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Vorlesung / Course

Einführung in die Rechtsvergleichung
Introduction to Comparative Law

Winter term 2019-2020

<http://www.eastlaw.uni-kiel.de>

23.10.2019: Basic questions and structures of comparative law
30.10.2019 Structures of comparative law (*continued*)
06.11.2019: Methods of comparative law: postponed
13.11.2019: Methods of comparative law
20.11.2019: Legal families (overview). German (or Germanic) legal family (deutscher Rechtskreis)
27.11.2019: French legal family
04.12.2019: Anglo-American legal family
11.12.2019: The legal systems in Northern and Eastern Europe
18.12.2019: Legal systems in Asia
08.01.2020: Religious laws, in particular Islamic law
15.01.2020: Religious laws (end). Contract law I (Vertragsrecht)
22.01.2020: Contract law II
29.01.2020: Torts law (Deliktsrecht)
05.02.2020: Property law (Sachenrecht)
12.02.2020: Civil procedure

Property law (overview)

- **Notion of property: Eigentum, Vermögen**
- „Full“ property, „limited“ proprietary (property) rights/rights in rem
- **Systematic position of property law in the legal system.** Constitutional, EU and international law dimension (human rights, investment protection etc.).
- The specific cases of expropriation and privatization

Systematic position of property law

- Branch of civil law dealing with „property“: *contents, acquisition, protection, transfer of property*
- Distinction movable/immovable property
- Part of civil law, but based on constitutional law
- Links with administrative law and criminal law
- Links with law of obligations and other parts of civil and procedural law

Constitutional guarantees of property

German Basic Law (Grundgesetz) of 1949

Article 14 [*Property – Inheritance – Expropriation*]

- (1) **Property** and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) **Property entails obligations**. Its use shall also serve the public good.
- (3) **Expropriation** shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of **compensation**. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the **ordinary courts**.

Russian Constitution of 1993

First Section. Main Provisions - Chapter 1. Fundamentals of the Constit. System

- Article 8** 1. In the Russian Federation guarantees shall be provided for the integrity of economic space, a free flow of goods, services and financial resources, support for competition, and the freedom of economic activity.
2. In the Russian Federation recognition and equal protection shall be given to the **private, state, municipal and other forms of ownership**.

Chapter 2. Rights and Freedoms of Man and Citizen

- Article 35** 1. The right of private property shall be protected by law.
2. Everyone shall have the right to **have property, possess, use and dispose** of it both personally and jointly with other people.
3. No one may be deprived of property otherwise than by a **court decision**. Forced **confiscation** of property for state needs may be carried out only on the proviso of preliminary and complete **compensation**.
4. The right of inheritance shall be guaranteed.

Questions

Comparison of e.g. Article 14 German Basic Law and Articles 8, 35 Russian Constitution?

- How are the guarantees of property in both Constitutions structured in comparison?
- Is „property“ defined, and if so, how?
- What are the limits to property protection under the two Constitutions?

Legal sources of property law

Examples: art.711 French Civil Code vs. sec. 929 German Civil Code (BGB)

- Germany, Austria, Switzerland, Estonia
- France: Code Civil
- Scandinavia: different specific statutes (e.g. Swedish Land Law/Jordabalk, Law on good faith acquisition of movables)
- Eastern Europe: e.g. Russia (Civil Code, special Codes)
- UK: Common law, equity, statutes (e.g. Law of Property Act 1925, property aspects in Sale of Goods Act 1989)
- USA: Common law, equity, statutes, in particular UCC. Restatement Property

German Civil Code (Bürgerliches Gesetzbuch)

Book 3 Law of Property

Division 2 General provisions on rights in land

Division 3 Ownership

Title 1 Subject matter of ownership

Title 2 Acquisition and loss of ownership of plots of land

Title 3 Acquisition and loss of ownership of movables

Subtitle 1 Transfer

§ 929 Agreement and delivery

For the transfer of the ownership of a movable thing, it is necessary that the owner delivers the thing to the acquirer and both agree that ownership is to pass. ...

Code civil (France)

Book I On Persons

Book II On Goods and Different Modifications of Property

Book III On the Different Ways How to Acquire Property

GENERAL PROVISIONS

Article 711

Ownership of assets is acquired and transmitted by succession, by donation inter vivos or testamentary, and by the effect of obligations.

Book IV On Securities

Questions

Comparison of the structure of regulation of property law in Germany and France?

- Where is property law positioned in the three Codes/Acts? Compare the context with non-property matters.
- What issues does property law regulate under the three Codes/Acts?
- What are the parallels and differences between sec.929 BGB and art.711 French Civil Code?



Law of Property Act

[Translation](#)

[Authentic text](#)

Content

Issuer: Riigikogu

Type: act

In force from: 23.03.2014

In force until: 31.07.2014

Translation published: 31.03.2014

Select

Law of Property Act¹

Passed 09.06.1993

RT I 1993, 39, 590

Entry into force 01.12.1993

[Amended by the following legal instruments \(show\)](#)

Part 1
GENERAL

Estonian Law of Property Act 1993 (Structure)

Part 1 GENERAL

Chapter 1 GENERAL PROVISIONS

Chapter 2 THINGS

Part 2 POSSESSION AND LAND REGISTER

Part 3 OWNERSHIP

Chapter 5 GENERAL PROVISIONS

Division 1 DEFINITION AND CLASSIFICATION OF OWNERSHIP

Division 3 PROTECTION OF OWNERSHIP

Chapter 6 MOVABLE PROPERTY OWNERSHIP

Chapter 7 IMMOVABLE PROPERTY OWNERSHIP

Part 4 SERVITUDES

Chapter 8 REAL SERVITUDES

Part 5 REAL ENCUMBRANCES

Part 6 RIGHT OF SUPERFICIES

Part 8 RIGHT OF SECURITY

Chapter 16 GENERAL PROVISIONS

Chapter 17 SECURITY OVER MOVABLES

Division 1 POSSESSORY PLEDGE

Division 2 REGISTERED SECURITY OVER MOVABLES

Chapter 18 REAL SECURITY

Division 1 MORTGAGE

Law of Property Act 1925

From Wikipedia, the free encyclopedia

The **Law of Property Act 1925** (c 20 [ⓘ]) is a statute of the United Kingdom Parliament. It forms part of an interrelated programme of legislation introduced in 1925. The programme was intended to modernise the English law of real property. The Act deals principally with the transfer of freehold or leasehold land by deed.

The LPA 1925, as amended, provides the core of English land law, particularly as regards many aspects of freehold land which is itself an important concept in the law.

Contents [hide]

- Background
- Provisions
 - Part I – General Principles as to Legal Estates, Equitable Interests and Powers
 - Part II – Contracts, Conveyances and other Instruments
 - Part III – Mortgages, Rentcharges, and Powers of Attorney
 - Part IV – Equitable Interests and things in Action
 - Part V – Leases and Tenancies
 - Part VI – Powers
 - Part VII – Perpetuities and Accumulations
 - Part VIII – Married Women and Lunatics
 - Part IX – Voidable Dispositions
 - Part X – Wills & Probate
 - Part XI – Miscellaneous
- Amendments
- See also
- Notes
- References

Background [edit]

The keynote policy of the act was to reduce the number of legal estates to two and generally to make the transfer of interests in land easier for purchasers. The act also sought to regulate mainly their assignment, and to tackle some of the miscellaneous gaps, ambiguities and shortcomings in the law of property (*lacunae*) these

**RESTATEMENT OF THE LAW FOURTH, PROPERTY
PROJECTED OVERALL TABLE OF CONTENTS**

VOLUME [1]

THE BASICS OF PROPERTY

DIVISION ONE: DEFINITIONS

- Chapter 1. Meanings of “Property”
- Chapter 2. Property as a Relation
- Chapter 3. Separation into Things
- Chapter 4. Things versus Legal Things
- Chapter 5. Tangible and Intangible Things
- Chapter 6. Contracts as Property [pointers to Contracts Restatement]
- Chapter 7. Property in Information [pointer to Intellectual Property Restatement]
- Chapter 8. Entitlement and Interest
- Chapter 9. In Rem Rights
- Chapter 10. Residual Claims
- Chapter 11. Customary Rights
- Chapter 12. Quasi-Property

DIVISION TWO: ACCESSION

- Chapter 13. Scope of Legal Thing
- Chapter 14. *Ad Coelum*
- Chapter 15. Airspace
- Chapter 16. Minerals
- Chapter 17. Caves
- Chapter 18. Accretion, etc. [cross-reference to water law, Vol. 2, § 1.1]
- Chapter 19. Fruits, etc.
- Chapter 20. Fixtures

Division 3: Possession

Division 4: Acquisition

**Vol. 2: INTERFERENCES
WITH, AND LIMITS ON,
OWNERSHIP AND
POSSESSION**

Division 1: Property torts

Division 3: Remedies (eg
damages)

**Vol. 3: POWERS AND
DUTIES ASSOCIATED
WITH OWNERSHIP**

DIVISION ONE: OWNER
POWERS (eg alienation,
gifts)

DIVISION THREE:
LANDLORD AND TENANT

Types of sources

- Civil Codes
- “Codes” for specific subject areas
- Specific legislation: movable/immovable property, supplementary legislation
- US: Restatement of the Law Property
- US: UCC Art.9 (security interest)

- International and European unification of property law

DCFR (2008)

Book VIII Acquisition and loss of ownership of goods

Book IX Proprietary security rights in movable assets, Book X Trusts

DCFR Book VIII Acquisition and loss of ownership of goods

Chapter 1: General provisions

Section 1: Scope of application and relation to other provisions

VIII. –1:101: Scope of application

(1) This Book applies to the acquisition, loss and protection of ownership of goods and to specific related issues

Section 2: Definitions

VIII. –1:201: Goods

“Goods” means corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases.

VIII. –1:202: Ownership

“Ownership” is the most comprehensive right a person, the “owner”, can have over property, including the exclusive right, so far as consistent with applicable laws or rights granted by the owner, to use, enjoy, modify, destroy, dispose of and recover the property.

VIII. –1:204: Limited proprietary rights

Chapter 2: Transfer of ownership based on the transferor’s right or authority

Section 1: Requirements for transfer under this chapter

Section 2: Effects VIII. – 2:201: *Effects of the transfer of ownership*

Chapter 3: Good faith acquisition of ownership

Chapter 4: Acquisition of ownership by continuous possession

Chapter 6: Protection of ownership and protection of possession

Principles of property law

- **Numerus clausus** of property rights? *Mostly yes, in theory not in Denmark. Legislation mostly not dispositive.*
- Principle of „**separation**“ of property law and law of obligations: *yes, everywhere*
- Principle of „**abstraction**“? *Germany and Estonia*
- Principle of „**speciality**“ (Spezialitätsprinzip) in property law: *mostly yes, but some exceptions in some countries, e.g. general liens in France, Nordic and Baltic countries*
- Principle of „**legal certainty**“ (Bestimmtheitsgrundsatz) in property law: *yes, but different ways of realization*
- Principle of „**publicity**“ (Publizitätsprinzip) in property law: *very different*

Typical issues of property law

- 1. Distinction **movable/immovable** (personal/real) property and consequences therefrom
- 2. **Acquisition of (full) property** in general
- 3. **Protection** of property (*e.g. rei vindicatio and relationship with contracts law, torts law and unjust enrichment*)
- 4. **Good faith transfers** (*movables/immovables*)
- 5. **Security rights in rem** (*e.g. liens, fiduciary ownership, retention of title, „security interest“ under UCC and international treaties*)

Specific topics of property law

Property law: Cases 1

- **Case 1:** Owner O sells car to purchaser P, but does not deliver. How can P get the car?
- **Case 2:** O sells again to P2 and delivers the car to him. Which claims has P against P2?
- **Case 3:** Non-owner NO sells car to P. Can P acquire property?

Transfer of property

How is property transferred?

Compare French law, German law, Estonian law, English law.

Compare also the approach of the DCFR to this question: is it closer to the German or the French model?

French Civil Code

BOOK III OF THE VARIOUS WAYS HOW OWNERSHIP IS ACQUIRED

Articles 711 to 2283

Art.711

Ownership of property is acquired and transmitted by succession, by gift inter vivos or will, and **by the effect of obligations**.

Art. 1141

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

Article 1583 (Sale)

It is perfect **between the parties** and the ownership is acquired as of right by the buyer with regard to the seller as soon as they have **agreed** on the thing and on the price, **although the thing has not yet been delivered nor the price paid**.

Art. 2279

In matters of movables, possession is equivalent to a title.

Nevertheless, the person who has lost or from whom a thing has been stolen, may claim it during three years, from the day of the loss or of the theft, against the one in whose hands he finds it, subject to the remedy of the latter against the one from whom he holds it.

Estonian Law of Property Act 1993

Part 3 OWNERSHIP

Division 1 CREATION OF MOVABLE PROPERTY OWNERSHIP

Subdivision 1 Delivery

§ 92. Creation of movable property ownership by delivery [RT I 2003, 13, 64 - entry into force 01.07.2003]

(1) Movable property ownership is created **by delivery** of a movable if the transferor delivers possession of the thing to the acquirer **and they have agreed** that ownership transfers to the acquirer.

UK Sale of Goods Act 1979: transfer of property

PART III EFFECTS OF THE CONTRACT

Transfer of property as between seller and buyer

17. Property passes when intended to pass

(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract **intend it** to be transferred.

DCFR Book VIII Acquisition and loss of ownership of goods

Chapter 2: Transfer of ownership based on the transferor's right or authority

Section 1: Requirements for transfer under this chapter

VIII. – 2:101: Requirements for the transfer of ownership in general

(1) The transfer of ownership of goods under this Chapter requires that:

- (a) the goods exist;
- (b) the goods are transferable;
- (c) the transferor has the right or authority to transfer the ownership;
- (d) the transferee is entitled as against the transferor to the transfer of ownership by virtue of a contract or other juridical act, a court order or a rule of law; and
- (e) there is an **agreement as to the time ownership is to pass** and the conditions of this agreement are met, **or, in the absence of such agreement, delivery or an equivalent to delivery.**

(2) For the purposes of paragraph (1)(e) the delivery or equivalent to delivery must be **based on, or referable to, the entitlement under the contract** or other juridical act, court order or rule of law.

(3) Where the contract or other juridical act, court order or rule of law defines the goods in generic terms, ownership can pass only when the goods are identified to it. ...

Good faith acquisition of property

German Civil Code

Section 932 Good faith acquisition from a person not entitled

(1) As a result of a disposal carried out under section 929, the acquirer becomes the owner even if the thing does not belong to the alienor, unless the acquirer is not in good faith at the time when under these provisions he would acquire ownership...

(2) The acquirer is not in good faith if he is aware, or as a result of gross negligence he is not aware, that the thing does not belong to the alienor.

Section 935 No good faith acquisition of lost property

(1) The acquisition of ownership under sections 932 to 934 does not occur if the thing was stolen from the owner, is missing or has been lost in any other way. The same applies, where the owner was only the indirect possessor, if the possessor had lost the thing.

(2) These provisions do not apply to money or bearer instruments or to things that are alienated by way of public auction or in an auction pursuant to section 979 (1a).

French Civil Code

Art. 1141

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

Art. 2279

In matters of movables, **possession** is equivalent to a title. Nevertheless, the person who has lost or from whom a thing has been stolen, may claim it during three years, from the day of the loss or of the theft, against the one in whose hands he finds it, subject to the remedy of the latter against the one from whom he holds it.

Estonian Law of Property Act 1993

§ 95. Acquisition in good faith

(1) A person who has acquired a thing by delivery in good faith is the owner of the thing as of the time of receipt of the thing into the person's possession even if the transferor was not entitled to transfer ownership.

- ...

(2) An acquirer is in bad faith if the acquirer knew or should have known that the transferor was not entitled to transfer ownership.

(3) Acquisition pursuant to subsection (1) of this section is not effected if a thing was stolen, lost or dispossessed in any other manner from the owner against the will of the owner. ...This subsection does not apply to money or bearer securities or to a thing acquired by public auction.

UK Sale of Goods Act 1979: Good Faith Purchase

PART III EFFECTS OF THE CONTRACT

Transfer of title

21. Sale by person not the owner

(1) Subject to this Act, where goods are sold by a person who is not their owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.

(2) Nothing in this Act affects—

(a) the provisions of the Factors Acts or any enactment enabling the apparent owner of goods to dispose of them as if he were their true owner;

(b) the validity of any contract of sale under any special common law or statutory power of sale or under the order of a court of competent jurisdiction.

Uniform Commercial Code (USA): Good faith purchase

ARTICLE 2 - SALES

PART 4. TITLE, CREDITORS AND GOOD FAITH PURCHASERS

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting".

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

- (a) the transferor was deceived as to the identity of the purchaser, or
- (b) the delivery was in exchange for a check which is later dishonored, or
- (c) it was agreed that the transaction was to be a "cash sale", or
- (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

Please compare the provisions on good faith acquisition of property under the following regulations:

- Germany (§§ 932, 935 BGB)?
- France (art. 2279 Code civil)?
- UK (England)
- USA (under Uniform Commercial Code)

DCFR Book VIII Acquisition and loss of ownership of goods

Chapter 3: Good faith acquisition of ownership

VIII. – 3:101: Good faith acquisition through a person without right or authority to transfer ownership

(1) Where the person purporting to transfer the ownership (the transferor) has no right or authority to transfer ownership of the goods, the transferee nevertheless acquires and the former owner loses ownership provided that:

- (a) the requirements set out in VIII. – 2:101 (Requirements for the transfer of ownership in general) paragraphs (1)(a), (1)(b), (1)(d), (2) and (3) are fulfilled;
- (b) the requirement of delivery or an equivalent to delivery as set out in VIII. – 2:101 paragraph (1)(e) is fulfilled;
- (c) the transferee **acquires the goods for value**; and
- (d) the transferee **neither knew nor could reasonably be expected to know** that the transferor had no right or authority to transfer ownership of the goods ... The facts from which it follows that the transferee could not reasonably be expected to know of the transferor's lack of right or authority have to be proved by the transferee.

(2) Good faith acquisition in the sense of paragraph (1) does not take place with regard to **stolen goods**, unless the transferee acquired the goods from a transferor acting in the ordinary course of business. **Good faith acquisition of stolen cultural objects in the sense of VIII. – 4:102 (Cultural objects) is impossible.**

Property law: Cases 2

- **Case 4:** O delivers car to P, but retains property in the car until payment. Valid?
- **Case 5:** P grants a lien (pledge) in the car to bank B, but continues to use the car. Lien valid?
- **Case 6:** P transfers property in the car to bank B as security for a credit. Valid?

Rights in rem, esp. security in rem

- Pledge
- Lien
- Retention of title
- Security transfer of title
- Security interest (Art.9 UCC)

Pledge (Pfandrecht)

- Generally recognized, but often unpracticable (possession requirement)
- No possession requirement in Russia
- Sometimes seen as institute of law of obligations or mixed institute

Retention of title (Eigentumsvorbehalt)

- „Simple“ retention of title usually recognized, but sometimes needs registration
- „Enlarged forms“ of retention of title often under question

Security transfer of property (Sicherungsübereignung)

- Usually recognized, but sometimes not permissible as circumvention of pledge (Austria, Russia)
- Problem: publicity?

Security interest under U.S. law: UCC

Uniform Commercial Code: Security Interest

ARTICLE 9 – SECURITY INTEREST

§ 9-201. GENERAL EFFECTIVENESS OF SECURITY AGREEMENT.

(a) [General effectiveness.] Except as otherwise provided in [the Uniform Commercial Code], a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

§ 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST ...

(a) [Attachment.] A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) [Enforceability.] Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if :

(1) value has been given; (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and (3) one of the following conditions is met:

(A) the debtor has authenticated a security agreement that provides a description of the collateral ...

§ 9-310. WHEN FILING REQUIRED TO PERFECT SECURITY INTEREST ... (a)

[General rule: perfection by filing.] ...

In which way differs the security interest under the UCC from a pledge (Pfandrecht) under German law?