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Property Rights and Bijuralism

*Max-Planck-Institut
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Property Rights and Bijuralism

Can a Framework for an Efficient Interaction of
Common Law and Civil Law Be an Alternative
to Uniform Law?

Mohr Siebeck

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für Hans Georg Bornheim

Preface

The following book discusses the interaction of different provincial systems of property law within a federal state. It was accepted by the Faculty of Law of the University of Cologne as a dissertation for the degree of *doctor iuris* in July 2016. The discussion of secured transaction law in § 12 B and C and § 14 B–D, as well as the discussion of Canadian insolvency law in § 16 A–C is partially based on my dissertation for the degree of Master of Laws at the University of Toronto. The relevant sections have been updated before submitting the dissertation for the doctoral degree. The book, including these sections, has been again revised for publication. In particular, the proposals by the Working Group of the Canadian Conference on Personal Property Security Law, and the 2019 secured transaction law reform in Saskatchewan as well as the decision by the Canadian Supreme Court in *Moore v Sweet* have been included, together with any other updates in case law and legal scholarship to the extent available in New Zealand.

Given that a significant part of the book discusses Canadian law, the citations follow the Canadian Guide to Uniform Legal Citation to ensure that the material can be cited as consistently as possible.

I am grateful to Professor Dr Heinz-Peter Mansel for the support and supervision during my years as a student and graduate student at the University of Cologne. I would also like to thank Professor Klaus Peter Berger for examining my thesis.

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Christchurch, March 2020

Jan Jakob Bornheim

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Table of Abbreviations

A	Atlantic Reports
ABCA	Court of Appeal of Alberta
ABQB	Court of Queen's Bench of Alberta
AC	Law Reports, House of Lords, Judicial Committee of the Privy Council and Peerage Cases
AcP	Archiv für civilistische Praxis
Adel L Rev	Adelaide Law Review
Advocates' Q	Advocates' Quarterly
AJ No	Alberta Judgments
AJ	Acta Juridica
Ala L Rev	Alabama Law Review
Alb L Rev	Albany Law Review
All ER	All England Law Reports
All ER Rep	All England Law Reports Reprint
Alta	Alberta
Alta L Rev	Alberta Law Review
Alta LR	Alberta Law Reports
Am Bankr LJ	American Bankruptcy Law Journal
Am Econ Rev	American Economic Review
Am J Comp L	American Journal of Comparative Law
Am J Legal Hist	American Journal of Legal History
Ann Rev Insolvency L	Annual Review of Insolvency Law
App Cas	Law Reports, Appeal Cases
App Ct	Appellate Court
AR	Alberta Reports
art	article
arts	articles
Ass	Assizes
ATR	Australasian Tax Reports
Austral Prop LJ	Australian Property Law Journal
Bank & Fin L Rev	Banking & Finance Law Review
Bankr	Bankruptcy Court
BC	British Columbia
BCC	British Company Cases
BCCA	Court of Appeal of British Columbia
BCJ No	British Columbia Judgments
BCLR	British Columbia Law Reports
BCR	British Columbia Reports

BCSC	Supreme Court of British Columbia
Beav	Beavan's Rolls Court Reports
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshof in Zivilsachen
BIA	Bankruptcy and Insolvency Act
BLR	Business Law Reports
Boston UL Rev	Boston University Law Review
BR	Bankruptcy Reporter; Quebec Official Reports, King's Bench
Brit J of Can Stud	British Journal of Canadian Studies
Brit YB Int'l L	British Yearbook of International Law
Burr	Burrow's King's Bench Reports
BYU L Rev	Brigham Young University Law Review
C de D	Cahiers de droit
CA Civ	Court of Appeal (Civil Division)
CA Crim	Court of Appeal in Criminal Cases
CA	Cour d'appel; Court of Appeal; Quebec Official Reports, Court of Appeal
Cal	California
Cal L Rev	California Law Review
Cal Rptr	West's California Reporter
Can	Canada
Can Bar Rev	Canadian Bar Review
Can Historical R	Canadian Historical Review
Can J Econ	Canadian Journal of Economics
Can JL & Juris	Canadian Journal of Law and Jurisprudence
CanLII	Canadian Legal Information Institute
Car II	Charles II
CarswellNS	Carswell Nova Scotia
CarswellOnt	Carswell Ontario
CBLJ	Canadian Business Law Journal
CBR	Canadian Bankruptcy Reports
CcBC	Code civil du Bas-Canada
CCLA	Civil Code of Louisiana
CCPPSL	Canadian Conference on Personal Property Security Law
CcQ	Code civil du Québec
CCSM	Continuing Consolidation of the Statutes of Manitoba
cf	confer
Ch App	Court of Appeal in Chancery
Ch Cas	Cases in Chancery
Ch D	Chancery Division; Law Reports, Chancery Division
Ch	Court of Chancery; Law Reports, Chancery Division
Cir	Circuit
CJCCCL	Canadian Journal of Comparative and Contemporary Law
CLJ	Cambridge Law Journal
CLR	Commonwealth Law Reports
CM	Cour municipale

Co Ct	County Court
Co Rep	Coke's King's Bench Reports
Col L Rev	Columbia Law Review
Com Pl	Court of Common Pleas
Comm L Bull	Commonwealth Law Bulletin
Comm L World Rev	Common Law World Review
Conn	Connecticut
Conn App	Connecticut Appellate Reports
Conveyancer	The Conveyancer and Property Lawyer Journal
Cornell L Rev	Cornell Law Review
Cornell LQ	Cornell Law Quarterly
Cowp	Cowper's King's Bench Reports
CPP	Canada Pension Plan
CQ	Cour du Québec
CS	Quebec Official Reports, Superior Court
Ct App	Court of Appeals
Ct Civ App	Court of Civil Appeals
Ct Exch	Court of Exchequer
Ct Sess, In H	Inner House, Court of Session
Cth	Commonwealth of Australia
Curr Legal Probs	Current Legal Problems
D	District Court
De GF & J	De Gex, Fisher & Jones' Chancery Reports
DeCITA	Derecho del Comercio Internacional - Temas y Actualidades
Del	Delaware
Denn LJ	Denning Law Journal
Dist	District
DLR	Dominion Law Reports
DNotZ	Deutsche Notar-Zeitschrift
Duke LJ	Duke Law Journal
E & A	Court of Error & Appeal
e.g.	for example
ECJ	European Court of Justice
Econ J	Economic Journal
ED	Eastern District
Edin L Rev	Edinburgh Law Review
edn	edition
Edw I	Edward I
EIA	Employment Insurance Act
El & Bl	Ellis and Blackburn
Eliz I	Elizabeth I
Engl and W	England and Wales
ER	English Reports
ETPJ	Estates Trusts & Pensions Journal
ETR	Estates and Trust Reports
EU	European Union

Eur Econ Rev	European Economic Review
Eur LJ	European Law Journal
Eur Rev Priv L	European Review of Private Law
EWCA Civ	Court of Appeal of England and Wales, Civil Division
Exch Ch	Exchequer Chamber
f	following (singular)
F	Federal Reporter
FCA	Federal Court of Appeal
Fed TD	Federal Court (Trial Division)
ff	following (plural)
Fla	Florida
FSupp	Federal Supplement
Ga L Rev	Georgia Law Review
GB	Great Britain
Gen Div	Ontario Court (General Division)
Geo III	George III
Geo IV	George IV
Geo V	George V
H & M	Hemming & Miller's Chancery Reports
Harv L Rev	Harvard Law Review
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
Hastings LJ	Hastings Law Journal
HBl	Henry Blackstone's Common Pleas Reports
HCA	High Court of Australia
H CJ	High Court of Justice
HL Cas	Clark & Finnelly's House of Lords Reports New Series
HL	House of Lords
Hofstra L Rev	Hofstra Law Review
How	Howard's Supreme Court Reports
ibid	in the same place
IBRD	International Bank for Reconstruction and Development
ICLQ	International and Comparative Law Quarterly
i.e.	that is
Ill	Illinois
Int	International
Int'l Rev L & Econ	International Review of Law and Economics
Iow L Rev	Iowa Law Review
ITA	Income Tax Act
J Comp L	Journal of Comparative Law
J Comp Leg Int'l L	Journal of Comparative Legislation and International Law
J Econ Lit	Journal of Economic Literature
J Econ Th	Journal of Economic Theory
J Equ	Journal of Equity
J Fin	Journal of Finance

J Financial Econ	Journal of Financial Economics
J Leg An	Journal of Legal Analysis
J Legal Stud	Journal of Legal Studies
J Pol Econ	Journal of Political Economy
J Priv Int'l L	Journal of Private International Law
Jb Dogm	Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts
Jher Jb	Jherings Jahrbücher für die Dogmatik des bürgerlichen Rechts
JL & Econ	Journal of Law and Economics
JQ No	Jugements Québec
JRNS	Juridical Review New Series
Jurist	The Jurist
JZ	Juristenzeitung
KB	Court of King's Bench
Ky	Kentucky
La	Louisiana
La L Rev	Louisiana Law Review
LARCC	Loi sur l'application de la réforme du Code civil
Law & Hist R	Law and History Review
LC	Lower Canada
LCJ	Lower Canada Jurist
Liv L Rev	Liverpool Law Review
Lloyd's Rep	Lloyd's Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
Loy L Rev	Loyola Law Review
LPA	Law of Property Act
LQR	Law Quarterly Review
LR Ch App	Law Reports, Chancery Appeal Cases
LR Ex D	Law Reports, Exchequer Division
LRCP	Law Reports, Common Pleas
LRQB	Law Reports, Queen's Bench
LS	Legal Studies
LT	Law Times Reports
LTVM	Loi sur le transfert de valeurs mobilières et l'obtention de titres intermédiés
LVM	Loi sur les valeurs mobilières
M	Macpherson's Session Cases
Mal L Rev	Malaya Law Review
Man	Manitoba
McGill LJ	McGill Law Journal
Mich L Rev	Michigan Law Review
Minn	Minnesota; Minnesota Reports
MJ No	Manitoba Judgements
MMP	Monatshefte für Mathematik und Physik
Mo	Missouri

Mo L Rev	Missouri Law Review
Modern L Rev	Modern Law Review
Monash UL Rev	Monash University Law Review
Moo PCNS	Moore's Privy Council Cases, New Series
MüKo-BGB	Münchener Kommentar zum Bürgerlichen Gesetzbuch
My & K	Mylne & Keen's Chancery Reports
NB	New Brunswick
NCL Rev	North Carolina Law Review
NE	North Eastern Reporter
Neb	Nebraska; Nebraska Reports
Nethl Int'l L Rev	Netherlands International Law Review
NJ	New Jersey; New Jersey Reports
NJW	Neue Juristische Wochenschrift
NL	Newfoundland and Labrador
Notre Dame L Rev	Notre Dame Law Review
NPC	New Property Cases
NS	Nova Scotia
NSCA	Court of Appeal of Nova Scotia
NSR	Nova Scotia Reports
NSSC	Supreme Court of Nova Scotia
NSW	New South Wales
NSWSC	Supreme Court of New South Wales
Nw J Int'l L & Bus	Northwestern Journal of International Law & Business
NW	North Western Reporter
NWT	Northwest Territories
NY	New York; New York Reports
NYUL Rev	New York University Law Review
NZ	New Zealand
NZL Rev	New Zealand Law Review
NZLR	New Zealand Law Reports
Ohio St LJ	Ohio State Law Journal
OHLJ	Osgoode Hall Law Journal
OJ No	Ontario Judgments
OJ	Official Journal of the European Union
Okla L Rev	Oklahoma Law Review
ONCA	Court of Appeal of Ontario
ONSC	Superior Court of Ontario
Ont	Ontario
OR	Ontario Reports
Ore	Oregon
Ottawa L Rev	Ottawa Law Review
Oxford J Legal Stud	Oxford Journal of Legal Studies
P	Law Reports, Probate; Pacific Reporter
para	paragraph
paras	paragraphs
PC	Judicial Committee of the Privy Council

PEI	Prince Edward Island
Penn St J L & Int'l Aff	Penn State Journal of Law & International Affairs
PMSI	purchase-money security interest
PPSA	Personal Property Securities Act; Personal Property Security Act
PPSAC	Personal Property Security Act Cases
Prov Ct	Provincial Court
QB	Court of Queen's Bench; Law Report, Queen's Bench
QB (AD)	Court of Queen's Bench, Appellate Division; Law Reports, Queen's Bench Division
QBD	Queen's Bench Division
QCCA	Court of Appeal of Québec
QCCQ	Cour du Québec
QLR	Quebec Law Reports
Quart J Econ	Quarterly Journal of Economics
Queb	Québec
R du B	Revue du Barreau
R du D	Revue du droit
R du N	Revue du notariat
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RCLF	Revue de la common law en français
RDF	Recueil de droit de la famille
RDI	Recueil de droit immobilier
RDJ	Revue de droit judiciaire
Rev dr int dr comp	Revue de droit international et de droit comparé
Rev Econ St	Review of Economic Studies
Rev Int Dr Comp	Revue internationale de droit comparé
RGD	Revue générale de droit
Riv dir int priv proc	Rivista di diritto internazionale privato e processuale
RJQ	Recueil juridique du Québec
RJT	Revue juridique Thémis
RL	Revue Legale, New Series
RLR	Restitution Law Review
RPR	Real Property Reports
RSA	Revised Statutes of Alberta
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
RSO	Revised Statutes of Ontario
RSPEI	Revised Statutes of Prince Edward Island
RSQ	Revised Statutes of Québec
RSY	Revised Statutes of Yukon
RTD	Revue trimestrielle de droit civil
s	section
S Cal L Rev	Southern California Law Review
Sask	Saskatchewan

Sask L Rev	Saskatchewan Law Review
Sask R	Saskatchewan Reports
SC	Supreme Court; Session Cases; Statutes of Canada
SC (HL)	Session Cases, House of Lords
SC (TD)	Supreme Court, Trial Division,
SCC	Supreme Court of Canada
Scot	Scotland
SCR	Canada Law Reports, Supreme Court; Supreme Court Reports
SCt	West Supreme Court Reporter
SDHI	Studia et Documenta Historiae et Iuris
Sel Cas T King	Select Cases in Chancery tempore King
SGA	Sale of Goods Act
Sing L Rev	Singapore Law Review
SJZ	Süddeutsche Juristen-Zeitung
SKCA	Court of Appeal of Saskatchewan
SKQB	Court of Queen's Bench of Saskatchewan
SLT	Scots Law Times
SNB	Statutes of New Brunswick
SNL	Statutes of Newfoundland and Labrador
SNS	Statutes of Nova Scotia
SNWT	Statutes of the Northwest Territories
SO	Statutes of Ontario
So	Southern Reporter
Soc Th & Pract	Social Theory and Practice
SQ	Statutes of Québec
ss	sections
SS	Statutes of Saskatchewan
St Ch	Star Chamber
STA	Securities Transfer Act
Stan L Rev	Stanford Law Review
STC	Simon's Tax Cases
Stu KB	Stuart's Lower Canada King's Bench Appeal Cases
Suffolk UL Rev	Suffolk University Law Review
SUL Rev	Southern University Law Review
Sup Ct J	Superior Court of Justice
Sup Ct L Rev	Supreme Court Law Review
Sup Ct	Supreme Court; Cour superieure
SW	South Western Reporter
Swans	Swanston's Chancery Reports
Sydney L Rev	Sydney Law Review
T & T	Trusts & Trustees
Tex	Texas
Tex L Rev	Texas Law Review
TIGA	Torts (Interference with Goods) Act
Tul L Rev	Tulane Law Review

U Chicago L Rev	University of Chicago Law Review
U Det LJ	University of Detroit Law Journal
U Ill L Rev	University of Illinois Law Review
U Pa J Int'l Econ L	University of Pennsylvania Journal of International Economic Law
U Pa J Int'l L	University of Pennsylvania Journal of International Law
U Pa L Rev	University of Pennsylvania Law Review
UBCL Rev	University of British Columbia Law Review
UC	Upper Canada
UC Davis L Rev	University of California at Davis Law Review
UCE & A	Grant's Error and Appeal Reports
UCLA L Rev	University of California at Los Angeles Law Review
UCQB	Upper Canada Queen's Bench Reports
UK	United Kingdom
UKHL	House of Lords
UKPC	Judicial Committee of the Privy Council
UKSC	Supreme Court of the United Kingdom
Unif Comm Code LJ	Uniform Commercial Code Law Journal
Unif L Rev	Uniform Law Review
UNSWLJ	University of New South Wales Law Journal
US	Supreme Court of the United States; United States Supreme Court Reports
USA	United States of America
USC	United States Code
Utah L Rev	Utah Law Review
UTLJ	University of Toronto Law Journal
UWAL Rev	University of Western Australia Law Review
Va	Virginia
Va L Rev	Virginia Law Review
Vand L Rev	Vanderbilt Law Review
Ves Sen	Vesey Senior's Chancery Reports
Vict	Victoria
WA	Western Australia
WASC	Supreme Court of Western Australia
Wash & Lee L Rev	Washington and Lee Law Review
WB	World Bank
WD	Western District
WL	Westlaw US
WLR	Weekly Law Reports
WWR	Western Weekly Reports
Yale LJ	Yale Law Journal
ZEuP	Zeitschrift für Europäisches Privatrecht
ZHR	Zeitschrift für Handelsrecht
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft

Introduction

“There are topics of conversation more popular in public houses than the finer points of the equitable doctrine of the constructive trust.”

Attorney General’s Reference (No1 of 1985), [1986] QB 491 at 506 (CA Crim), Lord Lane

A. The Problem

The incidents of property rights are manifold. Someone deeming herself the owner of something may be surprised to find out what she can or cannot do with that something. This book is not concerned with the variety of factual rights her ownership entails. This is not because it is arguably misleading to talk of the concept of ownership when speaking about the Common Law. Rather, the aim of this book is a different one. This book is concerned with how assets somebody deems herself the owner of – “property” – can be subjected to satisfy others against whom she undertook a promise or who for another reason claim to be entitled to demand some type of performance from her. These others are her “creditors.”

The incidents of property and the way in which one’s property is being made available to creditors differ between jurisdictions. One important way in which the property-creditor link is modified is the use of property as a security for an obligation. The framework governing this use of property as a means of security is secured transactions law. As a subset of property law, secured transactions law can differ significantly between legal systems. Within the European Union, that has led to the calls for a uniform European secured transactions law.¹ The United Nations Commission on International Trade Law (UN-

¹ See particularly the work of the working group on a Draft Common Frame of Reference: Ulrich Drobnig & Ole Böger, eds, *Proprietary Security in Movable Assets* (Principles of European Law, Berlin: Sellier-de Gruyter, 2015); Christian von Bar, Eric Clive & Hans Schulte-Nölke, eds, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (Outline Edition)* (München: Sellier, 2009) at 447–99. For an argument for a European secured transaction law see e.g. Boudewijn Bouckaert, “Divergences of the Law on Securities: A Law and Economics Approach” in: Ulrich Drobnig, Henricus J Snijders & Eric-Jan Zippro, eds, *Divergences of Property Law: An Obstacle to the Internal Market?* (Berlin: Sellier, 2006) 175; Ulrich Drobnig, Henk J Snijders & Eric-Jan

CITRAL) has also continued its work. While it initially only published a legislative guide, it has now published a Model Law for Secured Transactions.² The desirability of a uniform secured transactions law is not universally accepted.³ The example of Canadian law shows that it is possible to accept divergent property law systems and – consequently – different secured transactions law systems within one union.

Using the Canadian experience with bijuralism, this book analyses the differences in the notion of property rights in movable property between Common

Zippro, “Divergences of Property Law: An Obstacle to the Internal Market” in: Drobniq, Snijders & Zippro, eds, *Divergences of Property Law*, this note, 3; Horst Eidenmüller & Eva-Maria Kieninger, eds, *The Future of Secured Credit in Europe* (European Company and Financial Law Review Special Series, Berlin: Walter de Gruyter, 2008); Eva-Maria Kieninger, “Die Zukunft des deutschen und europäischen Mobiliarkreditsicherungsrechts” (2008) 208:2–3 AcP 182; Eva-Maria Kieninger, “European Regulation of Security Rights” in: Drobniq, Snijders & Zippro, eds, *Divergences of Property Law*, this note, 165; Eva-Maria Kieninger, *Mobiliarsicherheiten im Europäischen Binnenmarkt* (Baden-Baden: Nomos, 1996); Willem Rank, “Harmonisation of National Security Rights” in: Drobniq, Snijders & Zippro, eds, *Divergences of Property Law*, this note, 201; Wulf-Henning Roth, “Secured Credit and the Internal Market: The Fundamental Freedoms and the EU’s Mandate for Legislation” in: Horst Eidenmüller & Eva-Maria Kieninger, eds, *The Future of Secured Credit in Europe* (Berlin: Walter de Gruyter, 2008) 36; Henk J Snijders, “Access to Civil Securities and Free Competition in the EU: A Plea for One European Security Right in Movables” in: Drobniq, Snijders & Zippro, eds, *Divergences of Property Law*, this note, 153. For an analysis of secured transactions law harmonization see Moritz Brinkmann, *Kreditsicherheiten an beweglichen Sachen und Forderungen: Eine materiell-, insolvenz- und kollisionsrechtliche Studie des Rechts der Mobiliarsicherheiten vor dem Hintergrund internationaler und europäischer Entwicklungen* (Jus Privatum, Tübingen: Mohr Siebeck, 2011) at 468–87 and Gerard McCormack, *Secured Credit and the Harmonisation of Law: The UNCITRAL Experience* (Cheltenham: Edward Elgar, 2011).

² UNCITRAL, *Model Law on Secured Transactions*, (UNCITRAL) <https://uncitral.un.org/en/texts/securityinterests/modellaw/secured_transactions> accessed 20 September 2019

³ Critical voices include Martin Boodman, “The Myth of Harmonization of Laws” (1991) 39:4 Am J Comp L 699; Martin Boodman & Roderick A Macdonald, “How Far is Article 9 of the Uniform Commercial Code Exportable?: A Return to Sources” (1996) 27:2 CBLJ 249; Ronald J Daniels, “Should Provinces Compete?: The Case for a Competitive Corporate Market” (1991) 36:1 McGill LJ 130; Nuria de La Peña, “Challenges in Implementing Secured Transactions Reform in Latin America” in: Frederique Dahan & John Simpson, eds, *Secured Transactions Reform and Access to Credit* (Cheltenham: Edward Elgar, 2009) 236; Roderick A Macdonald, “In Praise of the Hypothecary Charge” (2007) 7–8 DeCITA 287; Alan Schwartz & Robert E Scott, “The Political Economy of Private Legislatures” (1995) 143:3 U Pa L Rev 595. For an example of an unsuccessful partial harmonization in the United Kingdom see Anja Fenge, “Englisches Kreditsicherungsrecht versus schottisches Sachenrecht: Sharp v Thomson” (1999) 98 ZVglRWiss 410 and George L Gretton, “Reception Without Integration?: Floating Charges and Mixed Systems” (2003) 78:1–2 Tul L Rev 307 on *Sharp v Thomson*, [1997] SLT 636 (HL).

Law and Civil Law, and how transsystemic legislation can cope with these differences. One focus of the book lies in an examination of the difference between the absolute notion of property and its vindication in Civil Law on the one hand and the relative property concept and proprietary restitution as a means of vindication in the Common Law on the other hand. Herein lies the meaning of the introductory quote: the finer points of the equitable doctrine of the constructive trust might be unpopular topics in the public houses of England, but the doctrine itself plays a fundamental role in Common Law property.

This book also shows how the differences between Common Law and Civil Law property law continue to shape secured transactions law. It addresses the law-and-economics suggestion that a Common Law legal system is inherently “better law” by showing that the alleged benefits of the Common Law system are not intrinsically linked to what defines Common Law or Civil Law property. While there is an inherent friction in the retention of two property law sub-systems under the umbrella of one transsystemic jurisdiction, I argue that a complete uniformity of property law would be a radical levelling of the legal culture of either Common Law or Civil Law, or both. Instead, divergent property laws are better addressed in the areas where competing property interests from different property law systems interact. These areas are the conflict of laws and insolvency law.

B. Outline

The *first part* of this book sets the stage for the analysis of the interaction of property, secured transaction, and insolvency within the framework of Canadian bijuralism. Condensed to its most basic meaning, the term “bijuralism” refers to the co-existence of two legal systems under one roof.⁴ In the case of this book, Canada is used as an example of such co-existence. The *first chapter* will thus trace the history of Canadian private law. Because modern Canada is at least institutionally a child of British imperialism, it is particularly the retention of Civil Law in Québec that is of interest. After all, most British colonies have a legal system based on the laws of England, be it the United States, Australia, New Zealand, or most of Canada. The chapter will thus look at the reasons for and the means of retaining Québec’s Civilian heritage. The *second chapter* will then look at the modern meaning of “bijuralism.” The *third* and final introductory chapter will lay the groundwork for the methodological and theoretical approach I take in this book: the economic analysis of the law. It will trace the development of the economic analysis of the law, the method, and its implication for the retention of legal systems and bijuralism.

⁴ Marie-Claude Gaudreault, “Canadian Legislative Bijuralism: An Expression of Legal Duality” (2006) 32:2 Comm L Bull 205 at 205.

Part two of this book is dedicated to property law. *Chapters four and five* give an overview of the substantive notion of property in Common Law and Civil Law. Alas, the scope of these chapters is limited. One very important restriction is that I am only concerned with movable and personal property (“chattel”). The selection could easily be explained as a pragmatic one: this book is long enough as it is without the inclusion of immovable and real property. However, I have two substantive reasons for my selection of movable over immovable property.

First, movable property – by virtue of its movability – is more likely than immovable property to cross the boundaries of legal system. Also, a debtor is more likely to own movable property in different jurisdictions than she is to own immovable property in different jurisdictions. Co-ordination problems between legal systems are thus more likely to occur regarding movable property.

Second, this book is concerned with the impact of property law on economic development. Businesses are more likely to use movable property rather than immovable property as collateral. Thus, the law of movable property is a more appropriate subject of study than the law of immovable property. Nevertheless, this study will show that it is not always possible to explain notions of movable property law without reference to immovable property law. The two are not totally separate areas of law.

Another restriction on the scope of my analysis of property law is that I am not concerned with how the holder of a property right can use her property. Rather, the goal is to place property rights into what the Civilian knows as the notion of “gage commun.” Property is only looked at to the extent of securing obligations. However, for this purpose, it is important to consider how something becomes one’s property and how one retains this property.

The next two chapters, *chapters six and seven*, look at modifications of property law by equity and trust law, and the relationship of both the Common Law and the Civil Law notions of trust and property law. *Chapter eight* presents theoretical accounts for property: why do we have property law, why is it the way it is, and how should it be? Finally, *chapters nine and ten* are concerned with a peculiarity of Common Law property: proprietary restitution. Proprietary restitution as such is unknown to Civil Law, but in Common Law, proprietary restitution re-distributes property and thus affects the gage commun. These chapters will thus try to integrate the notion of proprietary restitution with a theory of property.

The *third part* of the book concerns secured transactions law. First, I look at the economic theories behind secured transaction law in *chapter eleven*. Then, *chapters twelve through fourteen* are concerned with the substantive secured transaction law in Canada’s two legal systems. *Chapter twelve* looks at secured transaction law in the Common Law provinces. Property law and secured transaction law have a more uneasy relationship in those provinces. Thus, the rela-

tionship between secured transaction law and property law merits its own chapter: *chapter 13*. *Chapter 14* looks at secured transaction law in Québec's Civil Law.

Part four looks at the interaction of federal law and provincial law. *Chapter 15* presents security interest created by federal law. These present an interesting object of study because Canadian federal law creates certain security interests without there being a specific frame of reference in which these security interests operate. There is no general federal private law. These security interests depend on their complementary relationship with the general private law systems of the Canadian provinces. *Chapter 16* concerns the treatment of property rights in insolvency. As far as this book is concerned, insolvency is where property rights are most important. It is here where property rights secure the debt. A federal insolvency law that operates on property rights created by divergent legal systems must ensure that the notion of distributional fairness underlying its insolvency regime operates equally on property rights from each legal system. An insolvency framework that realizes this goal addresses concerns that might otherwise lead to the abolishment of one legal system, sometimes euphemistically referred to as "harmonization."

Part five concerns a different vector of co-ordination than part four: conflict of laws. Obviously, there is more potential of friction between divergent legal systems than between legal systems with a great degree of uniformity regarding property law. Certain conflict of laws rules can minimize this conflict. *Chapter 17* looks at international property law, including international trust law. *Chapter 18* looks at international secured transactions law. *Chapter 19* looks at the treatment of international proprietary restitution law.

C. A Note on Terminology

A note on terminology is necessary. When I use the term "Common Law" (capitalized) I mean the legal system that derives from the laws of England. Common Law includes all laws of England, whether they derive from the Court of Chancery or another royal court. If the reader reads the term "common law," on the other hand, this can have two meanings. I could – and in most cases I will – be referring to those laws of England that were not applied by the Court of Chancery, and rules that were later based on those rules. In this sense, "common law" is the opposite of "equity." Confusingly, the word "law" can act as a synonym for "common law" in this sense. If "law" is used to mean "common law," it will usually be preceded by the preposition "at."⁵ In a few rare cases "common law" is supposed to mean the general law of the land, as opposed to

⁵ Andrew S Burrows, "We Do This at Common Law but That in Equity" (2002) 22:1 Oxford J Legal Stud 1.

the peculiar law of a region, a tribe, or a certain class or estate. An example of such a usage would be the sentence “The ‘*Coutumes de Paris*’ formed the common law of New France.” In such cases the fact that the second, rarer meaning is intended is made clear either by the context or by an explicit statement to that effect.

Just like “common law,” the term “equity” can be ambiguous. Once again, in most cases, “equity” will refer to legal rules that were developed in the Court of Chancery or developed from such rules. In a few rare instances, mostly when discussing topical legal writing that itself used the term in such a fashion, “equity” has been used to refer to the concept of discretionary law – that is, some form of leeway in the application of hard-and-fast legal rules granted to judges.

The capitalized term “Civil Law” refers to a legal system that derives its legal rules mostly from Roman law. The non-capitalized “civil law,” on the other hand, distinguishes private law from public law and criminal law. One of the advantages of Civil Law over Common Law is that it commands its own adjective. The capitalized adjective “Civilian” thus denotes that the legal concept is one belonging to the Civil Law rather than the Common Law. The occasionally-used adjective “civilian,” on the other hand, refers to the concept of civil society. It is most likely used in this book when referring to a civilian government rather than the military government of British colonies.

Apart from these terminological notes, it will also be necessary to discuss the meaning of the words “right,” “remedy,” and “legal event.” These, however, are more appropriately the subject of a discussion rather than mere definition. The discussion takes place in a later chapter of this book.⁶

⁶ See Part II: § 9 C.III.2.b), “Counter-Argument”.

Part I

The Analytical Framework of Bijuralism

§ 1 The History of Civil Law in Québec

The continuing existence of two legal systems on Canadian territory – and thus of Canadian bijuralism itself – is a function of history.¹ To understand why the Civil Law persists in Canada, and how it interacted with the Common Law after the British conquest, it is useful to examine the legal history of French Canada. Furthermore, this helps us to understand the role of the Civil Law in the cultural identity of French Canadians.

The development of the private law in the former French possessions in North America is also a function of the changing constitutional frameworks of these territories. It is thus helpful to begin this chapter with a short overview of the history of territorial changes in these territories.

The territory of New France included all French possessions in continental North America. Initially, it was divided into five provinces: Canada, Acadia, Hudson Bay, Newfoundland, and Louisiana. After the end of the Spanish War of Succession, France ceded Acadia, Hudson Bay, and Newfoundland to Britain. At the same time, the colony of Île Royale was established as a successor to Acadia. There thus remained three French possessions in North America: Canada, Louisiana, and Île Royale.

The colony of Île Royale corresponds to modern-day Cape Breton Island, the northern part of Nova Scotia. Its territory ceased to have its own legal system when it became part of Nova Scotia after the Seven Years War. As a further consequence of the Seven Years War, the French province of Canada became the British province of Québec² and Louisiana became Spanish. In 1794, the province of Québec was split into two pieces by the *Constitutional Act, 1791*:³ Lower Canada and Upper Canada. The former was the Francophone province along the banks of the Saint-Lawrence, the latter was the Anglophone province along the Great Lakes. In 1841, both provinces were united into the United

¹ See e.g. Marie-Claude Gaudreault, “Canadian Legislative Bijuralism: An Expression of Legal Duality” (2006) 32:2 Comm L Bull 205 at 206.

² By virtue of the *Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo III, c 83 [*Quebec Act*].

³ *Clergy Endowments (Canada) Act, 1791*, 31 Geo III, c 31.

Province of Canada, only to be split again into Ontario and Québec with the coming into force of the *Constitution Act, 1867*,⁴ which established the Dominion of Canada as one unified kingdom.

Just like in most parts of France, the customary law of Paris was the law of the land in the French North American possessions. The Coutume de Paris was thus in force in pre-conquest Canada⁵ and Louisiana.⁶ In Canada, the Coutume de Paris was introduced in 1640.⁷

Louisiana had its own administration, separate from the French province then called Canada, as of 1712.⁸ As in Québec, the Coutume de Paris, along with royal ordinances, were the law of the land in Louisiana until the end of the Seven Years War.⁹

A. The Conquest of Québec

When the city of Québec was taken in 1759 in the Battle of the Plains of Abraham, in the articles of capitulation, it was stipulated as follows:

“Que Les habitans soient Conservés dans La possession de leurs maisons, biens, effets et privileges.

Accordé en mettant les armes Bas.”¹⁰

The wording of this article of capitulation is interesting to compare with s 92(13) *Constitution Act, 1867* – the modern constitutional provision which

⁴ *An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith, 1867*, 30 & 31 Vict, c 3 [*Constitution Act*].

⁵ See Mario Dion, “Evolution of Legal Systems: Bijuralism and International Trade” in: Canada, Department of Justice, ed, *The Harmonization of Federal Legislation with the Québec Civil Law and Canadian Bijuralism* (Ottawa: Canada, Department of Justice, 1997) at 41; Gaudreault, *supra* note 1 at 206; Michel Morin, “Introduction historique au droit civil québécois” in: Louise Bélanger-Hardy & Aline Grenon, eds, *Éléments de common law et aperçu comparatif du droit civil québécois* (Scarborough, Ont: Carswell, 1997) 59 at 62; William Tetley, “Mixed Jurisdictions: Common Law vs. Civil Law (Codified and Uncodified)” (1999) 4 Unif L Rev 591–620, 877–907 at 606.

⁶ See Tetley, preceding note at 608.

⁷ Richard C Harris, *The Seigneurial System in Early Canada: A Geographical Study*, Paperback (Kingston: McGill-Queen’s University Press, 1984) at 21.

⁸ HW Fontenot, “The Louisiana Judicial System and the Fusion of Cultures” (2003) 63:4 La L Rev 1149 at 1149.

⁹ *Ibid* at 1149–51; Vernon V Palmer, “French Connection and the Spanish Perception: Historical Debates and Contemporary Evaluation of French Influence on Louisiana Civil Law” (2003) 63:4 La L Rev 1067 at 1068; John R Trahan, “The Continuing Influence of le Droit civil and el Derecho Civil in the Private Law of Louisiana” (2003) 63:4 La L Rev 1019 at 1021.

¹⁰ Adam Shortt & Arthur G Doughty, eds, *Documents Relating to the Constitutional History of Canada, 1759–1791*, 2^d edn (Ottawa: J de la Taché, 1918) at 2.

places “property and civil rights in the province,” *i.e.* private law,¹¹ within the realm of provincial jurisdiction. Section 92(13) *Constitution Act, 1867* considers private law as a matter of property and civil rights, the retention of which by the Canadiens was asked for by Lt. de Ramzay in the capitulation.

In 1760, James Murray, at that point military commander of Québec City, issued a proclamation of intent: “Le Roy veut maintenir les Communautés, et les Particuliers, dans tous leurs Biens, dans leurs Loix et Coutumes [...]”¹² However this proclamation was not legally binding for the occupants.¹³ When Montréal fell, the articles of capitulation included the following demand:

“Les françois et Canadiens Continueront d’Estre Gouvernés Suiuant La Coutume de Paris et les Loix et Usages Etablis pour ce pays; Et Ils ne pourront Estre Assujettis à d’Autres Impots qu’a Ceux qui Estoient Etablis sous la domination française.”¹⁴

General Amherst’s reply referred to his earlier statement: “Ils deviennent Sujets du Roy.”¹⁵ This answer meant that the British Crown reserved its right to introduce English law in its new territory.¹⁶

This attitude can be explained. Lawson identifies a spirit in England at the time of the conquest which was shaped by the accomplishments of the Glorious Revolution and an orthodox legal practice which created an oblivious attitude towards the specific challenges of trying to integrate a whole new society with its particular legal system into the Empire.¹⁷ Furthermore, British policy towards Québec was mostly determined by trying to establish a stable military in the province,¹⁸ not civilian governance. The Home Office in Britain lacked a vision for the civilian future of Québec, and had no policy for the integration of the Canadian society into the British Empire. The Secretary of State for the Southern Department – the minister responsible for Britain’s colonial possessions in North America – George Montagu-Dunk, Earl of Halifax, was unsure what shape the civilian government in Québec should take and his proposal for its constitution was an amalgam of the differing advice he received.¹⁹ Halifax,

¹¹ See e.g. André Morel, “Harmonizing Federal Legislation with the Civil Code of Québec: Why and Wherefore?” in: Canada, Department of Justice, ed, *Harmonization I*, *supra* note 5, 1 at 1.

¹² Arthur G Doughty, “Appendix B” in: Arthur G Doughty, ed, *Report of the Public Archives for the Year 1918* (Ottawa: J de la Taché, 1920) 32 at 48.

¹³ Michel Morin, “Les changements de régimes juridiques consécutifs à la Conquête de 1760” (1997) 57 R du B 689 at 689–90 [Morin, “Changements”].

¹⁴ Shortt & Doughty, *supra* note 10 at 20.

¹⁵ *Ibid* at 20.

¹⁶ Morin, “Changements”, *supra* note 13 at 690.

¹⁷ Philip Lawson, *The Imperial Challenge: Quebec and Britain in the Age of the American Revolution* (Kingston: McGill-Queen’s University Press, 1989) at 25 [Lawson, *Challenge*].

¹⁸ *Ibid* at 32.

¹⁹ *Ibid* at 36.

however, had a strong opinion about the superiority of English law and that thought it inconceivable that British subjects should be subordinate to anything but the law of England.²⁰ Indeed, the Royal Proclamation of 1763, dated from October 7, 1763, immediately after the Treaty of Paris, called for the introduction of Common Law in Québec: “We have also given power to the said Governors, [...] to make, constitute, and ordain Laws, Statutes, and Ordinances [...] as near as may be agreeable to the Laws of England.”²¹

Governor James Murray and the colonial council passed just such an ordinance on September 17, 1764. As Riddell points out,²² it is notable that the ordinance was passed more than 18 months after the signing of the Treaty of Paris, which gave the Canadiens 18 months to emigrate if they chose to do so.²³ This indicates that the British government was aware of the importance of the Civil Law for the Canadiens, and the potential negative impact an introduction of English law might have on the attitude of the French population towards their new country. By postponing the introduction of English law, the British government prevented the introduction of English law having any impact on the Canadiens’ decision whether or not to remain in British Québec.

The ordinance established a Court of King’s Bench in the province that was to hear civil law suits “agreeable to the Laws of England,”²⁴ and a Court of Common Pleas that was to hear civil suits

“agreeable to Equity, having regard nevertheless to the Laws of England, as far as the Circumstances and present Situation of Things will admit, until such Time as proper Ordinances for the Information of the People can be established by the Governor and Council, agreeable to the laws of England.”²⁵

Furthermore, the ordinance included a provision governing inter-temporal conflicts of law, where all suits brought by Canadiens where “the Cause of Action arose before the first Day of October [1764]”²⁶ were to be governed by French Law. Any suit exceeding the sum of £10 could be brought before either court; for any suit below, justices of the peace were competent.²⁷

Due to the fact that justices of the peace had to swear an oath that amounted to a rejection of the Catholic faith, the judges could not be recruited from the

²⁰ *Ibid* at 36.

²¹ Shortt & Doughty, *supra* note 10 at 165.

²² William R Riddell, “The First Court of Chancery in Canada” (1922) 2 Boston UL Rev 231 at 233.

²³ Shortt & Doughty, *supra* note 10 at 100.

²⁴ Arthur G Doughty, ed, *Report of the Work of the Public Archives for the Year 1913* (Ottawa: J de la Taché, 1914) at 47 [Doughty, *Report 1913*].

²⁵ *Ibid* at 47.

²⁶ *Ibid* at 47.

²⁷ Morin, “Changements”, *supra* note 13 at 695–96.

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