PART I

Introduction and content

1 A common core to the protection of immovables?

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When the common core of European private law is predominant today, it is almost always because the jurists of ancient Rome laid down an intellectual structure which continues to inform intellectual debate today. One important example is the nature of possession. Other aspects of private law reveal a basic dichotomy between the solutions of civilians and common lawyers, and yet other cases show a break between the Latin and the Germanic traditions which can appear as important as the civil law/common law divide. No one reading the fourteen national reports that follow could be under any doubt about how to conceptualise the national remedies allowed for the protection of the ownership or possession of land. Here 'the English Channel is deeper than the Rhine';[1] (for the purposes of this metaphor, Scotland has to be detached from Britain, towed across the North Sea, and anchored off the coast of another 'mixed' jurisdiction, the Netherlands). We are already primed to expect just this from brilliant expositions of each of the two traditions, by Von Savigny for the Roman tradition[2] and by Maitland for the common law.[3] One should add that Nordic law is almost as distinctive as the common law.[4]

A common core, therefore, can only emerge in our chosen topic by the identification of functional issues. Rudolph Schlesinger formulated the technique of posing to national reporters a series of factual cases, a

[1] We return to the undoubted differences between French and German law below, pp. 23–8.
[2] Savigny, *Possession*.
[3] Maitland, *Forms of Action*. For the convenience of non-English-speaking readers, this relatively cheap and accessible text is cited as the main source for pre-1875 procedure; see also Simpson, *History of English Land Law*, Chapters II and VII; Pollock and Wright, *Essay on Possession*, Part II; Holdsworth, *History of English Law*, vol. 7, pp. 4–81.
[4] 'Nordic' is used in the English sense to refer to the five Scandinavian states of northern Europe – Denmark, Finland, Iceland, Norway and Sweden – of which Finland and Sweden report here.

technique ideally suited to the Protection of Immovables, since the issues fall naturally into the form of contentious litigation.[5] This technique is deceptively simple since the validity of the comparisons drawn from the reports on the cases turns entirely on the skill of the editors in formulating factual situations which will elicit responses that are at once illuminating and representative. Readers must judge the success of this technique in this context. However much the cases were juggled, there seemed always to be one national report which did not fit any pattern, but the real risk of the Schlesinger technique is that one particular fact postulated in a case may distort the position in a particular national system so as to hide its relationship to the *ius commune*. The converse risk is that so many alternatives have to be described that the basic picture is lost and the narrative flow is destroyed. We have tried very hard to select representative facts and to relegate the inevitable 'but ifs' to footnotes. Schlesinger omitted to point out one essential feature of his technique, that, when all is complete, it is beneficial to analyse all the reports, tear them up, rewrite the questionnaire and begin all over again. However, any such proposal would have unified our reporters in revolt; the book has already been far too long in the making.

As this is one of the first Common Core books to describe a central aspect of property, it is appropriate to address the three levels of the Schlesinger methodology involving operative rules, descriptive formants and metalegal formants.[6] This is an unequal trinity. In all systems it is a factual question whether a person is or is not in possession, and the cases selected here tend towards the obvious in this regard; the subject of our enquiry is the legal questions flowing from that factual determination. National reports consist, largely, of a description of the operative rules in their system (Level I of Schlesinger's trinity), and this is especially true of civilian states. Actions for the protection of immovables are so well settled along Roman lines that there is often little scope for the lack of concordance that Schlesinger was seeking between case law and the codes. At Level II, Schlesinger enjoined us to 'indicate the reasons for which lawyers feel obliged to give the solution mentioned in Level I' (operative rules) but this leads to a single universal response that the answer is dictated by the

[5] Schlesinger, 'Past and Future of Comparative Law'.

[6] The rules on 'How to Answer the Questionnaires' are available on the Common Core website, or alternatively in Bussani and Mattei, 'Common Core Approach', Appendix 1, pp. 354–5.

terms of the civil code, spiced only occasionally by reference instead to the codified civil procedure or other legislation. More often for common law and Nordic states than for civilian jurisdictions, this basic pattern is varied, and instances emerge of discordance in the case law.

Some of our cases operate almost exclusively at Level I, prime examples of rule-based exposition being Case 1(a) in response to which the basic rules operating to protect an owner of an immovable against an intruder have been set out. Much the same is true of Case 3 (owner sues licensee), Case 6 (restitution), Case 7 (rival ownerships) and Case 8 (owner sues adverse possessor). In essence, property is less fluid in its core essentials than either contract or tort, and the fact that many matters are settled in legislation may become a regular theme in future Core texts on property.

At the level of rules, this book reveals the fascinating tensions between two layers on which the modern *ius commune* is built. At the deepest level are concepts implanted deep into the spirit of European civil law, such as the distinction between real right and personal obligation and between ownership and possession. That common way of thinking is the shared legacy from the Roman jurists disseminated via Bologna, and means that English ways of thinking about protecting ownership are much more similar to French and German modes of thought than they would have been if the Roman Empire and the Roman Church had never reached the shores of Britain. Above that is a second layer, revealing a deep conceptual divide between people who look back to ancient Rome and the Justinianic law disseminated via Bologna, and those who look back to the Norman conquerors of England who drew from the (semi-vulgar) Lombardic law taught at Pavia. Civilian systems are based on twin actions, the vindication of ownership and the protection of possession by interdicts, the latter often holding the field. The common law, less ancient and affecting far fewer hectares of the continent of Europe, takes a quite different view that an interference with possession is best remedied by a tort-based action in trespass protecting the right to possession.

Von Savigny traces the Roman tradition from pre-classical origins, through the classical flowering, through Justinian (in this area degraded by classical standards), on through the glossators and commentators into humanism and up to the codes.[7] Savigny opposed the French code influenced by the vulgar law which conflated ownership and possession[8] and

[7] Savigny, *Possession*, Book VI.
[8] Levy, *Vulgar Law of Property*, pp. 19–34, 202–76.

the *actio spolii* of ecclesiastical law,[9] and the Code allowed delict-based responses to interferences with possession; this despite the fact that this represented the pre-code *ius commune* which, accordingly, Savigny helped to obscure. Instead, Savigny proposed a Romanic basic for the German Code which was partially adopted in the field of actions. The BGB has a non-Romanic conception of divided possession, but uses interdict-derived actions to enforce possession. There is thus a divide at the Rhone, with spoliation based remedies to the west and south. The history of civilian actions is explored fully in an introductory chapter by the Dutch expert in Roman law, Professor Frits Brandsma of Groningen.[10]

History repeated itself for the common law. In the common law, Maitland took his readers up to the point where the abolition of the ancient common law remedies begun in 1833 was completed in 1875.[11] The historical picture he painted was rather similar to the vulgar law and the *ius commune* of medieval Europe, though evolving quite separately from it. He devoted sixty-five pages to this history, the implications being both that the old forms of action rule us from the grave, and that they *should* continue to do so. On that view, the recovery of land is obtained in ejectment, an off-shoot of trespass. The action for recovery of land which emerged is quite distinct from the continental experience, since it is based neither on proof of ownership nor on proof of a recent disturbance of possession, but rather depends upon establishing a better right to possession than the person currently controlling the land. Scarcely half a page was needed for the debased modern world. At the very end Maitland gives us the hint that the common law should be freed from its shackles; after 1876,

> the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law.[12]

Here, our guides leave us to construct our own way forward through the two long centuries (one continental and one English) to our own time.

Here, then, is a third layer, the contemporary *ius commune*, built on the earlier foundations of the Digest and the early common law so as

[9] Ruffini, *L'Actio 'Spolii'*; Brissaud and Howell, *History of French Private Law*, pp. 319ff.; Gordley and Mattei 'Protecting Possession', pp. 305–19 (much the best readily available discussion in English of the *actio spolii*).

[10] See below, p. 9.

[11] Maitland, *Forms of Action*, Lectures III, IV and V (land actions to 1833), and Lecture VII (reforms 1833–75).

[12] *Ibid*., p. 66.

to obscure them, as modern cities stand on the sites of medieval cities built on the ruins of Roman settlements. Formants which are descriptive (Schlesinger's Level II) include case law alternatives – which make it necessary to expound the reasoning underlying the alternative views and the choice to be made between them – and in some states also procedural institutions, administrative structures and constitutional provisions. The metalegal level (Level III) also comes into play, introducing such matters as policy, economic and social factors, social context and values and the structures of legal process. Indeed, they predominate in some of the cases used in this comparison, notably in Case 1(b), which considers the administrative and criminal procedures that can be invoked by a dispossessed owner, which is closely related to how the law responds to the challenge of environmental protestors (Case 2) and the extent to which self-help is allowed (Case 5). In Case 4, a landlord sues a former tenant, the practical effect differing wildly according to the security-of-tenure regime in operation, but the question why a particular scheme came to be adopted lies beyond the scope of this volume. A public interest underlies all of the civil rules governing the relations of neighbours (Case 9–12). Reporters have been left to describe these matters as they arise, and analysis will be undertaken collectively in the comparative remarks, as Schlesinger himself envisaged.

In all of these areas, especially where Level III metalegal formants are prominent, there is much greater scope for departures for the Justinianic orthodoxy of the continent, and the question naturally arises whether these formants have operated to create a diaspora of legal doctrine or a functional convergence upon a common core. The answer seems to be, inevitably, that increased understanding and cross-reference in the twentieth century has evolved a new *ius commune*, derived from a functional analysis of the two main systems, a reaction to evolutions in landholding and development practice and to some extent a pick-and-mix approach to legal traditions. As a matter of coincidence, our two main guides, Savigny and Maitland, lead us by the hand to the point when the differences were greatest but then leave us to trace the gradual and partial reconvergence for ourselves.

Since 1970, the common law has had to respond to the twin problems of traveller encampments and environmental campaigns and the response has challenged some of the fundamentals in the protection of land. The distinction between dispossession and lesser interferences with land has been clouded, the common law possession order has interacted with the equitable injunction, and procedure has responded to the unknown and

mobile protestor. The common law is poised to determine whether it can cast off the clanking armour of the medieval knight and create a straightforward possession action, perhaps even an action to resolve contests about the control of land; all is ready for a set piece battle in the supreme court to decide whether to stick to the historical model or to move forward to a free form action.[13] The momentous step perhaps ready to be taken is a challenge to basing recovery of land on possession, the intellectual framework laid down for us by Gaius. Many civilian states face the same practical problems, but would find it more difficult to achieve such a radical conceptual reorganisation through case law alone.

At a functional level, the deep conceptual divisions have begun to recede into a distance in which they can appear almost trivial. The major point of European convergence is the impact of human rights trial principles under the case law decided at Strasbourg, the subject of an introductory chapter by Dr Sandra Passinhas of the University of Coimbra.[14]

At that point, our questions begin.

[13] *Secretary of State for the Environment, Food and Rural Affairs* v. *Meier* [2009] UKSC 11; [2009] 1 WLR 2780, discussed in relation to Case 2, below, pp. 120–1.
[14] See below, p. 31.

2 Actions in Roman and civil law for the protection of immovables

FRITS BRANDSMA

Introduction

One of the most remarkable features of the Roman law protection of property is the absence of a distinction between protection of immovables and protection of movables. Title to property is protected by a general remedy, the *rei vindicatio*, the vindication of a thing which is an object of ownership. In principle there is no difference in treatment of title and its protection with respect to its object. The legal parent of this vindication, the *legis actio per sacramentum in rem*, even started out, it appears, as a means of protecting title to movables, especially slaves, because land was not at first the object of private ownership.[1] The main difference between movables and immovables was the term of *usucapio*, acquisitive prescription. Title to movables could be acquired by way of *usucapio* after one year, whereas for immovables this required two years. Justinian changed the terms to three years for movables and ten or twenty years for immovables.

Of course, the nature of immovables – land and everything that is built on it – is such that practical differences require different remedies now and again. Only the owner of land has neighbours and the problems that brings with it.[2] He will sometimes need easements, or servitudes as the Romans called them. He will want to avoid damage when buildings threaten to collapse: he can ask for a *cautio damni infecti*.[3] He does not want to be bothered by overhanging trees or undergrowing roots: he may cut them off in the end.[4] He may want to reverse things done by someone on his premises secretly or by force, i.e. without his consent or against

[1] Buckland and McNair, *Roman Law and Common Law Comparison*, p. 61; Wolf, 'Actio Sacramento in Rem', pp. 1ff., 38–9; Kaser and Knütel, *Römisches Privatrecht*, § 22.5.
[2] Rodger, *Owners and Neighbours*. [3] *Digest* 39.2.7pr. [4] *Digest* 43.27.1pr. and 7.

his will; for this the interdict *quod vi aut clam* is at his disposal.[5] He may want to prevent a new building being finished if it threatens to interfere with his rights: he can use the *operis novi nuntiatio* as a prelude to more final legal action.[6] Only in the case of land can there be problems beneath and above the surface, concerning mines for example or overhanging balconies. None of these problems face the owner of a movable, although he is lucky in that his ownership can be protected against theft, unlike the owner of an immovable.[7]

The Roman law concept of title was a unitary one and, apart from that, it differs a lot from the concept of title under the common law. Title to ownership of land is not the subject of this chapter so it is unnecessary to deal with this issue at length, but a few remarks are necessary in order to understand the Roman law protection of immovables. Title meant absolute title, not merely a title better than that of the opponent. Proof of absolute ownership was required, title against the whole world. This burden was somewhat alleviated by the possibility of acquiring title by way of *usucapio*, acquisitive prescription. That meant that someone who could prove he acquired possession in good faith, thinking he got the thing from an owner, and on the basis of a good cause, sale for example, became owner after the required period of prescription. This freed him from having to prove an unbroken chain of transfers traced back to the first owner of the object, the so-called *probatio diabolica*. Possession was not unimportant, but it could not be said in Roman law (as it is in English law) that possession was nine-tenths of the law; in and of itself it was not sufficient to succeed in a claim where title was at stake. A better title was not sufficient for the plaintiff, since the defendant could plead a *ius tertii*, the title of another than the plaintiff.[8] Ownership and possession were two quite different things. *Nihil commune habet proprietas cum possessione*.[9]

Before we go on to consider the means of protection of immovables, one fundamental distinction has to be examined. This is the difference between real rights and personal obligations, or between real actions and personal actions as the Romans themselves would have said. Property, of course, was one of the real rights and as such was protected by real actions, especially, when the owner lost possession, by the *rei vindicatio*. Property

[5] *Digest* 43.24.1ff. [6] *Digest* 39.01.20pr. [7] *Digest* 47.2.25; cf. *Digest* 41.3.38.
[8] Compare the common law rule in *Asher* v. *Whitlock* (1865) LR 1 QB 1, 6; Buckland and McNair, *Roman Law and Common Law Comparison*, p. 68; Sparkes, 'Ejectment: Three Births and a Funeral'.
[9] *Digest* 41.2.12.1.