‘So How Should I Presume?’: Loan, Resulting Trust, or Discharge of a Prior Obligation

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I. THE ISSUE

This chapter considers the legal starting point in cases where one person has paid money to another and there is a dispute as to the reason for the payment, and therefore as to its legal consequences.[1] There are, obviously, a number of possible explanations for a payment. The payor might have been making a gift of the money to the payee. Alternatively, the payment might have been made in discharge of a debt or obligation owed by the payor to the payee. In both of these cases, the payment would not lead to any legal liability on the part of the payee (unless the payor was mistaken in thinking that a debt was owed, in which case the payee could become liable in the law of restitution).[2] Another possibility is that the payment was a loan, in which case the payee would be under a contractual liability to repay the debt. Yet another explanation is that the money was transferred on trust, so that the payee would have to hold it as a trustee.

Which of the above explanations does the law presume when it is proven simply that one person has made a payment of money to another? Surprisingly, there are three candidate answers to this question. First, a number of nineteenth-century authorities hold that ‘when money is paid by one man to another the legal presumption is that it was paid in discharge of some prior debt or obligation’.[3] This would mean that, in the absence of any further evidence, the recipient would be under no liability in relation to the payment. Secondly, both Professor James Penner and Professor William Swadling have recently argued that proof that one person made a payment or other transfer to another is sufficient to trigger the presumption of resulting trust.[4] On this view, in the absence of any further

1 The quotation is from TS Eliot, ‘The Love Song of J. Alfred Prufock’: www.poetryfoundation.org/poetrymagazine/poems/44212/the-love-song-of-j-alfred-prufrock.
2 See eg *Barclays Bank Ltd v WJ Simms, Son and Cooke (Southern) Ltd* [1980] 1 QB 677.
3 *Ex parte Cooper; Re Foster* [1882] WN 96, 96 (Jessel MR).
4 J Penner, ‘Resulting Trusts and Unjust Enrichment: Three Controversies’ in C Mitchell (ed), *Constructive and Resulting Trusts* (Oxford, Hart Publishing, 2010) 238–41; W Swadling, ‘Legislating

evidence, equity would presume that the payee would hold the payment on a resulting trust for the payor.[5] Thirdly, in 1968 in *Seldon v Davidson*,[6] the Court of Appeal considered the question of 'what is to be inferred as to the nature of the transaction when the simple payment of money is proved or admitted'.[7] Its conclusion was that 'on that bald state of affairs, proof of payment imports a prima facie obligation to repay the advancement'.[8] In other words, in the absence of any other evidence, the payment would be categorised as a loan and the recipient would be liable to repay the debt. The approach in *Seldon v Davidson* has been accepted in a series of subsequent English cases.[9]

Obviously, it would not be coherent for the law to presume three different things – discharge of a prior obligation, a resulting trust, a loan – on the same basic facts. This chapter will attempt to reconcile the apparently competing approaches by showing that they do not, in fact, apply in the same scenario. It will be argued that the presumption of discharge of a prior obligation is the one that applies where all that has been proven is that a payment has been made by one person to another. The presumption of resulting trust, notwithstanding the views of Penner and Swadling, is not triggered unless, in addition to the fact that a payment has been made, the claimant shows that the transfer was 'voluntary', ie made without consideration. Similarly, the rule in *Seldon v Davidson* is not properly to be regarded as being triggered simply by the making of a payment but must be understood as applying only where the evidence and the pleadings have reduced the possibilities to a choice between 'gift' and 'loan' (in which case the rule dictates that a loan is presumed). Having made these distinctions, the chapter will move from the analytical to the normative and, by way of conclusion, consider briefly

in Vain' in A Burrows, D Johnston and R Zimmermann (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, Oxford University Press, 2013) 655, 659.

5 Although there has been academic controversy on the matter, the better view is that the fact which is presumed when the presumption of resulting trust applies is that the recipient was intended to be a trustee. See generally J Mee, 'Presumed Resulting Trusts, Intention and Declaration' (2014) 73 *CLJ* 86; J Mee, 'The Past, Present, and Future of Resulting Trusts' (2017) 70 *Current Legal Problems* 189.

6 *Seldon v Davidson* [1968] 1 WLR 1083.

7 ibid 1090 (Edmund Davies LJ).

8 ibid. As will be discussed in the text to and following n 111 below, a gift would instead be presumed if the circumstances were such that the presumption of advancement would arise.

9 See text to nn 76–79 below. The rule has been rejected in Australia (see text to nn 129–130) and in Hong Kong (see text to nn 22–26 below). The rule has, however, been accepted in New Zealand: see eg *Re Matthews* [1993] 2 NZLR 91.

the merits of the three different rules in order to assess whether they represent an appropriate legal response in the circumstances in which they apply.

Before moving on to address the questions of substance, the chapter will consider, in section II, an important preliminary question – how much does any of this matter?

II. WHAT IS AT STAKE?

It has been suggested that presumptions and/or the location of the burden of proof only matter in rare cases where there is no available evidence or in the unlikely event that the evidence on each side is equally balanced. For example, in *Ex parte Cooper; Re Foster*,[10] Lindley LJ stated that '[w]hen the parties to such a transaction [a disputed payment] are alive, and give evidence, there is no occasion to resort to any presumption; the question is one of fact.'[11] Similarly, Professor Robert Chambers has argued that the presumptions of resulting trust and of advancement 'do not matter much as evidentiary devices, since they rarely determine the outcome of cases'.[12] Until recently such arguments had to concede that, in the context of illegality, the presumptions could play a crucial role under the test established by the House of Lords in *Tinsley v Milligan*.[13] However, in *Patel v Mirza*[14] the Supreme Court departed from *Tinsley*, eliminating the special significance that the presumptions of resulting trust and of advancement once had in the illegality context.[15]

The difficulty with the argument that presumptions rarely matter is that, in practice, 'lawyers and judges treat [presumptions] as having great importance'.[16] Yablon suggests that

> the perceived importance of burden-shifting doctrinal rules may be due to their role in framing questions for the judge or other legal decisionmaker and the

[10] n 3 above.
[11] ibid 96–97.
[12] R Chambers, 'Is There a Presumption of Resulting Trust?' in Mitchell (n 4 above) 268. See also *Marr v Collie* [2017] UKPC 17, [2017] 3 WLR 1507 [54] (Lord Kerr).
[13] *Tinsley v Milligan* [1994] 1 AC 340.
[14] *Patel v Mirza* [2016] UKSC 42, [2017] AC 467.
[15] See generally PS Davies, 'Ramifications of *Patel v Mirza* in the Law of Trusts' in S Green and A Bogg (eds), *Illegality after Patel v Mirza* (Oxford, Hart Publishing, 2018).
[16] C Yablon 'A Theory of Presumptions' (2003) 2 *Law, Probability and Risk* 227, 228.

> implicit recognition of judges and lawyers, now made explicit by behavioral theory, that the way such questions are presented has a significant impact on the answers that are provided.[17]

He argues that, in the case of a presumption whereby fact Y is rebuttably presumed upon proof of X, it may be that

> the effect of the presumption will be to cause the judge or other fact finder to focus more on X in the determination of Y than he or she might otherwise be inclined to do. Accordingly, when Y is present, the likelihood of a finding of X increases significantly, and decreases when Y cannot be shown.[18]

This effect, whereby people who are deciding under conditions of uncertainty are heavily influenced by a starting point (even when they know it to have been arbitrarily selected), has been described by leading behavioural psychologists Daniel Kahneman and Amos Tversky as 'anchoring'.[19]

A somewhat different argument for the importance of the allocation of the burden of proof is that the situation where the evidence is in equipoise may not be as rare as one might assume. Logically, it depends on the 'granularity' of the process whereby a judge weighs evidence. If it were the case, for example, that evidence could be weighed on a scale from 1 to 1,000, then it would be very unlikely that the evidence on each side would be equally balanced. There would, however, be a very much higher chance of this occurring if the scale only ran from 1 to 10. It has been argued that, in making the relevant sort of judgement, people do not in fact have an highly-graduated scale of certainty but, rather, have a much more limited number of 'settings'.[20] Clermont refers to seven options: '(1) slightest

17 ibid 228.
18 ibid 234.
19 Note, in particular, the 'wheel of fortune' experiment described in D Kahneman et al (eds), *Judgments Under Uncertainty: Heuristics and Biases* (Cambridge, Cambridge University Press, 1982) 14–17, referred to by Yablon (n 16 above) 232 (at the first stage of the experiment, subjects were presented with a number they believed to have been randomly generated; the size of this number significantly affected the subjects' subsequent answer to a factual question that they knew had absolutely no connection with the number).
20 KM Clermont, 'Procedure's Magical Number Three: Psychological Bases For Standards Of Decision' (1986–87) 72 *Cornell Law Review* 1115.

possibility, (2) reasonable possibility, (3) substantial possibility, (4) equipoise, (5) probability, (6) high probability, and (7) almost certainty.'[21]

A recent case in Hong Kong's highest court, *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd*,[22] provides an illustration of the potential importance of the allocation of the burden of proof, even in circumstances where both sides have given evidence in the course of a long trial.[23] *Big Island* also contains a detailed consideration of the status of the rule in *Seldon v Davidson*, and a discussion of the case now will prepare the ground for references to the case in the analysis in later parts of this chapter. The claimant in the case, BIC, had paid over HK$100 million[24] to the defendants. BIC claimed repayment on the basis that the money had been lent. The defendants, on the other hand, insisted that the money had been paid on the basis of various Fund Exchange Agreements, in return for equivalent payments by the defendants in RMB, the Chinese currency. At first instance, after a 43-day trial, Poon J held that BIC had failed to discharge the burden of proving that there had been a loan agreement. He went on to state that, although this did not affect the result, he also rejected the defendants' account of events as improbable. The judge's view was that there was '[s]omething more than meets the eye' to the situation and that the true explanation for the relevant transactions had been concealed from the court.[25] The plaintiffs appealed, inter alia on the basis that, following the rule in *Seldon v Davidson*, the burden of proof should have been on the defendants to prove that the payments had not been loans. The appeal was rejected by the Court of Appeal and the plaintiffs appealed again to the Court of Final Appeal. In rejecting the appeal, the Court held unanimously that the first instance judge ought to have found that the payments had been made on the basis of the Fund Exchange Agreements, since this account of events was well supported by documentary evidence. However, the Court of Final Appeal also considered the status of the rule in *Seldon v Davidson*. The

[21] ibid 1156.
[22] *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* [2015] HKCFA 47, available at: https://www.hongkongcaselaw.com/big-island-construction-hk-ltd-v-wu-yi-development-co-ltd-and-another-4/; noted by M Kok and K Kwok, 'The Rule in *Seldon v Davidson* and the "Absence of Basis" Approach Revisited in Hong Kong' [2015] *Restitution Law Review* 128.
[23] For an illustration of the practical importance of the presumptions of resulting trust and of advancement, see *Antoni v Antoni* [2007] UKPC 10, [2007] WTLR 1335.
[24] Roughly £10 million.
[25] See n 22 above, [11]–[16] (Tang PJ).

majority view, expressed by Anthony Mason NPJ, was that the rule did not form part of Hong Kong law, although Tang PJ took a different view.[26]

For the reasons discussed in this section, the practical importance of presumptions and of the location of the burden of proof in civil cases may be greater than is sometimes assumed. There seems to be no objection to a presumption playing a significant role in determining decisions if there is a strong logical connection between the fact which triggers the presumption and the fact which is presumed. However, if a particular presumption is outdated or for other reasons is not reflective of reality, then the presumption's influence cannot be defended. Along these lines, it will be suggested in the conclusion to this chapter that neither the presumption of resulting trust upon a voluntary transfer, nor the rule in *Seldon v Davidson*, has a sufficient foundation in probability to be acceptable as a matter of principle.

III. THE PRESUMPTION OF DISCHARGE OF A PRIOR DEBT OR OBLIGATION

As has been mentioned, a number of older decisions suggest that the making of a payment will, in the absence of further evidence, be presumed to have been in discharge of a prior debt or obligation. In the first of these decisions, *Cary v Gerrish*,[27] it had been proven that the testator had drawn a draft on his bank in favour of the defendant and that the bank had paid the money to the defendant on the basis of the draft. In his briefly reported judgment, Lord Kenyon reasoned that 'a naked transaction' like this, was 'no evidence to establish a debt':

> No evidence is offered of the circumstances under which the draft was given, it might be in payment of a debt due by the testator; or the defendant might have been given cash for it at the time.[28]

[26] Aspects of the case are discussed in the text to nn 64–65, 103–1106, 123–1126, and 131–1133 below.
[27] *Cary v Gerrish* (1801) 4 Esp 9, 170 ER 624.
[28] ibid 10.

In *Aubert v Walsh*,[29] the defendant in an action for money had and received gave notice of set-off and proved 'numerous [cheques] drawn by the Defendants on their bankers, and delivered to the Plaintiff, to whom the bankers had paid them'.[30] The plaintiff objected

> that it was necessary to shew on what consideration, or for what purpose these checks were delivered, in order to apply them to this set-off; and that they did not prove any payment, without evidence of the circumstances under which they were given.[31]

Mansfield CJ is reported as having said simply: 'I am sure I remember a case before Lord Mansfield CJ in which a [cheque] given was produced as evidence of a debt, and his Lordship held that that alone was not sufficient.'[32] Chambre J is reported as having added 'All our accounts would be in inextricable confusion if such evidence were allowed.'[33]

The next case in the series is *Welch v Seaborn*,[34] where £100 had been lent by a man named Simpson to Rice Evans, who had in turn paid it to Evan Evans, who was now bankrupt. It was argued by Rice Evans that he was a creditor of Evan Evans to the amount of £100. In the brief report of the case, it is simply stated that:

> Lord Ellenborough was of opinion that there was not sufficient evidence to leave it to the jury, whether this money had been advanced to Evan Evans, by way of loan, since the presumption of law was, that money when paid is paid in liquidation of an antecedent debt.[35]

A final case from later in the nineteenth century, *Ex parte Cooper; Re Foster*,[36] does not seem to have been noticed in the present context before. Once again the report

[29] *Aubert v Walsh* (1812) 4 Taunt 293, 128 ER 342.
[30] ibid 293.
[31] ibid 293–94.
[32] ibid 294. Here Sir James Mansfield, Chief Justice of the Common Pleas, was referring to a decision of the more famous William Murray, Earl of Mansfield, Lord Chief Justice of the King's Bench from 1756–88.
[33] ibid.
[34] *Welch v Seaborn* (1816) 1 Stark 474, 171 ER 534.
[35] ibid 474.
[36] n 3 above.

of the case is very brief, with the following being the full report of Jessel MR's judgment:

> When money is paid by one man to another the legal presumption is that it was paid in discharge of some prior debt or obligation, and not that it was meant as a gift, and if money is paid by a father to a son, and nothing beyond the fact of payment is proved, there is no legal obligation on the son to repay it, and the equitable doctrine, that there is a presumption that moneys advanced by a father to a son are intended as a gift, has no application. The onus of proof then is on the person who claims the repayment of the money, to shew that there was some contract rendering the payee liable to repay it. If there is such a contract, the payee is liable to repay at law as well as in equity.[37]

Two of these four cases, *Cary v Gerrish* and *Welch v Seaborn*, were commented upon in *Seldon v Davidson*. Edmund Davies LJ stated that '[t]hey are old cases; they are none the worse for that, but they are extremely briefly reported, and the extent to which they throw light on the circumstances of the present case is, with all respect, doubtful.'[38] Distinguishing the facts of *Seldon* from *Cary v Gerrish*, Edmund Davies LJ emphasised that it was

> clear from the assertion contained in the defence [in *Seldon*] that the advancements were made by way of gift, that no question here arises of the plaintiff repaying by the advancements a debt which she owed to her employee, nor is there any question of the defendant having given cash in return for the cheques drawn by the plaintiff.[39]

Referring to *Welch v Seaborn*, Edmund Davies LJ reiterated that 'the state of the pleadings in the present case rules out any … presumption' that the money had been paid in liquidation of an antecedent debt.[40] Willmer LJ commented only on *Cary v Gerrish* and he also concluded that it was distinguishable because the defendant had clearly admitted the payment of the money and there was 'no

[37] ibid 96. The report also includes a sentence from Lindley LJ (which was quoted above as text to n 11).
[38] n 6 above, 1089.
[39] ibid 1090.
[40] ibid.

suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort.'[41]

To sum up, beyond Edmund Davies LJ's observation that they were briefly reported, the authority of the older cases was not doubted in *Seldon*, and both Edmund Davies LJ and Willmer LJ went to the trouble of distinguishing the older cases on the facts. In light of this, and bearing in mind that there are two further cases to the same effect that were not discussed in *Seldon*, it seems reasonable to reach the provisional conclusion that the presumption established by the older cases remains part of the law, at least if it can be satisfactorily reconciled with the rule in *Seldon* and with the doctrine of resulting trusts.

IV. THE PRESUMPTION OF RESULTING TRUST

The conventional view has been that the primary fact triggering the presumption of resulting trust is that the claimant made a voluntary transfer (ie, a transfer without consideration) of personal property[42] or advanced the purchase money for a purchase in the name of another. The upshot, in the voluntary transfer situation, is that the presumption would not arise where all that has been proven is that X has made a payment to Y. This orthodox view allows the operation of the presumption discussed in section III to be reconciled with the operation of the presumption of resulting trust: where the only evidence is the making of a payment, the presumption is that the payment was made in discharge of a prior obligation but, once the claimant goes further and proves that the payment was voluntary (ruling out inter alia the conclusion suggested by the previously mentioned presumption), then the presumption of a resulting trust in favour of the transferor comes into play.

That the presumption of resulting trust would arise only upon a transfer that was voluntary does not appear to have been doubted until a relatively recent

[41] ibid 1088.

[42] Although there is ongoing controversy over the proper interpretation of this provision, s 60(3) of the Law of Property Act 1925 appears to ensure that there is no presumption of resulting trust in relation to voluntary conveyances of land. See J Mee, 'Resulting Trusts and Voluntary Conveyances of Land' [2012] *Conv* 307; J Mee, 'Voluntary Conveyances of Land: The Presumption of Resulting Trust Redux?' [2018] *Conv* 184.

contribution by Professor James Penner,[43] which supported a view which Penner attributed to Professor William Swadling. This view was that, in order to trigger the presumption of resulting trust, 'all a claimant needs to show is that he transferred property to the defendant or contributed to the purchase price (up to paying the entire price) of property transferred by the seller to the defendant'.[44] Swadling has since explicitly adopted this view, stating that '[i]t is not necessary to obtain the benefit of the presumption … that the transferor prove by evidence that the transferee gave nothing in return'.[45] Swadling acknowledged his debt to Penner's contribution on the point, which Swadling stated that he had failed to make clear in a previous article.[46]

Penner does not offer an argument of principle but suggests that he favours Swadling's position (or what has now become Swadling's position) 'for the simple reason that he has the cases on his side'.[47] The first two cases upon which Penner relies, to establish that 'there is no need to show that there was an absence of any quid pro quo',[48] involve the presumption of resulting trust that is triggered by contributions to the purchase price of property which is transferred into the name of another.[49] The relevant cases have nothing specific to say about the point under discussion. Penner does not engage with the argument that the indirect transfer to the defendant is 'voluntary' in the sense that the claimant has provided the purchase price for property that was transferred to someone else. Rather, he emphasises the fact that the cases do not go on expressly to rule out the possibility that the defendant might have provided some other *quid pro quo* for the transfer.

The final authority relied upon by Penner is *Tinsley v Milligan*,[50] from which he quotes a passage which he sees as the 'nail in the coffin'[51] for the view that the presumption of resulting trust will arise only if the recipient has provided no

[43] J Penner, 'Resulting Trusts and Unjust Enrichment: Three Controversies' in Mitchell (n 12 above) 238–41.
[44] ibid 238.
[45] Swadling (n 4 above) 659.
[46] ibid. Swadling's previous article was W Swadling, 'Explaining Resulting Trusts' (2008) 124 *LQR* 72.
[47] Penner (n 43 above) 239.
[48] ibid 240.
[49] *The Venture* [1908] P 218; *Mehta Estate v Mehta Estate* (1993) 104 DLR (4th) 24.
[50] n 13 above.
[51] Penner (n 43 above) 240.

consideration.[52] In the relevant passage, Lord Browne-Wilkinson states that what triggers the presumption is the fact 'that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant'.[53] The phrase 'voluntarily transferred' here clearly means that the recipient was a volunteer, who gave no consideration. Nonetheless, Penner comments, in respect of the relevant passage, that '[t]here is nothing here about any further requirement of having to show that the recipient of the title to the property provided no consideration for it'.[54] This comment is puzzling; it would only make sense if the word 'voluntarily' could be read to mean 'not as a result of compulsion', a position which is obviously unsustainable in light of the way in which the word 'voluntary', and variations thereon, is used in the case law concerning this category of resulting trust.[55]

Penner's argument explicitly applies to both the 'voluntary transfer' resulting trust and the purchase money resulting trust. Following on from the remarks in the previous paragraph, it will now be argued that in relation to the first of these two categories – the one with which this chapter is concerned – the argument is simply untenable.[56] The first difficulty is that it does not mention, and is inconsistent with, the four nineteenth-century authorities discussed earlier in this chapter, which indicate that bare proof of a payment from A to B does not trigger a presumption of resulting trust but rather a presumption that the payment was made in discharge of a prior liability. Secondly, the requirement mentioned in *Tinsley* that, in order to trigger the presumption of resulting trust, the transfer to the defendant must have been voluntary, in the sense of 'without consideration', is repeated in other leading cases. For example, in his explanation in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[57] of the situations in which resulting trusts can arise, Lord Browne-Wilkinson stated

[52] The rejection, in *Patel v Mirza* (n 14 above), of the *Tinsley v Milligan* approach to the doctrine of illegality (see text to nn 13–15 above) does not affect Penner's argument, since he was relying on the general description in Tinsley of the circumstances in which a resulting trust arises, rather than on any point concerning illegality.
[53] n 13 above, 371.
[54] Penner (n 43 above) 240.
[55] On the two meanings of 'voluntary', see *Overseers of the Savoy v Art Union of London* [1896] AC 296, 305 (Lord Halsbury LC).
[56] The position in relation to the purchase money resulting trust is more complex. Due to constraints of space, it is not possible to pursue the point in the current chapter.
[57] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

that 'Where A makes a *voluntary* payment to B … there is a presumption that A did not intend to make a gift to B.' (emphasis added)[58] Similarly, in discussing the relevant aspects of the law of resulting trusts in *Lavelle v Lavelle*,[59] Lord Phillips MR outlined the rules applicable '[w]here one person, A, transfers the legal title of a property that he owns or purchases to another, B, *without receipt of any consideration*' (emphasis added).[60] This echoes the description of the facts triggering the presumption that was advanced by Lord Upjohn in *Vandervell v Inland Revenue Commissioners*,[61] where he discussed the 'well-settled principles' that apply '[w]here A transfers … the legal estate in property to B *otherwise than for valuable consideration*' (emphasis added).[62] This understanding of the law continues to be reflected in judicial statements of the relevant principles in the English case law.[63] It is also noteworthy that Tang PJ expressly stated in *Big Island Construction (HK) Ltd*[64] that 'it is only when a payment is voluntary that a resulting trust may arise'.[65]

It is also possible to point to examples where the requirement of voluntariness is not merely stated as a point of principle but is also applied to the facts of the case at hand. In *Crown Prosecution Service v Malik*,[66] Richards J stated that '[t]here could be no presumption of a resulting trust since … this was not a voluntary conveyance but a conveyance for a consideration of £35,000'.[67] In *Collier v Collier*,[68] Chadwick LJ stated that:

> [T]he creation of the leases in 1986 is not to be regarded as a voluntary transfer of property such as to give rise to any presumption of resulting trust. The leases,

58 ibid 708. Lord Goff's explanation was in similar terms: ibid 689D.
59 *Lavelle v Lavelle* [2004] EWCA Civ 223, [2004] 2 FCR 418.
60 ibid [13].
61 *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291.
62 ibid 312. Note also *Re Vandervell's Trusts (No 2)* [1974] Ch 269, 294 (Megarry J).
63 Note eg *KK v MA* [2012] EWHC 788, [2012] BPIR 1137, [112] (Charles J); *High Commissioner for Pakistan in the United Kingdom v Jah* [2016] EWHC 1465, [2016] WTLR 1763, [139] (Henderson J). Note also the reference to a 'voluntary conveyance' in s 60(3) of the Law of Property Act 1925.
64 n 22 above.
65 n 22 above, [44]. See also ibid [61] (Tang PJ, quoting Dixon J in *Heydon v Perpetual Executors, Trustees and Agency Co (WA) Ltd* (1930) 45 CLR 111, 113) and fn 43.
66 *Crown Prosecution Service v Malik* [2003] EWHC 660, [2003] All ER (D) 33.
67 ibid [30].
68 *Collier v Collier* [2002] EWCA Civ 1095, [2002] BPIR 1057.

on their face, are granted for consideration. No presumption of resulting trust arises.[69]

Turning to considerations of principle, it may be pointed out that both the history and internal logic of the 'voluntary transfer' resulting trust doctrine show that the idea of voluntariness is crucial to its operation. At the time that the courts developed the rules on resulting uses,[70] replicated in the modern rules on resulting trusts, most voluntary conveyances of land were not intended as gifts but rather were made with the intention that the recipient would take as a trustee, to hold on the basis of instructions to be given later by the settlor. This led to the rule that, upon a voluntary transfer of property, the fate of the beneficial interest depends on the motivation of the transferor in entering into the transaction (on the 'consideration' for the transaction, in a different sense to the one now prominent in the law of contract), eg, on whether or not the settlor intended to pass the beneficial interest to the transferee. This idea is at the heart of the modern law in relation to presumed resulting trusts. Thus, the presumption applies in the case of what Chambers has called 'apparent gifts'[71] and what Swadling has referred to as 'ambiguous transactions';[72] it cannot sensibly apply to *all* transfers. The voluntary transfer resulting trust focuses on the unilateral intention of the claimant,[73] as is illustrated by the fact that a resulting trust has been held to arise in cases where the recipient was unaware of the transfer to him or her.[74] However, if a transfer has been made in return for consideration, there is no logical reason to afford decisive significance to the (possibly undisclosed) intention of the transferor. Once the transfer has been paid for by the transferee, it is entirely

[69] ibid [80]. See also ibid [64] (Chadwick LJ). Note *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415, [49], where, although a consideration of £1 had been paid, Lord Sumption described the relevant transfers as 'gratuitous' (another word for 'voluntary') and applied the presumption.

[70] See generally, Mee, 'Presumed Resulting Trusts, Intention and Declaration' (n 5 above) 94–97.

[71] R Chambers, *Resulting Trusts* (Oxford, Oxford University Press, 1997) 11.

[72] Swadling (n 46 above) 86.

[73] Note that matters have been complicated in the context of the purchase money resulting trust by the emergence of the common intention constructive trust which, on one view, has swallowed up the older doctrine entirely: see Mee, 'The Past, Present, and Future of Resulting Trusts' (n 5 above) 213–21. Note also, in the voluntary transfer context, the remarks of Chief Master Marsh in *National Crime Agency v Dong* [2017] EWHC 3116, [2018] Lloyd's Rep FC 28, [35]–[38].

[74] See eg *Duke of Norfolk v Browne* (1697) Pr Ch 80, 24 ER 38; *Re Vinogradoff* [1935] WN 68. Note also, in the purchase money resulting trust context, *Shephard v Cartwright* [1955] AC 431; *Sidmouth v Sidmouth* (1840) 2 Beav 447, 48 ER 1254.

reasonable for the beneficial interest to pass to the transferee in the absence of any express declaration of trust or some understanding between both parties that might trigger some other equitable doctrine.[75]

The foregoing discussion leads to the conclusion that, as it applies to the voluntary transfer resulting trust, the argument of Penner and Swadling is not sustainable either as a matter of authority or as a matter of principle.

V. THE RULE IN *SELDON v DAVIDSON*

The rule in *Seldon v Davidson* appears to be established in English law, having been applied, or (more frequently) mentioned favourably, in a number of modern cases. These have often arisen in the context of disputes between cohabitants[76] but have also involved, eg, a dispute between a football club and its chairman,[77] a course of dealing between two wealthy business associates,[78] and a payment by a wealthy claimant and his wife to a friend whose business had run into difficulties.[79] Section V of this chapter examines the nature and basis of the rule in *Seldon v Davidson*.

A. The Reasoning in *Seldon v Davidson*

The defendant in *Seldon* had been employed by the claimant as a chauffeur and handyman. The defendant and his wife wanted to buy a house and, to help them

[75] Swadling (n 4 above) 659 comments that: 'Many judges and textbooks talk of the presumption arising in cases of proved by evidence gratuitous transfers, but that collapses issues of the facts necessary to be proved by evidence to raise the presumption and the sorts of evidence which will rebut it. The fact that consideration was given, ie, that the transfer was not gratuitous, is something which rebuts the presumption.' However, proof of the existence of contractual consideration would not tell the court anything direct about the subject-matter of the presumption, ie about the nature of the claimant's intention (or, if one accepted Swadling's understanding of the nature of the presumption – advanced in Swadling (n 46 above) and criticised in Mee, 'Presumed Resulting Trusts' (n 5 above) – about whether the claimant made an express declaration of trust). It does not seem logical to argue that the presumption arises upon the making of any transfer, including one that is not voluntary, but that bare proof that the transfer is not voluntary serves automatically to rebut the presumption.
[76] *Freeman v Tems* (CA, 27 January 1993); *Clark v Mandoj* [1998] Lexis Citation 2366; [1998] EWCA Civ 505; *Markham v Karsten* [2007] EWHC 1509, [2007] BPIR 1109; *Woodward v Taylor* [2011] EWCA Civ 1729; *Favor Easy Management Ltd v Wu* [2011] EWHC 2017 (the rule was not mentioned on appeal: *Favor Easy Management Ltd v Wu* [2012] EWCA Civ 1464); *Chapman v Jaume* [2012] EWCA Civ 476, [2012] 2 FLR 830.
[77] *Re Nuneaton Borough Association Football Club Ltd (No 2)* [1991] BCC 44.
[78] *International Commercial Finance (UK) Ltd v K & K Knitwear Ltd* (HC, 18 June 2001).
[79] *Edwards v Dallyn* [1998] Lexis Citation 3489 (CA, 17 December 1998).

to do so, the claimant gave two cheques amounting to £1,550 to solicitors acting on behalf of the defendant and his wife. Subsequently, the claimant fell out with the defendant and he was dismissed from his employment. The claimant then sought repayment of the money. The defendant argued that the payment had been a gift or that, if it had been a loan, it was not repayable yet. The county court judge held, in response to a submission on behalf of the claimant, that the legal burden was on the defendant to prove one of the two defences on which he was relying. The judge then acceded to an application on behalf of the defendant for the trial to be adjourned so that the judge's ruling on the burden of proof could be appealed to the Court of Appeal. The two judges in the Court of Appeal had 'considerable doubts' as to whether an appeal lay on the point in question[80] given the potential for such adjournments to lead to 'a chaotic state of affairs'.[81] However, they did not rule conclusively on that point and, not wanting the parties to 'go away empty-handed',[82] proceeded to consider and dismiss the appeal on the merits.

The judgments in *Seldon* were given ex tempore and were relatively brief. Both judges noted the scarcity of relevant authorities. As mentioned previously, both judges discussed *Cary v Gerrish*,[83] and Edmund Davies LJ also referred to *Welch v Seaborn*.[84] Willmer LJ observed that:

> [Counsel for the defendant] was constrained to admit that the house which had been bought with the aid of the money paid by the plaintiff was no doubt prima facie subject to a resulting trust in favour of the plaintiff. That being so, it would be strange indeed if the same considerations did not apply to the money paid by the plaintiff to the defendant to assist him in the purchase of the house.[85]

Similarly, Edmund Davies LJ emphasised the fact that counsel for the defendant had been 'forced to concede that … the house must, prima facie, be regarded as being held by the defendant by way of a resulting trust for the benefit of the plaintiff'.[86]

[80] n 6 above, 1088 (Edmund Davies LJ); ibid 1087H (Willmer LJ).
[81] ibid 1089 (Edmund Davies LJ).
[82] ibid.
[83] n 27 above.
[84] n 34 above.
[85] n 6 above, 1088.
[86] ibid 1089.

The analogy with the resulting trust doctrine was the only argument expressly advanced by the judges to justify their decision that the burden of proof lay on the defendant to establish that the payment was a gift rather than a loan. However, a second argument may have had some influence on the minds of the judges. In the later Australian case of *Joaquin v Hall*,[87] Jenkinson J commented that the Court of Appeal in *Seldon* 'appears to treat the defence pleaded as a confession and avoidance'.[88] In argument in *Seldon*, counsel suggested that 'the mere handing over of money' should not 'always mean that there was an automatic obligation to repay'.[89] Willmer LJ asked in response: 'Why is the position not the same as in the case of a claim for breach of contract where it is pleaded that an exception clause applies?'[90] and Edmund Davies LJ followed this up with the observation that 'Confession and avoidance occurs every day of the week.'[91] An example of confession and avoidance would be a case where a defendant conceded that the money had been lent but claimed to have repaid the loan; in such a case, the burden of proof would lie on the defendant to establish the repayment of the loan.[92] However, Jenkinson J appears to have been correct to point out in *Joaquin* that the defence in *Seldon v Davidson* was of a different nature to confession and avoidance and involved the 'denial of an essential ingredient in the cause of action.'[93] The admission by the defendant that he or she has received a payment from the claimant does not in itself – unlike the admission that a contract of loan existed between the parties – 'confess' a liability to repay that must be 'avoided' by the defendant's producing evidence that explains away that liability.[94]

B. Contract of Loan or Unjust Enrichment

It seems clear that the effect of the rule in *Seldon v Davidson* is that, when it applies, it places an onus of proof on the defendant which, if not discharged, will lead to a finding that the payment was a loan. The result would be that the defendant is contractually obliged to repay the loan. In his interesting discussion of *Big Island*

[87] *Joaquin v Hall* [1976] VR 788.
[88] ibid 789.
[89] n 6 above, 1085.
[90] ibid.
[91] ibid.
[92] See *Young v Queensland Trustees Ltd* (1956) 99 CLR 560 (HCA).
[93] n 87 above, 789.
[94] As pointed out by Mason NPJ in *Big Island Construction (HK) Ltd* (n 22 above) [91].

Construction (HK) Ltd,[95] Professor Peter Watts appears to view the rule in a different light.[96] He suggests that it could be seen as providing support for the 'absence of basis' view of the law of unjust enrichment. Under this approach, favoured in civil law jurisdictions and in Canada, and advocated in the English context by Professor Peter Birks, 'once the transferor asserts "no basis" the onus moves to the recipient to prove a valid ground for the transfer of value.'[97] This is contrary to the current position in English law, whereby a person seeking restitution for unjust enrichment must be able to point to a specific 'unjust factor', such as mistake or failure of basis. According to Watts, while Birks looked for support for his position in the law of resulting trusts,[98] Birks 'appears to have overlooked that much more direct support for this view can be found in *Seldon v Davidson*'.[99] However, it does not seem to be accurate to suggest, as Watts does, that *Seldon* imposes the burden on the defendant 'of showing that the claimant intended to make a gift of the money or that otherwise there is a valid reason why restitution should be denied'.[100] If the defendant is unable to discharge the burden of proof laid on him by *Seldon*, the result will not be that 'restitution' will follow. Rather, there will be a finding of fact that the money was advanced as a loan and the defendant will be contractually liable to repay the debt.

This emerges clearly from *Seldon v Davidson*, where Edmund Davies LJ stated that 'proof of payment imports a prima facie obligation to repay the advancement' and went on to explain that

> [Willmer LJ] has expressed the view that *the loan* would be repayable on demand. I would say, if not repayable on demand, at least repayable within a reasonable time of a request for repayment, and, of course, if it be the case that mere loans were made and, later on, the borrower repudiates the loans and asserts that the advancements were by way of out-and-out gifts, that repudiation

95 n 22 above.
96 P Watts, 'The Onus of Proof in Restitutionary Claims' (2016) 132 *LQR* 11.
97 ibid 12, citing P Birks, *Unjust Enrichment*, 2nd edn (Oxford, Oxford University Press, 2005) 136–37.
98 See ibid 150–52, 304–07, developing an argument first presented in detail in P Birks, 'Restitution and Resulting Trusts' in S Goldstein (ed), *Equity and Contemporary Legal Developments* (Jerusalem, Hebrew University of Jerusalem, 1992). Note also Chambers (n 71 above).
99 Watts (n 96 above) 12.
100 ibid.

> of *the true nature of the transaction* would upon any view render the loans immediately repayable (emphasis added).[101]

This passage shows that, where the defendant is unable to prove that a gift was intended, the court will presume that the transaction involved a loan. As Swinton Thomas LJ put it in the later case of *Clarke v Mandoj*, what is at issue is a 'presumption in favour of a loan'.[102] It seems clear that the existence, in some factual circumstances, of a presumption that there was an actual contract of loan between the parties offers no support to Birks' general argument as to the circumstances in which restitution for unjust enrichment should be available.[103]

C. The Analogy with the Resulting Trust

As has been mentioned, the judges in *Seldon* laid emphasis on the proposition that a presumption of resulting trust would have been triggered by the fact that the defendant used the money to fund the purchase of a house. In *Big Island*,[104] Sir Anthony Mason NPJ commented that:

> The Court of Appeal's reasoning, based on the *prima facie* proposition that D held the house property on a resulting trust for the benefit of S, leading to the conclusion that the moneys paid by S to D should be repaid, is difficult to explain. The imposition of a resulting trust was designed evidently to justify an order for the repayment of the money paid on the footing that it was a loan. The relationship of resulting trust and loan in the circumstances of the case was inconsistent … What is more S did not claim that there was a resulting trust.[105]

[101] n 6 above, 1090.
[102] *Clark v Mandoj* (n 76 above) (no pagination in original, penultimate paragraph). See also *Arif v Anwar* [2015] EWHC 124, [2016] 1 FLR 359, [87] (Norris J): 'the presumption of loan under *Seldon v Davidson*'.
[103] It is not entirely obvious how the rule in *Seldon v Davidson* might be seen as supporting an absence of basis theory of unjust enrichment but perhaps the argument is that the rule involves a presumption that the transfer was not a valid gift, so that the alternative possibilities are not just that the transfer was a loan but also that it was a gift made on the basis of a mistake or other invalidating factor, or that it was intended to satisfy some obligation that did not exist. However, there is no trace of a suggestion to this effect in the case law on *Seldon v Davidson*. Furthermore, the view that emerges in the case law is that the rule is only triggered when the evidence and the pleadings show that the transfer was either a gift or a loan (see text to nn 115–127 below) and that it operates to allocate the burden of proof as between these two possibilities.
[104] n 22 above.
[105] ibid [91]. Similar points were made by Tang PJ, ibid [42]–[47].

The inconsistency referred to by Sir Anthony Mason NPJ arises from the well-established principle that an intention to lend on the part of the claimant is inconsistent with the creation of a resulting trust.[106] Sir Anthony Mason NPJ referred in the above passage to the 'imposition' of a resulting trust in *Seldon v Davidson*.[107] However, as Watts points out, 'although Willmer L.J. and Edmund Davies L.J.'s respective statements about resulting trusts were certainly elliptical',[108] they probably did not intend to suggest that a resulting trust actually arose over the house.[109] Watts goes on to suggest that:

> What the judges had in mind, it is suggested, is that, had the plaintiff alleged a resulting trust of the land bought with the money, instead of a loan, equity would have placed an onus on the defendant to deny the trust. It then seemed odd to them that the position would be different where only a loan of the money was being asserted.[110]

Watts's interpretation is convincing. Nonetheless, the rule emerging from Seldon draws significantly on the doctrine of resulting trusts in that it co-opts the concept of the presumption of advancement.[111] Professor Robert Chambers has suggested that *Seldon* 'demonstrates the independent nature of the presumption of advancement',[112] which 'being an inference that a gift was intended, can be

[106] *Re Sharpe* [1980] 1 WLR 219, 223B (Browne-Wilkinson J). See also *Big Island* (n 22 above) [44] (Tang PJ); [92]–[97] (Sir Anthony Mason NPJ).
[107] And did so again, ibid [98].
[108] Watts (n 99 above) 13.
[109] Note that the facts of *Seldon* had the special feature that the claimant used the money to purchase a house. This diverted attention to the purchase money resulting trust and away from the voluntary transfer resulting trust (and the possible clash between the presumption of a resulting trust over the money and the *Seldon* presumption of a loan).
[110] Watts (n 99 above) 13.
[111] In another respect, however, the rule in *Seldon v Davidson* and the resulting trust appear to be different in nature. Although the point is surprisingly unclear, it seems that the presumption of resulting trust is an evidential presumption, which does not reverse the burden of proof but merely creates a burden of production on the other side (on such presumptions, see *Murphy on Evidence*, 15th edn (Oxford, Oxford University Press, 2017) 153). See eg *Fowkes v Pascoe* (1875) 10 Ch App 343, 352 (Mellish LJ); *O'Kelly v Davies* [2014] EWCA Civ 1606, [2015] 1 WLR 2725, [19] (Pitchford LJ); *Swadling* (n 46 above) 80, fn 49. In contrast, the rule in *Seldon v Davidson* seems to reverse the burden of proof: see eg, *Seldon* (n 6 above) 1088G (Willmer LJ); *Edwards v Dallyn* (n 79 above) (no pagination in original; penultimate paragraph (Roch LJ)); *Nel (suing as executrix of Nel) v Kean* [2003] EWHC 190, [2003] All ER (D) 206, [97] (Simon J); contrast *Markham v Karsten* (n 76 above) [58] (Briggs J): an 'evidential presumption'.
[112] Chambers (n 71 above) 32.

applied in cases having nothing to do with the resulting trust'.[113] On the other hand, the point could be looked at differently, and it could be argued that *Seldon* is anomalous in its willingness to uproot the presumption of advancement from its home in the doctrine of resulting trusts and to give it an independent life. The range of relationships that attract the presumption of advancement has often been criticised. This is largely because of its sexist nature (since it applies from husband to wife and not the other way around and, historically at least, it only applied from father to child and not from mother to child).[114] It has also sometimes been argued that the presumption should also apply in the context of quasi-matrimonial cohabitations. It seems to be an undesirable feature of the rule in *Seldon v Davidson* that it imports the baggage associated with the presumption of advancement. If the rule were discarded, the burden of proof would (as usual) be allocated to the claimant, and the focus would be on assessing the actual evidence in the case, thus avoiding the disadvantages associated with drawing a 'bright line' between those relationships that attract the presumption of advancement and those that do not.

D. When, Precisely, is the Rule Triggered?

Given the way in which the older authorities were distinguished in *Seldon*, the question arises as to when the rule comes into operation. Having reviewed *Cary v Gerrish*,[115] and *Welch v Seaborn*,[116] Edmund Davies LJ commented that, in light of their lack of relevance to the facts of the case before him,

> one is really driven back to consider this matter without the assistance of authority and, being so unassisted, I ask myself what is to be inferred as to the nature of the transaction when the simple payment of money is proved or admitted between strangers.[117]

His conclusion was that 'on that bald state of affairs, proof of payment imports a prima facie obligation to repay the advancement in the absence of circumstances

[113] ibid 33.
[114] See J Glister 'The Presumption of Advancement' in Mitchell (n 4 above); J Glister 'Section 199 of the Equality Act 2010: How Not to Abolish the Presumption of Advancement' (2010) 73 *MLR* 807.
[115] n 27 above.
[116] n 34 above.
[117] n 6 above, 1090.

from which the presumption of advancement can or may arise'.[118] Edmund Davies LJ's references to 'the simple payment of money' and 'that bald state of affairs' might suggest a broad scope for the rule in *Seldon*, whereby the inference of a loan would follow in any case where the payment of money is proven between strangers, with the obligation being on the defendant to prove the existence of additional factors in the case which would raise the possibility of the payment being in discharge of a pre-existing debt (and which would, on this view, cause the burden of proof to shift back to the claimant).

Willmer LJ, having discussed the approach of Lord Kenyon in *Cary v Gerrish*, pointed out that

> [n]o such considerations arise in the present case; indeed they are clearly ruled out, because we have from the defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort.[119]

Willmer LJ's conclusion was that:

> In the absence of any such circumstances, money paid by the plaintiff in circumstances such as these is prima facie repayable on demand. If the defendant seeks to evade repayment of the money which was paid to him, it seems to me that the judge was right in placing the onus on him to prove the facts which he alleges show that the money was not repayable.[120]

These remarks seem to suggest a narrower scope for the rule, whereby it will only apply in circumstances where the state of the evidence and the pleadings in the case rules out the possibilities considered in *Cary v Gerrish*; in other words, the rule would only apply where it fell to the court to decide between gift and loan.

Given that *Seldon* is open to two interpretations in terms of the scope of the rule it establishes, it is necessary to look to the subsequent English case law for clarification. Sometimes the rule is stated in these cases by reference to quotations

[118] ibid.
[119] ibid 1088.
[120] ibid.

from the judgments of Willmer and Edmund Davies LJJ, thus offering little or no assistance concerning the interpretation of the relevant statements.[121] In most of the cases, however, the rule is described by reference to the choice between gift and loan, as for example in *Markham v Karsten*,[122] where Briggs J stated that

> where there is a dispute between the payer and recipient of a sum of money as to whether it was a loan or gift, and no presumption of advancement arises between them, the onus is on the recipient to prove that it was a gift.[123]

Along the same lines, in his minority judgment in the Hong Kong case of *Big Island*, Tang PJ took a narrow view of the scope of the rule, insisting that it means only that the burden of proof is on the defendant 'to prove that the payment was a gift'.[124] He was 'firmly of the view that the burden is not on the defence to prove, for example, that the payments were in repayment of an earlier debt or in return for cash.'[125] In his majority judgment, Sir Anthony Mason NPJ stated that, in light of the language used by the judges in *Seldon*, it 'would be possible to so confine the implied obligation to repay so that it has no application at all to commercial transaction[s]'.[126] Presumably, the point being made by Sir Anthony Mason NPJ was that, in the commercial context, it will not generally be plausible to argue that the payment in question was intended as a gift and so, on the assumption that its function is to allocate the burden of proof where there is a dispute as to whether a payment was a gift or a loan, the rule in *Seldon* would have no application. In fact,

121 *Freeman v Tems* (n 76 above); *Clark v Mandoj* (n 76 above) (see the judgment of Hobhouse LJ; Buxton LJ concurring).
122 n 76 above.
123 ibid [42]. See also *Briggs v Rowan* [1991] Lexis Citation 2759 (no pagination in the original): 'there is an onus of proof on the recipient to prove that it was a gift if he seeks to defend the claim for repayment on the footing that it was a gift' (Jules Sher QC, sitting as a Deputy High Court Judge); *Edwards v Dallyn* (n 79 above) (no pagination in the original): 'the burden of proof on [D] to establish that these payments were gifts and not loans' (Roch LJ); *Nel (suing as executrix of Nel) v Kean* (n 111 above) [97] (Simon J); *Aspect Capital Ltd v Revenue & Customs* [2012] UKFTT 430, [2012] SFTD 1208, [194] (Judge Mosedale); *Shop Direct Group v Commissioners for HM Revenue and Customs* [2013] EWHC 942, [2013] STC 1709, [120] (Asplin J). Note also the reference by Swinton Thomas LJ in *Clark v Mandoj* (n 76 above) (no pagination in the original) to the issue of whether the transaction 'was a gift or a loan'.
124 n 22 above, [53].
125 ibid [53].
126 ibid [99].

Sir Anthony Mason NPJ went on to hold that, even in this form, there was no room for the rule in *Seldon v Davidson* in Hong Kong law.[127]

In the current author's view, the English case law suggests that, in line with the position of Tang PJ in *Big Island*, the rule in *Seldon v Davidson* is not triggered simply by the making of a payment, but rather applies to cases where the court is faced with a choice between gift and loan.

VI. CONCLUSION

The view that has just been taken of the scope of the rule in *Seldon v Davidson* suggests that it is compatible with the presumption of resulting trust, which applies where (since the payment has been proven to be voluntary) the choice is between gift and trust. This view also allows the rule in *Seldon* to be reconciled with the existence of the presumption of discharge of a prior debt discussed earlier in this chapter; that presumption arises upon proof of a payment and the rule in *Seldon* arises only if, beyond that, the evidence and pleadings establish that the possibilities are gift or loan. This is consistent with the fact that there was no suggestion in *Seldon* that the older cases were wrongly decided. This analysis provides a method of rationalising the three presumptions that feature in the case law and, it is submitted, represents the best way to make sense of the current law and to avoid the problem of competing presumptions.

The final task of this chapter is to comment briefly on the normative desirability of this position. The current author has argued elsewhere that presumed resulting trusts, including the voluntary transfer resulting trust, are explicable on historical grounds and that their continued existence is difficult to justify in modern times.[128] When a person makes a gratuitous transfer of property, his or her likely intention is that the recipient should take the benefit of the property for himself or herself, so that the presumption of resulting trust does not reflect the probability of the matter. Therefore, although this is a comparatively radical position which cannot be defended in detail here, it would probably be best

127 See text following n 129 below.
128 J Mee, 'The Past, Present, and Future of Resulting Trusts' (n 5 above) esp 220–21.

to discard the voluntary transfer resulting trust, including the presumption of resulting trust that currently arises upon a voluntary transfer.

If the voluntary transfer resulting trust were to be dispensed with, this would have implications for the logic underlying the rule in *Seldon v Davidson*, since the only justification offered by the court in *Seldon v Davidson* was the analogy with the presumption of resulting trust. It is significant that in Australia, where the voluntary transfer resulting trust has been held by the High Court of Australia not to apply in relation to chattels passing by delivery,[129] the rule in *Seldon v Davidson* has never been accepted.[130] Even if (as seems likely) the relevant form of resulting trust continues to be tolerated by English law, there would seem to be a strong case for following the approach of the Hong Kong Court of Final Appeal in *Big Island* and dropping the less well-entrenched rule in *Seldon v Davidson*.

The reasoning in *Seldon v Davidson* itself is unimpressive and there does not appear to be any strong justification for the rule it established. Writing extra-judicially, Tang NPJ has commented that, while he favoured retaining the rule (in its narrower form),[131]

> most probably, it makes little practical difference whether the English or Australian view is adopted. Just as it does not matter whether one drives on the right or left, so long as one knows on which side one is supposed to drive.[132]

The difficulty with this argument is that, as was suggested earlier in this chapter, presumptions have significant practical influence. The standard rule is that the burden of proof lies on the person seeking to establish a claim and, in the absence of any compelling justification, it is undesirable to create an exception to

129 *Heydon v Perpetual Executors, Trustees and Agency Co (WA) Ltd* (1930) 45 CLR 111, relying on *George v Howard* (1819) 7 Price 646, 146 ER 1089. On the status of the voluntary transfer resulting trust in Australia, see eg, *Ford and Lee: The Law of Trusts Online* (Sydney, Thomson Reuters Australia, 2016) [21.100].

130 See *Joaquin v Hall* (n 87 above). See also eg *Sherwin v Commens* [2008] NTSC 45, [7] (Southwood J); *Alexiadis v Zirpiadis* [2013] SASCFC 64, [62]–[69] (judgment of the Full Court of the Supreme Court of South Australia); *Voce v Deloraine* [2012] NSWSC 1187, [12] (Lindsay J); *Steiner v Strang* [2016] NSWSC 395, [113]–[116] (Slattery J).

131 One possible objection to the rule, mentioned by the Hon Mr Justice Tang in 'Developing Common Law in Hong Kong' (Common Law Lecture Series 2015, University of Hong Kong, 27 October 2015), tinyurl.com/ycgjjj95, [50], is that it is unfair to place the onus of proof on the payee because a lender is more likely to retain an 'IOU' than a payee is to retain a receipt.

132 ibid [51] (footnote omitted).

this general rule. There seems to be wisdom in the comments made by Sir Anthony Mason NPJ in his majority judgment in *Big Island*, which eliminated the rule from Hong Kong law, to the effect that:

> The making of a bare payment to another may in the nature of things be explicable by reference to a wide variety of possibilities. To my mind, the probability that there is an obligation to repay the amount is not so strong that it should become the subject of a presumption … Presumptions lend themselves to tactical ploys in litigation; it is better that parties be encouraged to present the totality of their case, particular[ly] in cases arising out of commercial transactions.[133]

While, for these reasons, the current author favours discarding the rule in *Seldon v Davidson*, there seems to be no objection to retaining the presumption that a payment, in the absence of any evidence beyond the fact that it is has been made, represents the discharge of a prior obligation. Although described as a presumption, the effect of this long-standing rule is simply to place the normal burden of proof on a claimant who seeks to make the case that another person is contractually obliged to repay money to him or her.

133 n 22 above, [106].