century, leases were ‘generally given by landowners as security for borrowing, in order to circumvent the church’s prohibition on usury’.<sup>614</sup> The rights given to the lessee were contractual. Over time, the lease increasingly became proprietary because the lease was used to ‘grant rights over agricultural land for farming purposes’ and it became necessary to provide remedies to protect the tenant’s possession of land.<sup>615</sup> During the fifteenth century, the action of ejectment became available to tenants allowed leases to be recognised as real rights.<sup>616</sup> Because of this history, leases are classified as ‘chattels real’ and have ‘an unusual classification in law’.<sup>617</sup> In law, the word ‘chattel’ means personal property, and the word ‘real’ reflects their connection with land.<sup>618</sup> The leases concept in common law thus became a mixture of proprietary and contractual.

The second difference is that leases are private property interests. Leases are assignable and enforceable against third parties,<sup>619</sup> whilst licences are non-assignable.<sup>620</sup> If landlords sell their interests in land, the lease they made with others will be fully effective and enforceable against the buyers.<sup>621</sup> This will not happen under licences. Licences are not enforceable against any third party but only to the licensor,<sup>622</sup> so licensees cannot assert their licences against new buyers.<sup>623</sup> Leases involve ‘a split of ownership’,<sup>624</sup> whilst licences do not.

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damages, whereas a licensee can rely only on contractual remedies’. ‘...licence is a broad term covering any permission to make any kind of use of any thing. When used in relation to land as opposed to other things, it covers not only the grant of a personal right to occupy the land but also the grant of any right to make use of the land in any other way which is purely personal and not proprietary’. See Clarke and Kohler (n 31)273.

<sup>614</sup> Bright (n 612) 27.

<sup>615</sup> *ibid* 27.

<sup>616</sup> *ibid* 27-28.

<sup>617</sup> *ibid* 28.

<sup>618</sup> *ibid* 28.

<sup>619</sup> Clarke and Kohler (n 31) 271.

<sup>620</sup> ‘A licence is a personal right granted to the licensee, and cannot, therefore, be assigned or transferred by him, unless a power of assignment or transfer is specifically granted in the instrument. Neither can sub-licences be granted by a licensee, unless the power to do so is expressly conferred’. See David Fulton, *A Practical Treatise on Patents, Trade Marks and Designs* (Jordan & Sons 1894) 73.

<sup>621</sup> Clarke and Kohler (n 31) 272.

<sup>622</sup> *ibid* 272.

<sup>623</sup> Bright (n 612) 49.

<sup>624</sup> *ibid* 49.

The third difference is that a licence is a broad term covering ‘any permission to make any kind of use of any thing’.<sup>625</sup> When used in relation to land, it covers both the granting of a personal right to occupy land and the granting of any right to make use of the land that is purely personal but not proprietary.<sup>626</sup> Thus, a licence is a permission that entitles one person to enter the land of another, with the granting of the licence not being transferred any estate or interest in the land to the licensee.<sup>627</sup> The classification of licences and leases is that licences belongs to the side of choses in action, whereas leases belongs to choses in action real where a tenant can assert his or her right to exclude upon the landlord and any third parties, whilst a licensee can do so only to his or her landlord.

The classification of leases and licences is presented in the following figure on next page.

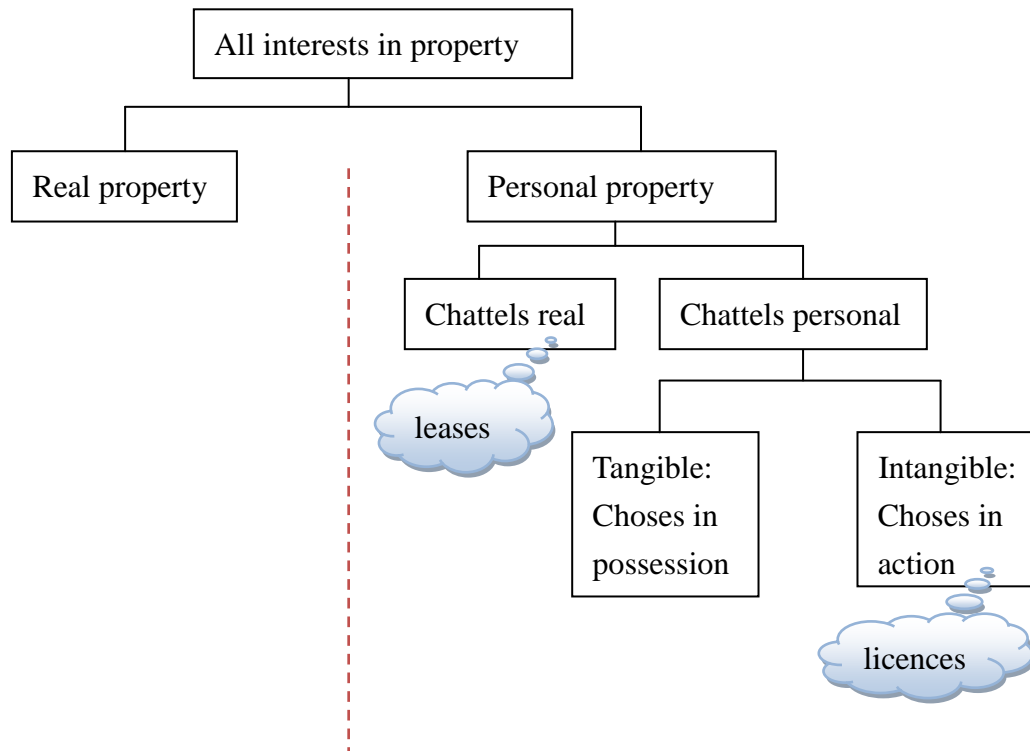
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<sup>625</sup> Clarke and Kohler (n 31) 273. A similar description can be found in Morris (n 568) 23, ‘A licence is a mere permission to enter or use land. Most importantly, it does not give an interest in land, but merely prevents a person’s entry or use of the land from being a trespass’.

<sup>626</sup> Clarke and Kohler (n 31) 273.

<sup>627</sup> Paul Coughlan, *Property Law* (2nd edn, Gill & Macmillan 1998) 291.

Figure 5-7: The classification of leases and licences in English common law



Reproduced partially from Marcus Smith, *The Law of Assignment* (Oxford University Press, 2007) 15

### 5.6.3 Leases in a map of Taiwanese civil law

There is nothing like an English licence in the map of Taiwanese civil law. The reason why there is not is because the civil law classification is totally unlike the English classification. The biggest difference in the beginning of the classification is that civil law begins with the classification from the ‘thing itself’ instead of the ‘interests’ in things, whilst the common law classification is precisely the converse.<sup>628</sup> The difference is even more obvious when the remedy of infringement is involved. In view of the civil law classification being designed around the ‘thing’ itself, the remedy of infringement of ownership is *rei vindicatio* (to return my thing back to me), and no matter whether it is real property or personal property, the rule of *rei vindicatio* equally applies. But it is not the same under common law because in the field of real property,

<sup>628</sup> Smith, *The Law of Assignment* (n 597)16.



debts belonging to personal property if we define personal property as individual tangible and intangible belongings. From this angle, the range of civil law personal property is wider than English personal property because English personal property does not cover real property per se.

This difference is caused by a different line drawing. English law draws the line between land and personal goods because land belonged to the king in the past. Civil law is however different. In civil law, the line is drawn between movable and immovable. All things belong to citizens including land, real rights and personal goods, with the line drawn purely by the substance of the thing itself. This different perception results in distinctive understandings of ownership. Comparing Figure 5-7 with Figure 5-8, the difference is clear. Ownership in English law, especially in real property, means various rights held by the tenants ‘for the kings’, while in civil law, it means holding a unitary ownership for ‘one’s own land’. This technical distinction also has the effect of classifying leases and licences. Put simply, when leases are treated as real rights in the English law structure, in the civil law classification, especially in Taiwan and Japan, leases are personal rights against the grantor only. The reason is stated in the following passage.

Leases under the Taiwanese civil law structure are placed into the law of obligations because the agreements made by grantors and grantees are purely contractual<sup>630</sup> and it is neither like a disposition of land nor movable goods like vehicles. The history shows that it is so arranged because civil law does not encourage the owner to gain profit from a thing, with the law encouraging more self-use.<sup>631</sup> The reason why leases are put into

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<sup>630</sup> It is the same in Italian law. ‘In Italian law, the lease is a contract...No real rights—no part of the ownership of the land—are conveyed to him. The law governing leases is found in that part of the Civil Code dealing with obligations, rather than in the part dealing with property’. See Merryman (n 566) 936-937.

<sup>631</sup> Miyahata has a deeper analysis of the history in this regard, see Miyahata (n 537) 4-7.

the category of obligations is because they consequently weaken tenants' rights because the tenant has no real rights in the lease. Despite Taiwanese society favouring a profit orientated mechanism because of its long history of the *yeh* concept,<sup>632</sup> after being ruled by Japan, leases have ultimately been classified into personal obligations until the present day.

Under the civil law of obligations, a lease is a covenant made by a grantor and a grantee. The remedy of breach is a right to bring a personal action. Leases are already in the personal rights category and there is no room for 'licences' to be placed in the same category. Some Taiwanese practitioners use 'leases' to explain 'licences' because leases are placed in the law of obligations just like a 'licence' in choses in action. It is substantially wrong because English leases are placed in proprietary and licences in contractual, unless we move leases to the law of things and make a space for licences in the law of obligations, otherwise it is impossible to create a new definition for licences as long as leases stay in the same old category.

#### **5.6.4 Placing licences in Taiwanese tenure**

Before this research explores the similarity of a licence concept in Taiwanese customary law, it is necessary to understand where a patent is positioned in the classification of English property law. The position is an original coordinate in the map of this study.

The original ontology classified patents as real property. As 4.1.3 in this research

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<sup>632</sup> *ibid* 2. Miyahata compares Japanese society with Taiwanese society, with Japanese society more inclined to use the property themselves [she calls it 'property for use'], while Taiwanese society tends to gain revenue from property [she calls it 'property for capital'] due to the legacy of the *yeh* concept. She further analyses the conflicting relations of self-use and the right to capital in relation to the favour of ruling authorities. Japanese society favours self-use rather than generating profits from the premises, therefore the law was designed to protect the owner better than the tenants before the War. Taiwan was affected by this design because of Japanese rule.

manifests, franchises, the origin of modern patents, were classified as incorporeal hereditaments in medieval England. For the extension of personal property in the sixteenth century, patents were gradually pushed into the personal property category, and now patents are expressly placed into the personal property category by section 30(1) of Patents Act 1977, which states that ‘Any patent or application for a patent is personal property (without being a thing in action).’<sup>633</sup> Concerning why English law does not classify patents as choses in action, Cornish expresses his puzzlement, commenting that it ‘is a mystery’.<sup>634</sup> Smith does not provide a further answer and does not think otherwise because he is sure that ‘patents are certainly not choses in possession’.<sup>635</sup>

Smith classifies patents as choses in action,<sup>636</sup> but there are writers who doubt why patents are classified as personal property.<sup>637</sup> Not only is the choses in action category challenged, the problem of whether licences are personal or proprietary is also subject to debate. Some think that patent licences are purely personal<sup>638</sup> and that even an

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<sup>633</sup> Jones and Cole (n 54) 454 (para 30.01).

<sup>634</sup> Willian Cornish, David Llewelyn and Tanya Aplin, *Intellectual Property: patents, copyright, trade marks and allied rights* (7th edn, Sweet & Maxwell 2010) 301n 66: ‘They are not however, things in action; though why not, is a mystery’.

<sup>635</sup> Smith, *The Law of Assignment* (n 597) 69. Smith states, ‘A granted patent is a form of personal property, but not a chose in action. A patent application is also a form of personal property, but again not a chose in action. It is not clear why the Patent Act 1977 should hold that a patent and an application for a patent, whilst amounting to personal property, should not be choses in action. Given the English law classification of interests in things, it is difficult to see what other classification can be accorded to a patent other than “chose in action”: patents are certainly not choses in possession’.

<sup>636</sup> He proposed four approaches to identify patent positions in property law: from intellectual property rights itself, rights of action for infringement, validity challenges and licensing respectively. *ibid* 66-71.

<sup>637</sup> An example is Gubby (n 91) 291, ‘However, categorising the patent as a form of personal property was also problematic. There were judges who rejected the patent as a form of property recognised at common law’. She cites Lord Camden’s opinion in *Donaldson v Beckett*, stating ‘If there be such a right at common law, the crown is an usurper; but there is no such right at common law’. See *ibid* 274. She further cites Judge Yates’ opinion in *Millar v Taylor* 1769, stating ‘This kind of property has always the additional distinction of prerogative property. The right is ground upon another foundation; and is founded on a distinction that can not exist in common law property’. Gubby also thinks a patent for a new invention ‘was also a grant of the royal prerogative’, therefore patents ‘equally could not be seen as having the common law as its source’. However, this research believes this too arbitrary to reach a conclusion by judging a court’s opinion on copyright equally applying to patents.

<sup>638</sup> Smith, *The Law of Assignment* (n 597) 71. He states, ‘The licensing of rights to a patent is essentially a matter of contract law; and the rights arising under a licence will be rights under a contract’. Even an exclusive licence, did not create a proprietary interest. See *Allen & Hanburys Ltd v Generics (UK) Ltd* [1986] RPC 203 (HL), *CBS United Kingdom Ltd v Charmdale Record Distributors Ltd* [1981] Ch 91,



exclusive licence does not create a proprietary interest, whilst others think a licence could be proprietary<sup>639</sup> and that an exclusive licence is virtually a proprietary interest.

Such diverse opinions highlight the controversy of classifying patents into choses in action. The term chose in action, however, should not be understood in a narrow way. Holdsworth points out that a chose in action is ‘a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action’.<sup>640</sup> In its primary sense, the term chose in action includes ‘all rights which are enforceable by action’, including but not limited to rights to debts and rights to recover the ownership of real property or personal property.<sup>641</sup> Therefore, in its origin, choses in action cover not only personal rights to debts but also real rights to real property. Choses in action could have indicated that patents have a proprietary nature. In view of choses in action covering real actions, it thus opens up another possibility that patents can be categorised as chattels real.

As a matter of fact, there are three good reasons for classifying patents as chattels real instead of chattels personal. Firstly, from an historical perspective, franchises were in the incorporeal hereditaments category, which belonged to real property. Originally,

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*Sport International Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776, *Crittall Windows Ltd v Stormseal (UPVC) Window Systems Ltd* [1991] RPC 265, and trade mark licence case *Northern & Shell plc v Condè Nast & National Magazine Distributors Ltd* [1995] RPC 117.

<sup>639</sup> Noel Byrne and Amanda McBratney, *Licensing Technology* (3rd edn, Jordan 2005) 22. ‘An exclusive licence is virtually a proprietary interest’. Supporting court opinions including *British Nylon Spinners Ltd v Imperial Chemical Industries Ltd* [1952] 2 All ER 780 (CA) ‘An English patent is a species of English property of the nature of chose in action...A person who has an enforceable right to a licence under an English patent appears, therefore to me to have, at least, some kind of proprietary interest which it is the duty of the Courts to protect’.

And also *Ultraframe (UK) Ltd v Fielding* [2006] FSR 17 (Ch) ‘...an exclusive licence of design right was a “non-cash” asset within the meaning of s. 320 of the Companies Act 1985’.

<sup>640</sup> Holdsworth, *A History of English Law vol VII* (n 209)516.

<sup>641</sup> *ibid.* ‘In fact the list of choses in action known to English law includes a large number of things, which differ widely from one another in their essential characteristics. In its primary sense the term chose in action includes all rights which are enforceable by action—rights to debts of all kinds, and rights of action on a contract or a right to damages for its breach; rights arising by reason of the commission of tort or other wrong; and rights to recover the ownership or possession of property real or personal’. ‘Hence it was not difficult to include in this category things which were even more obviously property of an incorporeal type, such as patent rights and copyrights’.

patents were proprietary like real estate and to categorise it as personal property was a fairly recent development in the late nineteenth and early twentieth centuries. They were so classified because of the slow process of expansion of chose in action in the sixteenth century. Eventually, patents were re-categorised into the category of chose in action. In substance, patents, just like estates, are proprietary in nature. Secondly, in the personal property category, it is only chattels real that have half proprietary and half personal characteristics. Other categories, like choses in action, have already been expressly excluded by the Patents Act 1977 and choses in possession made for physical things but not for intangible things; these two sub-categories have smaller chances than chattels real. Thirdly, once patents are categorised as chattels real, it is easier to explain why patentees have rights against many people, like real property rights; meanwhile, it is also possible to explain why an exclusive licence is at times proprietary and a non-exclusive licence is not. This study will turn back to this in detail in following sections. For the above three reasons, this research maps patents in the chattels real category and presents this idea in Figure 5-9 below.

Figure 5-9: Proposed classification of patents in the English common law structure

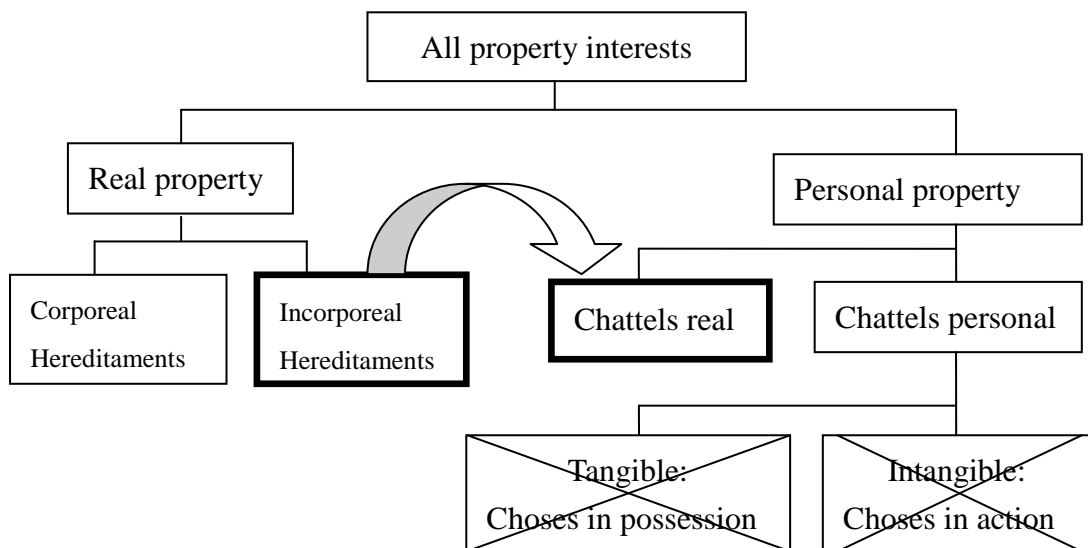
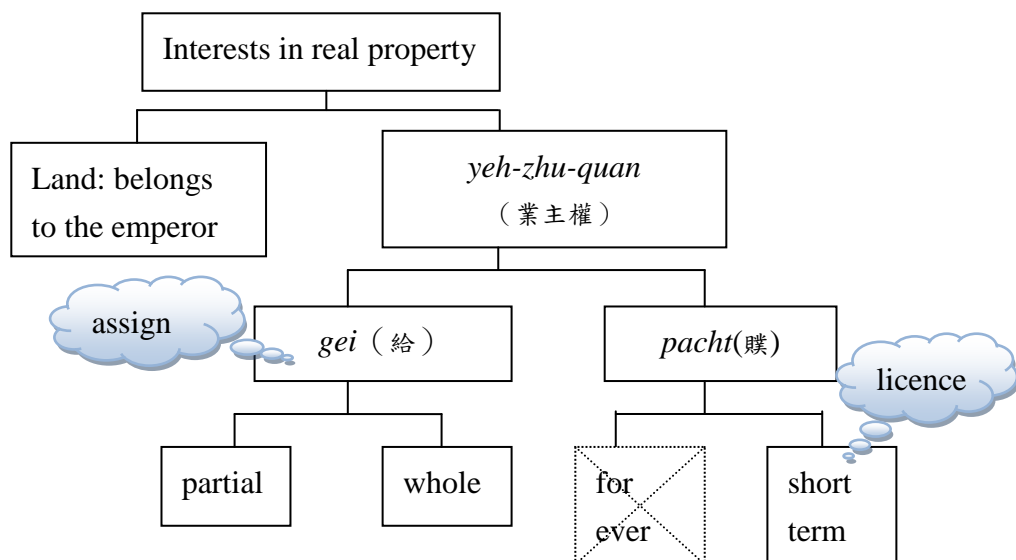


Figure 5-9 is helpful in pinpointing patents in the Taiwanese tenure structure. As Taiwan customary law has no such history like England, it is sufficient to use its original real property structure to envisage patents in a tenure map. The real property structure in Figure 5-10 below can be envisaged as the right hand side of Figure 5-9 because the sub-category *yeh-zhu-quan* (業主權) in Figure 5-10 belongs to individual citizens and not to the emperor. In other words, *yeh-zhu-quan* (業主權) is personal property that can be equated to the English classification. Thus, *yeh-zhu-quan* (業主權) in Figure 5-10 below can be envisaged as chattels real in Figure 5-9 above. It is not too strange to use holding a lease or *yeh-diàn* (業佃) to explain a patentee's status because in the past everyone was the emperor's tenant and the right an individual held was always a leasehold.

Figure 5-10: Proposed classification of a patent licence in the Taiwanese tenure structure



In modern times, the overlord does not have to be the crown or the emperor and can be all commoners in human society that hold the ownership of freehold patents. The government or crown, on behalf of all citizens, grants patentees leaseholds to patents with time limitations. In this duration, patentees are freeholders of his patent just like owners of flats holding their leaseholds as freeholds. Leaseholds held by patentees as

freeholds are eligible to be assigned or licenced.

A patent's position in Taiwanese tenure, a proposed property model, is thus established as in Figure 5-10. Like the English tenure structure, the Taiwanese tenure system dealt with proprietary interests in land. England and Taiwan shared the same factor that all physical land belongs to the king/emperor. Estates can resemble *yeh* (業) in Taiwanese tenure, whilst the ownership of an estate is *yeh-zhu-quan* (業主權). Patents were estates in medieval England, therefore, like other estates they can be equally fitted into this concept of *yeh* (業). Ownership of estate (*yeh-zhu-quan* 業主權) thus equally resembled patents as *zhuan-li* (專利, patent) *yeh-zhu-quan* (業主權). Like proprietary interests in land that can be assigned and licenced, proprietary interests in patents can be equally assigned by *gei* (給) and licenced by *pacht* (贖). *Gei* (給), as stated in 5.6.1, is a real right transfer similar to the English word 'assign'.

Licences are placed under *pacht* (贖), especially in the sub-category of short term *pacht* (贖) for two reasons. Firstly, *pacht* (贖) represents the 'ongoing commitment' of the parties.<sup>642</sup> As will be further explained in 5.6.5, *pacht* (贖) as an 'ongoing commitment' means a lease of real rights, or to lease an estate with actual possession.<sup>643</sup> This actual possession, as in the 'for ever box' in Figure 5-10, was partially abandoned after 1900<sup>644</sup> and was totally repealed after 2010. Therefore, *pacht* (贖) shall belong to the right hand side box in the 'short term' category. Another reason why the *pacht* (贖) notion we use is a *pacht* (贖) in the short term category rather than the same in the long term category is substantiated by *Taiwan Shiho* (臺灣私法, Taiwanese Private Law) because if a *pacht*

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<sup>642</sup> Miyahata (n 537) 24. Also in Ka, *Fantoujia: Qingdai Taiwan Zuqun Zhengzhi yu Shufan Diqun* (番頭家：清代臺灣族群政治與熟番地權)=*The Aboriginal Landlord: ethnic politics and aboriginal land rights in Qing Taiwan* (n 585)21.

<sup>643</sup> Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1*(臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482)309.

<sup>644</sup> *ibid* 322.

(贖) was made for the short term, then it was governed by a personal action.<sup>645</sup> In other words, a ‘short term’ *pacht* (贖) represented a contractual commitment of transfer, but a long term *pacht* (贖) was not. Licences in the English concept are contractual commitments; therefore, using a short term *pacht* (贖) as an English licence is taken under fair and reasonable consideration.

A *pacht* (贖) also has another characteristic that is similar to a licence, with both of them having a vague legal meaning that refers to an ‘ongoing commitment’ of the parties.<sup>646</sup> Like the English ‘licence’ covering ‘any permission to make any kind of use of any thing’ in a broad term,<sup>647</sup> sometimes, licences are difficult to distinguish from assignments or leases, with a *pacht* (贖) having the same problem. A *pacht* (贖) is difficult to distinguish from a *gei* (給, assign) when commitments in a *pacht* (贖) amount to the granting of a full right of occupation, thus in the eye of Japanese researchers, a *pacht* (贖) covers a contractual commitment, sometimes without a granting of proprietary interests like *shiyakuchi* (a lease for a surface right in Japan), and sometime with a granting of estate with an actual possession.<sup>648</sup> The commitments in a *pacht* (贖) rely heavily on the content of the agreement and are not restricted by the wording used,<sup>649</sup> which is the same as a licence.

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<sup>645</sup> *ibid* 309.

<sup>646</sup> Miyahata (n 537) 24. Also in Ka, *Fantoujia: Qingdai Taiwan Zuqun Zhengzhi yu Shufan Diqun* (番頭家：清代臺灣族群政治與熟番地權)=*The Aboriginal Landlord: ethnic politics and aboriginal land rights in Qing Taiwan* (n 585) 21.

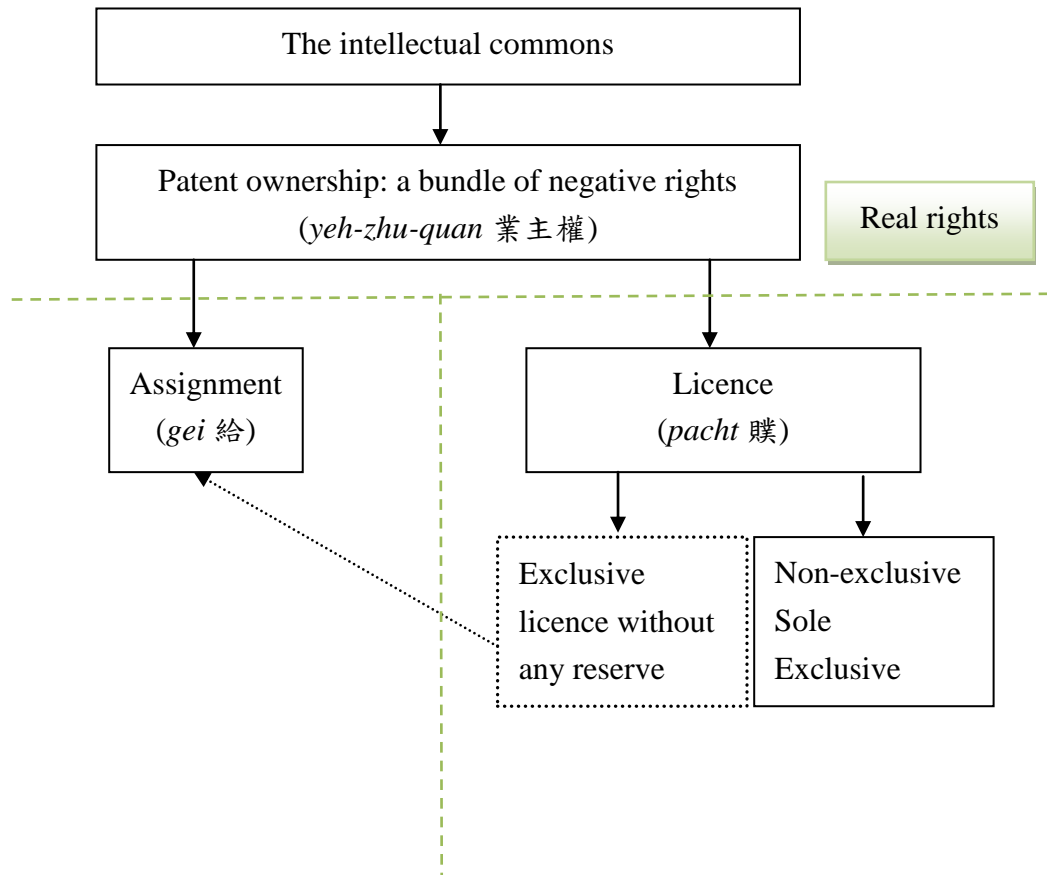
<sup>647</sup> Clarke and Kohler (n 31) 273.

<sup>648</sup> Miyahata (n 537) 4-5, 24. She says *pacht* (贖) has many types including but not limited to those similar to ‘Japanese *eikosaku* (永小作)[note: perpetual or indefinite lease, similar to *yong-diàn* (永佃)in Chinese], *kosaku* (小作) [lease with definite duration] or *shiyakuchi* (借地) [a lease to surface right]’. [This sentence is translated by this author]

<sup>649</sup> In general, *pacht* (贖) is contractual, but on some occasions, like aboriginal landlords granting estates to Han Chinese farmers, are normally proprietary. The judgement of a *pacht* (贖) contract as contractual or proprietary relies on the content of the agreement, if the grantor reserves no right, or little right to himself, such a grant is proprietary like an assignment; if the grantor reserves many rights to himself it is regarded as a purely contractual lease. See Commission for the Investigation of Traditional Customs in Taiwan, *Taiwan Shiho 1*(臺灣私法第一卷)=*Taiwanese Private Law vol 1* (n 482) 320-321.

By combining the analogies in Sections 5.5.3 and 5.6.1 above with Figure 5-10, an overall map of patents in Taiwanese tenure is clearly presented in Figure 5-11 below.

Figure 5-11: Ownership, licence and assignment



With an assignment and licence being discussed above, this diagram concludes and highlights that patents in a map of Taiwanese tenure are the following: those rights that a patentee holds are negative rights that contain a right to stop others from using and a right to stop others from manufacturing and such. Patentees hold these negative rights as freeholds where these rights are eligible to be assigned and licenced within a given time. A licence is consent for a patentee's waiver of the right to sue; on the other hand, it is a relief of the restriction to use.<sup>650</sup> The whole mechanism is designed in a passive way so that no positive granting of usage right is involved. In view of this way of thinking being grounded on a negative concept, it is especially difficult for civil law lawyers because they have to think about the granting of a licence as an agreement 'not to do certain actions by the patentee',<sup>651</sup> rather, in the normal case, it is an agreement where the licensee can do what he/she likes to his/her thing. Although licences are classified in the law of obligations above, the actual consensus is different from the normal setting in the civil law of obligations.<sup>652</sup>

### **5.6.5 Exclusive licences and non-exclusive licences in the classification**

Given the conclusion stated above, this research does not stop by the fulfilment of such a classification. Earlier in Chapter 2, this author mentioned that Japanese and Taiwanese judges both made misleading decisions in licence cases, which cannot be a coincidence. There must be something special in licences—apart from the classification above, that a traditional civil law classification cannot clearly explain. This section aims to find out

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<sup>650</sup> 'In the US, as in the UK, a non-exclusive licence is, in its simplest form, a waiver by the licensor of the right to exclude the licensee doing one or some of the forbidden activities which the grant of the patent provides'. See David de Vall and Petter McL Colley, *L W Melville Forms and Agreements on Intellectual Property and International Licensing*, vol 1 (3rd revised edn, Sweet & Maxwell 2008) 3-32.

<sup>651</sup> A licence 'is a consent under which a person precluded from the monopoly is allowed such access to it as the owner of the monopoly is prepared to allow'. See *ibid* 3-24.

<sup>652</sup> An overall picture for patents is, everyone is free to use in the first step, and a grant of patent is a restriction of that use. A licence is a release of that restriction. In contrast to the common law concept, the original setting of civil law is that everyone cannot use, unless he/she obtain a grant of permission to use. A licence is thus a further grant of a permission to use.

which part the civil law classification cannot explain. As a foundation, we need to understand the original classification in the common law system (limited to the UK and US).

Common law of England and common law of the United States of America have different answers to ‘what licences are’. UK courts are inclined to view licences as a creation of personal obligations,<sup>653</sup> with an exclusive licence not creating a proprietary interest,<sup>654</sup> even though sometimes an exclusive licence may be considered as property under other statutory purposes, such as in the Insolvency Act, Partnership Act or Companies Act.<sup>655</sup> US courts, however, are more flexible in this matter. Where courts have reason to believe an exclusive licensee possesses sufficient proprietary interest in a patent (for example when the licensee does not reserve any rights),<sup>656</sup> a non-exclusive licence may have the same effect as an exclusive licence so long as the licensor is

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<sup>653</sup> Vall and Colley (n 650) 3-34. Also in *Allen* (n 638) 246. ‘A licence passes no proprietary interest in anything, it only makes an action lawful that would otherwise have been unlawful. In the context of the royal grant of patents for inventions it was a consent given by the proprietor of the patent to another person, the licensee, to do something that the patent entitled the proprietor of it to prevent anyone from doing except with his consent. This is the meaning which “licence” has borne throughout the UK patent legislation up to and including the Act of 1977’.

<sup>654</sup> ‘There was clear authority that a licence of an intellectual property right, even an exclusive licence, did not create a proprietary interest’. See *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638(Ch) [294] Cited *Allen & Hanburys Ltd v Generics (UK) Ltd*, *CBS United Kingdom Ltd v Charmdale Record Distributors Ltd*, *Sport International Bussum BV v Inter-Footwear Ltd*, *Crittall Windows Ltd v Stormseal (UPVC) Window Systems Ltd*, *Northern & Shell plc v Condè Nast & National Magazine Distributors Ltd*. Justice Lewison also named other justices who take the same position as him, including Browne-Wilkinson in *CBS United Kingdom Ltd v Charmdale Record Distributors Ltd*, Justice Oliver in *Sport International Bussum BV v Inter-Footwear Ltd*, Justice Scott in *Crittall Windows Ltd v Stormseal (UPVC) Window Systems Ltd*, and Justice Jacob in *Northern & Shell plc v Condè Nast & National Magazine Distributors Ltd*. Also in Vall and Colley (n 650) 3-32, ‘A licence of an intellectual property right, even an exclusive licence, does not create a proprietary interest’.

<sup>655</sup> Examples like an exclusive licence of design right is a ‘non-cash’ asset within the meaning of s.320 of the Companies Act 1985. See *Ultraframe (UK) Ltd* (n 654). A waste management licence is a property under the Insolvency Act. See *Official Receiver (as Liquidator of Celtic Extraction Ltd and Bluestone Chemicals Ltd) v Environment Agency* [2001] Ch 475 (CA), and a milk quota licence is treated as property in the Insolvency Act by citing the Celtic Extraction case above. See *Swift v Dairywise* [2000] 1 All ER 320. A personal licence granted to one of the partners was a partnership property under Partnership Act no matter whether it was assignable or not. See *Don King Promotions Inc v Warren* [2000] Ch 291.

<sup>656</sup> ‘A person having an exclusive license to a patent possesses a sufficient proprietary interest in the patent to have standing to sue infringers. To be an exclusive license for standing purposes, the licensee must have received not only the right to practice the patented invention within a particular territory, but also the patentee’s express or implied promise that all others shall be excluded and prevented from making, using, selling, and practising the invention within the same territory as well’. See *Arcade Inc v Minnesota Mining and Manufacturing Co* [1997] 43 USPQ2d 1511 at 1513.



unlikely to licence the same technology to others, or to utilise this technology.<sup>657</sup>

UK courts in general do not think that proprietary or personal should be judged by whether a licensee can sue for infringement. The law enabling an exclusive licensee to sue for infringement is ‘purely procedural’.<sup>658</sup> It is not recognition of a proprietary grant. US courts, however, judge licences as a proprietary grant or personal consent by whether a licensee can sue his/her grantor for infringement. When an exclusive licence contains the right to exclude the grantor, there is no significant difference between assignment and exclusive licence.<sup>659</sup> In other words, if a US exclusive licensee obtains the right to exclude others, including the right to exclude the patentee (and sue for infringement if the patentee uses it), it is a proprietary grant like an assignment. In the eyes of US courts, the range of how a licensee can sue for infringement determines whether the grant is proprietary or contractual; it is not a purely procedural matter.

Given the fact that UK and US judges have different opinions on what happens after a licence commitment amounts to an assignment, one thing is clear, that licences themselves are basically contractual. In contrast to the common law judges, Japanese judges have a different point of view. They think an exclusive licence is proprietary. The Japanese Supreme Court stated (as in 3.2.4),

[ T ] he issue of this case is like a real property owner granting his surface right to

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<sup>657</sup> Vall and Colley (n 650) 3-35.

<sup>658</sup> Browne-Wilkinson J states, ‘Under section 19 of the Act an exclusive licensee is given a procedural right of action to sue for infringement. But the section is purely procedural’. ‘Therefore in my judgement the scheme of the Act preserves the normal distinction between assignees who have proprietary rights and licensees whose substantive rights are contractual’. See *CBS United Kingdom Ltd* (n 638) at 98-99. [this is a copyright case] Also in *Ultraframe (UK) Ltd* (n 654) [300]-[301]. ‘In addition it is clear that the world of intellectual property operates commercially on the basis that there is a clear distinction between an assignment (proprietary) and a licence (non-proprietary).’

<sup>659</sup> ‘[w]e agree with the precedent that when the transfer includes all substantial patent rights including the right to exclude the transferor, there is no significant difference between the rights transferred by assignment and those transferred by exclusive licence’. See *Arcade* (n 656) at 1513.

others. The superficiary has the right to exclude intruders, generally speaking, and the owner's *in-rem* rights (to the intruders) are not limited by the granting of the surface right.<sup>660</sup>

Japanese judges conceived exclusive licence as a proprietary granting of a surface right. This grant is imagined as a grant made by a land owner to a surface right holder (Figure 5-12). However, this is inappropriate. From the above analysis, a licence in general is not a proprietary grant; it is a waiver of the patentee's right to sue, a relief of the restriction to use on the licensee's side. If we use a civil law classification when thinking about this question, a licence is a contractual commitment. This could happen to a surface right holder and his/her lessee, where a surface right holder grants his/her surface right to his lessee with a contractual commitment. This cannot happen to a land owner who grants a proprietary surface right. This idea is presented in Figure 5-13 below, showing that Japanese judges incorrectly see an exclusive licence as a proprietary grant of a surface right.

Figure 5-12: An analogy of an exclusive licence in the civil law classification

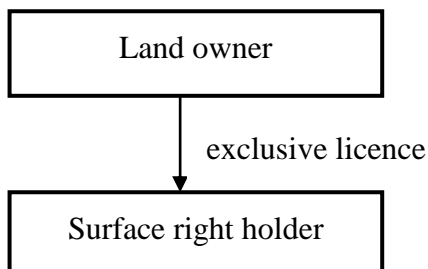
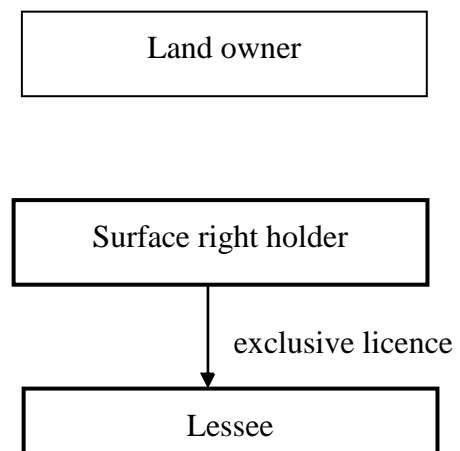


Figure 5-13: How an exclusive licence should be in the civil law classification



<sup>660</sup> [2005] June 17 precedent number 997(n 224) [translation by the author]

The Taiwanese Intellectual Property Office makes the same mistake. As stated earlier in 2.3.3, the Intellectual Property Office believes that an exclusive licence is an act relating to things, while a non-exclusive licence is an act relating to obligations.<sup>661</sup> The Civil High Court supports the opinion of the Intellectual Property Office.<sup>662</sup> The court classifies a patent licence as an exclusive licence and non-exclusive licence with two separate arrangements. When an exclusive licence issue is involved, the law of things is applied to the issue; when a non-exclusive licence issue is involved, the law of obligations is employed. This is a misconception though because Taiwanese practitioners envisage an exclusive licence as a grant for proprietary rights, and a non-exclusive licence as consent of use. This classification leads to confusion about the nature of a licence (a proprietary grant or a contractual commitment). This is all due to Taiwanese judges and practitioners misconceiving an exclusive licence as the granting of a surface right. It is actually more like a contractual lease of a surface right.

Although, an exclusive licence can be envisaged as a lease to a surface right, this analogy will not go far because it still does not explain who owns the full ownership in the first place. One cannot further use this example to explain why in the case of a bare licence that they merely obtain negative rights not being sued while leasing surface rights obtain positive rights to use and capitalise. The Taiwanese tenure system explains licences better than the civil law concept in this respect.

#### **5.6.6 Licences should be translated as *xu-ke* (許可) instead of *shou-quan* (授權) in the Taiwanese Patent Act 2011**

The legal term ‘licences’ has long been mistranslated as ‘*shou-quan*’, meaning rights

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<sup>661</sup> [1999] Zhifazi number 88007117 (n 166).

<sup>662</sup> [2006] Difang Fayuan Zhi Shangyizi number 18 (n 167).

(*quan* 權) have been granted (*shou* 授). It is a misconception though because in the substance of the meaning of licences, neither real rights nor positive covenant have been granted to licensees. A patent ‘licence’ is a negative covenant where a patentee will waive their right to assert exclusion against the licensee only if the licensee gets this permission called ‘licence’ from the patentee. The patentee merely renounces their right against the licensee and does not positively grant his proprietary rights (which is basically a bundle of rights of exclusion), nor positively commits that the licensee has a right to use his patent. Therefore, it is misleadingly translated as *shou-quan* (授權) when no positive rights have actually been given.

This misleading translation has led to significant difficulty in real practice. Licensees misconceive that they have obtained the right to use and manufacture from the patentees and question why they cannot ‘sublicence’ to whomever they want, just like subleasing, which happens often in non-exclusive licence cases when manufacturers want to protect their subcontractors. The majority of Taiwanese practitioners do not know that the substance of a patent licence is similar to a non-action commitment, where the licensee pays for the patentee’s non-action. Therefore, this term ‘licence’ should be translated as ‘*xu-ke*’ (許可), meaning ‘permission’, which is closer to original meaning of a licence. Articles 57, 59, 62, 63, 64, 69, 84, 87, 88, 89, 90, 91, 96, 97, 138 and 140 in relation to the terms ‘licences’, ‘licensees’ and ‘compulsory licences’ all need to be changed accordingly.

### **5.7 The law of *yeh* (業) in solving contemporary problems**

As this study presented in the first two chapters, the contemporary problems in Taiwanese real practice are:

- a) The position of patents in property taxonomy being unclear.

- b) Such an unclear position influencing law applications in patent transactions; if a patent is proprietary in nature, then the delivery requirement under principles of separation and abstraction is inevitably encountered.
- c) Civil law rights *in rem* cannot explain how a patent licence works: the extent that the rights a patentee owns and a licensee holds, are not well elaborated in civil law.

The law of *yeh* (業) solves the above problems. The law of *yeh* constructs its jural relations from one person to another person. With these assertions classified as assertions to one person only, and many others, the cluster of claims can be seen as a bundle of rights. For the reason that the law of *yeh* does not construct its jural relations by assertions to a thing and claims to a person, the law of *yeh* does not separate objects into things and claims. The transfer of assertions is not a movement of objects (things or claims) but a change of subjects (persons). Whether the object is proprietary or not is unimportant in the law of *yeh*. Since an assertion transfer is a change of subjects (persons), the principle of freedom of contract governs the transaction. As such, patent rights, whether proprietary or not, can be transferred under this structure.

Under this structure of whether patent rights are proprietary is unimportant, with the object being transferred being intangible rights most of the time in the law of *yeh* (like a right to manage the land), with ‘delivery’ never being an essential requirement for a valid transfer. Under the law of *yeh*, a patentee no longer needs to exercise the absurd delivery requirement that has been considered impossible to implement under the law of things. Within the regime of customary law, a patent rights transfer does not obey the principles of separation and abstraction. In the case of buying patents from a potential insolvency seller, the buyer has the right to terminate the contract when insolvency occurs. The buyer and seller no longer abide by the rigid legal structure in the code,

without the negative influence of the principles of separation and abstraction, leading to the ownership transfer contract not being sustained independently. As ownership is not transferred, the buyer need not worry about the purchased patents being a part of the seller's insolvency estate. The negative influence of the law of things is eliminated.

Under the law of *yeh*, the position of patents in property taxonomy becomes clear. The authority, on behalf of the commons, grants a patentee the rights to exclude others in order to encourage or preserve his/her investment/efforts for such an innovation, just like the authority does to the estate holder. This grant is not the conferring of positive rights; it is the granting of negative rights, a bundle of rights that include the right not to be used, manufactured and sold. In other words, a positive right, such as the right to use, already exists in society—under the state of nature, everyone is free to use. The granting of a patent only embargoes many others from using and is the manual creation of monopoly status for the patentee. For the reason that the patentee does not obtain any positive rights from the authority, 'to licence' means giving relief for such an embargo. As mentioned above, patent rights being proprietary or not are insignificant in a transfer, with the object being give out potentially being non-proprietary relief. Once a licence is granted, the licensee reverts back to the state of freedom to use. This reverting is targeted, so in the case of a non-exclusive licence, the non-exclusive licensee cannot grant his/her particular relief further down to anyone else unless otherwise agreed. However, in the case of an exclusive licence, the content of the grant is different. Just like an absent land owner, the owner/patentee grants the whole bundle of rights to the exclusive licensee who stands in the shoes of the patentee. In a case like this, rights that have been given out by the patentee are proprietary. The exclusive licensee can grant his/her proprietary rights further down, or may choose to grant non-proprietary relief to any non-exclusive licensee. The law of *yeh* provides answers to what extent the rights a patentee owns and a licensee holds, satisfactorily explaining the unelaborated part of

civil law.

## 5.8 Conclusion

This chapter presents a property model that can be built on Taiwanese customary practice. These customary property rules are not only similar to those rules in the common law system but also feasible for patents. This property modularity not only fixes the flaw of the civil law module but also provides a better paradigm for intellectual property.

Several suggestions emerge from this comparison of civil law ownership, common law estate and the Taiwanese customary rule *yeh* (業). The first is that the concept of *yeh* (業) is a better solution for a patent's property status than the concept of things in civil law. The idea of *yeh* (業) embraces a bundle of rights just like estate norm in common law; it is grounded on the exclusionary rules that patent rights are supposed to be. Unlike civil law property rules that communicate internal rules concerning positive use and disposition, the idea of *yeh* (業) contains only negative rights. It is perfect for explaining the nature of patents whereby patent rights are bundles of negative rights as well. For the strong similarity between real rights holdings in both systems, this chapter suggests that ownership of patents should be translated as *zhuan-li yeh-zhu-quan* (專利業主權) to replace the civil law phrase *zhuan-li suo-you-quan* (專利所有權) which has been misused for a long time.

Secondly, from an historical perspective, registration rules for land have had no direct impact on English patent registration, with Taiwanese justice making a misconnection between these two irrelevant systems. The principle of registration in land registration is a revolution, rather than an evolution in Taiwanese estate history. Traditionally, a

creation or assignment of *yeh* (業) is not required to be registered. This chapter suggests rules under the land registry shall not be involved in patent cases because there is no historical or legal ground to do so.

Lastly, licences cannot be explained under the classification of civil law property at present, so it is necessary to explain patent licences by means of customary law classification. This chapter advises that the *pacht* (贖) concept under Taiwanese customary estate law can be used in patent licence cases. In view of *pacht* (贖) being a personal contractual commitment of the parties, it shares the same characteristic with common law licence. This study further point out the mistake that the Japanese Supreme Court and Taiwanese Civil High Court have made in decisions.



## CHAPTER SIX

### CONCLUSIONS AND PROPOSALS

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This chapter aims to answer the last question—is the similarity between Taiwanese customary law and English common law on property taxonomy applicable to work under the framework of Article 1 in the Taiwanese Civil Code, as a supplement in the interpretation in laws? Before the analysis begins, section 6.1 provides a brief overview of the conclusions from previous chapters. Section 6.2 deeply analyses the hierarchy in the law interpretation set forth in Article 1, with 6.2.2 and 6.2.3 substantiating that using analogical skills by looking into rules in customary law to supplement the insufficiencies of statutory law is applicable under the framework of such hierarchy. As this study mentioned initially, the reason why patent status cannot be positioned in civil law property taxonomy is because the gap is structural and substantial. This substantial imperfection has been overcome by adopting customary law interpretation, as stated in 5.5, 5.6 and 5.7, with section 6.3 focusing on structural issues in this chapter. With the recommendations stated in 6.3 and the interpretation taken from 5.5, 5.6 and 5.7, this study concludes that the position of patents in property taxonomy and the meaning of licence that has puzzled Taiwanese law practitioners for over a century will be answered by this research.

## 6.1 Conclusions

Patents have been miscategorised into the civil law of things for nearly a century in Taiwan. This research sets out to find out why and how this misconception originated and spread, and offers a scheme whereby using a classification under customary law, a property model for patents, can be established.

In Chapter 1 this study reviews all paradoxical sayings pervading present-day Taiwanese academia and the judicial system. Majority jurists believe that real rights in Taiwanese statutory laws explain the nature of a patent well, so there is no need for further discussion. In fact, court decisions that have adopted jurists' opinions sometimes successfully explain the law, but sometimes they do not. This study postulates that the problem is due to a different understanding of 'property' in civil law and common law systems. Previous research is neither sufficient nor deep enough to propose an applicable model under Taiwanese law. Therefore, this chapter set out six questions that is be answered: Why does popular opinion explain patents using the law of things? What has happened in the past? What are the substantial differences of English common law taxonomy and Taiwanese civil law taxonomy on property? Insofar as the statutory laws do not solve the problem completely, is there any customary law in Taiwan that can help replenish the abovementioned gap? How similar is this customary law to that in English common law? Is this similarity applicable to work under the framework of Article 1 in the Taiwanese Civil Code?

In Chapter 2, this study answered the first question—what has gone wrong in Taiwanese jurists' and courts' opinions? The legislative record was examined and analysed, with this research discovering the source of misconception was the vague meaning of the word 'things', which was 'deliberately' not clearly defined in the code. This vagueness

has provided interpretative room for patents in the civil law property structure. To those who believe that patents resemble physical things, they believe that both the principle of separation and abstraction equally apply to patent assignment. The reasons they hold are seemingly reasonable (the word ‘things’ does not exclude intellectual property) but they neglect a significant fact that the principles of separation and abstraction were designed for transaction involving physical things, not transaction for intangible objects.

The second misconception is delivery. This chapter presented the bizarre misconception carried by some intellectual property professors and judges that ownership of copyright is only transferred at the time when the work is ‘delivered’ to the assignee. This study challenges this view by pointing out that a methodology patent cannot possibly be delivered because it is ethereal in nature, intangible and without a corporeal existence. Although theoretically it is possible to replace delivery requirement with registration, it is however still problematic in explaining the law because the court misuses the principle of registration in patent cases. The principle of registration, a creation of absolute ownership by the registry, applies well in relation to real property but badly concerning intellectual property. This study also challenges this myth by pointing out that copyright does not have a registry system, with the existence of ownership of copyright unaffected by whether it has a registry system or not. This chapter concludes that the origin of the misconception arose from an insufficient definition of the word ‘things’ because to consider patents as physical things is a slippery slope. Therefore, the principle of separation, abstraction, registration and even delivery should not be adopted in patent transactions because the patent is then forced to be confined to a civil law classification which was design for physical things.

In Chapter 3, this study answer the second question—what has happened in the past that has led jurists and judges to use principles arising from civil law real rights to explain

the nature of a patent? This study concludes that this mistake was triggered by a natural structural defect in the progress of transplanting too many laws from diverse resources. In Japan, the problem was that patent law meant clinging to the French style of Civil Code, with the code changing to the German style after patent law was enacted. In Taiwan, the problem was that Taiwanese Civil Code was heavily influenced by Japanese scholarship, so the flaws remained the same. Academia tried to redress any voids by forming a common scholarly consensus using the quasi-possession hypothesis. This hypothesis was selectively mirrored in Joseph Kohler's scholarship, where the majority of Taiwanese scholars view it as their legal grounds. However, this paradoxical view only exposes the slackness of Taiwanese academia and courts for favouring the use of ready-made rules, rather than conducting a comparative study from scratch.

Chapter 4 explored the history and evolution of how patents have been categorised as personal property. Patents, like franchises, were assimilated in land law as incorporeal hereditaments in the thirteenth century. The doctrines of seisin and estates were equally applied to patents in medieval times. Today, patents in choses in action were a development of the late nineteenth and early twentieth centuries. It was attributed to a slowly expansion of choses in action from personal to real property in the sixteenth century. Moreover, in the seventeenth century, patents as choses in action were re-categorised into a larger property concept, whereby later in the eighteenth century, Roman possession was used to support this enlargement. Philosophers strengthen this idea by citing John Locke, Aristotle, Hugo Grotius and Pufendorf's works, with patents eventually becoming personal property in the sub-category of choses in action as we see it now.

With the above analysis as a foundation, this study can now answer the third question—what are the substantial differences of real rights in English common law and

Taiwanese civil law? This chapter concludes that physical things in Taiwanese civil law cannot explain the property nature of a patent because civil law ownership lacks two significant features. Firstly, ownership in civil law cannot be segmented. Secondly, no one is free to use land in the first place, whilst in common law everyone is free to use land in principle. The prerequisite is precisely the converse. As Chapter 5 further explained, the differences are caused by different classification techniques. Civil law classification begins with the ‘thing itself’, instead of the ‘interests’ in things, whilst the common law classification starts with interest in things and jural relations dealing with intangible objects. Therefore, movable or immovable things, or rights *in rem* in Taiwanese civil law, cannot explain the property nature of a patent because ownership means to own ‘a thing’ perpetually. To own a perpetual patent contradicts the current notion that we have now. In contrast to civil law classification, common law classified ‘interests’ rather than things, with ownership meaning to own ‘interests’ for a certain period of time. This classification is similar to the classification in Taiwanese customary law whereby ownership refers to a holding of interests, rather than a holding of physical things. This chapter concludes that Taiwanese customary law can proffer a better property model for patents than civil law.

Chapter 5 answered two questions—is there any customary law in Taiwan that can help replenish the abovementioned gap, and how similar is this customary practice to that in common law? This chapter commenced with an overview of real rights classification under Taiwanese customary law, and through a comparative study of both systems, reached five concise conclusions, as *seriatim*:

- (1) The law of *yeh* (業) under customary law is more feasible than law of things under civil law.
- (2) *Yeh-zhu-quan* (業主權) is similar to common law estate holding.

- (3) There is no historical or legal grounds for adopting rules in land registration in patent registration, therefore the principle of registration in land registration shall not be involved in patent cases.
- (4) 'Patent assignment' shall be translated as '*zhuan-li-zhuan-rang*' (專利轉讓).
- (5) Licences can resemble *pacht* (贖), thus licences can be envisaged as personal obligations made by the grantors and grantees, just like a lease to a surface right.

This study has proven that, in many aspects, real rights classification in Taiwanese customary law is very similar to common law classification, with these similarities able to help replenish the abovementioned gap in statutory law. The position of patents in a property structure can then be explained through Figure 5-11. Moreover, this figure easily points out where mistakes are made in decisions made by the Japanese Supreme Court and Taiwanese Civil High Court. Patent assignments and patent licences can then be further explained by way resembling legal terms and norms set forth in Taiwanese customary law.

The law of *yeh* (業) explains what rights a patentee owns and a licensee holds. As stated in 5.7, the law of *yeh* (業) does not require delivery as an essential requirement of a valid transfer, so a patent transfer does not adhere to the absurd requirements of the law of things anymore. Under the law of *yeh* (業), a transfer is a change of subjects rather than objects, so whether patent rights are proprietary or not, patent rights can be transferred freely. The law of *yeh* (業) provides a path for patent transactions in real practice, with this path avoiding the dilemma arising from civil law legal structure by obeying the principles of separation and abstraction.

The law of *yeh* (業) also explains what a non-exclusive licence and an exclusive licence are. The rights a patentee owns are a bundle of negative rights that include the right not

to be used, manufactured and sold. To ‘licence’ means giving a relief of embargo. A non-exclusive licence is a grant for non-proprietary relief. This relief is targeted, so a non-exclusive licensee cannot grant his/her personal relief further down to others unless otherwise agreed. In the case of an exclusive licence, the owner/patentee grants the whole bundle of rights to the exclusive licensee, with the exclusive licensee standing in the shoes of the patentee. Patent rights on such occasions are proprietary. The exclusive licensee can grant his/her proprietary rights further down, or (s)he may choose to grant non-proprietary relief to any non-exclusive licensee. The law of *yeh* (業) explains the substance of patent rights and the meaning of licence, leading to the unelaborated part contained within civil law being fulfilled.

Finally, the following sections aim to answer the last question—whether the abovementioned scheme is applicable to work under the framework of Article 1 in the Taiwanese Civil Code. The following sections will prove that this scheme is workable under the Civil Code and that the results of this study can be adopted into every civil case when patents are involved.

## **6.2 Property model built on customary law is applicable and enforceable under the scheme of Article 1**

### **6.2.1 Hierarchy in the interpretation of law**

Article 1 of the Taiwanese Civil Code is the most important of all civil law rules in this code. It states,

If there is no applicable act for a civil case, the case shall be decided according to customs. If there is no such custom, the case shall be decided according to

the jurisprudence.

This clause sets out the hierarchical order; statutory laws are the first priority, followed by local customs and then jurisprudence. The structure of this clause has been copied from Article 1 of Swiss Civil Code 1907 because it has similar wordings that express the spirit of hierarchy.<sup>663</sup> It reads,

The Law must be applied in all cases which come within the letter or the spirit of any of its provisions. Where no provision is applicable, the judge shall decide according to the existing Customary Law and, in default thereof, according to the rules which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case-law.<sup>664</sup>

This legal order is not presented in every civil code though. For example, the two most influential codes to the Taiwanese Civil Code (Japanese and German Civil Codes) have

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<sup>663</sup> Wu Chung-Jau(吳從周), 'Lun Minfa Diyitiao 'Fa Li':Zuigao Fayuan Xiang Guan Minshi Panjue Panli Zonghe Zhengli Fenxi(論民法第一條『法理』:最高法院相關民事判決判例綜合整理分析)=On 'Jurisprudence' in §1 Civil Code: an analysis of decisions and precedents made by the Supreme Court' (2003) 15(2) Soochow Law Journal 9. Justice Wu Chung-Jau stated, 'Article 1 of our Civil Code... is copied from Article 1 of Swiss Civil Code 1907 made by Eugen Huber.' He noted that his first learning of Article 1 of Swiss Civil Code 1907 was from Professor Yang Ri-ran's class on Jurisprudence at National Taiwan University. Justice Wu Chung-Jau further cited the original clause of Article 1 of Swiss Civil Code 1907 in the footnote, 'Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält. Kann dem Gesetz keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht entscheiden, und, wo solches fehlt, nach der Regel, die er als Gesetzgeber aufstellen würde. Er folgt dabei bewährter Lehre und Überlieferung.' The same statement of Article 1 is copied from the Swiss Code and also found in Wang Ze-jian(王澤鑑), *Minfa Shili Yanxi:Minfa Zongze(民法實例研習:民法總則)=A Study on the Cases of Civil Law: General Principle* (San Min 1996) 27-28 and Yang (n 69) 248. Professor Yang cited Professor Wang Ze-jian's analysis and complimented him by stating, 'Wang Ze-jian has a penetrating statement with this regards, "Article 1 of our Civil Code is copied from Article 1 of Swiss Civil Code, the so called local customs, equals to *Gewohnheitsrecht* in Swiss Civil Code."' The primary source however, did not explicitly make this connection, see Judicial Yuan (Ministry of Justice) Department of Judicial Administration, *Zhonghua Minkuo Minfa Zhiding Shiliao Huibian-Xia Ce* (中華民國民法制定史料彙編-下冊)=*The Compilation of the Legislative Archives of the Civil Code of Republic of China-Final Volume* (Judicial Yuan 1976) 377-378. There is no direct evidence of this connection because this compilation is not a complete collection due to the war leading to many primary sources going missing as the curator later explains on page 987 and 988.

<sup>664</sup> See Ivy Williams, *The Swiss Civil Code: English version vol I* (Siegfried Wyler and Barbara Wyler eds, reprint edn, Hans Schellenberg 1987) 1. This translation is based on the Swiss Civil Code 1907 and revised, inserted and annulled articles from 1907 to 1984. Article 1 has stayed the same since 1907.



no such hierarchy applicable in law in their civil codes.<sup>665</sup> That means that this study, which follows this order, may only be suitable for the Taiwanese civil law system and may not be equally applied to other civil law jurisdictions.<sup>666</sup>

Taiwanese Civil Code expresses this hierarchical legal order, so this research follows the order from the beginning to the end. The order shall be that this research needs to prove that there is no applicable statutory law for patent transactions in the beginning. As long as this condition is proven, research carries on with local customs and jurisprudential discussions. Chapters 2 and 3 proved that there is no applicable statutory law for patents, whilst Chapters 4 and 5 looked into the general principle in the common law system and similarities in Taiwanese local customs. This study follows the above stated order. The final question this study needs to ask is: do the customs and jurisprudence conform to the definition in Article 1? What do ‘customs’ and ‘jurisprudence’ exactly mean in Article 1?

## **6.2.2 Customs under Taiwanese Civil Code**

The word ‘customs’ has many interpretations. Divided doctrinal sayings have shown two diverse trends for the definition of customs: either stringent or loose standards. The stringent standard says that customs must be widely accepted as a general practice in subject matter and be accepted as law.<sup>667</sup> The loose standard, on the contrary, does not

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<sup>665</sup> German Civil Code had a similar dogma in the first draft, but deleted in the second draft. Japan puts that dogma in the guidelines issued to judges, but not in its civil code. See Wu (n 663) 10.

<sup>666</sup> Countries who have this dogma are Switzerland (Article 1), Austria (Article 7), Thailand (Article 14) and Turkey (Article 1). Not every civil law jurisdiction sets priority in the application of laws. See *ibid* 9 at note 8.

<sup>667</sup> An example is international law professor Cheng Chia-jui who talked about the sources of internal legal order, where the first one must be constitutional law, legislation and delegated legislation; the second one is customary law, followed by judicial decisions and general principles of law—principle of fair and equitable treatment that belongs to the jurisprudence area. Professor Cheng takes the strict standard on the definition of customary law, stating that ‘Customary law in the internal legal order has, as a supplementary source of customs law, been used as no less binding than ordinary law when such laws are in conformity with some very stringent conditions: (1) they must be widely accepted as a general

think that customs must be accepted as law. Since Article 1 uses the word ‘customs’ not ‘customary law’, Article 1 does not require customs to be accepted as a law, such as in general practice. Under this loose standard, customs only mean local social practices that local communities consistently practice and accept as facts; customs do not have to be in written texts, or accepted as law by communities.<sup>668</sup> ‘Customs’ is not only used in Article 1 but also in Article 776, 778, 779, 781, 784, 785, 786, 790, 793, 800, 836, 838, 850 and 915 in relation to land usage,<sup>669</sup> which use this word ‘customs’ in context as well. Not only does academia have diverse opinions but legislators have also used this word inconsistently in these clauses. Sometimes it loosely means social practices<sup>670</sup> and sometimes it means stringent general principles that have to comply with the principle of generality and the principle of consistency followed by communities for some considerable time.<sup>671</sup> The true meaning of customs in the legislators’ minds remains a mystery.

No matter whether the word ‘customs’ is defined broadly or narrowly, this study passes

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practice in customs matters; and (2) they must be accepted as law.... Customary law in the East Asian legal system has only been included in the code of civil law, not in the administrative law’. See Cheng Chia-jui, ‘The Sources of National Customs Law in East Asian Countries’ in Cheng Chia-jui (ed), *Customs Law of East Asia* (Wolters Kluwer 2010) 33. For a deeper analysis of strict and loose standards and various definition of customs across different periods of time in history, see Huang Yuan-sheng (黃源盛), ‘Ming Guo Chuqi De Mingshi Shenpan Yu Mingjian Xiguan: yi daliyuan caipan shilliao wei zhongxin de kaocha (民國初期的民事審判與民間習慣：以大理院裁判史料為中心的考察)’=On The Customs and Civil Judgments at The Primary Stage of Ming Gou: focus on daliyuan decisions’ in Liu Zeng-gui (劉增貴) (ed), *Fazhi Yu Lisu: disanjie guoji Hanxue huiyi lunwenji lishizu (法制與禮俗：第三屆國際漢學會議論文集歷史組)*=*Law and Customs: third Hanxue conference: history division* (The Institute of History & Philology, Academia Sinica 2002).

<sup>668</sup> Tsai Ming-Cheng (蔡明誠), ‘Xiguan Yu Wuquan Fading Yuanze (習慣與物權法定原則)’=Customs and the *Numerus Clausus* Principle’ in Lin Jing-miao (ed), *Sifaxue Zhi Chuantong Yu Xiandai (私法學之傳統與現代下冊)*=*The Traditional and Modern Private Law vol II* (Xue Lin 學林 2004) 324-325.

<sup>669</sup> Wu (n 663) 82-85.

<sup>670</sup> For example, Article 776, 778(2), 790 (1) (ii), 793, 836(1) and 850 means as long as local social practice differs from these clauses, local customs precede statutory laws. See Chang Yun-chien (張永健), ‘Wuquanfa zhong zhi Xiguan: zixun chengben lilun zhi guandian (物權法中之習慣：資訊成本理論之觀點)’=Property Customs in Taiwan: an Information cost perspective’ (2011) 188 *The Taiwan Law Review* 月旦法學 83-84.

<sup>671</sup> For example, Article 779(3), 781, 784(3), 785(3) and 786(3) have a proviso that ‘if it is otherwise provided by statutes or customs, such statutes or customs shall be followed’. Article 800, 838(1), 850-3(1) and 915(1) have different provisos like ‘unless it is otherwise provided by a particular agreement or custom which shall apply’.

both standards because the traditional landholding system, as presented in Chapter 5, is no longer an oral tradition; it has already been put down to written texts by Japanese researchers in *Taiwan Shiho*. The concept of *yeh* has been widely discussed by academia;<sup>672</sup> both Taiwanese and Japanese researchers have made significant contributions to this area of law. The owner has remained being called *yeh-zhu* until now, with *pacht* often heard in rural areas. This customary practice has even transformed itself into flat leasehold. Leaseholders constantly treat themselves as freeholders and lease the whole flat to another tenants, with the leaseholders calling themselves ‘*er-fang-dong*’ (二房東, the second owner) and naming their landlords ‘*da-fang-dong*’ (大房東, the first owner).<sup>673</sup> Leaseholders see themselves as landlords just as small-rent landlords did to their primary cultivators. This social practice has been widely accepted as a general practice and Taiwanese people consider it as obligatory; even the transformation from land to a flat does not destroy the uniformity of this underlying concept. This custom has the consistency, uniformity and generality that the strictest standards require. Therefore, customary practice proposed by this study suffices for the requirement that customs in Article 1 should have.

As with the tension of customs and *numerus clausus*,<sup>674</sup> before 2009 it was very difficult to create a real right by means of customs because of the strict restriction of *numerus clausus*. After 2009, the law of things was significantly amended, with this

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<sup>672</sup> The concept of *yeh* has already been a part of the History of Law and Society and Taiwan History curriculum including, but not limited to National Taiwan University, National Chengchi University, National Taiwan Normal University, Feng Chia University and Tamkang University. This author was a participant on the History of Law and Society curriculum at National Taiwan University. The concept of *yeh* can be found in law and history books, theses, journals and conference papers. Taking the journal *Taiwan Shi Yanjiu* (臺灣史研究, Taiwan Historical Research) as an example, if one types in the word *yeh* (業) in the catalogue search, it will present 80 results from various types of research concerning the concept of *yeh*.

<sup>673</sup> This customary practice has been supported by Miyahata’s thesis. As a native Japanese, she spoke about her own experience, stating that when she stayed in Taiwan, she was very surprised by the generality of *er-fang-dong* (二房東) in Taiwan, with many of her Taiwanese friends being so earnest to be *er-fang-dong* (二房東) and some of them even invested in making more rooms with their own money, in order to collect more rent from sub-lessees. See Miyahata (n 537) 2.

<sup>674</sup> For the definition of *numerus clausus*, see the Terminology section.

restriction being removed. Real rights can be created by means of customs as long as the court recognizes it.<sup>675</sup> Judges can, by ways of the next step, application to jurisprudence, adopt customary law and concepts in a patent case. Below is how this resemblance works under the scheme of civil law jurisprudence.

### 6.2.3 Jurisprudence and this research

Although Article 1 of Taiwanese Civil Code is derived from Article 1 of the Swiss Civil Code 1907, there is a slight difference in the meaning of jurisprudence. The Swiss definition of jurisprudence is more accurate and narrow than Taiwanese jurisprudence.<sup>676</sup> It limits judges to applying jurisprudence that has been approved as legal doctrine and case-law, and according to the rules that the judge would lay down if (s)he had himself/herself to act as legislator. In contrast to the precise Swiss requirement, the Taiwanese definition to jurisprudence is far looser than the Swiss counterpart—there is no restriction at all. Although the loose definition causes Taiwanese judges to use jurisprudence frequently, it does indeed provide some benefits to the judicial system, making the system more like case law.<sup>677</sup> The loose definition also provides benefits to researchers; for example, this study does not need to prove that the proposed model has been accepted as a legal doctrine in intellectual property law society because Taiwanese law does not require it. The lesser the restriction on jurisprudence is, the better it is

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<sup>675</sup> See comments by Chang (n 670) 83. Also a deeper monograph regarding the trend of weakening the restriction of *numerus clausus* in Asia, see Su Yeong-chin (蘇永欽), ‘Wuquan Fadingzhuyi Songdongxia de Minshi Caichanquan Tixi: zaitan dalu minfadian de kenengxing (物權法定主義鬆動下的民事財產權體系)=The Structure of Civil Law Property Rights after Weaken *numerus clausus*: re-exploring the possibility of Chinese Civil Code’ in Cheng Chia-jui (程家瑞), Pan Wei-ta (潘維大) and Hung Chia-yin (洪家殷) (eds), *Essays On Comparative Studies of Chinese Legal Systems: Proceedings of the Cross-Strait Conference on Civil Law Studies, Taipei, November 27-28, 2004* (Soochow University School of Law 2005). Similar comments can also be found in Smith, ‘Community and Custom in Property’ at page 36 ‘current debates over the *numerus clausus* in China, Japan, and Taiwan center on the role of custom. Those who would like to weaken or abolish the civil-law-style custom into property law’.

<sup>676</sup> Wu (n 663) 11.

<sup>677</sup> *ibid* 11. Wu Chung-Jau (吳從周) was a judge in Taiwan before he published this monograph as a PhD student at the University of Cologne in Germany. Therefore, his comment on Taiwanese judges’ abuse of using jurisprudence is authoritative.

because to solve immense human problems with limited laws, there is always something missing somewhere in the law. Taiwanese jurisprudence provides more trust on professional judgements and proffers more flexibility to the application of law.

Despite Taiwanese academia having various definitions of Taiwanese jurisprudence,<sup>678</sup> there are still rules to follow regarding how far jurisprudence can be reached. At large, ‘jurisprudence’ inherently covers two meanings. One is legal philosophy and the other is legal methodology.<sup>679</sup> The latter is more popular than the former because judges are more interested in knowing how this specific problem is solved and by what methodology, rather than philosophical theory about subject matter.<sup>680</sup> Taking this study as an example, a comparative study from an historical perspective and building a property model for patents grounded in Taiwanese customary law is more favourable to judges, compared with building a property model from a philosophical perspective. In other words, pragmatically, judges are inclined to cite a result from a reasonable methodology. Another reason for disfavouring citing philosophy is that a doctrinal theory is not the source of law<sup>681</sup> and carries a potential risk of being challenged by the higher court if a party appeals.<sup>682</sup>

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<sup>678</sup> There are four popular views on Taiwanese jurisprudence. Some say Taiwanese jurisprudence refers to a general principle arising from the local community that is guided by good will and rationale. Some say that it is a general principle arising from the nature of law. Some say it is the nature of things (Natur der Sache). Others combine the above three definitions and say it is a general principle arising from the local community that is based on the nature of law and nature of things. Overall, there are two trends in this definition, one is ‘the general rules of the local community’ and the other is ‘the nature law of all human beings’. Both are correct and it reveals different opinions at different stages of the development of jurisprudence. See *ibid* 12,13,15,16,19,96. Also in Yang Ren-shou (楊仁壽), ‘Chanshi Falu Zhi Fangfalun (闡釋法律之方法論)=The Methodology of Law Interpretation’ (1986) 6(1) *Sifa Yanjiu Nianbao* (司法研究年報)=Judicial Studies Annual 2-5.

<sup>679</sup> Wu (n 663) 30.

<sup>680</sup> *ibid* 32. See also Yang (n 69) 49-57. Yang Ren-shou (楊仁壽) who is the Supreme Court justice and also emphasised the importance of legal methodology in case decisions.

<sup>681</sup> Wu (n 663) 36-37. The author Wu Chung-Jau (吳從周), as a judge, provides a deep analysis about how judges value philosophy and legal methodology differently when using jurisprudence for court decisions. Taiwanese practitioners favour legal methodology over philosophy because legal philosophy has been criticised as ‘unpractical’, or ‘too theoretical’ in solving disputes at hand for a long time. Therefore, this study chooses legal methodology as jurisprudence, i.e. a comparative method grounded in history is more favourable by practitioners at present.

<sup>682</sup> Article 496(1) of the Taiwanese Civil Code, ‘Except where the party has filed an appeal to assert the ground for a review or has failed to assert such ground known to him/her, a rehearing action may be

There are three set types of undertaking for this legal methodology. The first type is using analogical techniques to take examples from the same area of law.<sup>683</sup> The second type is using analogy to place the corresponding clauses in one specific law that can be applied in a different area of law, such as the definition of the term ‘not less than’ in criminal law also being applied in a civil case.<sup>684</sup> The third type is using analogical skills, looking into rules outside the statutory law, such as local customs or foreign general principles, to supplement the insufficiencies of statutory law,<sup>685</sup> like this study using a surface right owner’s and lessee’s relations to explain a patent right owner’s and licensee’s relations. Concerning the first and second types, the inner analogy was not successful for patents, as shown in Chapter 2. Chapters 4 and 5 used the last methodology—looking into rules outside the law from local customs in order to supplement the insufficiencies of statutory law. This study used the last type of methodology and proved that the first and second types are unworkable, so the result of this analysis suffices for the definition of jurisprudence.

### 6.3 Key recommendations and proposals

Throughout this thesis, a series of recommendations have been made. They are presented here in concise form.

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initiated to request a review of a final judgement with binding effect in any of the following situations: where the application of law is manifestly erroneous’. [translation by Lawbank]

<sup>683</sup> Wu Chung-Jau (吳從周) notes this type of analogy, with German scholars calling it ‘Gesetzesimmanente Rechtsfortbildung’. The three methodologies are analogy, limitation and enlargement, according to the legislative purpose, and to make proportional arrangements within the scope that are permissible. See Wu (n 663) 27.

<sup>684</sup> Jurisprudence has a significant function of bridging different area of laws. See *ibid* 28. Example like Article 10(1) of Criminal Code states, ‘The term “not less than”, “not more than”, or “within” includes the given figure’. Civil Code and many ordinances do not replicate this definition because they all refer back to the Criminal Code by means of jurisprudence.

<sup>685</sup> Wu Chung-Jau (吳從周) noted German scholars calling it ‘Gesetzesübersteigende Rechtsfortbildung’. The typical examples are maximum mortgage and fiduciary transferring guarantees. The court adopts Taiwanese customs and created these two systems outside civil law. See *ibid*.

### 6.3.1 Recommendations

This study recommends a clear cut of free patents from the law of things. It can be done by changing misleading civil law terms used in Taiwanese Patent Act 2011 and filling statutory law insufficiencies by way of interpretation that is conferred by Taiwanese customary law in accord with English common law.

- I. The law of *yeh* is more feasible than the law of things because *yeh-zhu-quan* can successfully explain patent ownership, while civil law *suo-you-quan* cannot

Physical things are the coded theme in the law of things. All legal relations are designed around them where a concept of ownership develops arising from this main theme. Ownership (*suo-you-quan* 所有權) under this theme denotes a perpetual holding. Due to a holding being perpetual, the alienation of ownership is a significant alternation of the status quo, so any alienation is governed by the principle of separation and abstraction. The original setting of these two principles was to protect inferior buyers. However, in the case of patent assignment, the buyers have no need to be protected because ownership has already passed to the buyer when the contract is signed. The principle of separation and abstraction, opposing, create unfairness to the seller when the buyer goes bankrupt—since ownership has been transferred to the buyer, the seller cannot ask for a return. It is all due to the principle of abstraction that makes the transfer of ownership independent from a contractual agreement, with the validity of the sales agreement not influencing the legal effect of the ownership transfer. Under this situation, the principle of abstraction creates unfairness to the seller, so the principle does not aid the stabilisation to patent transactions, adding more risk to it. For this reason, the whole set of rules, including ownership in a perpetual sense, are unfeasible for patent transactions. Moreover, the compulsory requirement of delivery is virtually impossible to implement when assigning patents, therefore in every aspect, the civil law concept is unsuitable for

patents.

The law of *yeh*(業), on the other hand, is a better law for patents and patent transactions. The law of *yeh* (業) is a law particularly designed for intangible things, with all rules arising from the law of *yeh*(業) circuiting around a person and his/her real rights. Ownership (*yeh-zhu-quan* 業主權) under this law refers to a holding for a limited duration, with owning a right for a certain period of confined time. There is no principle of separation and abstraction involved in alienation of ownership under this law, with the best of all being that there is no compelled delivery requirement in this law. All deviating and contradicting parts arising from the civil law of things disappear in the law of *yeh*(業), making this law much more applicable than civil law.

The law of *yeh*(業) has another irreplaceable advantage. The law of *yeh* admits leases as real rights, whilst the law of things denies them. It is important for the later resemblance of patentees and licensees with leaseholders and licensees. As the law of *yeh*(業) classify leases as real rights, patentees own their patents just like leaseholders hold their leases, with both of them being proprietary. The law of things does not have the same resemblance because civil law classifies leases as non-proprietary personal obligations. It stops the further development of licences as parties' contractual obligations in this structure.

In contrast to civil law, under Taiwanese traditional real rights classification where leases are proprietary, licences are allowed to occupy the place of contractual obligations. Leaseholders hold their leases proprietarily, whereas licensees hold their licences contractually, and it is fairly easy to apply real rights rules into a patent case. Patentees hold their patents proprietarily and their licensees hold the patent contractually; there is no deviating and contradicting in view of analogy. However, for



the law of things, leases are contractual in the civil law classification; it is extremely bizarre to carry on with patentees holding patents contractually and licensees hold patents contractually as well. From a legal science perspective, this customary law classification is in an ascendant position when compared to civil law.

## II. The principle of registration from land registration shall not be adopted in patent registration

The principle of registration arising from land registration has been misaligned with patent registration for a long time, starting with the Taiwanese academia and then spread to the juridical system. The misconnection of land registration and patent registration arose from civil law ownership being applied to patent rights. In fact, court decisions that have adopted this misconception sometimes successfully explain the law, but sometimes do not. The Civil High Court in Taiwan has used this misconception firstly in trade mark cases, whilst in the same year not using this misconception in copyright cases. Judicial Yuan, where all the justices unify their disagreements through a voting system, agree to further adopt this misconception in patent cases. Henceforward, this misconnection was officially admitted by the court in trade mark and patent cases. The inconsistency in adopting legal rules only invites deeper investigation into why Judicial Yuan tolerates such an inconsistency in the same area of laws.

This study suggests that the principle of registration originating from land registry is irrelevant to patent registration. From an historical perspective, these two registries developed independently. Taking English history as an example, the official index system was only introduced to patents after 1852 because before that there was none. It was specifically stated in an 1851 House of Lords' report that registration should be considered merely as a record of claims and not as any determination of rights between

parties. This opinion is further supported by Section 32(9) of the Patents Act 1977, where registry is *prima facie* evidence of anything required or authorised by the law and definitively not the creation of any right. Patent registration is irrelevant to recognition of ownership, thus it is evident that it is superfluous for Taiwanese justice to link land registration with patent registration.

Moreover, from a Taiwanese historical perspective, there was no requirement for land registration. Ownership transfer in Taiwan does not even have a public ceremony like its English counterpart where the vendors were required to hand over a piece of turf publicly to the purchasers in the presence of witnesses, with an oral agreement in secrecy in Taiwan having the same transfer effect. The principle of registration in the land registry that exists now was a later revolution starting during Japanese rule and not an evolution developed by Taiwanese society. Therefore, the misconnection of land and patent registry's is purely a legal abstraction created by civil law trained judges. The principle of registration is not suggested to be applied in patent cases for this reason.

III. Patent 'assignment' should not be translated into *rang-yu* (讓與) to prevent any confusion with the existing usage of outright ownership alienation for physical things

Under the law of things, 'assignment' is a synonym for 'alienation'. It refers to outright alienation of ownership as a whole, translated as *rang-yu* (讓與). As mentioned above, physical things are the code for the law of things; an assignment means a transfer of physical things with all proprietary rights therein. Also, the prerequisite of this transfer is that this thing is mine, therefore assignment is an alienation of ownership between the owner and the assignee. This understanding differs from common law. In the past when England was under the feudal tenure system, no one owned the King's land. Everyone

was his tenant and held the land for him. The land was not owned by citizens who held leaseholds instead, so the ‘objects’ they assigned were leaseholds which were lesser than true freeholds, with ‘assignment’ meaning a transfer of lesser interest. This is a significant difference in the usage of the same legal terminology, with this nuance having a significant impact on patent assignment activities.

This study took John Henry Merryman’s box metaphor and further developed it. Civil law ownership can be envisaged as a box where the owner can open up the box and remove some real rights for transfer. As long as the owner keeps the box, even if the box is empty, the owner retains ownership. In the civil law concept, assignment refers to a transfer of this box; it means the owner loses ownership as a whole, no matter whether the box is empty or full of real rights. However, under the common law system, there is no box at all. The owner keeps a bundle of real rights whereby transfer each one counts as assignment. Assignment does not necessary mean the owner loses his whole bundle of rights after assignment because whether the assignee owns the property depends on the quantity of the real rights being transferred.

‘Assignment’ in the common law consensus makes perfect sense in patent assignment because if patentees are envisaged as leaseholders, assignment refers to a conveyance of lesser interests to assignees. ‘Assignment’ in the civil law sense, however, does not offer the same explanation to patent assignment because if a patentee can make an outright ownership transfer like a physical thing owner, why can’t the patentee own that patent perpetually just like a physical thing owner? The civil law explanation leads to a contradiction, therefore this study suggests that patent assignment should use another translation rather than adopting the concept directly from civil law ownership disposition. Patent ‘assignment’ should not be translated into *rang-yu* (讓與) to prevent confusion with the existing usage of outright ownership disposition for physical

things.

IV. ‘Patent assignment’ should be translated as ‘*zhuan-li-zhuan-rang*’ (專利轉讓) rather than a civil law term ‘*zhuan-li-rang-yu*’ (專利讓與)

Patent assignment is not a disposition of a physical thing as stated earlier in 5.6.1. This study suggests that in order to highlight that a patent assignment is a change in the holding to intangible claims rather than a disposition of a physical thing, patent law should use the neutral word ‘*zhuan-rang*’ (轉讓) used in a stock/option assignment, instead of the civil law term ‘*rang-yu*’ (讓與). Apart for the word ‘*zhuan-rang*’ (轉讓) being closer to the substance of the meaning of assignment, another worthwhile reference is proffered by the Department of Justice of Hong Kong, where the English word ‘assignment’ has been translated as ‘*zhuan-rang*’ (轉讓) when Hong Kong was under British rule.<sup>686</sup> This adjustment avoids a misconnection with the law of things in the Civil Code. As such, this study suggests that the terminology used in the Patent Act in relation to assignment should be changed from ‘*zhuan-li-rang-yu*’ (專利讓與) to ‘*zhuan-li-zhuan-rang*’ (專利轉讓).

This change could serve as a model reference for copyright law and trademark law in relation to the use of the word ‘assignment’. This discussion will cease here though by pointing out the harmonisation of the term ‘assignment’ in intellectual property law and other areas of law is another challenging topic. This is due to the Chinese word ‘*rang-yu*’ (讓與) only being used in the Patent Act 2011 and Copyright Act 2000, with the Trade Mark Act 2011 using another word ‘*yi-zhuan*’ (移轉, transfer) to represent the meaning

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<sup>686</sup> Department of Justice of Hong Kong Bilingual Laws Information System, ‘The English-Chinese Glossary of Legal Terms’ <<http://www.legislation.gov.hk/eng/glossary/homeglos.htm>> accessed 2 April 2013

‘assignment’.<sup>687</sup> How the word ‘assignment’ should be used in other laws is less related to the issues in dispute, so this study will now move onto the term ‘licence’ in the next paragraph.

V. Licences are similar to the concept of *pacht* (贖), thus licences can be envisaged as personal obligations made by grantors and grantees in relation to real rights

In view of licences not being placed in the civil law classification, this research searched customary law for an answer. *Pacht* (贖), which represents a purely contractual obligation made by the parties, provides a good translation ground for the concept of a licence. *Pacht* (贖) follows a crescendo that gradates by the quantity of covenants that have being given, as does a licence. Both *pacht* (贖) and licence denote that the source comes from a bundle of real rights in a negative sense, with following this string allowing the status of the patentee to be clearly explained. The intellectual product underneath a patent belongs to human society who may use this intellectual product freely. The patent law system is a mechanism that allows the inventor, who attributes this product to the public, a limited time of exclusivity. The law does not grant the patentee a usage right but a right to exclude others from using, with this exclusivity concept showing a typical characteristic like owning an estate.

Patentee status can be analogised by means of the Taiwanese tenure system. A patentee can be envisaged as *yeh-zhu* (業主) who holds a patent for the public for a limited time.

Within this given time, this patentee is free to use and gain capital from the patent as a freeholder. The patentee may grant their bundle of exclusivity rights to others by means

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<sup>687</sup> For example, section 1 of Article 28 of the Trade Mark Act 2011 reads, ‘Any transfer of the right derived from an application for registration of a jointly owned trademark or the share of a joint applicant in such trademark shall have the consent of all joint applicants...’ [translation by Lawbank] Article 42 reads, ‘A transfer of trademark right shall have no locus standi against any third party unless it is entered in the Register by the Registrar Office.’ [translation by Lawbank]

of *gei* (給) as assignments, or they may grant their rights by means of a *pacht* (贖) as licences. Those who obtain patents by way of assignment can, just like small-rent landlords, grant their rights further and collect royalties like rent. Those who obtain patents by way of licences, similar to primary cultivators, are subject to the covenants they obtained.

The resemblance of *pacht* (贖) and licences also explains where Taiwanese and Japanese judges have gone wrong with exclusive licences. Judges have misused the civil law concept, stating that an exclusive licence grant is the granting of a surface right, making the exclusive licence grant proprietary. This judgement is contradicted by current general practice in common law where a licence is contractual. This research suggests that a better analogy should be that since leases in the Taiwanese and Japanese Civil Codes have been classified as contractual rights, holding patents by way of licences, is like holding surface rights by means of leases. However, an analogy under civil law classification will not go far because it still does not explain why patent licensees under a bare licence merely obtain the right not to be sued by the proprietor, whilst leaseholders obtain positive rights for using and generating profits from surface rights. The Taiwanese customary concept explains what a licence means better than the civil law concept.

VI. Licences should be translated as *xu-ke* (許可) instead of *shou-quan* (授權) in the Taiwanese Patent Act

In view of a licence not be the granting of real rights or positive rights, a patent ‘licence’ should not be translated as ‘*shou-quan*’ (授權), which means that rights (*quan* 權) have been granted (*shou* 授). A patent ‘licence’ should be a creation of a contractual covenant from a negative perspective where patentees waive their rights to assert exclusion

against licensees only if the licensees obtain the patentee's permission; it is similar to non-action covenants in the civil law concept. The licensee pays royalties in exchange for a patentee's non-action, therefore the term 'licence' should be translated as 'xu-ke' (許可) meaning 'permission', which is closer to its original meaning. Articles 57, 59, 62, 63, 64, 69, 84, 87, 88, 89, 90, 91, 96, 97, 138 and 140 in relation to the terms 'licences', 'licensees' and 'compulsory licences' all need to be changed accordingly.

This change could be a model reference for copyright law and trademark law in relation to the use of the word 'licence'. This discussion however, will be stopped here by pointing out that the harmonisation between the term 'licence' in intellectual property law and other areas of law is another challenging topic. This is due to the Copyright Act providing a definition clause whilst the Patent Act does not. The complete solution for the harmonisation of the term 'licence' in intellectual property law is to put a definition clause of 'licence' in Article 3 of the Copyright Act so that other intellectual property law can use it by analogy. However, this study is not about copyright law amendments, with how the word 'licence' should be harmonised being less related to the issues in dispute, and as such will not be discussed further.

### **6.3.2 Proposed Provisions**

A successful cure for all the misconceptions requires a simultaneous amendment of two laws: the Civil Code and the Patent Act. Therefore, this study proposes two-fold amendment provisions. The first is to the Taiwanese Civil Code 2010 (herein under the 'Civil Code') and the second to the Taiwanese Patent Act 2011 (herein under the 'Patent Act'). This work may form the groundwork for amendments to the Civil Code concerning the intersection between 'things' and 'intangibles'. However, further work is required before any concrete suggestion can be made.

## I. The Civil Code

- a) A clause needs to be added: Article 66 needs a new sentence stating the definition of ‘things’

The root of confusion originates from the ambiguity of the word ‘things’ in Chapter III of the code. The misconception of the law of things applied in patent case arises from two causes. The first is that the definition of ‘things’ was deleted in the third draft of the civil code in 1929. In the first draft, there was a clear definition of ‘things’ in Article 166.<sup>688</sup> The second reason is that the legislator of the third draft, Hu Han-min’s inadequate illustration in the legislative report regarding the general principles of the law of things, stated that ‘no rights *in rem* can be created by other means, unless they are otherwise stated in special laws, like mining rights in the Mining Act, and copyrights in the Copyright Act’.<sup>689</sup> This draft provided the misleading direction that the legislators recognised copyrights as property in the law of things, as did patents. This misconception needs to be remedied by putting a definition back in this code.

The original clause of Section 1 of Article 66 is,

An immovable thing is land and things which are constantly affixed thereto.

As in the beginning of ‘Chapter III Things’, once further work is developed on patents

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<sup>688</sup> Concerning the legislative record of the first draft, see Hu Han-min (胡漢民), ‘Minfa Wuquan Yuanze (民法物權原則)=The Principles of The Law of Things in Civil Code’ in Judicial Yuan (Ministry of Justice) Department of Judicial Administration (ed), *Zhonghua Minguo Minfa Zhiding Shiliao Huibian* (中華民國民法制定史料彙編)=*Compilation of Legislative Reports in Relation to The Civil Code of The Republic of China* (Department of Judicial Administration 1976) 307. Article 166 was the original definition clause, states, “‘Things’ means ‘physical things’”. [translation by this author]

<sup>689</sup> *ibid* 41 [translation by the author].



vis-à-vis other intangibles, this clause might be reconsidered to limit the definition of ‘things’ to physical things. Once it is clear that ‘things’ refers to physical things, it would then be clear that this clause is insufficient. There shall be a definition clause added before Section 1.

‘Things’ means things that are physical, including movable and immovable things.

(Added words underlined and a synopsis presented in the Appendix One)

Once it is crystal clear that ‘things’ refers to physical things, it will then be clear that ‘ownership’ from Article 765<sup>690</sup> onwards refers to owning physical things. With this precise definition, the three inclusive positive rights—the right to use, the right to capital, and the right to disposition—merely refers to the rights that an owner has, simply in relation to his/her physical thing. These three positive real rights (under the civil law concept<sup>691</sup>) no longer have relations with patent rights that are basically comprised of negative rights.

With this clear definition, quasi-possession stated in Article 966<sup>692</sup> only relates to those real rights attached to physical things, such as surface rights or usufructs. It will not be further misinterpreted by jurists<sup>693</sup> that civil law quasi-possession theory equally applies to patents, and will also reduce the muddling of Romanic possession with

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<sup>690</sup> Article 765, ‘The owner of a thing has the right, within the limits of the Acts and regulations, to use it, to profit from it, and to disposed of it freely, and to exclude the interference from others’.[translation by Lawbank]

<sup>691</sup> See the ‘real right’ definition in the Terminology section.

<sup>692</sup> Article 966, ‘A quasi-possessor is a person who exercises such property rights over a thing as are established without having taken possession of the said thing. The provisions of the present chapter concerning possession shall apply mutatis mutandis to the quasi-possession as specified in the preceding paragraph’. [translation by Lawbank]

<sup>693</sup> A typical example is civil law jurist Wang Ze-jian (王澤鑑) stating, ‘The object of quasi-possession limits to property rights...and property rights included real rights, personal debts and rights over intellectual property’. See Wang, *Minfa Wuquan* (民法物權)=*The Law of Things in The Civil Code* (n 43) 696-697.

common law possession.<sup>694</sup>

- b) A clause needs to be amended: Article 67 needs to limit movable things to physical things other than immovable things

Again, once further work is developed on patents vis-à-vis other intangibles, this clause might be reconsidered to limit the definition of ‘movable things’ to any physical thing except for immovable things mentioned in the preceding article. Such a consideration of limitation is due to the word ‘movable things’ in civil law has a different understanding to ‘personal property’ in the common law system. As this study pointed out earlier, English law draws the line between land and personal goods because land belonged to the king in the past. Civil law draws the line between movable and immovable because all things belong to citizens. The items referred to by ‘movable things’ are different from those in ‘personal property’. To prevent patents from being miscategorised as movable things, Article 67 requires a definite scope of application.

The original clause of Article 67 in the Civil Code states,

A moveable thing is any thing except for immovable things mentioned in the preceding article.

This study suggests that this clause should be amended to,

A movable thing is any physical thing except for immovable things

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<sup>694</sup> By using John Henry Merryman’s box metaphor, the difference of possession in these two systems is revealed. If civil law ownership is envisaged as a box, possession is another box which is held by a possessor. This box, however, lacks ‘the right to dispose or alienation’ that reside in the owner. Possessors by and large, have lesser rights than the true owners. But in common law, there is no box at all, with every owner also being a possessor.

mentioned in the preceding article.

(Added words underlined and a synopsis presented in the Appendix One)

This modification has another advantage. Article 761<sup>695</sup> and Article 946<sup>696</sup> require ‘delivery’ as an effective condition for a transfer. Before this modification, it is always an argument whether patent transfer is governed by them and whether it is possible to ‘deliver’ a patent in practice. After this modification, they no longer apply to patent transfer. The delivery requirement is only limited to personal goods, such as a car or a mobile phone, where delivery is imaginable. Moreover, a subsequent clause, such as ‘*bona fide* acquisition’ (Article 768, 768-1)<sup>697</sup>, will not be applied into patent cases. This modification reduces the argument about whether a patentee recorded in error is applicable to claim his/her *bona fide* acquisition under the Civil Code.<sup>698</sup> This change offers a certain rejection to that inquiry.

## II. The Patent Act 2011

New transaction rules are needed to rebuild the Patent Act 2011 in compliance with the amendment in the Civil Code above. This research suggests certain clauses in the Patent Act need to either be added or amended accordingly.

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<sup>695</sup> Article 761(1), ‘The transfer of rights *in rem* of personal property will not effect until the personal property has been delivered’. [translation by Lawbank] This study suggests that a better translation should change ‘personal property’ to ‘movable thing’.

<sup>696</sup> Article 946, ‘The transfer of possession becomes effective by the delivery of the thing possessed’. [translation by Lawbank]

<sup>697</sup> Article 768, ‘A person, who has peacefully, publicly and continually possessed another’s personal property with the intent of being an owner for ten years, acquires the ownership of such personal property’. Article 768-1, ‘A person, who has peacefully, publicly and continually possessed another personal property with the intent of being an owner for five years, and was in good faith and not of negligence at the beginning of his possession, acquire the ownership of such personal property’.[translation by Lawbank] This study suggest that a better translation should change ‘personal property’ to ‘movable thing’.

<sup>698</sup> A discussion of *bona fide* acquisition applies to patent cases, see Shieh, ‘Cong Xiangguan Anli Tantaoy ZhihuiCaichanquan yu Minfa zhi Guanxi (從相關案例探討智慧財產權與民法之關係)=A Discussion on the Relationship of Intellectual Property Rights with the Civil Law through Relevant Cases’ (n 83) 234,235.

- a) Clauses that need to be added
- i. Article 6 (1) of the Patent Act needs a new sentence stating the legal consequence of assignment

In view of ‘things’ in the Civil Code being limited to physical things, Article 373 in the Civil Code is limited to legal consequence in relation to the transfer of physical things, with patent assignment no longer applied to Article 373<sup>699</sup> or Article 377 in the Civil Code.<sup>700</sup> It then becomes a gap for patent assignment. When a patent assignment deal is made, the assignor and assignee have no idea at what time the interests and risks pass to the assignee if the parties have not considered it in a contract. It could be at the time when the contract is signed, or at the time when registration occurs. To avoid uncertainty, this study suggests that there should be a default time for patent ownership transfer. This default time should be the same as the sale law in Section 2 of Article 345 of the Civil Code,<sup>701</sup> when the sale of rights is established when the parties agree on the object and the price; and also the same as the succession law in Article 1147 of the Civil Code,<sup>702</sup> where succession is effective upon the death of the deceased.

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<sup>699</sup> Article 373 of the Civil Code, ‘The profits and dangers of the object sold pass to the buyer at the time of delivery, unless otherwise provided by contract’. [translation by Lawbank]

<sup>700</sup> Article 377 of the Civil Code, ‘When the object of a sale is a right, by virtue of which the seller may possess a certain thing, the provisions of the four preceding articles shall be mutandis applied’. [translation by Lawbank] This article only provides instruction on a transfer of right attached to a physical thing but does not answer what happens when the right is purely intangible.

<sup>701</sup> Article 345 (2) of the Civil Code, ‘The contract of sale is completed when the parties have mutually agreed on the object and the price’. [translation by Lawbank] The original design of the sale law is that Article 345 is in charge of the establishment of a sales contract (upon agreement of object and price), and Article 348 is in charge of effective ownership transfer (upon delivery). For the ‘thing’, as this study has suggested, is limited to a physical thing, therefore Article 348 is limited to a physical thing ownership transfer, with patents no longer covered. Section 1 of Article 348 states, ‘The seller of a thing is bound to deliver the thing to the buyer and to make him acquire its ownership’. Section 2 of Article 348 states, ‘The seller of a right is bound to make the buyer acquire the right sold. If, by virtue of such right, the seller can possess a certain thing, he is also bound to deliver the thing’. [This article is translated by Lawbank]

<sup>702</sup> Article 1147, ‘Succession opens with the death of the deceased’. [translation by Lawbank] This author thinks a better translation should be ‘Succession starts with...’ because the original Chinese wording uses ‘starts’.

The original sentence in Article 6 (1) is,

The right to apply for a patent and the patent right are both assignable and inheritable.

The following sentence needs to be added after this section:

The interests and risks of a patent pass to the assignee at the time when the transaction, instrument, or event is made. In the case of *inter vivos* assignment, the above given time can be agreed otherwise by contract.

(Added words underlined and a synopsis presented in the Appendix One)

It is then clear that proprietary interests and potential risk pass to the assignee upon the death of the deceased if the patent is passed through the law of succession. In the case of *inter vivos* assignment, the interests and risks are passed to the assignee when the parties agree on the object and the price. An *inter vivos* patent assignment allows the parties to alter the time by consent, such as ‘at the time when the registration is done’ (according to the requirement stated in Article 84 (1) of the Patent Act), as long as the time is expressly stated in the contract.

ii. Article 84 of the Patent Act with a new Section 2

Throughout the whole Patent Act there is no clause clearly stating the nature of registration, with this ambiguity causing many judges to misconnect rules in the land register with the patent register. This misconnection is due to the Civil Code governing the general principle. Therefore, Article 758 of the Civil Code, in principle, is applied to

patent law as long as the Patent Act has no provision excluding this application. Article 758 reads, ‘The acquirement, creation, loss and alternation of rights in rem of real property through the juridical act will not take effect until the recordation has been made’.<sup>703</sup> It thus makes the registering of patents a statutory obligation in the creation of patent rights. In other words, it misleads the public that a successful publication of a patent is an official recognition of a creation of patent rights. In order to prevent this misleading from happening, it is necessary to have a clear statement that patent register is not an official recognition of a patentee’s property right but merely a *prima facie* record of the law’s requirement.

The original sentence in Article 84(1) is,

The grant, alteration, extension, prolongation, assignment, trust, licensing, compulsory licensing, revocation, extinguishments or pledging of an invention patent right as well as other matters which should be published, the Patent Authority shall effect such publication in the Patent Gazette.

This Article needs an addition to Section 2, further stating,

The above publication shall be prima facie evidence of anything required by this Act.

(Added words underlined and a synopsis presented in the Appendix One)

This clause takes reference from Section 32 (9) of the Patents Act 1977 of the United

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<sup>703</sup> This sentence is translated by Lawbank. This study suggests a better translation would be ‘The acquirement, creation, loss and alternation of rights in rem of an immovable thing through the juridical act will not effect until the recordation has been made’.

Kingdom.<sup>704</sup> The advantage of this modification is that this clause expressly excludes the application of Article 759-1,<sup>705</sup> which implied a linkage with the principle of registration. Patents, henceforward, will have a clear rule on the own without being misconnected to the civil law notion of property.

b) Clauses that need to be amended and terms that need to be changed

i. Article 62 (1)

The original Article 62(1) is,

An assignment, trust, or licence made by the patentee to another person to practice the invention, or the mortgage created on the patent by the patentee shall not be asserted against any third party, unless it has been registered with the Patent Authority.

This clause has two problems. Firstly, patent rights have been treated as positive rights that can be granted to a third party to ‘practice the invention’. It deviates from the original spirit where the whole patent law system was designed based on the exclusion strategy. The illustration stated in the Patent Act Amendment Bill 2011 provided by the Taiwanese Intellectual Property Office worsens this situation by explaining that ‘the word “practice” includes to make, offer to sell, sell, use or import, and all these rights

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<sup>704</sup> Section 32(9) of The Patents Act 1977 states, ‘The register shall be prima facie evidence of anything required or authorised by this Act or rules to be registered and in Scotland shall be sufficient evidence of any such thing’. See Jones and Cole (n 54) 466.

<sup>705</sup> Section 1 of Article 759-1 of the Civil Code states, ‘If a right in rem of real property has been recorded, the right-holder recorded in the register is presumed to own the rights legitimately’. Section 2 states, ‘If a bona fide third party in reliance of the real property recordation has recorded an alternation to the right in rem of real property pursuant to a juridical act, the validity of the alternation shall not be affected by the original false recordation of a right in rem’. [translation by Lawbank] This study thinks a better translation should be ‘immovable thing’ instead of ‘real property’ because civil law has a different classification of things than that in the common law system.

belongs to a superordinate concept of “use”<sup>706</sup>. This study placed emphasis earlier on the common law patent system adopting an exclusion property module using exceptions rather than creating rules for proper use, so the Patent Act should be prevented from being used to grant positive rights that depict assignment, trust and licences. No one explicitly states this point better than Justice Brewer in the *United States v American Bell Tel. Co.*, stating that ‘the patent is not a conveyance of something which the government owns’.<sup>707</sup> The purpose of the patent is to protect the patentee or propitiator in a monopoly, not to give him/her a usage right that they did not have before. The thing patented is open to use by anyone and the patent system is only to separate the inventor from having exclusive use. Since the patentee or proprietor has no positive rights in the source, how can they ‘grant patent rights to third party to practice the invention’ later? This research concludes that the Intellectual Property Office’s opinion is apparently wrong and deviates from the spirit of the patent system, thus the wordings in this Article ‘to practice the invention’ should be deleted accordingly.

Secondly, the original design of this clause was heavily influenced by the civil law with that any alienation of real rights being required to be registered. As this study has suggested, the register shall be prima facie evidence of the claims but not recognition of any rights governed by the principle of registration. Especially in the case of a licence, as a personal contractual covenant made by parties, it is bizarre to require every licence contract to be recorded in the register. Even in the Civil Code itself, there is no compulsory requirement to register contractual leases. The only concern of licence registration is exclusive licence. Exclusive licensee is entitled to sue for infringement, so it can be a problem if the public is not well-informed. However, on the other hand, an

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<sup>706</sup> See paragraph 3 of the Intellectual Property Office, ‘Zhuanlifa Xiuzheng Caoan (專利法修正草案) =Reason for Patent Act Amendment Bill’ (*Intellectual Property Office*, 3rd of December 2009) <[http://www.tipo.gov.tw/ch/AllInOne\\_Show.aspx?path=2769&guid=45f2e9ed-6a50-488e-8514-47a78e3c320&lang=zh-tw](http://www.tipo.gov.tw/ch/AllInOne_Show.aspx?path=2769&guid=45f2e9ed-6a50-488e-8514-47a78e3c320&lang=zh-tw)> accessed 16 May 2012 [translation by the author]

<sup>707</sup> *United States* (n 450) at 238-239.



exclusive licensee's entitlement to sue does not depend upon registration of the licence.<sup>708</sup> A lack of registration only leads to the loss of entitlement to costs or expenses in litigation.<sup>709</sup> This article shall have another sentence stating 'the right to sue for infringement' is not within the scope of being forbidden from asserting against 'any third party'. This 'any third party' majorly refers to the subsequent buyer, subsequent trustee or exclusive licensee who will be directly influenced by the unregistered transaction.

This study suggests that Article 62(1) should be amended as,

An assignment, trust, or exclusive licence made by the patentee to another person ~~to practice the invention~~, or the mortgage created on the patent by the patentee shall not be asserted against any third party, unless it has been registered with the Patent Authority. The assignee or exclusive licensee's entitlement to sue for infringement is not affected by a lack of registration or delayed registration but the assignee or exclusive licensee cannot recover damages if the registration exceeds six (6) months from the date of such a transaction.

(Added parts are underlined and the deleted part marked in grey. For a synopsis see the Appendix One)

This clause takes reference from Section 68 of the Patents Act 1977 of the United

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<sup>708</sup> See *Dendron GmbH v University of California* [2004] EWHC 1163(Ch), [2004] FSR 43 Patents Court 865. 'There is no requirement that an exclusive licensee be registered as such as a condition of commencing proceedings for infringement. Rather, the Act imposes (in s.68) a restriction on the exclusive licensee's right to recover damages in the event that the "transaction, instrument or event" by which he becomes exclusive licensee is not registered within six months of its date. Non-registration does not affect his rights to recover costs or his right to an injunction. Thus, the register is inconclusive, and identifying an exclusive licensee depends entirely upon a proper construction of the document or documents by which he claims to be exclusive licensee'.

<sup>709</sup> Jones and Cole (n 54) 771.

Kingdom,<sup>710</sup> where in *Dendron GmbH v University of California*,<sup>711</sup> the court further explained that non-registration does not affect the exclusive licensee's rights to recover costs or his right to an injunction. This amendment also makes things clearer that non-registration does not affect the assignee or exclusive licensee's right to an injunction in Taiwanese law.

- ii. The term 'assignment' shall be changed to '*zhuan-rang*' (轉讓) throughout the Patent Act

As this study suggested earlier, assignment in a patent is not an alienation of tangible property. In order to cease the misconnection between patents and the law of things, this study suggests that the terminology used in the Patent Act in relation to assignment should be changed from '*zhuan-li-rang-yu*' (專利讓與) to '*zhuan-li-zhuan-rang*' (專利轉讓). The term '*rang-yu*' (讓與) used in Article 6(1), 13 (1) and (2), 62(1), 64, 65(1), 84, 88 and 138 of the Patent Act needs to be amended accordingly.

- iii. The term '*shou-quan*' (授權) should be amended to '*xu-ke*' (許可) throughout the Patent Act

The term 'licences' has been mistranslated for a long time as '*shou-quan*' (授權), which implies that there are positive rights (*quan* 權) being granted (*shou* 授) in a licence. It is

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<sup>710</sup> Section 68 of the Patent Act 1977,

Where by virtue of a transaction, instrument or event to which section 33 above applies a person becomes the proprietor or one of the proprietors or an exclusive licensee of a patent and the patent is subsequently infringed before the transaction, instrument or event is registered, in proceedings for such an infringement, the court or comptroller shall not award him costs or expenses unless—

- (a) the transaction, instrument or event is registered within the period of six months beginning with its date; or
- (b) the court or the comptroller is satisfied that it was not practicable to register the transaction, instrument or event before the end of that period and that is registered as soon as practicable thereafter

<sup>711</sup> *Dendron GmbH* (n 709) 865.

a misconception because ‘a licence passes no proprietary interest in anything, it only makes an action lawful that would otherwise have been unlawful’.<sup>712</sup> As this study suggests earlier, the term ‘licence’ should be translated as ‘*xu-ke*’ (許可), meaning ‘permission’, which is closer to its original meaning. Articles 57, 59, 62, 63, 64, 69, 84, 87, 88, 89, 90, 91, 96, 97, 138 and 140 in relation to terms ‘licences’, ‘licensees’ and ‘compulsory licences’ require amendment accordingly.

### **6.3.3 Proposed recommendations and amendment procedures**

The Legal Affairs Division of the Intellectual Property Office is responsible for proposing an amendment bill to Legislative Yuan.<sup>713</sup> The amendment motion could also be brought by a member of Legislative Yuan with 10 other members’ endorsements after a second consultative discussion.<sup>714</sup> Prior to the discussion in Legislative Yuan, the Intellectual Property Office would hold public hearings and conferences inviting intellectual property scholars, industry representatives, representatives of patent lawyers and any third party who is interested in the amendment. The proposed suggestions would be discussed and opened up for debate. Any amendment or proposed suggestion would be discussed by way of public hearings and conferences by the Intellectual Property Office, as well as further debated during many consultative discussions in Legislative Yuan.

The call for change can be achieved via journals or book publications. An explanative

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<sup>712</sup> *Allen* (n 638) 246.

<sup>713</sup> According to Article 13 of the Administrative Regulations for the Intellectual Property Office of the Ministry of Economic Affairs, the Legal Affairs Division is responsible for the amendment of intellectual property laws ‘other than Trade Mark and Copyright Act.’ This is due to the Trade Mark Act being taken care by the Trade Mark Division and the Copyright Act being the Copyright Division’s affair.

<sup>714</sup> According to Article 11 of the Rules of Procedure of the Legislative Yuan, ‘The motion of amendment can be brought out by a convener after the second consultative discussion, with 10 other legislative member’s endorsement.’

doctrinal work, and especially a comparative study like this,<sup>715</sup> could be a reference source for the court.<sup>716</sup> Once adopted by the Supreme Court, the decision would have a chance of becoming a precedent that all tiers of court follow. The proposed suggestion would fully communicate with all jurists in Taiwan if this approach is used.

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<sup>715</sup> Substantiated by Professor Yang, an explanative doctrinal work, and especially a comparative study, has an increasingly significant impact on court decisions. Yang (n 69) 263 stating, ‘In our jurisdiction, the same as Japan, especially works with a comparative study, doctrinal works have an increasingly significant influence on court decisions since Shi Shang-kuan and Wang Ze-jian.’ [translation by this author] Professor Yao Rui-guang (姚瑞光) believes that a doctrinal work could be jurisprudence in the hierarchy of Article 1 of the Civil Code. ‘The general principle of the law, foreign laws, unimplemented laws in our jurisdiction, precedents, and doctrinal works could be the major basis of jurisprudence.’ [translation by this author] Yao, *Minfa Zongze Lun*(民法總則論)=*On the General Principles of the Civil Code* (n 127) 24.

<sup>716</sup> Yang (n 69) 253-254. Professor Yang cites the Supreme Court precedent, ‘When the statutory law is not sufficient, or is not applicable, the court can supplement the law by interpretation. If the court finds no basis for its interpretation, the court may consider the nation’s condition and take references from doctrinal works and make them precedents.’ [translation by this author] See Daliyuan 大理院 (The Supreme Court), *Daliyuan Panjue Yaozhi Huilan Zhengji* (大理院判決要旨匯覽正集)=*The Restatement of the Supreme Court Precedents* (Daliyuan 1919) 1.

#### **6.4 Concluding remarks**

The position of patents in property taxonomy is now clear. The authority grants a patentee the right to exclude others, just like the authority does to an estate holder. This grant is not the conferring of positive rights but merely an embargo on many others from use. ‘Licence’ means the relief of such an embargo on a licensee. Once a licence is granted, the licensee reverts back to the state of freedom to use. In the case of a non-exclusive licence, the non-exclusive licensee cannot grant his/her relief further down because the relief is a one to one relationship. In the case of an exclusive licence, the owner/patentee grants the whole bundle of rights to the exclusive licensee, with the exclusive licensee standing in the shoes of the patentee. The rights that have been granted are proprietary. The law of *yeh* provides answers to what rights a patentee owns and a licensee holds, thus satisfactorily explaining the unelaborated part in civil law.

The property model built on Taiwanese customary law proposed in this research is applicable and enforceable under the scheme of Article 1 of the Civil Code. The legal methodology, also named ‘jurisprudence’ used in this research in previous chapters, is confined to the definition of jurisprudence in this code. By conducting a three stage analysis, this study proves that using an analogical technique of taking examples from the same area of civil law and using analogies taken from corresponding clauses in one specific civil law and applying them to a different areas of law, like patent law, cannot be achieved successfully because many civil law concepts do not explain the common law concept well. Only Taiwanese customary law can solve this dilemma. The conclusion proffered by this author satisfies the three step analysis required by the notion of jurisprudence, with the customary law and concept proposed by this study being applicable for adoption in each individual patent case.

In view of the applicability of a customary legal concept being adopted in patent cases, this study proffers solutions to current statutory laws in two aspects. Firstly, Articles 66 and 67 of the Civil Code and Articles 6(1), 62(1) and 84 of the Patent Act need a major change. Secondly, customary legal terms and concepts need to be adopted in the Patent Act. Articles 57, 59, 62, 63, 64, 69, 84, 87, 88, 89, 90, 91, 96, 97, 138 and 140 in relation to the terms ‘licences’, ‘licensees’ and ‘compulsory licences’ need to be changed to ‘*xu-ke*’ (許可) accordingly.

As with the first solution, this study sets the groundwork for further development elsewhere to consider limiting ‘things’ and ‘movable things’ to physical things. New patent transaction rules are suggested to be established separately in the Patent Act, where the interest and risk transfer, the legal consequences of registration or non-registration of such transactions, and the nature of the register in granting patents and patent transactions, are clearly described. The second solution solves the misuse of civil law legal terms in patent transactions (assignment and licence), whereby adopting customary legal terms and concepts into patent law terminology that will allow this Patent Act to give judges a better, more correct direction to interpret the law.

APPENDIX ONE

AMENDMENT CHART

The suggested amendment clauses of the Civil Code and the Patent Act are presented in the synopses below.

Civil Code

While this work may form the groundwork for amendments to the Civil Code concerning the intersection between ‘things’ and ‘intangibles’, the following suggestions may be considered in such amendments.

Article	Original clauses	Suggested clauses
66	<p>An immovable thing is land and things which are constantly affixed thereto.</p> <p>The products of the immovable thing, if they are not separated therefrom, constitute a part of the immovable thing.</p>	<p><u>‘Things’ means things that are physical, including movable and immovable things.</u></p> <p>An immovable thing is land and things which are constantly affixed thereto.</p> <p>The products of the immovable thing, if they are not separated therefrom, constitute a part of the immovable thing.</p>
67	<p>A moveable thing is any thing except for immovable things mentioned in the preceding article.</p>	<p>A moveable thing is any <u>physical</u> thing except for immovable things mentioned in the preceding article.</p>

Patent Act

Article	Original clauses	Suggested clauses
6 (1)	The right to apply for a patent and the patent right are both assignable and inheritable.	The right to apply for a patent and the patent right are both assignable and inheritable. <u>The interests and risks of a patent pass to the assignee at the time when the transaction, instrument or event is made. In the case of <i>inter vivos</i> assignment, the above given time can be agreed otherwise by contract.</u>
62 (1)	An assignment, trust or licence made by the patentee to another person, or the mortgage created on the patent by the patentee, shall not be asserted against any third party, unless it has been registered with the Patent Authority.	An assignment, trust or <u>exclusive</u> licence made by the patentee to another person, or the mortgage created on the patent by the patentee, shall not be asserted against any third party, unless it has been registered with the Patent Authority. <u>The assignee or exclusive licensee's entitlement to sue for infringement is not affected by lack of registration or delayed registration but the assignee or exclusive licensee cannot recover damages if the registration exceeds six (6) months from the date of such a transaction.</u>
84	The grant, alteration, extension,	The grant, alteration, extension,



	<p>prolongation, assignment, trust, licensing, compulsory licensing, revocation, extinguishments or pledging of an invention patent right as well as other matters which should be published, the Patent Authority shall effect such publication in the Patent Gazette.</p>	<p>prolongation, assignment, trust, licensing, compulsory licensing, revocation, extinguishments or pledging of an invention patent right as well as other matters which should be published, the Patent Authority shall effect such publication in the Patent Gazette.</p> <p><u>The above publication shall be prima facie evidence of anything required by this Act.</u></p>
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APPENDIX TWO

CHARACTER LIST

<i>ān</i>	垵	an exclusive fishing ground
<i>gong-lao-zu</i>	功勞租	a rent paid for the grantee's achievements during his lifetime
<i>da-zu-hu</i>	大租戶	a large-rent landlord
<i>da-zu-yeh</i>	大租業	a large-rent estate
<i>diǎn</i>	典	real mortgage
<i>diàn</i>	佃	tenure
<i>diàn-hu</i>	佃戶	tenant
<i>di-ji-zu</i>	地基租	ground rent
<i>eikosaku</i>	永小作	(Japanese) a perpetual or indefinite lease for land
<i>fan-da-zu</i>	番大租	aborigine rent for the land
<i>gei</i>	給	assign
<i>k'en-chao</i>	墾照	reclamation permit
<i>kosaku</i>	小作	(Japanese) a lease to land with a definite duration
<i>sheng-fan</i>	生番	unacculturated aborigine
<i>shiyakuchi</i>	借地	(Japanese) a lease for land without a grant for proprietary interests, like a lease of a surface right
<i>suo-you-quan</i>	所有權	ownership
<i>pacht</i>	贖	(Taiwanese) to let (a parcel of land)
<i>tien-hu</i>	佃戶	tenant

<i>tien</i>	田	rice fields
<i>shui</i>	稅	(Taiwanese) to let (a house or flat)
<i>shixingcelin</i>	施行敕令	an ordinance of a direct enactment of laws
<i>wu-zhu-quan</i>	物主權	ownership of personal goods
<i>yang-shan-zu</i>	養贍租	rent paid to the clan's elderly relatives during their lifetime
<i>yeh</i>	業	Estates
<i>yeh-zhu</i>	業主	owner
<i>yeh-zhu-quan</i>	業主權	estate ownership
<i>yi-tian-er-zhu</i>	一田二主	one (rice) field with two owners
<i>yi-tian-san-zhu</i>	一田三主	one (rice) field with three owners
<i>yong-diàn</i>	永佃	perpetual leasehold for cultivating another individual's land by paying rent
<i>yong-xiao-zuo-quan</i>	永小作權	long term leasehold (a definite term) for cultivating another individual's land by paying rent
<i>yuan</i>	園	non-rice fields
<i>xiao-zu-hu</i>	小租戶	small-rent landlord
<i>xiao-zu-yeh</i>	小租業	small-rent estate
<i>xian-geng-diàn-ren</i>	現耕佃人	primary cultivator
<i>xian-nian-pacht-geng</i>	現年贖耕	one year tenure
<i>xian-xiao-yin</i>	現銷銀	upfront payment for the rent of the land that a house was build on
<i>zhuan-li-zhuan-rang</i>	專利轉讓	patent assignment (recommended)

		translation)
<i>zhuan-li-rang-yu</i>	專利讓與	patent assignment (current use)
<i>zhuan-li yeh-zhu-quan</i>	專利業主權	patent ownership

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