PART III. CONTENTS AND PROTECTION OF PROPERTY.

I. Functions and protection of possession.

A. General functions of possession.

161. 1. Procedural or evidential function:

a) He who possesses is presumed to possess for himself[1];
b) He who possesses is presumed to have the better title, i.e. to be the owner[2]. The burden of proof rests on the other party, who must prove a better title (In most cases, this follows already from the basic rule on the burden of proof (*actori incumbit probatio*)). However, there may be specific situations where the possessor must name his predecessor (see e.g. for stolen goods) or has the burden of proof[3]. More generally, when the vindicating party proves that he was the owner and that the goods were stolen (not longer ago than the prescripion period), the presumption falls[4] and he can in principle revindicate (see *supra*).
c) Good faith is equally presumed[5].

2. Role in the acquisition of property: see *supra*.

3. Sometimes a criterion for strict liabilities.

B. Additional protection of (the right of) possession.

1. Possesory actions.

162. Different categories of remedies (*interdicta*, possessory actions)[6]:

– "*complainte*" (*klachte*):
aa) revindication of lost possession;
bb) negative actions against disturbance of possession).
They require possession in the strict sense (possession for oneself, not mere detention). Where the possessor against whom possession is reclaimed is in good faith, the action will only be possible of the goods were lost or stolen[7].

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[1] E.g; BGB § 938, art. 2230 CC.
[2] BGB § 1006, implied in Art. 2279 CC. Comp. also ABGB § 323 : the possessor is not obliged to declare the causa of his possession.
[3] E.g. the possessor who has denied that he was in possession – ABGB § 376.
[4] BGB § 1006;
[5] E.g. ABGB § 328.
[6] See Belgian Judiciary Code art. 1370; Dutch NBW art. 3:125, Italian CC 1168 sq., etc.
[7] See BGB § 1007 I comp. 1007 II.

b) "*reintegranda*": protection of all kinds of possession (also mere detention) in case of violence or similar facts (in English law : trespass). This is also called the "police function" of possession[8]. The action usually prescribes in 1 year[9].

In German law, these actions also apply to movables; in most systems (French, Belgian, English, etc.) they only apply to immovables and there are no specific remedies for movables. Usually, the general remedies available in summary proceedings are used. Specific remedies are more superfluous, due to the substantive effects of possession. He who possesses "*pro suo*" is presumed to be the owner, and the party claiming the thing must prove that the possessor has acquired in bad faith or on the basis of an invalid title. in the latter case, the possessor is still protected by the exceptions out of his relationship with the party from whom he has acquired (comp. supra). Apart from the substantive effects of possession, tort remedies may help (esp. in English law – see Torts (Interference with goods) Act 1977).

Apart from the *reintegranda*, where it applies, there is no general clear rule concerning the position of a detentor who has the right to possess the thing, but not for himself (e.g. tenant, borrower, bailment) (whether he can only address himself against the party with whom he contracted or also has remedies against third parties directly).

2. Self help.

In some systems, there are explicit rules, e.g. BGB § 859 and ABGB § 344.

3. *Ius tollendi* in case of revindication by the owner of the land or principal thing.

4. Compensation of the possessor in case of revindication by the owner.

II. Protection of property (remedies).

A. Constitutional protection

163. Property is usually protected against government interference by constitutional law (rules on takings and expropriation). It is also protected on the basis of the first Protocol to the ECHR. See ECHR 23-10-1982, *Sporrong & Lönnroth*; 24-6-1993, *Papamichelepoulos*; and for a recent application ECHR 20-11-1995 *Pressos Compania Naviera* (also applicable to choses in action).

B. "Direct" protection (i.e. based on property law itself).

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[8] See e.g; ABGB § 346 (*Usurpation*) and 33ç (*eigenmächtige Störung*), BGB § 861-862 (*verbotene Eigenmacht*), etc.

[9] BGB § 864.

164. Exercising one's right within the limits as described *infra* (III) (include the limit of abuse of rights) cannot be illicit and thus not be stopped.

NB. German law stresses direct protection of property and deals with it in property law. English law traditionally gave only indirect protection, as a matter of tort law. Belgian and French law are in between[10]. "Direct" remedies are "real" actions, indirect ones are only "personal" ones (in the continental sense of the word).

1. Revindication (*rei vindicatio* or *actio revindicatoria*, *terugvordering*)[11]

165. This right is the expression of the "*droit de suite*" and requires some form of "dispossession" (applies only to ownership of material things or of property rights on things).

Revindication is excluded when the property right is lost as in all cases of acquisition by the defendant, including *accessio*, *specificatio*, *commixtio*, *confusio*, prescription, etc. Thus, revindication requires that the revindicated thing is specified[12], unless a share in a specified mass of goods is revindicated. Whether the loss is compensated by a claim for compensation, see *infra* (tort law, enrichment law).

As long as the right (of ownership) is not lost, the proprietor can revindicate his property, and thus get back possession, unless he's obliged (according to a legal relationship under the law of obligations, the law of specific property rights, etc.) to leave another person (who thus has a right to detain the thing[13]) in the mere factual possession of the thing (tenant, etc., but also usufructuary, etc.)[14] – in the latter case, this obligation towards the possessor is usually binding upon the owner's successors[15].

As long as the owner has no enforceable title, conservatory measures may apply (see *supra*), in Belgian law esp. the so-called "revindicatory seizure".

In case of bankruptcy, seizure and similar proceedings, the right of revindication means the right to "separate" the things from the bankrupt estate or other *concursus*. Whether the owner remains bound to continue existing legal relationships (contracts etc.) depends on the specific rules of contract law and bankruptcy law.

Revindication makes no sense for choses in action, at least not for creditors' rights not

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[10] See generally G. CALABRESI & D. MELAMED, "Property rules, liability rules and inalienability. One view of the Cathedral", 89. *Harvard LR* 1972, 1089 ff.

[11] E.g. BGB § 985, ABGB § 366, it CC art. 948.

[12] E.g; ABGB § 370.

[13] In German law, where possession is used in a wide sense, this is a right to possess (*titulus possedendi*).

[14] BGB § 986 I. This exception does not apply where the detentor has no right to detain, but only a "precarious" position.

[15] E.g; BGB § 986 II.

incorporated in a document (where there is no possession in the strict sense). A creditor can use an *actio negatoria* or a declaratory remedy (see *infra*) in order to avoid a third party to collect the debt. Intellectual property rights can be "revindicated", but only in a metaphorical sense - see *infra* declaratory judgements.

NB. English law does recognise revindication of personal property only since the XIXth Century (in the form of an action for conversion). Before, it enjoyed only indirect protection ("personal" actions).

166. A complementary right[16] is the right to revindicate or claim restitution of the proceeds ("fruits") picked without right, and some other benefits unlawfully enjoyed by the possessor or other defendant. The conditions for such an action may vary from country to country. Anglo-American law allows tracing to a large extent, continental systems only limited instances of "real subrogation". In most cases, revindication will no longer be possible and only subsidiary (indirect) remedies (in tort or restitution) apply.

2. *Actio negatoria* and similar actions (*Beseitigungs*- and *Unterlassunanspruch*, stopzettingsaanspraak, negative injunction) [17]

167. Action to stop a violation (disturbance, invasion, interference, ...) of a property right (for the future)[18].
- There is no remedy as long as it is just normal hinder, due to the normal use of their property by others (*see infra*).

a) Only for objectively illicit acts ("*iniuria*"): if there is a cause of justification, no injunction is possible (maybe a remedy under C 3. *infra*). A cause of justification is e.g. a state of necessity., order of the public authority or justified self-help. Negligence ("*culpa*") is not necessary in order to obtain an injunction. E.g. German RG 1903 (false information written in a biography, but without negligence).

In land law, there are some more specific actions for specific situations[19].

The *actio negatoria* is not well-known in French & Belgian law, because it is usually hidden behind a provisional measure (proceedings *en référé*, *einstweilige Verfügung*, *kort geding*). In matters touched by competition or consumer law, there is a shorter procedure, which allows to get quickly a final injunction (on the merits) instead of a provisional one (*action en cessation*, *vordering tot staking*). Further, possessory actions may also be used. In other continental countries, the action is known better (see e.g. BGB § 1004, It.CC art. 949; Greek CC art. 1108). Further, actions for illicit acts without negligence are underdeveloped,

[16] In case of receivables already collected by an apparent creditor, it is basically the only remedy.
[17] The term is sometimes used in a even broader sense, including the *actio declaratoria.*
[18] A *Beseitigungsanspruch* relates to violations already started, the *Unterlassungsanspruch* to imminent violations.
[19] E.g. BGB § 907-908 and ABGB 340-343 (injunction against dangerous constructions of a neighbour). In Austrian law, this is seen as a right of the possessor. E.g. protection against immissions, etc.

because it is sometimes argued that without negligence, you can only obtain compensation for licit acts as under C (this reasoning also confuses illiceity and fault or negligence)

167 b. Legal systems differ as to the extent to which this protection is also given creditors' rights. Under German law, they are qualified as "relative rights" and do thus not always enjoy protection under BGB § 823, 1. See *supra* n° 39.

The *actio negatoria* is very important in the field of intellectual property[20].

4. Declaration of right (*actio declaratoria, Feststellungsklage*).

168. A declaratory judgement is a judgement declaring, in case of dispute, who is the owner (or at least who has the "better right"). This possibility is esp. important for choses in action, including intellectual property rights, where a "revindication" is not possible. A declaratory action can also have the opposite purpose, namely a declaration that the defendant does not have a property right (or a better title) (see e.g. art. 949 italian CC); but there has to be a sufficient interest for such an action - and in the circumstances in which such interest exists, an *actio negatoria* will usually be a more useful action.

A form of declaratory protection is also the judgement ordering correction of registers or other publicity measures (publication in newspapers).

4. *Actio Pauliana*

169. A specific action to protect creditors' rights is the *actio Pauliana*. On this basis, fraudulent acts by the debtor are declared invalid vis-à-vis the creditor. He can thus stop third parties who rely on these acts, insofar as they interfere with the rights of the creditor. Typical case is the alienation of assets; in case of Paulian fraud, the creditor can seize the assets, although they have been alienated to a third party (unless the third party has given sufficient consideration and acted in good faith).

An *actio Pauliana* offers a stronger protection than tort laws, at least in those countries where it gives priority to the creditors of the fraudulent alienator over the creditors of the acquirer (as under Belgian law).

5. Some specific remedies for property of land.

169bis. Some more specific remedies have been developed in land law. E.g. the action for demarcation of land (art 646 CC) or for enclosure (fencing) (art. 647 CC) –(with exceptions in case of a right of way – art. 682 CC). See *infra*.

6. Specific rules for co-ownership.

[20] A classical question is whether a mere "license" grants the licensee the right to act on its won, or whether he may only do so in cooperation with the proprietor.

E.g. the right to demand partition (depends on the type of co-ownership)

7. Specific remedies for the protection of claims (creditors' rights) – see supra.

8. Specific remedies for the protection of intellectual property.

C. Indirect protection by the law of obligations.

1. Tort law.

170. French-Belgian tort law is based on the system of one very general clause (in case of a contractual relationship, the rules on contractual liability will apply). Compensation on the basis of tort law requires not only an illicit act (*iniuria*) (see B. 2.), but normally also a certain degree of negligence (except strict liability), damage (harm) and a causal link. Negligence is presumed in case of a direct violation of a property right (violation of a right ≠ violation of the interests one has in having the right) or a violation of a specific legal duty, but the author can give evidence to the contrary (to avoid liability for the past - for injunctions, see *supra*).

Compensation can be monetary or in kind (*in natura* = restoration of the *status quo ante*)

Under Belgian law, this protection does not only cover the violation of the property right itself, but also consequential damage to other interests than the property right. Other countries are more restrictive for consequential loss, esp. purely economic loss (see Tort law).

The German system covers under BGB § 823 I only the damage to the property itself and, on the basis of a judicial interpretation of the "commercial entity" (*Gewerbebetrieb*). Further compensation could be based sometimes on other provisions as § 823 II, where a specific protective rule has been violated, or § 826 in case of an act considered to be a violation of *bonos mores* (in the more economic sense the term has under German law).

English law has developed a number of specific torts concerning violation of property. Due to the expansion of the tort of negligence, many cases will now be covered by the latter one.

Most systems have more specific rules for the compensation due by a possessor in bad faith.

2. Law of restitution

170b. Usually, there are specific rules for the relationship between the owner and a party in possession (*sensu lato*); the general rules apply in other situations.

a) Restitution for use (without wrong) of someone's property (*Eingriffskondiktion*)

170c. comp. also *supra* n° 166 (“fruits”) and the claim for compensation of the use made by the possessor (*Nutzungsherausgabe*).

b) Restitution of benefits received in case of unauthorised disposing of someone’s property.

170d. (...)

c) Restitution of assets received without title to the party to whom they had to be transferred

170e. When a debtor is discharged although he has paid the wrong person (esp. payment in good faith to an apparent creditor), the real creditor can act against the party who has received payment. A similar rule applies when goods are transferred to the wrong person, in those cases in which the transferor is discharged (e.g. to the party in possession of a document representing the goods).

Under common law, the party who has received the benefits would be a constructive trustee. In continental systems, tracing will only be allowed insofar as the assets are still present *in natura* (or the rare case of real subrogation). If not, the entitled party only has an obligatory action.

3. Exceptional remedies

171. Most systems have developed for certain cases a duty to compensate without an illicit act.

Under Belgian law, we find this when the balance between - usually neighbouring - property rights is manifestly destroyed. This is often applied in relationship with the government, where the equality before public charges is an additional argument. Comp. the specific rules on expropriation and the rule in administrative law on “exceptional damage due to public authorities”.
Comp. in German law the “*Aufopferungsanspruch*” (e.g. BGB § 904 II (state of necessity) and 906 II).

In my opinion, this only applies when the act is not objectively illicit, *e.g.* because it is justified by the public interest and can thus not be stopped (causes of justification), or when there was no negligence on the side of the other party (in cases where this is required for his liability). Otherwise, the (more far-reaching) remedies under B. (for illicit acts even without negligence) or C. (in case of negligence or strict liability) should apply. As the remedies under B. are, however, often underdeveloped in Belgium, parties often invoke unnecessarily this doctrine.

III. Contents and limitations of property, esp. ownership.

A. Contents.

172. Property rights are never unlimited. Ownership is indeed the most extensive of all rights on a thing, and in that sense the most "absolute", but it is never "absolute" in the sense of unlimited[21].

Traditionally, ownership is defined as a bundle of rights, such as the right to use the thing (*ius utendi*), and even to destroy it (*ius abutendi*, *not* having the meaning of right to abuse) (comp. *e.g.* art. 544 C.C.). It normally also includes the right to dispose in the technical sense of transferring of ownership or constituting of limited property rights or renouncing to ownership altogether

B. Limitations

Property rights can be limited in different ways:

1. Property rights of others on the same thing: loss of property.

173. Ownership (and other property rights) are evidently limited by:
- the existence of other property rights on the same thing (co-ownership, limited property rights (*iura in re aliena*) such as easements (*servitudes*)[22] or security rights, incl. retention rights, seizure by creditors);
- the rules of loss of property :
--- normally when the thing is acquired by somebody else - incl. e.g. expropriation, and loss by way of enforcement, acquisitive prescription, extinction of limited rights after a certain period of time (in French & Belgian law max. 99 years);
--- sometimes property is lost irrespective of acquisition by somebody else.

Ownership (and property rights) are also limited by other rights with a certain real affect on the same thing, and by other limitations to the "authority to dispose" of the thing. This notion is studied *supra* Part II, III D.

2. Co-ownership.

The rights of each owner are limited by those of the other ones. See e.g; art. 577-2 Belgian

[21] Comp. explicitly the Dutch NBW. Provisions such as art. 544 CC, ABGB § 354 and 362 and BGB § 903 have a more absolute wording; in practice, limitations are very similar. The more traditional French and german formulation may, however, lead to the belief that there is something like a (hard) core of the right of ownership which may not be restricted. Such an idea is found in Cass. B 1996 and is not absent from ECHR case law. The ECJ has departed from this idea.

[22] Including eg the right to passage when the land is enclosed.

CC.

3. Obligatory rights of others.

174. Property rights are limited by obligations of the owner (proprietor) in different ways.

a) Obligatory rights of others relating to the object of property itself.

1° Applications.

175. Property rights are limited by creditors' rights of others relating to the thing, by which the owner is personally bound.

Examples of such rights *c.q.* obligations:
- obligations of landlords towards tenants;
- obligations not to use one's property in a certain way, e.g. not to install a competing firm or exercise a competing activity (non-competition clauses) - insofar as such obligations are valid (a matter for competition law);
- obligations not to alienate one's property - again insofar as such obligations are valid. The validity of restrictions to the freedom to alienate one's property are found in most legal systems; in the C.C. they are quite strict (struggle against the "*main morte*" in the period of the French Revolution).
- obligations to give preference to a specific party in case of alienation (pre-emption rights);
- obligations of "fiduciary owners" towards beneficiaries, to use or administer the property in a ceratin way in case - if the rights of beneficiaries are considered to be mere creditors' rights (as is normally the case in continental jurisdictions, differing from Anglo-American trust law)

176. To which obligations an owner is bound, is a question of law of obligations (sources of obligations). We only indicate the most important sources.

aa) consented by the owner (in case of acquisition under general title (see *infra*) also those consented by his predecessor. *E.g.* the owner can not revindicate the house from his tenant in violation of the tenancy agreement. In German law, this is construed by considering the right of ownership as in a certain sense accessory to the obligatory action to the third party in (factual) possession (and having a "right to possess") (see *supra*). This is not the case in most other jurisdictions, but the result is similar.

bb) In case of qualitative obligations, the owner can also be bound by the rights consented by his predecessor. *E.g*. many lease contracts.
In other cases (non-qualitative obligations), the owner is not bound to perform the obligations engaged in by his predecessor. But he can still be bound by them in the following sense : he cannot oblige the other party to restitute his property, if the obligation to restitute is synallagmatic (in the large sense) to an obligation engaged in by the owner's predecessor,

and that other party has on this ground a “retention right” on the property. Such a retention right is normally available in synallagmatic relationships, unless the obligation to restitute is abstracted from that relationship (“abstract obligation”) (see Law of obligations).

cc) On the basis of the protection of legitimate confidence, he will also be bound by the (obligatory) rights consented by an apparent owner.
E.g. lease consented by an apparent owner (if the lease is not consented for more than 9 years, it is a mere “act of administration”; if consented for more than 9 years, it is a equated to an “act of disposition” and stricter rules apply).

2° Effects.

177. The remedies can be found in the law of obligations.

Where revindication would be contrary to the obligations of the owner towards the other party, revindication is suspended (comp. explicitly BGB § 986). Revindication is suspended also where it is contrary to obligations of another party, esp. the predecessor of the owner, on the condition that these give the party detaining the property a retention right. Under German law, a similar result is reached with the already mentioned idea that the property right is dependent on the obligatory claim against the debtor - see BGB § 986 II.

In some cases, the obligatory remedies also have a further effect under property law (in causal systems of transfer). Although obligatory rights do not limit the authority to dispose of the goods, their violation can sometimes lead to the avoidance or termination of the *titulus* on the basis of which the property was acquired. In causal systems of transfer, such as most continental systems (except e.g. Germany), property is annulled when the *titulus* for acquisition is avoided or terminated with retroactive effect (which is normally the case in most causal systems). Such termination could be the consequence of non-performance of an obligation of the acquire towards the alienator.

There may also be specific sanctions for specific obligations. E.g. the obligation to respect a right of pre-emption of a farmer in case of sale of the land by the owner is sanctioned effectively by subrogating the farmer in the rights of the buyer.

b) Obligatory rights of others relating to the assets of the owner in general.

178. The owner may also have other obligations, which are not related to a specific property, but rather to his assets in general. These “obligations” are often more effectively sanctioned, by avoidance or termination of acs whereby the owner disposes of his assets. See e.g.:
- Obligations towards his spouse/her husband and family (dispositions by one spouse threatening the stability of the family (protection of the family home and other important assets), giving rise to voidability of the disposition - see art. 215, 224 Belgian CC);
- Obligations towards the legitimate heirs (protection of "legitimate" heirs by the possibility of reduction of gifts)

- Obligations towards one's creditors in general (protection of creditors against acts of *fraus creditorum*, *actio Pauliana*, etc.).

3. Specific statutory, regulatory or customary limitations.

179. The use which may be made of property, is often limited by statutory, regulatory or customary limitations (many different types), depending on the type of things.

In older legislation, a lot of them were qualified as a kind of servitude (easement) imposed by law. This is esp. the case for rules concerning relations between neighbours (see for such rules art. 640 ff. CC, BGB § 906 ff.; OR/CO 684 ff.; art. 1033 ff. CC it., etc.). There is a certain similarity between this civilian explanation and legal systems which recognise a "*dominium eminens*" of the State or crown, such as feudal land law and modern English land law.

Most other statutory limitations belong to public law (administrative law) and are thus not studied here (*e.g.* urbanistic & planning law, environmental, health & safety law, economic regulation, protection of the architectural, cultural and archeological heritage, etc.).

4. Limitations based on (written or unwritten) vague norms.

a) Duty of the owner to tolerate normal hinder and justified violations

180. Legal systems distinguish two types of hinder which an owner must tolerate, one without compensation, and another one with compensation.

No compensation is due when the disturbance or hinder is normal – i.e. due to the (normal) use of their own property by others (esp. neighbours normally using their own, adjacent, property). BGB § 906 I requires that the disturbance is is not substantial (*unwesentliche Beeinträchtigung*).

Many statutory rules can be seen as indicating more precisely which hinder is normal and which one abnormal (esp. the rules concerning relations between neighbours)[23].

Compensation is due, but the hinder or disturbance must be tolerated, when its is "justified"
-by a "ground of justification", such as a state of necessity, self-defence, etc.
- where it follows from a usage which is normal, but does cause a substantial disturbance of interests, and it is economically not possible to avoid the disturbance caused by this normal usage (see e.g. BGB § 906 II). It is still required that the usage or activity is not forbidden by specific regulation (otherwise, the disturbed party has the right to stop the hinder with a

[23] See e.g. rules concerning relations between neighbours such as art. 640 ff CC (use of water), rules concerning common walls, dikes or fences, concerning distances between buildings art. (674 ff. CC), border crossing trees and plants (ABGB § 422, BGB § 910), etc.

negative injunction or *actio negatoria*)[24].

NB. Comp. also cases where hinder is seen as abnormal, but justified, with the effect that it must be tolerated, but damages can be claimed.

b) Doctrine of abuse of right.

182. This doctrine is unwritten law in many systems, written law in some, e.g. Switzerland (art. 2 ZGB). According to this doctrine, it is usually forbidden to use one's right:
- *animo nocendi* (with the intention of damaging someone else) (e.g. BGB § 226);
- or manifestly exceeding the limits of a normal usage;
- or without taking into account someone else's interest, if there is a disproportion between benefit and detriment.

This usually applies only to some of the remedies provided by the property right, leaving the possibility to use it in another way.

NB.
1. Strictly speaking, abuse of right is a *contradictio in terminis*. "Abuse" shows precisely where the right is only an apparent right, *prima facie*, but not a real one.
2. Abuse of right is usually equated with a tort. There is, however, an important distinction as to the level on which these notions play a role. The doctrine of abuse of rights determines whether a certain act is within the limits of a certain right or not. A tort requires not only an illicit act, but also harm caused and usually some degree of negligence. The doctrine of abuse of rights plays a negative role in tort law; it shows that certain acts for whose justification a certain subjective right is invoked, are not justified by that right, although they could *prima facie* be based on that right. But the consequences of the doctrine can reach further; sometimes the fact that the possibility to invoke a right is limited, is in itself a sufficient remedy (a direct sanction instead of the indirect sanction of compensation of damages). *E.g.* estoppel (*venire contra factum proprium*). Damage and causality can be an element, but is not a necessary requirement for an abuse of right (whereas damage and causality are necessary requirements for obtaining compensation of damages).

Specific example : construction over the border of one's property : in case of good faith, it would be abusive for the landowner to claim destruction if other remedies are available (transfer of the land for value, right of superficies with annual rent). See e.g; BGB § 912.

c) Use contrary to public morality.

183. Another vague norm is constituted by the notion of public morality.

5. Obligations which are not directly linked to property, but indirectly .

a) "Qualitative" liabilities.

[24] Comp. also ABGB § 364.

184. These are strict liabilities linked to the fact of being owner (or another property right, e.g. usufruct). Most strict liabilities are not linked to ownership, but to some type of activity (factual use of the goods). But some strict liabilities are qualitative, *e.g.* art. 1386 French-Belgian C.C. (liability of the owner of buildings); certain forms of liability for environmental pollution.

See also *infra* the duty to compensate for abnormal hinder caused to another's property.

b) Taxation etc.

185. Finally, property is taxed more or less heavily. Compare also art. 14, 2 German GG: "*Eigentum verpflichtet*" (*propriété oblige*, property obliges). Again, this is not a limitation of the property right itself; property is merely the factor used by the legislator.

N. LUHMANN[25] describes very well the evolution which has taken place from old to modern law in this respect; modern subjective rights are not inherently giving rise to obligations (inherent reciprocity); reciprocity is attained only indirectly, over the state (taxation etc.) or over the market (price equilibrium).

[25] N. LUHMANN, "Zur Funktion der "subjektiven Rechte" ", 1. *Jahrbuch für Rechtssoziologie und Rechtstheorie* 1970, 321 ff, also in *Ausdifferenzierung des Rechts*, 360 ff.

PART IV. SPECIFIC PROPERTY RIGHTS

I. Ownership

a) Immovables.

- "Attributes of ownership". E.g. the right to mark the border of one's property (demarcation, art. 646 CC); the right to fence one's property (CC art. 647), etc. Comp. *supra*.

- Right of accession, see *supra*.

b) Movables

II. Limited rights of enjoyment.

a) Movables : usufruct

b) Immovables

1° Strictly territorial : real servitudes (CC 637 ff., BGB § 1018)

2° Transferable :
aa) emhyteusis
bb) superficies (ErbbauVO 1919, Opstalwet)
cc) usufruct (CC 578 ff., BGB § 1030 ff.)

3° Strictly personal : personal servitudes (other than usufruct) : right of usage, right of habitation (CC 625 ff., ABGB § 478, BGB § 1090)

III. Real security rights.

a) Movables :

1° based on possession : Pledge (*Faustpfand* or *Handpfand*), right of retention, some privileges
2° based on registration : registered pledges, some privileges
3° without publicity : silent pledges, security ownership, some privileges

b) Immovables : Hypothec (mortgage), immovable privileges

c) Creditors' rights (based on possession, registration or silent) : pledge, security ownership

IV. Forms of co-ownership.

Distinctions :
- free v. bound

- of single things (*Miteigentum in Bruchteilen, indivision) v*. universalities (joint property , *propriété collective, Gesamthand*)

b) *intuitu personae* v. *intuitu pecuniae*

	co-ownership of single things (ownership in common) share in each thing separately no "common debts" s.s.	**joint property (universalities)** "abstract" share existence of "common debts" (i.e. recoverable on common assets)	**claims**
"bound" (no partition)	*c) Voluntary co-ownership of single things (e.g. time sharing)* d) special case : *"forced accessory co-ownerhsip" (esp. apartment buildings)*	*Communities (marital community, partnership)*	*e) joint claims* *f) joint and several claims*
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