Principles of French Law

Second Edition

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Introduction: The Spirit of French Law

French law like French culture is distinctive. When legal systems are classified, the French and the English systems are not classified in the same family or group: English law is entered into the larger grouping of common law systems, while French law belongs to the loosely defined civil law systems.[1] However, they are both also very much part of a Western European tradition of law and so its distinctiveness should not be exaggerated. A common heritage from Roman law and canon law is now shaped by common adherence to the European Convention on Human Rights, the European Union, as well as to wider international obligations such as GATT, the Geneva Convention on refugees, and the United Nations Charter and declaration.

The distinctiveness of French law lies in the areas of values, legal procedure, the form of legal rules, and an attitude to law which is often described as a *mentalité.*

I. Legal Values

As part of the Judeo-Christian and Roman law traditions, French law shares most values with other Western European countries. In the area of human rights and individual freedoms, France's adherence to the European Convention on Human Rights (which is directly applicable in French courts) provides a common point of reference with other European countries and also with non-European countries which have similar frameworks for protecting rights. Membership of the European Union and agreements such as Schengen express a commitment to a whole range of common economic and social values which are directly applicable in France. Discussions on the reform of French domestic law now typically involve reference to the European Convention and the policies of the European Union. In addition, the practices and policies of other Western countries have been major influences. French writers can talk with some justification of a 'European' or 'universal' law even in such specifically national areas as criminal law.[2]

Should one say that French law is republican in spirit? As we shall note, over the 200 years or so since the Revolution of 1789 there have been a number of

[1] However, the grouping of the continental systems is not so easily defined. They are often subdivided themselves into Roman, Germanic and Nordic systems. See on this point K. Zweigert and H. Kötz, *An Introduction to Comparative Law,* 2nd edn. (Oxford, 1987), 69, 70. See also H. Patrick Glenn, *Legal Traditions of the World*, 2nd edn. (OUP, 2004).

[2] M. Delmas-Marty, in N. Jareborg, *Towards Universal Law* (Uppsala, 1995), ch. 10.

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non-republican regimes, each of which have left their mark to a greater or lesser extent on the development of the law. Indeed, the Civil Code itself, while formally promulgated at the time of the First Republic, is often known as the *Code Napoléon* and Napoléon I clearly had a significant personal influence on a number of its provisions. On the other hand, French public law, both the administrative and constitutional, is dominated by the idea of France as a republic, a constitutional and lay (i.e. non religious) regime accepting the importance of individual human rights. And we can certainly see the impact of values associated closely with republicanism (or so associated in France). Indeed, traces of the values behind the republican motto, 'Liberty, Equality and Fraternity' may be seen in the law of contract, civil procedure, family law and labour law.

The existence of a broad commonality of policy and values does not preclude some very specific French values. Within this book, there are noted a number of social values which are distinct. In criminal and family law, there are certain specific offences which reflect social attitudes, e.g. in relation to duties to parents and to the vulnerable in society. In employment and company law, there is a great concern to protect jobs in the regulation of dismissal and insolvency. The whole area of public law with its conceptions of public service and public employment is replete with specifically French conceptions of how government should work. Constitutional law is very distinctive in many respects. There are thus distinctive values but these do not dominate the whole of law, but provide variants to the principal common values of democracy, legality, respect for the individual, the family, employment and so on.

II. Legal Procedure

Procedures adopted by different legal systems owe as much to history as they do to the values which influence their operation. In France, there are significant differences in terms of procedure which make French law different, not only from the common law, but also from other continental systems. In the case of commercial law, it is the role of lay business judges and the relative informality of proof which is distinctive. Commercial disputes are rapidly resolved by law administered by commercial men and women, rather than by professional judges. In criminal law, distinctive features are the status of the prosecutor (*procureur*) as a member of the judiciary and the role of the investigating judge in the pre-trial investigation leading to the decision to prosecute, and, more recently, the *juge de l'application des peines* in the administration of sentences and the use of conciliation procedures to avoid prosecutions. Here, the judiciary take on roles which would be given to administrators or distinct groups of officials in the management of the criminal process outside the trial phase. In employment law, distinctive features are the importance of administrative authorization by the *inspecteur du travail* before a dismissal is permitted and the composition of the employment court which has both employers and employees in equal numbers but (unless there is a tie) without

a judge in the chair. Employment law is more focused on employee rights than in England. In public law, there are distinctive procedures for administrative and constitutional cases. In administrative law, the procedure is more informal and inquisitorial than in private law and less party-driven than in many legal systems. There is almost a sense in which the procedure of the administrative courts is an investigation of administrative shortcomings, rather than litigation between parties. The composition of administrative courts is also distinctive in that the members, especially of the higher courts, are not trained as judges, but are first and foremost administrators, who may move between judicial and administrative tasks. In constitutional law, the court is not composed solely of lawyers and does not have an adversarial procedure. It is an investigation conducted by those knowledgeable in constitutional matters with few formal rules of procedure.

In the case of private law (including for this purpose criminal law) and the private law courts, there is a further special and fundamental feature: the system of *cassation* ('quashing'). For while a system of appeals from decisions of first instance exists to the cours d'appel, the latters' judgments are subject only to *pourvoi en cassation* to the Cour de cassation, the nature of whose role is crucial to the exposition and the development of French private law. The starting point for understanding this is that the Cour de cassation is the 'guardian of the law' and in principle, therefore, is concerned with ensuring the proper application of the law to the facts as found by the lower courts. In this sense, then, recourse to the Cour de cassation by *pourvoi en cassation* may be thought of as similar to appeal on a point of law. Certainly, given the regional character of courts of first instance and appeal, its role is to ensure that the unity of French private law which was achieved by the promulgation of the Civil Code is maintained as a reality. However, the phrase 'appeal on a point of law' is rather too imbued with common law associations to stand without more. For the Cour de cassation does not re-decide cases submitted to it (having corrected the legal rules to be applied) but rather, as its name indicates, quashes the decisions of lower courts. In this perspective, it is a court of review, review, that is, of the legitimacy of the decision-making of the lower courts which are submitted to its control: it is 'a true judge of judgments' ('*un véritable juge des jugements*').[3] In this way, the relationship between the Cour de cassation and *juges du fond* (lower courts judging the merits) may possess a certain echo for the English lawyer of the English procedure by which a higher court reviews a lower court by way of case stated. But the importance of this system of *cassation* for the development of and understanding of the substance of French private law cannot be overestimated. For all legal propositions of private law have to be analysed so as to estabilish which issues or aspects of issues are treated as ones of fact (for the 'sovereign power of assessment' of the *juges du fond*) or of law for the control of the Cour de cassation. And while modern legislation occasionally makes clear that in coming to a particular decision (or exercising a particular

[3] J.-L. Aubert, 'La distinction du fait et du droit dans le pourvoi en cassation en matière civile' D 2005 Chron. 1115.

discretion) the lower courts have a 'sovereign power', for the most part it is the Cour de cassation itself which determines which propositions are within its control and which escape it. It intervenes on grounds, in ways and to an extent of which it is itself the master. Thus, whole tracts of the legal landscape (or what to a common lawyer would be the legal landscape) have been all but abandoned by the Cour de cassation to the lower courts, two striking examples of this being the interpretation of contracts and the measure and quantification of damages. In other contexts, the Cour de cassation is careful to restrict the lower courts' room for manoeuvre with rules of law whose non-observance will attract its intervention. In the result, it is one of the most salient but also one of the most frustrating aspects of French private law that many issues are decided by the lower courts behind this impenetrable veil of their 'sovereign power of assessment'. French jurists themselves sometimes observe that where an issue is put in the hands of the *juges du fond* this allows them to take into account 'equity' in their decisions, but the incidence and extent of this phenomenon must, by its nature, remain unverifiable. Be that as it may, it is clear that the boundary between law and fact in French private law practice is a function of these institutional and procedural arrangements, as much as it was in nineteenth century English civil law a function of the role (and to an extent judicial distrust) of juries. We shall see throughout our discussion of the private law this division influencing the way in which the law is exposed and discussed.

The features identified thus far reflect different, specifically French, procedures in the various areas, but there is no unifying theme. There is an effort to integrate some users of the law into the decision-making panel, by using commercial men and women, employees, administrators and politicians as judges. A more universal feature is the role of written evidence in the procedures and the relatively small part played by oral evidence and argument. The role of the 'file' in collating evidence and providing a basis for decision helps explain the rapidity of oral phases in hearings at first instance, and the ease of appeal procedures: if there is a file, it can be sent up for appeal to a higher court more easily than the oral evidence of a lower court hearing in the United Kingdom. The requirement to have a lawyer is a common, but not universal feature of many claims which can be made in the courts. This obligation restricts the scope for the litigant conducting their own case and makes easier the conduct of the case for the court.

III. The Form of Legal Rules

There are three features of French legal rules which are usually identified as distinctive, at least in relation to the common law. The first is the importance of *codification,* the second is the statement of rules in general terms, rather than in specific detail, and the third is the relative unimportance of judicial decisions compared with doctrinal legal writing, in stating the rules of the legal system.

As will be seen in the chapter on sources, French law is very heavily based on legislation, but this is not a feature peculiar to French law. The pace of social change and the importance of government direction in society and the economy has meant that most modern societies have a large amount of law-making from legislatures and government. The distinctive feature of France and a number of continental European countries is the perception that the written legislative rules provide a coherent and self-contained framework for the solution of contemporary social problems. The post-revolutionary Codes (Civil, Criminal and Commercial, together with Civil and Criminal Procedure) were the first successful attempt and have been replicated with varying success later. Rather than the classical common law conception of the law as a patchwork quilt of legislative provisions held together by thread woven out of general principles and sewn by the judges, the French civilian is thought to see the Code as the source of general principles into which judicial and later legislative decisions fit. With some exaggeration, no doubt, Philippe Malaurie has argued

> Codification—above all our Civil Code—has permeated deep into our national culture. The Civil Code is part of our national heritage, just like French-style gardens, the Palace of Versailles, Philippe de Champaigne or General de Gaulle. At stake in codification is our culture and our identity. The Civil Code has been more than the symbol of national unity . . . The Civil Code is at the same time the cause, the witness and the consequence of our cultural unity.[4]

This picture does have some truth in that exegesis of the Code is the commonest form of civilian argument. The inter-relationship of provisions in the Code is an important test of legal arguments. But there are also difficulties with this picture. First, some of the Codes are quite old and have undergone significant change. Secondly, others have been subject to layer upon layer of textual amendment which make the underlying principles difficult to discern. Thirdly, there are whole branches of the law which do not have this kind of coherent principle, but which have the same kind of consolidating statute as can be found in English law. Lastly, as will be seen in the chapters on sources and administrative law, public law is as much a judge-made system as the English law. The texts of public law give only part of the story. The general principles of public law are the real bedrock of the system and these are as much common law as any parallel branch of English law. Thus codification and the spirit it engenders is not universal in the application of French law. All the same, codification does retain a symbolic function within French legal culture. In the view of a former Vice-President of the Commission supérieure de la codification, codification is an important element in the rule of law—permitting access to the rules which govern individuals.[5] As a result, the Commission created in 1989 has programmed some forty-two codes

[4] P. Malaurie, 'Les enjeux de la codification', AJDA 1997.642.

[5] See his speech of 4 December 1995, Commission supérieure de la codification, *Sixieme rapport annuel 1995* (Paris, 1996), 21.

to go alongside the five Napoleonic codes, and these will cover public authorities, public law procedures and other areas hitherto outside the existing structure of codes. All the same, most proposals are more in the form of consolidations of existing texts in a sensible order than a radical rethink of principles. This was achieved in relation to the reformed Criminal Code of 1993. The commission wants to avoid too many 'minicodes' in very discrete areas, but also the 'maxi-codes' which try to cover too many different areas.

The nature of French legal rules is the subject of repeated comment and comparison. The succinct statements of principle in the Civil Code are taken to be a model of how legislation is drafted and this is contrasted with the common law method of covering each eventuality. To be accurate, the French legislature is more likely to adopt a principled drafting style compared with the British Parliament. But the overall effect is often little different. The French resort much more to secondary legislation, which the Government has an inherent power to enact. This produces a parallel set of provisions (usually labelled R in modern codes) which are more detailed than the provisions in a *loi* (labelled L in the Code). The combination of these two sets of provisions often provides a very detailed result, even more detailed than English law. Nevertheless, the principled approach of legislation makes its purpose more evident and it is easier for the orientation of the legislation to be understood by non-lawyers.[6] Texts drafted in most common law countries are more straightforward in terms of knowing the practical impact of the legislation from a single document.

The authority of legislation as the expression of the general will and as the embodiment of general principle results in a lower status for judicial decisions. Judges as bureaucrats are meant to implement the law, not to create it. The authority of judicial decisions relates to the quality of their content, rather than to any precedential force which attaches to the jurisdiction which made it. Even the lowest courts can disregard the decisions of the highest courts if they are considered wrong. In terms of setting out the law correctly, the role of academics is also important. Doctrinal legal writing has had an influential role greater than traditionally in the common law.[7] The balance between the different actors in the legal system creates a distinctive approach to law.

IV. Attitude to Law

It has been strongly argued that there is a distinctive attitude to law which creates a different mentality among French lawyers. This feature is picked up by a number of authors.[8] Among the features identified which illustrate this difference

[6] See generally W. Dale (ed.), *British and French Statutory Drafting* (Institute of Advanced Legal Studies, London 1986).

[7] See R.C. Van Caenegem, *Judges, Legislators and Professors* (Cambridge, 1987), 155–7.

[8] See especially Zweigert and Kötz, (above n. 1) 71; B. Markesinis, *The Gradual Convergence* (Oxford, 1994), 10; G. Samuel, *The Foundations of Legal Reasoning* (Antwerp, 1995), 28;

of approach are the starting points for legal reasoning and the method of legal development.

As has just been stated, the common law comes across as a custom-based system in which the values of the law are recalled by the judges. In areas dominated by common law principles, specific statutory provisions have to be integrated to make a coherent whole, and may encourage the development of common law rules along similar lines to those contained in statute. But in areas dominated by statutory rules, the English judges are wary of incorporating into them common law principles by way of interpretation.[9] In much of French law, the structure of principles and values was set out in the Codes, notably the Civil, Criminal and Commercial codes, as well as the Codes of Civil and Criminal procedure. These provide the coherence of the system and it is not necessary to go further back into the legal tradition. Put in this way, there is a danger of exaggeration. French administrative law and, to a lesser extent, French constitutional law are case-based systems which operate in very similar ways to the common law, mainly because of the absence of codification in the sense of a restatement of general principles. By contrast, English company law, social security law, and tax law all operate within closely defined statutory frameworks. They may lack broad statements of principle, but they are not judge-made in the same sense as many aspects of the common law. This difference might be seen as reflecting different intellectual traditions: a rationalism in France and a traditionalism, incrementalism and pragmatism in Britain. That might be to draw the contrast too starkly, but the different traditions do originate in different periods and have been shaped by historical conditions at different times.[10] All the same, the intellectual climate in which the systems have to operate today are very close indeed and this ensures significant commonality of approach.

Samuel has argued that French law reasons from rights (*le droit subjectif*) while the common law starts from actions.[11] In France if there is a right, then a remedy can be found. In English law, traditionally there is a right only if an action and a remedy are provided by law. Thus, in English law, one can get a long way in regulating employment relationships without any conception of a right to strike.[12] However, since the writing of the first edition of this book in 1998, the Human Rights Act of the same year has reduced the impact of this contrast with French law, as English lawyers have increasingly had resort to arguments from (Convention) rights, whether as regards public law (seen for example in

P. Legrand, 'European Legal Systems are not Converging' (1996) 45 ICLQ 52; cf J. Bell, 'English Law and French Law—Not so Different?' [1995] CLP 63, 98–101.

[9] See J. Bell and G. Engle (eds.), *Cross on Statutory Interpretation*, 3rd edn. (London, 1995), 43–6.

[10] See R. Van Caenegem, *An Historical Approach to Private Law* (Cambridge, 1992), 187 ff.

[11] 'Le droit subjectif and English Law' [1987] CLJ 264.

[12] See below pp. 507–509.

the development of the grounds of judicial review)[13] or of private law (seen for example in the development of a law of privacy on distinctly unpromising common law foundations).[14]

Legal development in the two systems is linked to different foci of attention. The French legal structure is described in terms of concepts and the way fact situations fit into those concepts. A good example would be the importance of 'public service' in French law, a concept which is almost absent as a legal framework in English law, yet the same activities are regulated often in very similar ways. English law seems preoccupied with the resolution of fact-situations, albeit on a relatively unstructured basis. The development of the law is by analogy from facts, rather than through the logical articulation of legal concepts. Although this is accurate to some extent, there are limits to this characterization. Much of French law is case-based these days and the judges when they reason are more likely to follow methods similar to the common law in reasoning by analogy.[15]

The common law reasons by dialogue with the past, using analogies and decisions from the past in order to provide the building blocks for the future. Although this is explicit in much of what is said in a common law judgment, it is equally evident in the way lawyers reason in France. In any legal system, law operates as a tradition, a set of ideas and texts handed down and worked upon by a legal community.[16] Continuity and consistency are important legal values, though they are appreciated to different extents by different legal systems. The English common law is at the extreme of valuing legal certainty through precedent and other devices perhaps more than the achievement of justice in the individual case. The French legal tradition is even more formalist in terms of procedure, but allows a degree of latitude in the characterization of facts and the interpretation of rules by judges in individual cases. The differences are perhaps more ones of emphasis rather than radical distinctions in mentality.

V. A 'Social Model'?

Over the last decade or so in particular, French lawyers and others have raised questions as to the way in which French law should develop over the coming years. On the one hand, some are concerned to preserve what they see as valuable in their own, distinctive legal tradition, whether this is at the level of legal concepts (for example, *la cause* in contract law[17]) or, and especially, at the level

[13] D. Feldman, 'Standards of Review and Human Rights in English Law' in D. Feldman (ed.), *English Public Law* (Oxford, 2004), ch. 7; P. P. Craig, *Administrative Law*, 5th edn. (London, 2003), 421–425, 445–446, 465–473 and esp. 568–603.

[14] e.g. *McKennitt v. Ash* [2006] EWCA Civ 1714; [2007] 3 WLR 194.

[15] J. Bell, 'English Law and French Law—Not so Different?' [1995] CLP 63, 81–83.

[16] M. Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 237.

[17] Below, pp. 317 ff.

of legal values. So, for example, it would appear that a significant reason for proposals put forward in 2005 by a group of French jurists for reform of the law of obligations and prescription[18] was that French private lawyers felt left out and even left behind by developments at a European level towards a 'European Civil Code' or at least, a 'Common Frame of Reference' (proposals which are often seen as dominated by German and/or common law thinking).[19] As to legal values, there has developed a debate as to whether French law as a whole reflects and should continue to reflect a 'social model', a model different from the 'liberal' model seen as typical of 'Anglo-Saxon' law (meaning English law and the laws of the United States) and also of some of the regulations and directives emanating from the European Union.[20] But by no means all French lawyers accept the premises of this way of thinking. So, while for example some argue for a 'social' or '*solidariste*' approach to the law of contract, others counter that this way of thinking should not be allowed to contradict established *French* legal principle (notably, the binding force of contracts) and the important values of legal and contractual certainty.[21] Not surprisingly, this kind of debate is most prominent in the area of employment law, where the traditional and overtly 'social model'—reflected in the fact that *droit du travail* is seen as part of *le droit social*—is being challenged by reference to a more liberal approach.[22] As Mark Freedland explains in Chapter 12, the election in 2007 of President Sarkozy may mark a turning point in this respect.

VI. Conclusion

It would be wrong to conclude that there are no significant differences between English and French legal cultures. The traditions of codification, legal education and judicial decision-making, as well as procedure in and out of court, all have a significant impact on the way a lawyer operates. At the same time, it would be wrong to exaggerate the differences. Both systems are very much 'formalist' in terms described by Atiyah and Summers.[23] In this sense, it matters to both that the law is clear and certain (and is thus predictable), as much as it produces a fair outcome in all individual cases. The legal procedures and decision-making of

[18] P. Catala (ed.), *Avant-projet de réforme du droit des obligations et de la prescription* (La documentation française, 2005) ('*Avant-projet de réforme*').

[19] On these proposals see in particular Report from the Commission, *First Annual Progress Report on European Contract Law and the Acquis Review* Com (2005) 456.

[20] This was particularly noticeably in some French reaction to the so-called 'Bolkenstein Directive', EC Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market.

[21] Below, pp. 300–301.

[22] Below, pp. 511–512.

[23] P.S. Atiyah and R.S. Summers, *Form and Substance in Anglo-American Law* (Oxford, 1987), 11–28.

both are clearly rule-based far more than American law. It would also be wrong to consider that the legal systems are monolithic. The chapters in this book will show that approaches in private law are different from administrative law, and areas such as employment and commercial law have specific characteristics, often because they are designed for specific groups of people who also form the body of judges who adjudicate on the application of those rules. The outcome is that France is a multi-jural society with a variety of legal cultures which have some similarities and differences. While some broad statements can be made, a better understanding is gained by closer attention to the detail of how specific branches of the system operate.

9

Property Law

I. Introduction

The Declaration of the Rights of Man and of the Citizen of 1789 declares that property is 'an inviolable and sacred' right (article 17) and that 'the goal of any political association is the preservation of the natural and imprescribable rights of man'. These rights are liberty, property, security and freedom from oppression (article 2). Property ownership is an essential constituent of liberal political society. While that political value has persisted, it has undergone significant changes. The economic context has altered since 1789. We are no longer dealing with an economy dominated by rural landholding and produce. The industrial, consumer and intellectual revolutions have successively created a range of movable and intangible items of property whose value is of increasing importance. The public policy context has also changed in that restrictions imposed on the use of property in the public interest are more generally accepted. Indeed, article 9 of the Preamble to the 1946 Constitution suggests that public ownership of socially important goods is imperative. We will see that this provision has had a limited impact, but policy limitations on private ownership are an important feature of the modern law of property.[1]

A. History

Contemporary French property law is the product of a number of influences. Much of the conceptual language in which property is described stems from Roman law. The Civil Code adopts most of the basic divisions of Roman law, such as possession, dominium, usufruct and servitude. This was inevitable given the developed state of civil law scholarship and the influence of Roman law scholars in the formation of the Code. All the same, the ancient customary law was not without influence. The medieval tenure system was swept away in 1789, but the protection of the family and inheritance system were strongly influenced by the ancient customary law and the desire to promote family solidarity. The Revolution gave further policy direction to property law in terms of the place of public utility

[1] See especially the discussion below, p. 275 below.

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and the status of property. But the significance of social utility expanded during the social welfare reforms of the 1930s onwards. Nationalization also had an impact in creating new categories of publicly owned property. Public ownership here has important similarities with private property in that there is an owner (the state) whose rights the law protects. Indeed, when it came to privatization, the Conseil constitutionnel ruled that article 17 of the Declaration of the Rights of Man and of the Citizen of 1789 protected the state's property as much as that of a private individual. Accordingly, it could not be transferred to private owners for less than its true value.[2]

B. General Concepts

The French law of property as set out in the Civil Code represents the conceptual structure of Roman law applied to the needs of a predominantly agricultural society. Much has happened since 1804. France is no longer predominantly agricultural and land ownership has a much more important role as residences than as farms.[3] Whereas physical property was important in 1804, much more of modern wealth is found in intangible property: copyright, patents, designs, know-how, computer programs and other forms of intellectual property. Whereas free use of land was a relatively straightforward paradigm, the modern world has to accept more restrictions imposed for the good of the community, such as servitudes to provide electricity, gas, telephones and water, as well as planning and environmental restrictions. Although the structure of French property law remains fundamentally similar to that established in 1804, the context in which it operates is now different and the problems which arise are not always the same. In some areas, such as collective property, this has required legislation. In other areas, the broad terms of Code provisions have had to be adapted to new situations. Thus, while much of the conceptual structure established in the Civil Code remains in place, its operational context has changed radically and concepts often serve new policy objectives.

1. Bien

French law uses a number of terms to describe property. The simplest word is *chose* which identifies a physical thing. The Code prefers to use the term *bien* to designate things which are capable of being appropriated. As Portalis put it, 'things would be of no interest to the legislator without the utility which men draw from them'. Thus, article 714 of the Civil Code provides that some things are not property because they are for the common enjoyment of all, e.g. the environment. *Bien* is used to designate both tangible and intangible property.

[2] C. cons. 26 June 1986, *Privatization*, Rec. 61, Bell, *French Constitutional Law*, decision 30.

[3] One survey would suggest that on average 62.5% of household wealth is tied up in land, most of it residential: Malaurie and Aynès, *Les Biens*, 38.

2. Patrimoine

Legal writing since Aubry and Rau has made use of the concept of *patrimoine* ('patrimony') to describe the totality of rights which an individual possesses.[4] Rather like the notion of 'estate' used in the common law's treatment of inheritance, it combines both the assets and liabilities of an individual which go to make up her or his wealth, but excludes purely personal rights, such as parental authority. The *patrimoine* is treated normally as an indivisible whole and contains both property rights and obligations owed (debts and rights of action). In modern times, it has become possible to divide a person's patrimony into a business and a personal patrimony. This has come about thanks to the creation of the one person company by the *loi* of 11 July 1985.[5] A further example is found in the legislation which establishes the institution of *fiducie* whereby property is transferred to one person under an obligation to hold it for the benefit of another.[6] Under the new article 2011 of the Civil Code, the fiduciary holds the property and rights transferred to him 'holding them separate from his own patrimony'. A *patrimoine* normally belongs to a physical or legal person, but there are a few situations in which French law recognizes a *patrimoine d'affectation*, a free-standing estate which is dedicated to a particular objective, such as a *fondation* (the closest the French come to the equitable notion of a 'charity').

II. Types of Property

A. Corporeal and Incorporeal Property

Property is divided by authors into corporeal and incorporeal property. Corporeal property includes tangible things, such as land and chattels. Incorporeal property, on the other hand, is more complex. It embraces a wide range of intangible things, such as debts and shares, as well as intellectual property rights, such as patents and copyright. It also includes property rights less than ownership, such as hypothecs, even over tangible property rights.

While the Civil Code lays down the basic rules for property in general, an important part of the law relating to incorporeal property is to be found elsewhere. Intellectual property has distinctive characteristics which have led, in France as in England, to its being treated as a separate category of property. The special legislation in this area has recently been brought together in a 'Code of

[4] See E. Bartin, *Cours de droit civil*, 5th edn. (Paris, 1917), vol. IX, paras. 573–576; Malaurie and Aynès, *Les Biens*, paras. 7ff.

[5] No. 85-695. On the *entreprise unipersonnelle à responsabilité limitée* (EURL) and the *exploitation agricole à responsabilité limitée* (EARL), see below p. 470.

[6] *Loi* no. 2007-211 of 19 Feb. 2007 whose art. 1 introduces provisions into the Civil Code. See below, pp. 340–341 and for a comparison between the proposed *fiducie* and trust see Malaurie and Aynès, *Les Biens,* para. 763.

intellectual property' (*Code de la propriété intellectuelle*) which deals with the rights of authors and artists, and 'industrial property', such as patents, designs and models.

B. Movable and Immovable Property

Article 516 of the Civil Code divides property between immovable and movable property, a distinction which broadly corresponds to the distinction between real and personal property in English law.

1. Immovable property

Immovable property is essentially real property, but for convenience in an agricultural economy various items of personal property are treated as part of immovable property. Because the category of immovables was fixed in 1804, this list and the distinctions to which it has given rise may seem rather archaic, and it certainly has lost a lot of its significance in a post-industrial society.

Article 517 of the Civil Code subdivides immovable property into three categories: (a) immovables by nature, (b) immovables by destination, and (c) immovables by their object.

(a) Immovables by nature

These are the most straightforward. The principal category set out in article 518 is land and buildings which are immovable by reason of their attachment to the ground. It is not necessary that foundations are dug, provided the construction is attached to the soil. Thus, an electricity pylon even if not embedded in a concrete base is an immovable by nature.[7] Things which are attached to buildings or land are also immovables so long as they are part of it. For example, in the case of the Catalan frescoes,[8] some peasants sold the frescoes on the walls of a chapel to an antique dealer. He removed them from the walls and sold them to two Swiss museums. The original vendors claimed the property back and brought an action in the French courts on the ground that the property sold was an immovable. The museums claimed that the property was movable and that the Swiss courts had jurisdiction. The Cour de cassation decided that the frescoes were immovables by nature, but once detached from the chapel became movables. This solution parallels articles 520 and 521 of the Code in relation to crops and trees, which are treated as immovables so long as they are not cut or harvested.[9]

[7] Civ. 4 May 1937, DH 1937.141. See also art. 519 C.civ. which mentions windmills.

[8] Ass. plén. 15 Apr. 1988, D 1988.325 concl. Cabannes.

[9] All the same, it is possible to sell the crops as movables in anticipation of the harvest. For this purpose, case law and doctrinal writing has created the notion of a 'movable by anticipation': Malaurie and Aynès, *Les Biens*, paras. 133–136.

(b) Immovables by destination

These are movable property placed on land for the service and exploitation of land. Article 524 illustrates this idea by a list of rural examples such as animals for cultivation, rabbits, beehives together with presses, barrels and other items necessary for the production of beer or wine and tools necessary for forges, paper-making or other factories. More modern examples would cover tools of trade in a bar, hotel or clinic. In order for something to be an immovable by destination, it is necessary that the movable attached to the land and the land itself both belong to the same person, and for it to be dedicated to the land in the sense that it is indispensable to the exploitation of the land. If it is an immovable by destination, then it cannot be seized by creditors in the same way as movables. An illustration comes from the case of *Tiersonnier*[10] where a landowner placed 80 cattle on his land and claimed that they were exempt from a *saisie-exécution*.[11] It was held that, although they had been dedicated to the land, only 60 were indispensable to the exploitation of the land. The surplus 20 animals were therefore merely movables which could be seized.

(c) Immovables by their object

These are certain rights which relate to the land (*a ius ad rem*). Article 526 of the Code lists these as a usufruct of an immovable, a servitude or an action to reclaim land.

2. Movable property

Movable property is defined by article 527 to include things which are movable by nature and those which are movable by law. Movables by nature are things which can be moved from one place to another, whether they are moved by a human being or, like animals, can move themselves. Movables by law are those obligations and actions which concern sums of money due or movables, shares or other interests in commercial or financial companies.[12] The importance of the classification of a thing as a movable is that it can be subject to seizure, including a *saisie conservatoire*.[13] There are more limited conditions for the seizure of buildings.

C. Things Outside Commerce

A number of things are not in commerce[14] and are not treated as either movable or immovable property. So, for example, certain family heirlooms are not capable

[10] Req. 19 Oct. 1938, DH 1938.613.
[11] Above, p. 117.
[12] On the classification of *fonds de commerce* (the assets of a person involved in commerce) see below pp. 473–476.
[13] Above, p. 98.
[14] Art. 1128 C.civ. and cf. below, p. 317.

of being traded.[15] Moreover, public property can be subject to special treatment. Public buildings, the seashore and other land held by public bodies is part of the *domaine public* and is not capable of being bought and sold by private individuals. Such public property is governed by the *Code du domaine de l'Etat*. Public bodies do acquire some property from private individuals for their ordinary activities, e.g. an office in a public square in which the town's tourist information office is run. Such property is not part of the essential character of the state or local government and is merely private property which a public body happens for the moment to be occupying. But the office could next become a florist shop run by a private individual. In such a situation, the property is part of the *domaine privé*. Thus a public body will have some property which is integral to its activity and is part of the *domaine public*, like the town hall, and some which is merely part of the *domaine privé*. The distinction is important in terms of how the property can be transferred. If property is part of the *domaine public*, then special procedures have to be followed to declassify it as part of the *domaine public* before it can be sold to a private person. If the property is part of the *domaine privé* then it can be transferred in much the same way as any other piece of land. It is not possible to obtain title to the *domaine public* by prescription. Given the increasingly fluid line between the public and private sector in modern government, this distinction is easier to state than to apply to the range of agencies and organizations which form part of the public sector.

D. Public Property

The discussion of *domaine public* highlights the fact that private individuals do not own all the property. The state is also a major owner. In terms of land, the distinction between the *domaine public* and the *domaine privé* points out that the state is owner in some cases because of the importance of certain property to the public interest, but in other cases it has become owner for more accidental and contingent reasons. No harm is done to the public interest if the *domaine privé* is sold off to the private sector. In more recent years, the state has become owner not only of land, but also of companies and other assets. Nationalized industries and businesses have been the mechanism for running public services such as the railways and television. But the state has also acquired an interest in other companies for more contingent reasons. The most famous of these was the acquisition of the car-maker Renault after the Second World War as a punishment for the collaboration of the firm's owners with the German occupation. As with the *domaine public*, the state is the legal owner of this property either directly or by means of *entreprises publiques* which it has created to run an activity. The state has the right to use and enjoy the property in the public interest. But the acquisition and disposal of such property by means of nationalization and privatization is controlled by *loi*. Nationalization and privatization fall within the legislative province of Parliament under article 34

[15] e.g. Civ. (2) 29 Mar. 1995, Bull. civ. II no. 115.

of the Constitution. Despite the wide wording of paragraph 9 of the Preamble to the 1946 Constitution, the Conseil constitutionnel has required that public necessity be demonstrated to justify a nationalization of property in the private sector.[16] When it comes to privatization, the state must receive full compensation for the assets transferred to the private sector, otherwise some citizens are unequally advantaged in the distribution of public property.[17] The state is thus subject to significant restrictions in the exercise of property rights in relation to public property. As a result, it has often preferred simply to own property in the same way as private individuals, e.g. by acquiring a shareholding in a company through the operation of the market, rather than through nationalization, or to sell such shares on the open market, rather than through privatization. In consequence, the rules on private property with which this chapter is concerned are of relevance to some activities of the state and other public bodies.

III. Ownership

A. In General

Article 544 of the Civil Code declares that:

> Property is the right to enjoy and dispose of things in the most absolute way, provided that it is not used contrary to statutes and regulations.

The absolute nature of property is clearly qualified by a framework of legal regulation: property is the most absolute right in relation to a thing which the law allows to an individual. The case law of the Conseil constitutionnel makes it clear that property rights can be restricted by law and that one cannot complain of a legislative restriction which is at least as great as existed before.[18] But property rights can be regulated by the legislature, e.g. by planning law or by reference to shareholder publicity rules.[19] The special status of property within the 1789 Declaration only prevents expropriation unless it is justified by a clear public necessity. The limited protection afforded to property has now been reinforced by the European Convention on Human Rights.

B. Ownership and Possession

French law has increasingly supported the position of the possessor of property, rather than the owner. In the case of movable property this is made clear by

[16] C. cons. 16 Jan. 1982, *Nationalizations*, Rec. 18.
[17] C. cons. 26 June 1986, *Privatizations*.
[18] C. cons. 18 Oct. 1961, Rec. 50; C. cons. 25 July 1989, *TGV Nord*, RFDA 1989.1009; Bell, *French Constitutional Law*, 176–182.
[19] Bell, *French Constitutional Law*, 182–184.

article 2279 of the Civil Code: 'In the case of movable property, possession is equivalent to title.' This makes sense since movable property can be transferred easily from individual to individual. Public order is preserved by protecting the person in possession. Obviously the rule does not apply where the transfer of property is subject to some other formality, e.g. registration of cars, but such cases are not common. In the case of immovables, a certain pragmatism applies. It is necessary to protect the person in possession to prevent social disorder. In practice, it is difficult for a person to establish that she has ownership of property, and so she will typically rely on her established possession in any action. Under article 2282, the possessor of real property is entitled to protect their interest 'without reference to the justification of their right'. Since the *loi* of 9 July 1975,[20] even the mere occupier of land (the *détenteur précaire*) is allowed to bring actions to protect his interest based on the simple fact of possession. French law distinguishes between possessory actions and proprietary actions (*action pétitoire*). It is for the claimant to choose between these if evicted from property. If he relies simply on prior possession and seeks to re-establish this, he can be defeated only by the other side demonstrating either a better right to possess or by showing that they are the owners of the property. It is not sufficient for the dispossessor to show that the possessor does not have title to the property.

The possessory actions are *réintégration*, *complainte*, *dénonciation de nouvel oeuvre*. *Réintégration* (previously called *réintégrande*) serves to re-establish the possession of a person who has been evicted by a positive act of another (whether or not it was accompanied by violence). The claimant must be unable to exercise rights over all or part of the property, and must have had peaceful enjoyment of the property at the time of eviction.[21] The *complainte* is an action to stop an actual interference with property rights or intrusion into the property (e.g. work on another's land). A possession can bring a pre-emptive action, the *dénonciation de nouvel oeuvre*, to prevent work which, if it were continued, would give rise to an interference with property rights. Both the *complainte* and the *dénonciation* require that the claimant has enjoyed possession for at least a year,[22] but this is not required for *réintégration*. The idea is to ensure that possession has been established for sufficiently long enough to be able to identify the rights involved. But public order requires that possessors should not be totally dispossessed.

C. Acquisition of Ownership

Ownership can be acquired in a number of ways. One common method of classifying these draws a distinction between cases where the title is simply derived

[20] No. 75-596.

[21] Civ. 23 Feb. 1893, *Chaumier*, DP 1893.1.376 where one neighbour forcefully resisted the use of a water conduit by the claimants so that they never did have peaceful enjoyment.

[22] Art. 1264 N.c.pr.civ.

from another person (e.g. by transfer *inter vivos* or by inheritance) and cases where it is an original (i.e. new) title, as when a person appropriates property that has no owner or ousts its existing owner. A person becomes the original owner of property as a result of his own actions and without reference to the actions of others. This is unusual in modern law, but the French law demonstrates the importance of physical control in the notion of ownership.

1. Original title

(a) Becoming the first owner: occupation

A person may become the first owner of movable property by taking possession of it. This is true of things which have never had an owner, such as wild birds and fish, and things which once were owned but no longer have an owner, such as abandoned property. But ownership cannot be acquired in this way in the case of immovable property: all ownerless property of this kind belongs automatically to the state.[23]

(b) Adverse possession: *usucapion*

The principal method of acquiring original title is *usucaption*, acquisition by prescription. A person acquires title to a thing by possessing it openly and peacefully over a long period (article 712 of the Civil Code). Article 2219 of the Civil Code describes prescription as a method of acquiring or losing rights by lapse of time. In *usucapion* the new owner needs not only to let time elapse passively, he needs to take some positive steps to mark out his ownership. It is not enough that the original owner has lost interest in the thing: there must be some reason why the new owner is the person whose title the law should recognize.

The justification for *usucapion* is a matter of social order. If a person has held the property for a long period then that has become a settled part of social organization and should not be disturbed. Obviously these days registration of title to land and in relation to some chattels offers an alternative and better method of determining who is the owner of which property. Nevertheless, *usucapion* can be useful in dealing with some long-standing situations. Social order requires the law to recognize long-standing possession, however it came about. Thus a person can acquire title by prescription even if he obtained possession in bad faith, e.g. by squatting on land knowing that he had no right to be there. Such a situation is extreme and French law is reluctant to recognize it. Under article 2262 of the Civil Code, the normal prescription period of 30 years applies in this case, so the original owner has plenty of time to bring an action to repossess the property. Where the person comes into possession in good faith, then the prescription period is reduced (*la prescription abrégée*). The shorter period is normally ten years under article 2265 of the Code, but where the original owner has moved from the district of the cour d'appel in which the property is situated, then the

[23] Art. 713 C.civ. (and see also art. 539).

period is extended by twice the number of years in which he has lived outside that area. Thus the maximum prescription period for a good faith possessor is 20 years. Hence the prescription period is referred to as 'prescription of 10 and 20 years' in article 2266. For the shorter prescription period to apply, it is sufficient that the possessor at the beginning of the period was in good faith. But if the vendor of land acquired it in bad faith, then even a good faith purchaser will have to rely on the full prescription of 30 years.[24]

For *usucaption* to apply, the key elements are that the claimant possessed the property in his or her own right in a peaceful and public manner.

Own right: Not every person holding a thing or occupying land does so in his or her own right. A mere occupier, such as a friend who is allowed to live in your flat while you are on holiday, clearly has no pretence of a claim to be owner. Their right to occupy the flat clearly acknowledges that you are its true owner. Similarly the tenant of land or the hirer of a thing, e.g. a hire car, derives their right from another person and cannot claim that their possession gives them any right of ownership.

Long period: The prescription period begins when the claimant or his predecessor in title came into possession of the thing. Given the long prescription period which operates, then it will be common for a claimant to rely not only on his own possession, but also that of a predecessor. The period is long in order to give the original owner every opportunity to claim the property back. Indeed, the Civil Code provides that the prescription period is suspended in certain situations in which the original owner is unable to bring an action. These situations are more limited than under the pre-Revolutionary law, but include where the owner is a child or an adult whose affairs are administered by another (a person under *tutelle*), e.g. because he is mentally incapable of handling his affairs (article 2251). A supervening event (*force majeure*) affecting the owner may suspend the prescription period, but this only applies where the event makes it absolutely impossible for the owner to react to the adverse possession by the claimant.[25]

Publicity: The effect of possession must be noticeable if the original owner is going to have a chance to react and claim the property. Possession must thus be public. It is not possible to become owner if the property is hidden or if occupation is not identifiable. For example, if there is a shared drive, the claim of one user to possess all of it can only be shown if he makes successful efforts to exclude the other from using it.

Ownership must be claimed. Once it is claimed, it is deemed to have existed from the moment the claimant moved into possession. Although this operates as a matter of law, it will usually be difficult to sell the land without the title being clarified. The claimant will thus usually have to obtain an *instrumentum* from a

[24] See Civ. (3), 29 Feb. 1968, Bull. civ. III no. 83.
[25] Req. 11 June 1921, S 1922.1.217 note E. Naquet.

notary which records his title. The notary will receive the statements of witnesses and will record these to demonstrate the right to ownership which is claimed.

Peaceful: Article 2233 of the Civil Code provides that prescription can never be begun by a violent act. The prescription period only begins to run from the date on which forceable occupation ceased. Not even the need to respect social stability requires force to be rewarded.

(c) Movables[26]

The acquisition of title in movables is easier than with land. Commerce requires speed and security in the transfer of items which are easily transported and may be perishable. There is not sufficient time to investigate title in the same way as with land. The transferee wants to be able to rely on apparent title. Going further than English law, which recognizes in this context various exceptions to the principle *nemo dat quod non habet*, article 2279 al. 1 of the Civil Code lays down a general rule for the protection of those who acquire possession in good faith: 'in the case of movable property, possession is equivalent to title'.

This priority of possession only applies in the case of corporeal movables. Incorporeal movables, such as shares, do not transfer in the same way. For example, in the case of *Lefèvre*,[27] Morris, the owner of shares, handed the share certificates together with a signed blank transfer form to his agent. The agent handed the documents to a colleague who used them to transfer the shares to Mme Le Marrois to repay his personal debt to her. The shares register continued to carry the name Morris. The court decided that he remained owner of the shares and that Mme Le Marrois could not rely on article 2279 to obtain title to them. That article is restricted to situations where the thing is transferred manually, rather than by changing a registration. Article 2279 does not apply even to some corporeal objects whose transfer is subject to registration, e.g. ships, river barges and aeroplanes. But these are special statutory exceptions and the category does not extend to other registered objects such as cars.[28]

Possession is a factual situation of control, but it is not lost where someone else has control over the thing on behalf of the possessor. Thus, where the purchaser of a lorry sent it to a garage for repairs, he did not lose possession. The original owner, British Leyland (France), could not claim title to the lorry against the garage on the ground that its dealer had not paid it for the lorry.[29] Whatever defect may have existed in the title of the dealer, the person who purchased the lorry

[26] See C.S.P. Harding and M.S. Rowell, 'Protection of Property versus Protection of Commercial Transactions in French and English Law' (1977) 26 ICLQ 354.

[27] Civ. 4 Jan. 1876, DP 1877.1.33.

[28] Civ. (1), 11 July 1960, D 1960.702 note Voirin.

[29] Civ (1), 16 Jan. 1980, Bull. civ. I no. 30. Similarly, the good faith purchaser of a stolen lorry which he handed over to the police still is considered in possession of the vehicle when the true owner wished to reclaim it: Civ. (1), 22 Nov. 1988, Bull. civ. I no. 331.

from the dealer acquired good title to it and remained in possession while the vehicle was in the garage.

To rely on article 2279, the possessor must be in good faith. Thus, where five old masters paintings were taken away from the place of safety in which they had been placed during the Second World War, the court considered that the subsequent owner could not have been unaware of the unusual origin of the paintings and must be treated as in bad faith. He could not then resist the claim by the original owner, the museums of Stuttgart.[30]

The basic principle is that, where a thief[31] or the finder of goods are still in possession of the thing, the true owner can bring an action of *revendication* to reclaim it at any time—there is no prescription period. But where the property has been passed on, then article 2279 operates to protect the good faith transferee. However, within three years of a loss or theft, the original owner can reclaim the property from the good faith possessor provided he pays the latter the price he paid for it. In that way, the good faith possessor is not out of pocket. Where goods have been bought at a fair, a market or a public sale, or from a seller trading in similar items,[32] then the original owner cannot reclaim the goods against a good faith purchaser.[33] This protects commercial dealings.

2. Acquisition by transfer

Property is usually acquired by transfer from someone who has good title. Unlike German law, French law effects transfer of title automatically by the operation of contract. Under article 1138 al. 1 of the Civil Code, the obligation to deliver a thing is accomplished by the mere consent of the parties. All the same, this is a very precarious basis for security in dealings. In the case of movable property, as we have just seen, it is moderated by the rule under article 2279 that possession is equivalent to title. So the third party can rely on possession as a basis of security for dealings. In the case of land, while contract may effect the transfer of title, the institution of registration of transactions has been introduced to provide security. If the transferee wishes to secure his or her title, he or she has to register it, since priority of interests is granted by law to priority in registration.

(a) Land registration

Land registration (*la publicité foncière*) is governed by the *décret* of 4 January 1955 (as amended). The procedures for registration of land transactions have a long

[30] Civ (2), 23 Mar. 1965, Bull. civ. II no. 206; also Civ. (1), 2 Feb 1965, D 1965.371 (possessor of a stolen Louis XVI desk treated as in bad faith).

[31] Where the owner has merely been tricked out of his property by fraud rather than by theft, he has no similar right to reclaim the goods by *revendication*: e.g. Req. 16 July 1884, DP 1885.1.232.

[32] Whether or not a person trades in similar items is a question of fact: see Pau 3 July 1979, *Chouchou bar*, D 1980.IR.232 where an antiques dealer had sold a Louis XV commode but admitted that his previous dealings included selling a car in a cafe called the 'Chouchou bar'.

[33] Art. 2280 C. civ.

and checkered history. In 1424, Henry VI of England and France required the registration of mortgage transactions in Paris. The *droit coutumier* of Northern France (the 'pays du nantissement') required the transcription of acts for the transfer of land onto public registers, while Brittany operated a system of publicity through bans. The *ordonnance* of Villiers-Cotterets of 1539 tried to extend these systems to the whole country, but this and later attempts were not successful. Registration of gifts was, however, uniformly required. Attempts were made during the Revolutionary period to establish a more systematic land registration system. But the *lois* of 1795 (9 messidor Year III) and 1798 (11 brumaire Year VII) failed. As Ripert and Boulanger remarked, the traditional reason for the unpopularity of land registration was that the Fisc seized upon the registration of land transactions as an opportunity to levy a tax, and this hampered the development of a proper land registration system.[34]

The Roman law tradition strongly influenced the Civil Code. Following Grotius and Domat, article 1138 of the Code provides that the transfer of property is completed simply by the agreement of the parties. Any system which subordinated the efficacy of such an agreement to the formality of registration was seen as contrary to the freedom of the parties. In addition, Bigot de Préameneu, argued in presenting the draft Code to the Conseil d'Etat in 1804 that the peace of families creates public happiness, and this moral and political ideal would be infringed by the conflicts arising from a system of registration of land transactions. For him, 'the system of publicity [of land transactions] prevents families keeping secret their affairs… this secret has always been regarded as one of the principal aspects of individual freedom'.[35] The Code contented itself with requiring the registration of gifts of property which could be mortgaged (to protect family property). Registration of mortgages and similar rights did come in the 19th century, but the land registration procedures set up in 1855 were incomplete and kept records according to the name of the landowner, rather than according to plots of land. A property register of plots of land was only created in 1807, for tax purposes. It took until 1955 to establish a system of recording all transactions by reference to plot of land.

As a consequence of this history, France has a system of registration of transactions, but this procedure does not affect their validity, merely their effectiveness against third parties. There are three distinct elements in the French registered land transaction.

In the first place, there is the agreement of the parties which suffices to transfer the property under article 1138 of the Civil Code. This agreement need not be in writing. Even when it is in writing, it need not follow any particular form and can be an *acte sous seing privé* (a private written document as opposed to

[34] G. Ripert and J. Boulanger, *Traité de droit civil*, iii, Part 2: *Publicité foncière* (Paris, 1958), 57. On the history of land registration, see H. Regnault, 'L'insinuation des actes emportant transfert de propriété à titre onéreux dans l'ancien droit français', *Mélanges Fournier* (Paris, 1929), 665.

[35] P. A. Fenet, *Receuil complet des travaux préparatoires du Code civil* (Paris, 1836), xv, 237.

a notarized act). Because validity does not depend on registration, the relevant date for all issues concerning the validity of the contract is that on which it was made, not the date of registration. Thus, where a contract agreement was made on 20 March, but the notarized act and registration was not made until 4 April, the Cour de cassation decided that the first date was the relevant one for calculating the two-year period within which an action to rescind for *lésion* had to be brought and the later notarized act and registration had no effect on this.[36]

The second element is the notarized act (*acte authentique*) by which a notary records in an official note what the parties have agreed. The notary advises the parties on the transaction. The notary effectively ensures that the requirements for the validity of the transaction have been followed. Only notarized acts or decisions of courts can be registered at the registry of charges. Certain transactions, e.g. charges on land created by agreement,[37] must be made by way of notarized act in order to be valid. Even where an agreement does not require to be in the form of a notarized act to be valid, such as a sale of land, it will have to be recorded by a notary who will verify the signatures and the identity of the parties concerned. The notary (or, in some cases, a court) will act as the gatekeeper to ensure that documents submitted for registration are in proper form.

In the third place, the transaction will be registered in the appropriate local registry of charges (*bureau de conservation des hypothèques*). Despite its name, the register contains all land transactions. The role of the *conservateur* in charge of the office is not to verify the legality of the transactions submitted for registration, but merely to check that a long list of very precise details set out in the *décret* of 14 October 1955 is included in the documentation submitted. Should the information not be included, he will simply reject the application for registration. Only in rare cases does the *conservateur* strike out a registration and this on grounds of fraud. Should this happen, the affected party has the right to challenge the decision in the private law courts.

Any transactions or court judgment which effects or records a change or the creation of real property rights or charges in real property *inter vivos* must be registered, including those subject to a condition precedent or subsequent. This includes real rights such as ownership, usufruct, usage, servitudes, and emphyteusis, and transactions such as sale, gift, exchange or accession to common property. But, in addition, certain personal rights such as a long lease for more than 12 years, as well certain loan agreements for the purchase of property (the *crédit-bail immobilier*) and land concessions , since these seriously affect the value of property. Finally, certain contracts are registered really to ensure that they continue despite changes in ownership, e.g. the contract of land promotion or the *règlement de copropriété*. In the case of charges, it is necessary to distinguish those for which registration is required and those for which it is not. Preferred credit

[36] Civ. (1) 18 June 1962, D 1962.608.
[37] Art. 2127 C. civ.

rights (*privilèges*) are subject to publicity, with the exception of rights set out in article 2104 of the Civil Code which predominantly relate to rights of employees. Judicial hypothecs or charges (*hypothèques judiciaires*) resulting from court decisions and charges created by agreement (*hypothèques conventionnelles*) both require to be registered to have any effect in relation to the property. In the case of legal charges (*hypothèques légales*), most require to be registered.[38]

The effect of registration is to make the transaction or charge effective (*opposable*) against third parties. It has effect from the date of registration. In many cases, the transaction is effective between the original parties or those receiving their interest by way of gift. But a third party taking by way of contract is not bound by the unregistered interest. This protective effect is clearly desirable and so, since 1959, it has been possible for people to provisionally register their rights in advance of a formal transaction. Thus, someone with an option to purchase or with an unnotarized agreement to sell land can register their interest (the system of *prénotation*).

When dealing in relation to the land, the potential creditor or purchaser (or more likely his notary) can check against the land and against the individual owner and discover all interests and charges in relation to land.

(b) Gift

Because under French inheritance law, certain members of the family have rights to a specific share in the estate, the law on gifts is more restrictive than under English law. The principal restriction is in relation to the procedure which must be followed. Under article 931 of the Civil Code, a gift must be made by way of notarized act unless there is a manual transfer. In these ways, there is a public record of the transfer which enables an heir to challenge the validity of the gift or to require the transferee to account for the gift and set it off as part of his or her benefit from the estate.

(c) Inheritance

Property passes directly to the heirs under French law. It is not held by an executor or administrator as a distinct estate which is ultimately distributed to the beneficiaries. Rather the property vests in the universal heirs (those entitled to specific shares in the estate and who inherit unspecified amounts) jointly. The property falls into *indivision* until such time as it is divided up between those heirs, and it is administered under the rules on common property discussed below. Specific heirs are legatees who receive a specific item or amount under the will. On the death of the deceased, they acquire a right to the property in question, but only can enter into possession by making a request to the heirs to hand it over.[39] Succession has been discussed in more detail in Chapter 8.[40]

[38] On these charges see the discussion on hypothecs on p. 291 below.
[39] Art. 1011 C. civ.
[40] Above, pp. 262–263.

D. Ownership of Collective Property

Collective property is of great significance. Property will be in collective ownership in a number of common situations: during a marriage, under an inheritance, or where several individuals share a building, e.g. a block of apartments. The common law uses the notion of trust to handle many of the problems arising in such situations. French law lacks such a concept and so has to regulate the situation of common ownership (*indivision*) of the property in question. It is interesting to observe that many of the outcomes which the common law achieves through the use of trusts and common property are achieved in France through the careful regulation of common ownership. The Civil Code did not favour the situation of *indivision* since it does not enable an individual to exploit the property to the full. But it has to be recognized that there are many reasons why property will remain in *indivision* for a significant period. The most common reasons are family convenience. Where one of the heirs to property is a minor or where the widow of the deceased is still alive, the other heirs may be happy to keep the inheritance together until it can be shared out on the majority of the child or the death of the widow, when it is no longer needed as a family asset. The relationship during marriage is similar. In agricultural settings where the unit may be very small, there are often particularly good reasons for keeping the landholding together and running it as a single unit, rather than dividing it up. As is noted elsewhere, French inheritance law entitles the children of the deceased to share equally and this could lead to fragmentation of an estate unless action is taken.

The legislation laid down in the Code was altered by the *loi* of 31 December 1976 dealing with the management of *indivision*.[41]

1. The basic regime

The property held in common is described as the *masse indivise*. It is treated as a common asset to be managed for the good of all. The way in which French law handles this situation can be seen most clearly from the way in which it deals with the undivided inheritance. While the common property will be constituted essentially by the original inheritance, it is likely that the composition of the assets will change over time. Where new items are added, they become subject to the same rules governing the *masse*. In the case of a replacement, the process is described as *subrogation réelle* in the sense that the rights over the new property are exercised by way of subrogation for the rights which existed over the original property.[42] For instance, if a house is gutted by fire, then the money paid under the insurance

[41] No. 76-286.

[42] This institution of *subrogation légale* is in no way a form of restitution in the common law sense. It merely identifies a replacement for property which has been lawfully disposed of in the normal course of the management of the common assets. In the common law of restitution, the concern is more commonly to provide a remedy for wrongful transfers of property. See further below, p. 449.

policy becomes subject to the rules on *indivision* in place of the house. Equally, if the co-owners agree to sell the house, then the proceeds of sale become part of the *indivision*.[43] But if the property is sold by only one of the co-owners, then the proceeds are his, subject of course to his duty to account to the *masse* for the value of the property sold. The value is determined at the date of repayment to the *masse*. For instance, in 1936, a father sold a motor launch belonging to the inheritance he shared with his sons for 2,600 francs. He purchased another launch which he resold in 1946 for 8,000 francs. The court held he was obliged to make restitution to the *masse* for the value of the launch in 1936 assessed in terms of prices in 1954.[44]

The last case illustrates that the rights of co-owners are rights against each other, but do not prejudice third parties. Third parties can acquire good title to items of the common property sold by a co-owner.

Since 1976, the rules on the enjoyment of the fruits of the inheritance or community of property have been simplified. In broad terms, the fruits of the exploitation of the common property belong to the *masse* subject to reasonable remuneration for any services rendered by one of the co-owners. Thus it was stated in one case that, even though one required a special qualification to run a biological analysis laboratory, this did not mean that the profits from this laboratory ceased to be part of the *indivision*, subject to appropriate remuneration for the work, costs and responsibility incurred by the co-owner running it.[45] Article 815-12 of the Civil Code makes specific provision for remuneration, determined if necessary by the judge, for the co-owner who manages the property. The co-owner whose personal efforts have led to an increase in the value of the common property, e.g. a farm or a business, is entitled to a similar recompense to someone who has laid out expenditure to improve it.[46] Thus a dentist who inherits clients but improves the profitability of the firm is entitled to some remuneration, even though the increased clientele remains common property.[47] The rules are more flexible than those on the remuneration of English trustees.

The common property consists not only of assets, but also of debts. Creditors will be paid in priority from the assets (*actif*) of the estate and they may bring actions to secure the seizure and sale of common property in order to obtain repayment. Where an individual co-owner has personal debts to a third party, that creditor cannot seize any of the common property, but under article 815-17

[43] e.g. Civ. (1), 6 Nov. 1967, D 1968.36 where a house was sold for 14,944,576 (old) francs and reinvested in a business which was then sold at a loss for only 133,026 (new) francs. The value of that part of the inheritance was taken by the Cour de cassation to be the proceeds of sale of the business, since the heirs shared the gains and losses.

[44] Bordeaux 18 Feb. 1954, D 1955.151 note Weill.

[45] Civ. (1), 10 Mar. 1984, Bull. civ. I no. 152.

[46] Civ. (1), 25 May 1985, D 1988.28.

[47] Civ. (1), 26 Jan. 1994, *Epergue*, JCP 1994. IV.697.

of the Code he can petition to bring about the division of the assets and thus be repaid from the share due to his debtor.

The normal regime for the administration of common property (*le régime légal*) applies unless there is a specific agreement. Under article 815-3 of the Code 'decisions for the administration and disposal of common property require the consent of all the co-owners'. The principle of unanimity obviously poses practical problems, especially where expenses must be incurred. The same article of the Code requires an express mandate for any decision which exceeds the normal use of the thing as well as for the making and renewal of leases. In the case of routine administration of the property, an implicit mandate will be presumed to exist. Where special steps have to be taken to conserve the property, then any co-owner is considered to have authority to take the necessary action and to reclaim the costs from others.[48] Such steps have been described as 'physical or legal measures which are intended to protect the property from an immediate danger without seriously compromising the rights of the co-owners'.[49] It will be common that the common property will be entrusted to the administration of one individual, e.g. a farm is run by one of the children of a family. That person will undertake administrative tasks. For example, in the case of the estate of the painter Picasso, the legal administrator was entitled to transfer his works of art within the estate to a company specializing in managing copyright.[50] But, of course, the overriding requirement of unanimity means that there will be unresolved disputes between co-owners. The powers of the judge to intervene are limited. Under article 815-6 of the Code, the president of the tribunal de grande instance can order such urgent measures to be taken in the common interest, but this will not cover the generality of issues which arise. Wide interpretation of this general power does, however, permit the common activity to be carried forward. For example, in *de Boutiny*[51] the common property was leased to certain co-owners who would not agree to a rent increase. Another co-owner petitioned for the appointment of a legal administrator of the property to determine the proper rent and the Cour de cassation quashed the refusal by the Cour d'appel to make such an appointment. It argued that the profitability of the common assets was in the interests of all co-owners and the conflict between their interest as co-owners and their personal interest as tenants did not undermine the need to protect that common interest.

No one is obliged to remain in a situation of co-property and she or he may request severance at any time. This is the ultimate safeguard of an individual's

[48] Art. 815-2 C. civ.

[49] Civ. (3), 25 Jan. 1983, D 1983.IR.256: there was no immediate danger requiring the bringing of a court action where works undertaken in relation to a party wall by a neighbour would not give him an immediate right to support by prescription nor did they threaten the fabric of the common property.

[50] See Civ. (1), 4 Apr. 1991, *Picasso*, D 1992.261.

[51] Civ. (1), 13 Nov. 1984, D 1985.104.

interest, and the court may help resolve disputes about the value of the assets, usually by appointing an administrator or expert. Under article 815-9 of the Code, during the currency of the co-property, any co-owner is allowed to make use of the property provided that she accounts to the *masse* for the benefits gained.

2. Co-property in buildings

Buildings which many people share have been a major feature of French urban life for much longer than in England. The regulation of the relationship between the parties has been more developed. In order to deal with the inevitable disputes which occur between those who share the same building, the *loi* of 10 July 1965[52] provides a compulsory regime for all premises which have parts which are partly private, i.e. individually owned, and partly common. This does not apply to property which is entirely in *indivision* nor where a single company or landlord owns the whole building. The *loi* provides a framework for the management of the common parts.

(a) Enjoyment

The common parts of the property are the outside shell of the building (including the walls and roof), the stairs, terraces and all facilities for common use such as lifts. These parts are maintained for the common good. The common parts are owned by each owner in proportion to the value of his or her *lot*. Under article 22 of the 1965 *loi*, in the absence of specific provision, the building is divided into notional one-thousandth units and an owner receives a number of units according to the value of his unit in terms of its size, location, tranquility, etc. Each owner in the building has a right to enjoy the common parts, but it is not like having a servitude across someone else's land. It is rather a right to enjoy the property in common with others and to share the burdens of that common enjoyment.

The use of the property is defined in the basic instrument, the *règlement de copropriété*, and the basic purpose for which the property is dedicated. There must be this special *acte authentique* which establishes the regime under which the property is held and it will describe the property (the *lot*) and what may be done on it. For example, it may be residential property (*habitation bourgeoise*) so that no trade may be conducted on it, but a professional activity such as running a dentist's surgery is permitted within the building. It is for the parties signing the original *règlement* to explain what they intend the building to be used for. All the same, while there is wide freedom of contract, there are some clauses which are extraneous and inappropriate to regulating the use of a building, e.g. a non-competition clause in a shopping centre.

The right to enjoy property is limited of course by the right of others, and article 9 al. 1 of the *loi* makes it clear that one cannot make use of one's rights in a shared building to harm others.

[52] No. 65-557.

(b) Management

The management of the building is vested in an association of owners, the *syndicat de copropriété*. It has its own legal personality and can bring actions to protect the interests of the co-owners, e.g. to deal with nuisances by a neighbour or to challenge planning decisions of the local authority. The *syndicat* collects the common charges and pays third parties, e.g. for gas to heat the building. All the owners of parts of the building form part of the general assembly. Most decisions are taken by simple majority, but more serious decisions (e.g. to sack the *syndic*) are taken by a majority of all owners, and fundamental decisions, such as to alter the statutes of the *syndicat* require a three-quarters majority of all owners. The most extreme decisions, e.g. to change the character of the building, require unanimity. There is thus a way for individual owners to protect their position, a set of checks and balances to ensure administrative efficiency and no prejudice to the rights of one individual. Day-to-day administration is entrusted to an administrator, the *syndic*, who takes decisions with the support of a management committee (*conseil syndical*). The funds which are collected to pay charges are common property in which the co-owners have no individual rights. It is thus a common fund which is administered by the *syndicat*.

(c) Charges

Charges for the common parts have to be shared between the co-owners. There are two different kinds of charges which are shared in different ways. The first kind are *common services and equipment* which are linked to the enjoyment of the property, e.g. common heating, hot water, lifts and the caretaker. Such charges are divided according to the utility of the service for each *lot*. Thus a ground floor flat pays less towards the lift than a sixth floor flat. For example, where a supermarket formed part of a building but had its own security and maintenance arrangements, it was exempt from the charges for the caretaker and cleaners which applied to the rest of the building.[53] The second kind of charge relates the maintenance, upkeep and administration of the common parts. Such charges are divided according to the value of each *lot* as explained above.[54] Under article 10 of the 1965 *loi*, these categories of charge are compulsory, as is the way of dividing them among the co-owners. The statute is rigid because of the litigation which the previous legislation failed to prevent. A rule-based and unchallengeable system was the only way of reducing the number of disputes which co-ownership generates. The *syndicat* has a charge on the individual owner's property to recover the collective charges if they remain unpaid.

[53] Civ. (3) 1 Apr. 1987, Bull. civ. III no. 72.
[54] Above p. 287.

IV. Property Rights Less than Ownership

A. Usufruct

A usufruct is defined in article 578 as 'the right to enjoy the things which another owns like the owner himself, but with the duty to preserve its substance'. This definition is drawn from Roman law and describes a property right less than ownership. It is of great significance among older members of the family. Created often by will or agreement, an older member of the family is permitted to enjoy property such as the family home while they live before it is sold or taken over by the younger generation. Often the usufructuary (*usufruitier*) will be the widow of the deceased. Unlike the lease, which also gives the lessee the right to enjoy the property for a period of time, it is a property right which must be respected by third parties.

During the usufruct, the usufructuary has the right of enjoyment whereas the reversioner (*nu-propriétaire*) has the ultimate interest in the property. The reversioner expects to obtain the substance of the property at the end of the interest of the usufructuary. Where the property is consumable or fungible, e.g. the merchandise of a business or money, then the reversioner will not get back the things themselves but a replacement equivalent in value. This is often described as a 'quasi-usufruct'. In order to define the rights of the parties, the Code provides in article 600 for an inventory to be drawn up to determine what has been handed over, unless the document creating the usufruct provides differently. Under article 601, the usufructuary has to provide a deposit or an equivalent guarantee, unless there is a provision to the contrary.

The usufructuary enjoys the property and the benefits coming from it. The Code distinguishes between *fruits civils* (such as rents) which are enjoyed as and when they come into the estate and *fruits naturels et industriels* (such as crops either self-sown or grown by man) which are acquired when cut. In both cases they fall to the usufructuary during the period of the usufruct. But in the latter case, if the usufructuary has sown crops which are not harvested when the usufruct ends, then he or she has no right to them or to be compensated for their value.

The interests of the usufructuary and the reversioner are resolved by giving the former only rights concerning the day-to-day administration of the property. He cannot take decisions which have a permanent effect on its value. Thus, article 595 of the Civil Code prevents the usufructuary from leasing the property for more than nine years. (Of course, given security of tenure in commercial and agricultural leases, this can still be problematic.)

There are two limited forms of usufruct used in family arrangements. Under article 625, the *usage* gives the beneficiary the right to use the property and to enjoy its fruits for one's own needs and those of one's family (unless there is specific provision to the contrary). It follows the normal rules on the creation and

extinction of real property rights. The right is one which is *intuitu personae* and so cannot be transferred or leased to another person. An even more limited real property right is the *habitation* which is the right to enjoy property as a dwelling for one's own benefit or for that of one's family.

B. Servitudes

Although the right to property has been described in the Civil Code as a absolute right, it had to compromise with the needs of either the neighbours or the organization of society at large.

The Civil Code created a number of *servitudes* (easements) in order to protect the owners of the contiguous land: if for instance, there is no passage to the public highway, articles 682–685 of the Civil Code provide for a systematic right of way of the plot which is so enclosed (*le fond dominant*). The right of way can only be requested by the owner or the holder of a real right (usufruct, usage, etc.) and compensation must be paid to the owner of the land over which a right of way is claimed (*le fond dominé*). Other servitudes regulate the discharge of natural water: it is prohibited to discharge the rain collected from the roof directly onto the neighbouring land (however, once on the ground it is allowed to flow naturally to the contiguous land), moreover, an owner lower down on a slope is not entitled to build anything which would stop the natural flow of the water (if it builds a wall for instance, holes need to made).

The servitudes mentioned above were particularly relevant in an era during which agriculture and land were so important. However, the industrial and economic progress has given rise to an even larger category of *servitudes*: the *servitudes* of public utility. These *servitudes*, as their name implies, are created in order to benefit the collectivity; they protect the general interest of the population. A number of rules ensures that the integrity of the public highways are respected (a certain distance has to be respected when erecting building, for instance). Property owners cannot oppose the passage of aircraft above their land. Lastly, most lands nowadays have to bear a number of ordinary *servitudes* of public utility: in the air, the passage of electricity, phone lines or pylons, and underground the domestic gas pipes, the connecting pipe to the sewage system, and so on. By contrast with the traditional *servitudes* mentioned above, owners are not compensated when a *servitude* of public utility is imposed over their property; legislation has to provide expressly for it.

V. Other Interests Affecting Property

A. Security Interests

Rights of a creditor secured against property in principle are considered to be personal rights between the creditor and debtor, rather than property rights. They

are thus covered in that part of the Civil Code dealing with special contracts. Nevertheless, some such rights are property rights, e.g. hypothecs. As has been seen, in relation to immovables and to some movables, such interests may have to be registered to be effective against third parties dealing in the property.

1. Privilèges

Certain individuals are preferred creditors and thus have legally protected *privilèges*. These entitle the individual to payment (in competition with others having similar rank) in preference to secured creditors such as the holders of hypothecs. The Treasury is the most preferred creditor. Such *privilèges* can be general or special and in relation to movable or immovable property. In relation to movables, general *privilèges* arise under article 2101 of the Civil Code for example in relation to the payment of court fees, funeral expenses, the cost of medical treatment during a terminal illness, certain rights of employees, and debts owed to a spouse in relation to the development of a business. General *privilèges* in relation to immovables arise under article 2104 in similar situations in relation to court fees and the rights of employees. Special *privilèges* arise in relation to specific kinds of movable property notably in farming, or the lien of a hotelier or of a carrier of goods. In relation to immovable property, they arise under article 2103 especially in relation to loans or work done by builders and architects in relation to the construction of the property. The *décret* of 1955 on land registration has made the *privilèges* in relation to immovable property into legal charges (*hypothèques légales*) and subjected them to registration as a condition of their effectiveness. As a result, they retain their priority status, but must be publicly known.

2. Hypothèques

Hypothecs (*hypothèques*) are property rights which secure the performance of an obligation (e.g. to pay money) against some specific real property. In many ways, the hypothec resembles a common law mortgage in that it offers security, normally against land. At the ultimate extreme, the creditor has the right to seize the property in order to ensure payment of the obligation. But the scope of hypothecs is broader than a mortgage and so the term 'charge' is perhaps most appropriate. Hypothecs, as has been noted, can have any of three sources. Hypothecs arising by agreement (*hypothèques légales*) follow the formalities of a notarized act. There are restrictions on the property which may be made subject to such a charge. The notarized act must specify the property subject to the charge and its location. Article 2130 prohibits a charge on future property, but then undermines this somewhat by permitting a debtor who recognizes that his present property is insufficient to provide security for a debt to promise to charge his future property to secure the debt, as and when it falls into his possession. The agreement thus made is sufficient to generate an automatic charge on the new property from the date when it enters the patrimony of the debtor. The amount of the debt must

also be specified at the time of the contract. A judicial hypothec (*hypothèque judiciaire*) is a charge which is attached by law under article 2123 of the Code to any judgment of a court (civil or administrative) or an arbitration to secure compliance by the losing party. A legal hypothec (*hypothèque légale*) is a charge which arises by law in favour of certain persons. These are specified in article 2121 of the Code as one spouse in relation to the other, for minors in relation to the property of their tutor, of the state, local government and public bodies in relation to the property of their accounting officers, a legatee against the property of a succession, and a number of other rights set out in article 2101. Most of these secure the performance of obligations owed by persons in positions of trust. There are some limits on these. For example, if there is a need to waive the spouse's charge in order to raise security on the property of the other spouse in the interests of the family, then the court can order a waiver where the spouse holds the charge under article 2139 al. 3.

B. Leases

In French law, leases are not generally interests in land, but contracts. They are thus governed by the provisions in the Civil Code on special contracts. There are one or two long leases which are property rights. That said, leases have certain consequences which make them close to interests in land, especially in relation to agricultural and business leases. Article 1743 provides that the tenant's rights prevail against a subsequent acquirer of the leased property. This offers security and is a modification of the relative effect of contracts. Since 1975 article 2283 of the Civil Code has been amended so that the tenant has been able to exercise possessory actions directly without needing to involve the landlord in the action. As has been seen above, a lease of over 12 years is subject to the requirements of land registration. These features recognize the importance of the tenant's interest in relation to the land, but it is still only a personal right. The Cour de cassation made this clear in 1861[55] when it ruled that:

> A lease does not effect any disaggregation of the right to property, which remains in the hand of the landlord, for whom it is merely a means of making it productive and receiving its fruits. Unlike the emphyteusis and the usufructuary, the tenant does not have possession personally in his own right; he possesses on behalf of the owner for whom he is the representative and agent . . .

Most leases are regulated by *loi*. The controls on residential leases are discussed in Chapter 10 as an illustration of restrictions on freedom of contract.[56] Commercial leases have been subject to special regulation since 1926. This provides some security of tenure for someone who has established a business (and its associated

[55] Req. 6 Mar. 1861, *Syndicat Vollot*, DP 1861.1.417; Malaurie and Aynès, *Les Biens*, 98.
[56] Below p. 475.

goodwill) in connection with a specific location in business premises. The tenant has a right to compensation if a lease is not renewed. This is further discussed in Chapter 11.[57] Agricultural leases offer perhaps the nearest example of a lease which is akin to a property right. Under the regulation which has existed since 1945, the agricultural tenant has a right to the renewal of a lease except where the landlord wishes to exploit the farm himself.[58] The tenant can modify the premises and, where the landlord does not consent to this, can obtain court authorization to do this.[59] Where the landlord sells the property, the tenant has a right of pre-emption. That is to say, the tenant can require that the landlord sell to him at the price which the buyer agreed to pay.[60] Although not formally the holder of an interest in land, the agricultural tenant has much more than a personal right against the landlord.

Two forms of long lease are property rights. The emphyteusis (*bail emphytéotique*) is a lease for between 18 and 99 years under which the tenant, in return for a modest rent payment, undertakes to perform major works on the land.[61] This is similar to the construction lease where, under a lease for the same period, the tenant agrees to erect and maintain buildings in good condition on the landlord's land.[62] The formalities for the creation of these are laid down in the relevant codes governing these institutions.

[57] Below pp. 474–476.
[58] Article L 411-16, *Code rural*.
[59] Ibid., art. L 411-28.
[60] Ibid., art. L 412-1.
[61] Articles L 451-1–425-13, *Code rural*.
[62] Articles L 251-1 to 251-9, *Code de la construction et de l'habitation*.