

Property Law

Bram Akkermans

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1 Property Rights and Property Law

Rights play an important role in private law. The owner of a car that has been damaged unlawfully by someone else has a right against the tort-feasor to be compensated. The seller of a car has the right against the buyer of the car to be paid the price for which the car was sold. And, finally, the owner of a car has a right to the car itself. This last right differs from the former two. It is not a right against a particular person such as the tort-feasor or the contract partner; it is a right on a tangible object, namely, the car.

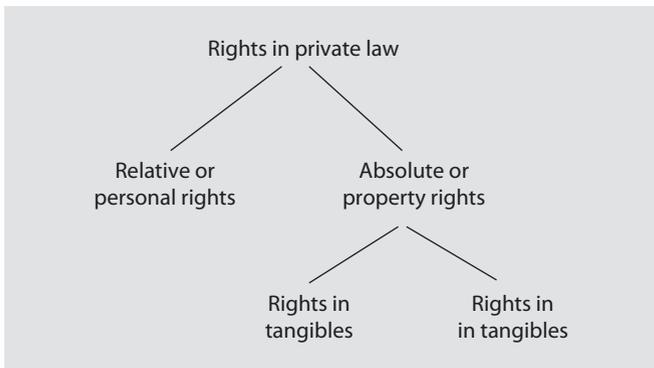
1.1 Property Rights

Absolute and Relative Rights

Rights against a particular person are called *personal rights* or *relative rights*. Rights that are not against a particular person are called *absolute rights*. These absolute rights always pertain to «something», and this «something» is called the *object* of the right. The objects of rights may be *tangible*, such as land, buildings, cars, and books. They may also be *intangible*, such as trademarks, intellectual property (including copyrights and patents), shares, and claims. Absolute rights in private law are called *property rights*, and *property law* is the branch of private law that governs these property rights. See ■ Fig. 5.1.

Effects *erga omnes*

Strictly speaking, property rights are not directed at any particular person, but because they pertain to an object, they have effect *erga omnes*. The expression *erga omnes* is Latin and refers to an effect against «everyone». Property rights are therefore rights with effect against everyone. This effect is a defining characteristic of property rights and means that



■ Fig. 5.1 Rights in private law

property law, the law that governs property rights, differs from, for instance, the law of contract, which deals with legal relations between the contract parties only:

If Peter is the owner of a car, nobody else in the world is entitled to use this car without Peter's consent. If Jane has contracted with Sam that Sam will clean Jane's house for money, only Sam is under an obligation to clean Jane's house, and only Jane is under an obligation to pay Sam this money.

An immediate consequence of the fact that property rights have effects against everyone is a phenomenon that is best known under its French name *droit de suite* (literally, «right to follow»). If the object of a right falls into the hands of a person who does not hold the right, the right holder can exercise his right against that person:

Droit de suite

For instance, Elisa has the property right of usufruct on a house which belongs to her former husband James. This right involves that Elisa is entitled to use the house as long as she lives. Suppose that James sells the house to Joan, who becomes the new owner of the house. Because Elisa's right pertains to the house, and is not a right specifically against James, Elisa is still entitled to use the house. Joan must respect the usufruct which Elisa has on the house. And if Joan were to sell the house again, the new owner must also respect the usufruct. The right which Elisa has on the house so to speak 'follows' the house, regardless of whoever is the owner.

1.2 Central Questions

This chapter deals with a number of central questions of property law. The first question, addressed in ► Sect. 2, is why there should be property rights and property law at all.

The second question is what the main types of property rights are in the common law and in the civil law traditions. This question will be answered in ► Sects. 3, 4, and 5.

Although there are different property rights, they have a number of characteristics in common. In ► Sect. 6, the question what these common elements are will be answered by discussing seven principles and rules of property law.

The fourth question concerns the dynamics of property rights. How are these rights created, how are they transferred from one holder to another, and how are they terminated? This is the topic of ► Sect. 7.

A final question, to be answered in ► Sect. 8, is how property law will develop, in particular in light of further integration within the European Union.

2 Why Property Rights?

We are all accustomed to the idea that it is possible to have exclusive rights on objects. There seems to be nothing strange about the fact that someone who owns a book can prevent everyone else from reading it. And still, if one comes to think of it, it is less obvious than it seems at first sight. Why should there be property rights at all? Would it not be better if everyone were allowed to use everything? There is a theoretical (freedom of ownership) and an economic perspective (tragedy of the commons) to answering these questions.

Freedom of Ownership

Property rights actually facilitate the free circulation of goods by enabling these goods to change owners. A free market economy functions on the basis of what is known as the freedom of ownership. In such a system, every individual is free to acquire and dispose of their own property. The right of ownership and other property rights are the means by which individuals hold entitlement to their objects. Property law firmly establishes the presumption that all objects and things are freely transferable unless explicitly prohibited:

To illustrate this: After the fall of the Berlin wall and the removal of the Iron Curtain at the end of the 1980s and the beginning of the 1990s, former socialist countries had to change their system of property law from shared or communal ownership to a free market economy based on freedom of ownership. This change did not only concern movable things, but also land, which previously also had been held by a community of people. Transition to a free ownership regime was not always without problems, especially not since most people were accustomed to sharing objects, in particular land. It is sometimes held that the incentive to individually own needed to grow first.

Tragedy of the Commons

Economic theory also gives us a good indication as to why there are property rights and therefore also why there is property law. A good illustration of why it is good to allow ownership of material objects, as a primary property right, is offered by the idea of the «tragedy of the commons»:

The tragedy of the commons concerns an observation of what can go wrong with herders sharing a common parcel of land, on which they are each entitled to let their sheep graze. It is in each herder's interest to put as many sheep as possible onto the land, even if the quality of the commons is thereby temporarily or permanently damaged as a result of overgrazing. The herder receives all of the benefits from the sheep he puts onto the land, while the damage to the commons is shared by the entire group. If all herders make this individually rational economic decision, the commons will be depleted, or even destroyed, to the detriment of all.

It is therefore in the interest of all if fewer sheep are put onto the land, and if the land is assigned to those herders who profit most from it. This can be accomplished by making one person or group of persons the owner of the land. The owner of the land is by definition the person who may decide what will happen to the land. If other persons want to use the land, they need permission from the owner.

The herders can then gain rights from the owner, such as a lease of the entitlement, to put their sheep onto the land (a grazing right). Those herders who profit the most from the land will be able and willing to pay the highest price for the grazing right, which means that the rights will end up with those who profit the most from them. The owner will receive the money, but since the owner may be a collective, such as the municipality, or a whole set of herders, this does not have to be detrimental.

Recent examples of the same problematic are overfishing and pollution of the environment. The creation of fishing rights and pollution rights and of a market to trade them may have similar advantages to the introduction of private ownership of land.

3 Property Rights in Civil Law and Common Law

There are different kinds of property rights, both on tangibles, e.g., ownership, title to land and to chattels, mortgage, servitudes, and on intangibles, e.g., what are called «intellectual property rights» such as copyright, patents, and trademarks.

In this chapter, intellectual property rights will not be discussed, but even so, it is possible to distinguish many different property rights.

Which specific rights exist differs from one legal system to another, and for that reason it makes little sense to provide a list of «all» property rights. However, it is possible to divide property rights into subcategories:

- Primary property rights, as, for example, the right of ownership
- Secondary property rights to use
- Secondary property security rights
- Secondary rights to acquire a property right

Primary property rights are discussed in ► Sect. 4; secondary property rights are the topic of ► Sect. 5.

In property law, there is a major divide between continental European systems, the civil law systems, and the law of England and Wales, the common law. Civil law systems are dealt with in ► Sect. 3.1, while common law property law will be dealt with in ► Sects. 3.2 and 3.3.

3.1 Civil Law Property

Ownership, Possession, and Detentorship

In the civil law tradition, a distinction is made between ownership, possession, and detentorship of a good.

Ownership

Ownership is a property right that a person has in respect to some object. This is an immaterial relation between the person and the object, without the need for any physical equivalent. For instance, Jean can own a book even if she lent the book to Louise or if the book was stolen from her.

Possession

Possession is not the same as ownership; it is a factual relation between a person and an object. A person who possesses an object exercises factual control over this object. Usually, ownership and possession coincide so that the owner is also the possessor of a thing. Even though it is a factual state, property law attaches importance to possession, usually allowing someone who was dispossessed to recover possession:

An example would be the person who has bought a good and has received it from the seller. Normally he has also become the owner – possession and ownership usually go together – but this does not have to be so. If the seller was not the owner, it may be the case that the buyer did not become the owner either. However, the buyer does control the good and therefore he is the possessor of the good (in good faith), even though he has not become the owner. Another example of a possessor who is not the owner is a thief. The thief has factual control over what he stole. But theft is not a way to obtain ownership, and therefore the thief is merely the possessor (in bad faith), but not the owner.

Detentorship

Possession must be distinguished from *detentorship*. A detentor also exercises factual control over a good but not on behalf of himself; he recognizes that he is holding factual

control for someone else. The detentor therefore recognizes the right of someone else. This difference is relevant in respect to the possibilities to retrieve an object if it has been taken. Whereas, as we saw right above, the possessor can generally retrieve an object with a possessory action, a detentor cannot. Examples of *detention* are when a person has borrowed or leased a good.

Away from the Feudal System

Civil law systems share a basis in *Roman law*. This basis can be found throughout the system of property law, from the classification of objects in land and goods to the rights that can exist in respect of these objects and the way in which these rights are created, transferred, and terminated.

After the fall of the Roman Empire, continental Europe fell under the influence of Germanic law. Germanic law was tribal law, very different from the highly systematized and centrally organized Roman law. It was very fragmented in nature, and each local lord (of a tribe) used his own version. However, what united the Germanic tribes was their system of landholding. Under the influence of this Germanic tribal law, a feudal system came into existence.

A feudal system is not only a system of government but also a system of property law (or better of landholding). In this system, a lord (such as a King) grants feudal rights, known as fees, to a vassal. A vassal might grant a further fee from his own fee to a subvassal, thereby creating a pyramid of landholding.

Feudal System

In this feudal system, property rights and personal rights (or better duties) were closely interwoven. These rights on the land were accompanied by duties of the vassal toward his lord. A fee that was held by a vassal was, on one hand, a kind of property right on the land and at the same time included the duties that the vassal had toward his lord:

To state that a fee was a combination of a property right and a set of duties is in a sense an anachronism. In the Germanic system, in which feudality was grounded, the distinction between absolute property rights and relative personal rights did not exist. Only in retrospect can we say that a fee contained both what we now call a property right and personal duties.

It may be interesting to realize that the distinction between property rights and personal rights was already made in Roman law. However, knowledge of Roman law was lost under the influence of the Germans who had invaded much of continental Europe, and was only rediscovered in the twelfth century.

French Revolution

It was not always clear what exactly the duty of a vassal on the land was. In fact, especially toward the end of the eighteenth century, many vassals were unfamiliar with their rights and duties. The peasants, who were at the very bottom of the feudal pyramid of landholding, complained that they were placed under unfair burdens. Moreover, often only the landlords held documentation of the obligations of the peasants, such as the duty to provide one-tenth of their harvest. These claims were part of the books of grievances or *cahiers de doléances* that the peasants brought with them when they stormed the *Bastille* in Paris in 1789 starting the French Revolution.

The French Revolution meant a change of the system of landholding. On 11 August 1789, the feudal system was abolished, and only in 1804 it was replaced by a unitary system of property law in the newly made French Civil Code. This Code was an anti-feudal document that abolished, for example, all positive duties in property law, such as the duty of farmers to give up parts of their harvest. Moreover, property rights that were previously associated with the feudal system did not reappear in the Civil Code.

The *German Civil Code* of 1 January 1900 makes an even stronger anti-feudal statement. It strictly separates the law of property from the law of obligations and explicitly states that property law must be an autonomous field of private law.

Ownership

Unitary System

Civil law property systems are unitary: there is one system of property law that applies to land and goods alike. A unitary system means that the right of ownership is the same right of ownership regardless of whether it is held on a car or on a piece of land:

This type of system has been in existence since the French Revolution, which caused the abolition of the feudal system of landholding on the continent. Napoleon Bonaparte, who issued the drafting of a civil code for his empire, wanted one single legal system for all objects. His example was followed in the rest of continental Europe.

Definitions of Ownership

Primary property rights are the most comprehensive property rights available in a legal system. In civil law systems that have a unitary system of property law, there is one such right (on tangibles), and that is the right of ownership. Although the right of ownership is defined differently by the various civil law systems, these systems share the idea that the right of ownership is the most comprehensive right.

Art. 544 of the French Civil Code provides the oldest definition of ownership, which is still valid, stating:

Ownership is the right to enjoy and dispose of things in the most complete manner, provided they are not used in a way prohibited by statutes or regulations.

Paragraph 903 of the German Civil Code states:

The owner of a corporeal object can, when this does not interfere with the law or other rights of third parties, do with the object what he wishes and exclude others from interfering. The owner of an animal must, in the exercise of his powers, obey the special provisions for the protection of animals.

Finally, Art. 5:1 of the Dutch Civil Code states:

1. Ownership is the most extensive right which a person can have in a corporeal object.
2. To the exclusion of all others, the owner is free to use the object provided that this use does not violate the rights of others and that it respects the limitations based upon statutory rules and rules of unwritten law.
3. Without prejudice to the rights of others, the owner of the object becomes owner of the fruits the object produces, once separated.

There are, however, also differences between the systems. The French definition of ownership extends to things (*biens*), which includes not only corporeal objects but also incorporeal objects, such as claims. It is therefore possible to own a claim under French law. Suppose that A damaged B's car in a car accident and that A is liable for damages amounting to €2.000 on the basis of tort law, B then has a claim against A for the amount of €2.000. In French law, B would be the owner of this right.

Objects of Ownership

The German and Dutch definitions restrict the concept of ownership to corporeal objects; ownership of a claim is therefore impossible under German or Dutch laws. Therefore, according to German and Dutch law, B would *have* a claim against A but would not *own* this right.

Primary property rights are absolute rights, which means that they can (potentially) be invoked against everyone. Because they are also the most comprehensive rights, an owner can use his right against everyone else. Among others, this means that the owner of a good can vindicate this good. Vindication is a legal action in the civil law tradition by means of which a right holder can reclaim possession of the object of

Vindication

his right. For example, the owner of a stolen bike can reclaim the power over his bike from a thief by way of vindication.

One Right of Ownership

In the civil law tradition, there can be only one right of ownership in respect to an object. If one person holds the right of ownership of a good, then all other persons are not owners. Ownership is therefore a matter of all or nothing, not a matter of degree as it is in common law where different persons can have different titles to a good.

Specific Protection

Property rights, ownership, and other property rights enjoy a special form of protection by the law. This special protection takes the form of specific enforceability, meaning that the duties that follow from the right can be enforced as such.

At first sight, it may seem obvious that legal duties can be enforced, but this is not always the case. Often, if someone does not fulfill his duties, the person to whom the duty was owed can receive monetary compensation for the damages but cannot demand that the duty be fulfilled:

Tort law is a good illustration of this phenomenon. If someone damages someone else's object, the victim can claim monetary compensation, but cannot necessarily require that the damage be undone, or that the act of damaging stops. For example, a water leakage from the upstairs apartment may create damage to the apartment below. A successful action in tort allows a person to claim damages, but not automatically to stop the water flow. In the case of contractual default, the same is the case: the creditor can claim damages, but not necessarily specific performance. There are, after all, situations where performance is difficult or where the debtor really does not want to perform. Think for instance of a soccer professional who does not want to play under any circumstance. Contract law can generally only give monetary incentive to perform. A debtor who really does not want to perform can generally not be forced to do so other than through the payment of money.

Vindication

In the civil law tradition, each property right generally has its own action protecting it. The right of ownership, for instance, is protected by the action that is known as *vindication*. Vindication means that the owner is restored in factual power over the object that she owns. For example, if a thief stole your bike, vindication means that you can claim the actual bike back from the thief.

An action parallel to vindication is also possible in connection with other property rights that involve the factual

power over a good. For instance, if a thief stole the bike on which you hold a right of usufruct, you can also claim the actual bike back from the thief.

In common law, only rights relating to land are specifically enforceable; rights relating to chattels are enforced through the law of torts under the tort of conversion. The tort of conversion generally forces the tort-feasor, in this case the person who interferes with someone else's property right, to choose between paying damages or returning the object or ending the interference with it:

Tort of Conversion

When a thief steals your bike, you may sue the thief in tort and claim damages from him. The thief will then have a choice to pay damages or to return your bike to you.

It should, finally, be noted that property rights are protected not only by property law but also by criminal law. The thief and the person who deliberately destroys someone else's property are liable to be punished.

3.2 Common Law Property Law

The unitary system of ownership, according to which the «same» ownership applies to both immovable and movable objects, distinguishes the civil law tradition from the common law tradition that exists in England and Wales. The common law system, as it is applied in England and Wales, comprises two subsystems: common law in the narrow sense and equity. Both have their own version(s) of property rights. In this section, the property law of common law in the narrow sense is discussed. Property law in equity is discussed in ► Sect. 3.3.

The common law is the system of customary law that has developed since the Battle of Hastings in 1066. It has two kinds of property law, one for land, land law, and another for «what is not land», personal property law. This division essentially follows the distinction between immovable objects (land) and movable objects (chattels or goods). It is the reason why the common law system of property law is called «fragmented»:

Fragmented System

The common law of property and the origin of common law are closely related, as William the Conqueror claimed all land in England for himself upon his victory in 1066. From that moment on, all persons held land from the Crown instead of entirely for themselves. Personal property law, i.e. the law relating to movable objects (goods), did not become relevant until the industrial revolution, when movable objects also became of value.

Land Law

Under the rules of common law, the King is the owner of all land; all others hold land from the King in tenure. This is a feudal system of landholding. Under this system, the King could originally determine the content of the right he gave to others, especially the obligations that right holders had to undertake in return for this right to the land.

Because the feudal system was modernized in the course of time, there was no need to overthrow it, as occurred on the continent after the French Revolution. English *land law* is therefore still a feudal system with its own terminology that has developed and been standardized over time:

Scots law also used a similar feudal system, until the Scottish parliament passed the Abolition of Feudal Tenure Act 2000, terminating all feudal rights in 2004.

One of the most recent modernizations of English land law was the Law of Property Act of 1925. With this Act, the legislature sought to limit and standardize the available property rights in respect to land. After this Act, only two types of feudal rights on land remained—«estates» in English legal terminology—which a person can have *at common law*:

- The fee simple absolute in possession, also known as *freehold*
- The fee for a term of years, also known as *leasehold*

Fee Simple

The most extensive right a person can have is a fee simple absolute in possession or, in short, *fee simple*. The fee simple entitles the holder to exclusive possession for an unlimited duration of time.

Term of Years

From the fee simple, the holder can derive a secondary property right in the form of a fee for a term of years or, in short, a *term of years* or *leasehold*, granting exclusive possession to someone else for a limited duration of time:

For instance, X has a fee simple of a piece of land with a house on it. She can grant a term of 5 years on the land with the house to Y. Y will be entitled to exclusive possession of the house, which will give her the right to live in it. For the duration of the term of years X has lost exclusive possession and can therefore not enter the land without Y's permission. After the 5 years have passed, Y's fee will have ended, but X's fee, which is for an (almost) unlimited time, still continues. This means X regains exclusive possession of the house.

Personal Property Law

The feudal estates of freehold and leasehold do not apply to *chattels* (by and large, movable objects). There is a newer system of property law, personal property law, that applies to chattels (goods) and *choses in action* (among others, claims):

In English personal property law goods are known as chattels, after the word 'cattle'.

In personal property law, the primary right is called «title». Title, short for «entitlement», is the right of exclusive possession to a chattel. It is the most extensive entitlement to a chattel a person can have. For instance, if Thomas holds title to a book, he, and he alone (exclusivity), is entitled to control what happens to the book. Title

There is a complication, however, and this has to do with the so-called *relativity of title*. Relativity of title means that it is possible that more than one person is entitled to the same chattel. If several persons who are all entitled to the same good all claim possession over the good, the person with the stronger entitlement will receive possession. The comparison between two titles is always relative: the one title is stronger than the other. However, the title that wins out in one competition may lose in another competition. It is possible that another person with a still better right might come along and claim possession over the current possessor:

Suppose that Thomas holds title to a book, but that Andy claims to have a better title. In fact, Andy claims and is able to prove that Thomas borrowed the book from him. As a result of the evidence Andy will have a better title than Thomas. Suppose, moreover, that Andy himself had borrowed the book from his sister Susan. Susan will therefore hold a better title than Andy. However, as long as Susan doesn't claim her title, Andy can continue with possession of the book.

This is different in the continental system, according to which only one right of ownership can exist on a good. There is therefore no relativity of title in civil law systems:

Let us have another look at the case of Thomas, Andy and Susan, to see how that would be analyzed under a civil law system. Andy borrowed the book from Susan. This leaves Susan as the owner of the book, and makes Andy into a detentor of the book. Andy has no right to the book itself, but a personal right against Susan to use the book. Susan cannot

vindicate the book from Andy on the basis of her ownership as long as Andy has this personal right against her. But a new owner (if Susan sold the book) might vindicate the book from Andy, since Andy's personal right only can be invoked against Susan. Thomas is also a detentor, this time based on his personal right against Andy. Andy cannot claim the book from Thomas because of this personal right, but arguably (there are some complications) Susan might vindicate her book from Thomas, since Susan still owns the book and Thomas only has a right against Andy, which cannot be invoked against Susan.

5

Trusts

Equity is a second system of law that corrects the strict application of the common law. Equity is important to property law as it is the origin of trusts. In a *trust*, management powers and enjoyment rights relating to property are separated and divided between a manager (trustee) and one or more beneficiaries (beneficiary owners):

A trust is very useful to manage property, for example to decide on what happens to your property after death, giving certain goods to your children, but others to charity. Another example is to manage money or shares in another (off-shore) jurisdiction.

4 Primary Rights

Generally, the right of ownership (in civil law) or the fee simple or title (in English law) is the most extensive right to use a thing or an object. It grants the holder of the right the most extensive entitlement to use it.

Limitations

Of course, this does not mean that the holder may do everything; there are limitations. For instance, the holder of a primary right of a monument cannot alter it without permission from the (local) government: monuments are normally under control of the State to ensure that they keep their valuable state. Other examples are that the purpose for which a building is used may not be changed from commercial to residential (to change a building from a shop into an apartment building) without a special permit and that the person entitled to a piece of land can only build on it with a building permit:

These are all examples of how private law rights are limited by rules of public law. However, the permission to (ab)use an object one owns may be limited on the basis of private law too. Around 1900, a discussion raged in French legal doctrine about what an owner is allowed to do with his properties. The liberal French author on property law Demolombe argued that the owner could do with his object of ownership whatever he wished. This would include that the owner of a famous painting, say a

Degas, would be permitted to destroy it by setting it on fire. Although other liberal authors agreed with Demolombe at that time, disagreement is certainly possible and this raises the question about the scope of the ownership of things that are of value not only to the holder, but also to the rest of society.

5 Secondary Property Rights

Property rights other than ownership are known as secondary property rights. There are two types of these secondary rights: (1) secondary property rights to use and (2) secondary property security rights. They comprise of permissions and/or competencies (powers) that would normally belong to the holder of the primary right but that can be exercised by the holder of the secondary right instead of, or next to, the holder of the primary right.

5.1 Secondary Rights to Use

Secondary rights to use are property rights that entitle the holder to use the object for a limited duration of time. Generally, there are two types, one for a short(er) and one for a longer duration of time.

Secondary rights to use for a shorter period tend to be more extensive in content. The best example is the right of *usufruct*. A right of usufruct is the right to use and enjoy an object that is owned by someone else. The secondary right of usufruct therefore comprises of the permission to use and enjoy the object of the owner, who no longer holds this permission himself. The owner now holds «bare ownership», signaling that he has given away his permission to use and enjoy the object. This secondary property right entitles a person to use an object as if he were the owner, usually for the duration of his life:

Usufruct

For example, it can be the right to have a painting, owned by someone else, in your house for the remainder of your life. This situation is usually created upon death of one spouse in a family to allow the longest living spouse to enjoy the painting without any heir, children or stepchildren interfering. The holder of a right of usufruct can continue to use the object of his right even if the owner of the good sells it. Because the usufruct rests on the object and is not a personal right against the person who granted it, the right 'follows' the object (*droit de suite*).

Servitude

Servitude Secondary rights to use for a longer period of time generally have less extensive content. An example is the right of servitude. A right of servitude can be created on one piece of land for the benefit of another piece of land. A typical example is the right of way, which allows the owner of the one piece of land to walk (or drive) over the other piece of land, usually that of the neighbor. Such a right is, for example, useful to reach a nearby road or to ensure an escape route in case of fire.

The right of servitude limits the ownership of the land on which the servitude runs. The owner is normally allowed to exclude everyone else from his land but now agrees to no longer exclude the right holder of the servitude when he or she is exercising his or her right.

The right of servitude is created on the land. The effect of this is that when the right of ownership of the land is sold and transferred to someone else, the new owner is still bound by the right of servitude.

5.2 Property Security Rights

Property security rights are created to secure the payment of a monetary claim. They are usually created on an object on which the debtor of a claim has a primary right:

The best example of a secondary security right is a right of hypothec (or, in the common law, of mortgage). This is a secondary security right that an owner of a house (or land) grants to a bank or other creditor in exchange for financing the acquisition of the house (or land).

There are two main types of secondary security rights:

1. The right of pledge, which can be created on most movable objects (for instance, jewelry or cars) and on particular kinds of rights
2. The right of hypothec (or mortgage), which can be created on immovable objects (land and all that is attached to it, like houses) and on some special movable objects (e.g., ships or airplanes)

Secondary property security rights break the equality of creditors rule, also known as *paritas creditorum*. When creditors claim money from a debtor, they are generally treated equally.

Suppose that A owes €1.000 to B and a further €3.000 to C. If everything goes well, A will pay both of his creditors. However, if A does not have enough money to pay both B and C, what will happen then? If A pays one creditor and lacks the money to pay the other, the other has bad luck. This creditor still holds a claim against A but will probably not receive his money. However, as long as there still is some money, the claims of B and C are equal in rank; this means that B and C are entitled to amounts of money from A's estate in proportion to their claims. In this example, this is 1:3. It is, for instance, not the case that the older claim prevails over the younger one:

Paritas creditorum

It is the function of the legal institution of insolvency to secure a correct division of money if a debtor cannot pay all of his debts.

A consequence of this principle of equality is that the chance that a creditor will receive his money depends on the claims of other creditors. Most creditors do not find that a comfortable situation and may therefore be unwilling to allow credit. Because credit strongly facilitates commercial transactions, and the unwillingness to allow credit hampers these transactions, the law recognizes the phenomenon of security.

A property security right is held by the creditor of the claim, usually a bank, and will break the *paritas creditorum* rule by giving the holder the power to take possession of and sell the object of the right, to transfer the primary property right of the debtor to a new owner, and to satisfy the debt from the proceeds. Any surplus must be paid back to the debtor:

Property Security Right

For instance, Joan bought a house and for that purpose borrowed €150.000 from the bank. As security for this loan she creates a right of hypothec on her house, in favor of the bank. If Joan does not repay the money in time, the bank may evict Joan from the house, take possession of the house, sell it at an auction to satisfy the outstanding debt by means of the proceeds. Suppose that Joan still owes €100.000 to the bank and that her house brings in €140.000 at the auction. Then the bank can take €100.000 from the proceeds and must return €40.000 to Joan. If the house only brings in €80.000, Joan must still pay the bank €20.000.

Secondary security rights also give the holder of the right priority in insolvency. Holders of personal rights will be treated equally in insolvency: *paritas creditorum*. However, holders with a secondary right for security may claim their money before the creditors who hold only personal rights:

Priority

Suppose that Joan not only owed €100.000 to the bank but also €50.000 to a friend. If there is no hypothec to secure any of these loans and the house is sold to satisfy the creditors, the bank will receive 2/3rds of the proceeds, and the friend 1/3rd, proportional to the claims they had against Joan (*paritas creditorum*). However, if the bank has a right of hypothec, the proceeds of the house will first be used to pay the bank. If the house brings in €80.000 the bank will receive all that money and Joan's friend will receive nothing. If the house brings in €140.000 the bank will receive €100.000 and the friend €40.000. (This example assumes that there are no other creditors and that Joan has no money, but only the house).

6 Principles of Property Law

Property law systems in Europe differ widely, especially at the level of detailed rules. However, all systems of property law must deal with the same issues, and they approach these issues similarly. This approach is based on principles and rules of property law, which will be dealt with in this section.

6.1 The Principle of *Numerus Clausus*

Property rights exist in land or goods and are not merely directed toward one or more concrete persons; they can, in principle, be invoked against everyone. For this reason, it is undesirable that individual persons (including «legal persons» such as companies with limited liability) can make up such strong rights by themselves, if only because they would thereby bind other persons who were not involved in creating these property rights:

Imagine that A could create a property right on his land, with the content that everyone should pay the owner of this piece of land an annual amount of €50. This would make A rich very quickly indeed.

Therefore, only a limited number (*numerus clausus*) of property rights are recognized. The property rights in this exhaustive list are the only types of property rights that persons can create.

6.2 The Principle of Specificity

A second principle of property law is the principle of specificity. A property right is a right on a good or on land, and it should be clear in respect of precisely which good or land the

property right is created. It is, for instance, not possible that a jeweler can own «four golden rings» without being clear precisely which rings are owned by the jeweler:

The importance of the principle of specificity becomes clear if one considers what would happen if this principle were not respected. Suppose that the jeweler needs money and wants to create a right of pledge on his golden rings. In order to do so, he must give the rings to the holder of the right of pledge. If it is unclear which rings the jeweler owns, it is not possible to comply with this condition for creating a right of pledge. If the jeweler hands in four random golden rings, the creditor might end up with rings that belong to a third party, who has nothing to do with either the jeweler or the holder of the right of pledge.

A consequence of the principle of specificity is that so-called fungible objects, which occur in masses, such as grain, sand, and also money, can generally not be the object of individual property rights if they are mixed with other objects of the same kind:

If Jane brings money to the bank to put it in her savings account, she loses ownership of this money, because in the bank it is mixed with money from other persons and can no longer be identified as the money of Jane. Although Jane has an individual bank account, this is merely an administrative status representing Jane's rights on the money in the bank. Jane only has a claim against the bank to return to her the same amount of money (plus possible interest) that she deposited in the bank. A practical consequence is that if the bank becomes insolvent, Jane has to compete with all other creditors for a share in the remaining money. She cannot take out 'her' money, because there is no money that belongs specifically to her.

Specificity is, finally, also important because property rights end if the things or objects on which they rest cease to exist. This only makes sense if property rights have specific objects.

The principle of specificity is under pressure nowadays because immaterial «things», such as money in bank accounts, claims, and virtual objects in online computer games have become more and more important and valuable. It would be useful to allow property rights on them, but—as can easily be understood—immaterial things are less easy to identify than material objects.

6.3 The Principle of Publicity

If property rights potentially affect everyone, it is important that everyone can know who has which property right. If you want to buy a house, it is essential to know whether there is a hypothec (or mortgage) on the house. The holder of the hypothec can, under certain circumstances, sell off the house to satisfy his claim from the proceeds. Because of the *droit de suite*, this property right can be invoked against anybody holding the house and therefore also against new owners. If this is the house you recently bought and if the debts for which the house is sold are not your own debts, it is rather painful. Therefore, property rights should, in principle, be publicly knowable. The way in which this demand for publicity is satisfied differs for real estate (land and what is built upon it) and movables.

Land

In respect to land, publicity is realized through a land registry:

When Adam sells his land to Beatrice every legal system would require an authentic deed, drawn up by a notary or other official, that contains the agreement of transfer between the parties. Let us assume that in this case the deed is drawn up by the notary Clovis and sent in for registration.

Negative Systems

There are generally two types of registration systems. On one hand, there are registration systems that operate on the basis of a simple registration of *deeds*, i.e., official documents created by a notary:

When the deed drawn up by the notary Clovis is received by a deeds registry, a date and timestamp is placed on the deed. The registrar sees that the deed was drawn up by an official notary who has the capacity to draw up deeds. The deed is then registered under the heading of the piece of land it concerns.

Such *cadastre* systems are called negative systems because the registrar registers the deed with only a marginal check of the formal validity of the contents. They are used in French law (*cadastre*) and in Dutch law (*kadaster*).

Positive Systems

There are also «title registry systems». They are known as positive systems because the registrar actively checks the content of the deeds offered to him. After this thorough check, the registrar updates the registry, which contains not a set of deeds but exact information about who holds which property law entitlement (title) to which piece of land:

When the deed drawn up by the notary Clovis is received by a title registry, a date and timestamp is placed on the deed and the registrar starts his or her investigations into the validity of the deed. He or she will check the parties, the piece of land concerned and retrace the steps made by the notary Clovis. When the check is completed (this can take up to 3 months), the results of the deed are registered: Beatrice will be identified as the new owner.

This positive system of land registry is used in German law (*Grundbuch*) and in English law (Land Registry). In English law, registration has only become mandatory in the last years. Therefore registration of land will only occur henceforth when land is transferred between parties or passed upon inheritance. A full registration system will result over time.

Movable Objects

There are many movable objects, and it is impossible and undesirable to maintain a register which includes every movable object (e.g., for every spoon and every fork in your kitchen) and who has which property right on it. Happily, movable objects are most of the time—but certainly not always—owned by the person who actually has them in his possession. Therefore, when a person holds factual control over an object, this is a signal to the world that this person is exercising a property right. In the case of movable objects, publicity of ownership takes the form of possession.

When a property right on a movable object is transferred, this is usually also done by the transfer of possession. In that way, it is made public that the property relations have changed:

There are some complications here, depending on whether a legal system works with a consensual or with a tradition system. More details will be presented in Sect. 7.2.1.

6.4 The *Nemo Dat* Rule

The *nemo dat* rule holds that nobody can transfer a property right that he did not have himself in the first place. The name of this principle is an abbreviation from the longer Latin phrase *nemo dat quod non habet* (nobody can give what he does not have). A person who owns a thing can transfer the full ownership of it, but the holder of a mere right of usufruct

Competence to
Dispose

may be able to transfer the right of usufruct but cannot transfer the full ownership of the object.

The *nemo dat* rule is implemented in the requirement that a person transferring a property right must have the competence to dispose of that right. When the competence to dispose is lacking, this person cannot transfer the right to someone else.

Although the competence to dispose is closely connected to the property right itself, they are not identical. The normal situation is that the holder of a property right is competent to dispose of it and nobody else. However, sometimes the holder lacks this competence, for instance, if she is in a state of insolvency. Moreover, sometimes someone other than the right holder is (also) competent to dispose of a right, such as the holder of a right of pledge who can transfer ownership of the object under pledge if he has to sell the object for the payment of a debt:

If Bank B holds a pledge on Adam's car, and Adam defaults on his payments, the bank will have the right to take possession of the car and sell and transfer the car to someone else. When this happens, Adam will lose his competence to dispose to the bank. Bank B will now be able to dispose of the (ownership of the) car and sell and transfer it to someone else.

6.5 Prior Tempore Rule

The rule *prior tempore, potior iure* (earlier in time, more powerful as a right), which stems from Roman law, determines that older property rights trump newer rights. This is very important in case there is a conflict between several property rights, such as when there is more than one hypothec on one piece of land. Then the holder of the older hypothec will get paid first from the proceeds of the land, and the holder of the second right comes after the first hypothec holder (but before the creditors who do not have a property right on the land). The same holds for the right of pledge:

Adam has granted a right of pledge on his car to Bank B. However, he has also granted another right of pledge on that same car to Bank C. This creates a problem now that Adam can no longer pay either bank. Bank B and Bank C each claims to have priority over other creditors and seeks to take possession and sell and transfer the car to satisfy their claims with the

proceeds of sale. However, only one of the banks will be able to do so.

Property law solves this problem with the *prior tempore* rule. The creditor with the older property right has priority over the creditor with the newer right. Bank B holds the older property right (pledge) and may therefore exercise the right of pledge. Bank C must wait to see if there is anything left of the proceeds of sale after Bank B has satisfied its claim:

It should be noted that with regard to these left-over proceeds, Bank C has priority over other creditors who do not have a security right. For this reason it makes sense for a creditor to accept a second pledge (or hypothec, for that matter) on an object.

The *prior tempore* rule is specific to property law, as personal rights generally compete against each other with an equal status (*paritas creditorum*).

7 Creation, Transfer, and Termination of Property Rights

A large part of property law provides rules on how property rights can be created, transferred, and terminated. These rules are also known as operative or interface rules, as they determine how property rights behave and how we interact with them.

7.1 Creation

All property rights, both primary and secondary rights, must have come into existence at some time. In this section, we only discuss some of the ways in which primary property rights can be created.

A primary property right can originate when an object that previously belonged to no one is found and taken into possession by the finder. This is called *occupation*. This may, for instance, be the case when someone catches fish in open waters or shoots a wild bird.

Occupation

A property right can also come into existence when a new object is created out of a previously existing object. When sufficient labor has been invested in the new object, the person who provided the labor will become holder of a primary right over the new object:

Creation

For instance, if someone knits a sweater out of wool, this person becomes the owner of the sweater. However, it is doubtful whether someone who makes a coin out of a piece of gold that belonged to someone else becomes the owner of this coin. In this case, the value of the gold in the coin may be higher than the added value resulting from minting the coin.

Mixing

In case of mixing of two or more objects, a new primary right will arise. Depending on the type of mixing, the new primary right will be shared by the parties previously holding primary rights on the objects that mixed or by one single party:

If money from different persons is collected in a bag, the total amount probably belongs to the original owners together.

Accession

However, if land and bricks with different owners are joined to build a house, the owner of the land will become the owner of the house. This happens by operation of the principle of accession: that which belongs to the land becomes part of the land.

Prescription

Finally, a property right can also be acquired by possession, i.e., the exercise of factual power for oneself, for a long period of time. If after a long period of time the holder of primary right has not objected or taken legal action against the «adverse possession», the possessor will acquire a primary property right of the possessed thing by what is known as prescription. This rule exists to create legal certainty. It is important that discrepancies between the factual situation (possession) and the official legal situation (the title) do not exist for too long. In the long term, the legal situation is adapted to the factual one. So if A is in possession of the piece of land of B for a long duration of time (say 30 years), A becomes the owner of that piece of land and B loses his right of ownership:

When the possessor is in good faith, meaning that he sincerely thought he could exercise a right, the prescription period will generally be shorter than when this is not the case. Possession in good faith can for example occur if someone bought a good from a person whom he rightfully, but mistakenly, took to be the owner. A thief would be a typical example of a possessor in bad faith.

7.2 Transfer

Transfer and Publicity

If a property right is transferred, two requirements must be met. The easiest one is that it must be clear between the *transferor* (the person who transfers) and the *transferee* (the person

to whom it is transferred, also known as *acquirer*) that the former has lost the property right and that the latter has acquired it:

An example in which this demand is not met is the following. A and B agree that B will have the book that now belongs to A. One day B visits A at her home and sees the book lying on the table. B puts the book in his suitcase and takes it home. It is possible that B assumes that he has become the owner of the book, but A knows nothing about it. Such 'transfers' are not desirable, and it is unlikely that the law will recognize these events as valid transfers of ownership.

To the extent that only the relation between transferor and transferee is concerned, it would suffice that they both agree that the property right has passed from one to the other. However, the interests of third parties are often involved in the transfer of a property right:

Suppose that A has a claim against C for an amount of €10.000. A agrees with B that from now on, B will have the claim, but they do not say anything to C, who still thinks that she owes money to A. C pays €10.000 to A, but now B claims that C should pay that amount to him. Another example: A transfers the right to a box with golden rings to B, but the box remains on A's premises. Later a money lender visits A, lends A €2.000 and takes the box with rings as object for a right of pledge. B tells the money lender that he will vindicate the rings, because they belong to him. The money lender fears that he will lose his security right.

To avoid problems like those in these examples, it is desirable that third parties know that a transfer of property right took place. In this connection, the principle of publicity plays a role. According to this principle, it should be known to the public at large who is the holder of a property right. If this is known, problems like the ones mentioned above are less likely to occur. To make this known, the requirements for the transfer of a right aim to ensure that the effects of the transfer will be known to the public at large or at least the persons to whom it concerns.

In Europe, there are two main ways in which the transfer of property rights can occur. Both systems can be understood from the need to «publish» the transfer, and their difference can be seen as an outflow of different ways to manage the publicity requirement. One is the consensual system; the other is

the transfer system. We will discuss both briefly and only in connection with the sale of a material object.

The Consensual System

A consensual transfer system merely requires consensus to transfer a property right between the seller and the buyer. This means that the conclusion of the contract of sale will transfer the property right from the transferor to the transferee or acquirer:

For instance, if a customer buys a loaf of bread in the bakery, the sales contract makes the customer the owner of the bread immediately. In theory, the customer has already become the owner even before the bread was handed to her. The baker is under an obligation to give the bread to the customer, as the customer is already the owner because of the contract. More important is the consensual nature of transfer in the following case: A sells his car to B, but will only deliver it tomorrow. During the night, the car is stolen. Will B's insurance have to pay? According to a consensual system, the answer is 'yes', because B immediately became the owner of the car, even though he did not actually have possession yet.

The consensual system is used in France, Belgium, and England. However, these countries distinguish between movable and immovable objects. In the case of *movable objects*, the buyer becomes the owner immediately upon conclusion of the contract.

In the case of *immovables*, the property right is also transferred, but this transfer will only have effect between the parties. Only when the contract in the form of a deed—an official document—has been registered will the transfer of the property right also have effect against the rest of the world:

A sells his house to B, but the registration of the deed still takes a few days. Within this short period, A sells the house for a second time, now to C. The second deed is registered before the deed of the first sale agreement was registered. C has now become owner of the house, because the transfer based on the first sale contract only worked against C after the deed was registered. Because the sale contract between A and B had immediate effect between these two parties, B could evict A from the house immediately after the sale contract was entered into, even before registration of the deed.

The Tradition System

A tradition system requires, besides a contract of sale, a special act to transfer the property right. This property-transferring

act, especially concerning movables, was known as *traditio* in Roman law, which is why these systems are called «tradition systems»:

Germany and the Netherlands are countries in which a tradition system is in use. England also uses the tradition system for land and for the transfer of chattels not based on a sale agreement (e.g. barter, which is exchange of goods for other goods or services).

A contract of sale in a tradition system therefore serves as the starting point for the transaction but in itself does not have effect in property law. The contract is known as the *title* for the transfer in these systems:

This title, which is the reason why a property right must be transferred, should not be confused with the title one can have in an object, and which is comparable to (some variant of) ownership.

The title does not necessarily have to be a contract of sale. It can also, for example, be a donation (gift).

7.3 Termination

Property rights can be created and transferred, but they can also be terminated. There are generally two ways in which a property right can end.

The first possibility is that the object on which the property right rests is destroyed or ceases to exist independently. Ownership of a car will end when the car is completely destroyed by fire. Land can stop existing, if, for instance, it is permanently flooded or when a large meteor hits and destroys the land. Then there is nothing left to own for the land owner, and ownership ends. Claims can stop existing if the corresponding duty has been fulfilled or if the claim was waived by the creditor.

The second possibility is that the property right on an object ends, even though the object itself continues to exist. One way in which property rights can cease to exist is when they are *waived* or *abandoned* by the right holder. Abandonment of rights is usually possible for movable objects and claims but not easily for land. If a fisher who has captured a fish and in that way became owner of the fish lets the fish go, ownership of the fish is terminated. If B is under an obligation to pay A €100 and A tells B that he does not have to pay anymore, then the claim of A against B has been waived and has perished.

Property rights can also be terminated by operation of law. This happens, for instance, if the title on a piece of land is lost because of prescription. If a piece of land belonged to A, but B used the land as if it was his own for a long period (say 30 years or more), and if A did not protest or undertake any legal action, A loses his title to the land. Normally B would gain the title.

A right of usufruct usually ends if the holder of this right dies, and a leasehold (a fee for a term of years) ends if the term has passed.

Finally, in most legal systems, a property right can also be terminated by agreement between the parties involved in the right. If A is the owner of a piece of land and B is the owner of the neighboring land, who in this capacity enjoys the right of servitude that he may cross A's land, A and B (officially the owners of the two pieces of land) can end this right of servitude by mutual agreement.

8 European Union Property Law

After the overview of property law in the sections above, it is time to look forward to the development of property law. In the European Union, there is an increasing debate on the need to create uniform rules of private law for the European Union's internal market. The starting point of this debate is the assumption that the internal market cannot function properly without common rules of private law, mostly contract law but increasingly also property law:

Imagine an EU citizen buying objects online from another EU Member State. An important question that needs to be answered is when the buyer receives the primary property right over this object, as the holder of a primary right generally also bears the risk if the object is lost before it arrives. If the primary right is transferred upon conclusion of the contract, as in a consensual transfer system, the risk is with the buyer. If delivery, i.e., the transfer of possession is needed to transfer the primary right as in a tradition system, the risk is with the seller.

The European Commission therefore seeks to investigate possibilities to create common rules for the internal market. However, creating these rules is much more difficult in property law than in contract law. Changes in property law are threatened to be wholesale instead of piecemeal because changes in one part necessitate changes «everywhere».

Moreover, because of the importance of property law to a legal system in general, as the basis for other areas of law such as taxation, succession, marriage, and insolvency, changing these rules is controversial and always politically sensitive.

Even if the political will exists to change property law systems to create uniform rules for the EU's internal market, it will be difficult to decide what would be the best rules. In this respect, mixed legal systems may be of help. Mixed legal systems are legal systems that combine multiple legal traditions in a single legal system. In Europe, a combination of common law and civil law systems can provide interesting insights. Property law scholars therefore often look at the law of Scotland, which combines the English common law (not equity) and the French civil law traditions. Another very important mixed system is South African law, which combines Roman Dutch law (which is unwritten civil law from the seventeenth century brought to South Africa by the Dutch settlers) and English common law (again, not equity). These legal systems may offer inspiration for the further development of common rules for the European Union.

Because there are so few and minor similarities between the European systems at the technical level, any decision for harmonization will result in a requirement for many of the legal systems to change their technical rules of property law. Nonetheless, there are several European initiatives that are worth mentioning. For many years, there has already been a debate on the creation of a European right of hypothec, a secondary property security right on land and houses that could be used to finance the acquisition of land and houses in Member States more easily.

Moreover, a debate is ongoing about the creation of a European security right on movables and claims, which would create a uniform European system that can be enforced throughout the EU.

Finally, EU rules on wills and succession, as well as rules on marital property law, are in development, which should enable international couples to choose the legal system that will be applicable to their marriage or succession.

Recommended Literature

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