

Journal of Civil Law Studies

Volume 1

Issue 1 *Civil Law Workshop*

Robert A. Pascal Series

Revisiting the Distinction Between Persons and Things

Article 4

1-1-2008

Is the Name Property? Comparing the English and the French Evolution

Audrey Guinchard

Follow this and additional works at: <http://digitalcommons.law.lsu.edu/jcls>



Part of the [Civil Law Commons](#)

Repository Citation

Audrey Guinchard, *Is the Name Property? Comparing the English and the French Evolution*, 1 J. Civ. L. Stud. (2008)

Available at: <http://digitalcommons.law.lsu.edu/jcls/vol1/iss1/4>

This Article is brought to you for free and open access by the Law Reviews and Journals at DigitalCommons @ LSU Law Center. It has been accepted for inclusion in Journal of Civil Law Studies by an authorized administrator of DigitalCommons @ LSU Law Center. For more information, please contact sarah.buras@law.lsu.edu.

IS THE NAME PROPERTY? COMPARING THE ENGLISH AND THE FRENCH EVOLUTION

Audrey Guinchard*

Introduction.....	21
I. To Dispose of One’s Name: Symbol of a Property Right?	25
A. The Practice: French Variations and English Constancy.....	26
B. The Theoretical Justification of the Practice: Dispelling Confusion.....	33
II. To Protect One’s Name: The Exercise of a Property Right? ...	40
A. The Source of the Confusion	40
1. The Holder of the Action	41
2. The Conditions of the Legal Action.....	43
B. The Rejection of the Confusion	47
III. To Change One’s Name: An Indication of a Property Right?	49
A. The Origin of the Issue: Establishing Immutability of Names in French Law.....	49
B. Solving the Issue: Promoting Property Rights vs Promoting Extra-Patrimonial Rights	55
Conclusion	58

INTRODUCTION

“I will inhabit my name” writes the poet St John Perse¹ to highlight how the name can make a person and symbolise his/her

* Doctor in Law; Lecturer, University of Essex (United Kingdom).

1. ST JOHN PERSE, EXIL, VI (1942). Alexis Saint Léger, French citizen of Guadeloupe, took the pseudonym of Saint John Perse. Some also translate as “I will live my name.”

identity. Certainly, a person cannot be reduced to a name as Juliet warns us:

What's in a name? That which we call a rose
By any other name would smell as sweet;
So Romeo would, were he not Romeo call'd,
Retain that dear perfection which he owes
Without that title. Romeo, doff thy name,
And for that name which is no part of thee
Take all myself.²

Nonetheless, “a necessary and usual sign of personality, the name concentrates personality and expresses it.”³ Some cultures even believe that changing names could cure a person of ill-health.⁴ Embodiment of a person, the name is protected both in article 24-2 of the International Covenant on Civil and Political Rights and in article 8 of the European Convention for the Protection of Human Rights and Fundamental Liberties.

It thus should not come as a surprise that both England and France declare that the name cannot be object of a property right. Though the name embodies so much of a person, it cannot be considered as a thing or good on which one holds property rights. So to the question “is the name property?” the answer is a straightforward “no.” End of the matter then? Not quite. The study of *Du Boulay v. Du Boulay*,⁵ where the Privy Council affirms the English law position, reveals that France and England did not have the same approach in 1869. The case revolved around the question of what protection French law, as applied in the Caribbean island of Saint Lucia, offered to the person whose name was used by another.⁶ If the Privy Council concluded that French

2. W. SHAKESPEARE, *ROMEO AND JULIET*, Act 2, Scene 2, lines 43-48 (1594).

3. R. NERSON, *LES DROITS EXTRAPATRIMONIAUX* 33 (LGDJ 1939).

4. J. Carbonnier refers to the oriental beliefs that to change a person's name when ill will cure this person. 1 J. CARBONNIER, *DROIT CIVIL: LES PERSONNES* 190 (PUF 1957).

5. *Du Boulay v. Du Boulay*, L.R. 2 PC 430 (1869).

6. Because the Treaty of 1815, which marked the end of Napoleon's Empire, conceded to the United Kingdom the Caribbean island Saint Lucia, former French colony alongside Martinique and Guadeloupe, French law was applicable at the time. Martinique, from where the plaintiffs originated from, and Guadeloupe remained French territories. For a history of Saint Lucia, *see*

law offered no protection because the various pertinent legislations in question had not been introduced in Saint Lucia for specific registration, it did not dispute the fact that the said legislation was presented as embodying a “property right” in the name. And indeed, in 1869, the traditional justification in French law courts, a justification which dated back to the 18th century, was that the name is property, albeit a different kind of property than that of other goods or things. Only at the very end of the 19th century was this perception overturned,⁷ allowing, in that respect, French law to become identical to English law. But why, then, did France maintain for so long a position so contrary to that of England? Can the name be related to property? Do we have to revise the taken-for-granted distinction between persons and things, at least for the name?

The question is even more puzzling when one compares in detail the French and English laws of surnames. Indeed, despite now the common affirmation that there is no property right on the name, English and French laws differ significantly in their specifics, and that difference appears to challenge their shared agreement on the name not being property. English law considers that a person is at liberty to change name with no limit other than that of not committing fraud; correlatively, a person cannot forbid a stranger to use his/her name: “the mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress.”⁸ Those two attributes of English law reinforce the idea that a person does not seem to “own” his/her name: s/he exercises a liberty which stretches as far as allowing him/her to assume different names, whatever inconvenience such attitude can create, as long as there is no fraud.

By contrast, to an outsider, French law can appear to create a property right or at least a proprietary interest in the name. Indeed,

H. BREEN, *ST LUCIA: HISTORICAL, STATISTICAL AND DESCRIPTIVE* (Longman, Brown, Green and Longmans 1844), available also on Google Books.

7. See *Du Boulay*. The doctrine played a major role in this evolution which became accepted “truth,” despite sporadic decisions of the courts affirming the contrary until mid-twentieth century, See Cass. Civ., March 1st, 1957 BULL. 1957, 2, 129; Cass. Civ., June 11th, 1963, GAZ PAL. 2, 290 (1963).

8. *Du Boulay*.

contrary to what happens in English law, a person cannot change names on his/her own accord and has various rights of action before the courts, notably when someone else uses his/her name without his/her consent, even if there is no fraud. It is as if the plaintiff “owns” his/her name and that “ownership” is sufficient to trigger legal protection against any use of the name “owned.”⁹ And yet, French law is adamant that there is no property right in the name.

One can only wonder how English and French laws, opposite in their features, can nonetheless reach the same conclusion. Surely, one or the other got it wrong? Could it be French law, as it used to affirm exactly the contrary until the early 20th century? The Privy Council case of *Du Boulay* seems to suggest so. However, the topic deserves a more thorough investigation, especially when one looks at the third feature of the law of surnames, i.e. whether a person can or cannot dispose of his/her name by contract or by will.

In English law a will can be drafted so as to include a “name and arms” clause, which typically transfers the land or any other property to another person on the condition that he (or more rarely, she) takes the name of the testator. This possibility to dispose of one’s own name seems to contradict completely the English law’s affirmation that a person has no property right to his/her name. This time, is it English law that misunderstood the true nature of the name?

Comparison with French law only increases the confusion. Indeed, in France, a person cannot transfer his/her name by will or even by contract, a prohibition that seems to confirm the claim that there is no property right to the name in French law. But then, how can it be reconciled with the other components of the French law of surnames, which seem to suggest the contrary?

To provide the beginning of an answer to those various questions, we will first have to go back in time, at least for French law. As the work of the French legal historian Anne Lefebvre-Teillard demonstrated, the French law of surnames has changed dramatically since the Middle Ages, whereas English law, as far as we could gather, does not seem to have undergone any profound

9. See R. Munday, *The French Law of Surnames: A Study in Rights of Property, Personality and Privacy*, 6 LEGAL STUDIES 79, 88-90 (1986).

transformation.¹⁰ This evolution of French Law affected not only its features, but also the different theoretical rationales it developed to explain those features.

Compared with English law, this analysis will shed new light on our original question—“is the name property?”—in view of the three elements of the law of surnames: whether a person can or cannot dispose of one’s own name (I), protect it (II), and change it (III).

I. TO DISPOSE OF ONE’S NAME: SYMBOL OF A PROPERTY RIGHT?

Roman law recognized that a person could dispose of his name (*gens*) by requiring a beneficiary of a donation or a will to bear his name in exchange for receiving the goods or property.¹¹ Whether this practice survived the collapse of the Roman Empire in the 5th century is unclear, but it somehow reappeared in the Middle Ages in connection with arms and land possessed by the nobility. In English law, “inserted in a will or settlement by which property is given to a person,”¹² the name and arms clause imposes on him “the condition that he shall assume the surname and arms of the testator or settlor, with a direction that if he neglects to assume or discontinues the use of them, the estate shall devolve on the next person in remainder.”¹³

To what extent this ancient practice to dispose of one’s own name is used nowadays is difficult to say, for the last legal challenge was in 1962.¹⁴ Yet it remains a feature of modern English law, whereas French law currently ignores it. “Currently” must we emphasize, because until the mid-nineteenth century, the practice was still alive. English and French laws of surnames have not always diverged in their features (A), albeit the theoretical

10. A. LEFEBVRE-TEILLARD, *LE NOM: DROIT ET HISTOIRE* (PUF 1990).

11. See H. HOULLIER DE VILLEDIEU, *DE LA PROPRIETE DES NOMS PATRONYMIQUES EN DROIT ROMAIN ET EN DROIT FRANÇAIS* 32-34 (Oudin Poitiers, thèse 1883); and E. PERREAU, *LE DROIT AU NOM EN MATIERE CIVILE* 153-154 (Sirey 1910). Both authors cite *De Officiis* by Cicero.

12. E. JOWITT, *THE DICTIONARY OF ENGLISH LAW* (Sweet & Maxwell 1959), v. “Name and arms clause.”

13. *Id.*

14. In *Re Neeld, Carpenter v. Inigo-Jones and others*, CA (1962) All E.R. 335, (1962) Ch. 643.

justification by which French lawyers explained this opportunity to dispose of one's own name promotes a reassessment of whether the name is property or not (B).

A. The Practice: French Variations and English Constancy

The name and arms clause is one of those features English law seems to have always known but whose origins are quite uncertain. According to Lord Evershed, "the existence of clauses of this kind for a hundred years or more in the precedent books and the absence until 1945 of any reported attempt to challenge their validity is, I venture to think, somewhat impressive;"¹⁵ a statement which Lord Upjohn affirmed: "Names and arms clauses have been known for the best part of two hundred years."¹⁶ Certainly, cases attesting of the practice go back up to the 18th century, but it is probably safe to presume that the clause, regarded as "relics of feudalism" by a modern commentator,¹⁷ was introduced around the 12th century when surnames appeared and started to symbolise a noble household, its reputation, and its wealth. Originally used by the nobility, the clause allows for an estate to remain within the family, under its name and arms, in a situation where the latter would have disappeared, if it were not for the clause.

In accordance with custom, for the name and the law of arms, only direct male heirs are entitled to take the name and arms; in their absence, name and arms cease to be transmitted to the next generation and simply disappear. So although the land and the related property would be transmitted to the family through the remaining female line, the connection between land and name, and possibly coat of arms, would be lost. To avoid such possibility, a testator who wishes to maintain his name and arms alive will use a name and arms clause, requiring his daughter, her children and/or her spouse, or even his nephew, to bear his name and arms as a condition to inherit the estate or part of the estate¹⁸ given. Failure to comply with the clause would simply lead to the loss of the

15. *Id.* at 344 (dissent).

16. *Id.* at 354.

17. O. M. Stone, *Name Worship and Statutory Interpretation in the Law of Wills*, 26 MOD. L. REV. 652, 656 (1963).

18. *Barlow v Bateman*, (1730) 3 P Wms 65.

estate, which would pass in remainder to the next person identified in the will, who also would have to take the name and arms.

The effectiveness of the clause in passing names, in connection to estates, to several generations down the line is best illustrated in *In Re Neeld*¹⁹ decided by the Court of Appeal in 1962. T, the testator, devised a will where two names and arms clauses were at stake: one by which the name Inigo-Jones should be used, and another by which the name and arms of Neeld should be taken. What is interesting is that the first name was the testator's initial surname, before he changed it in 1941 to comply with a name and arms clause, that of Neeld, as settled in Neeld's will in 1855, nearly a century before. In other words, one clause was a way of perpetuating his own name (Inigo-Jones) despite his change of surname; the other clause allowed for the other name (Neeld) to be maintained, by making sure that the original name and arms clause drafted in 1855 would still be complied with by the second and third generations.²⁰ Obviously, ensuring the diversity of names was not the sole purpose of the second clause: there were property interests at stake that the testator did *not* wish to forfeit. Notwithstanding, the name and arms clause is an effective means to secure the use of a name that would otherwise become extinguished.

Such possibility to transfer one's own name to future generations had not always found approval. In 1766, Lord Mansfield considered the clause as "silly,"²¹ and it is true that nowadays the clause appears to be "a relic of a bygone age,"²² for some, "English law . . . show[ing] far too much tolerance of the mythology which the dead past imposes on the living present."²³ Not surprisingly then, from 1945 onwards, a series of cases threatened the clause's existence. The courts held a number of clauses too uncertain in their requirements, e.g. the testator not specifying when the change of name must be effective.²⁴ They

19. *In Re Neeld*.

20. *Id.* at 338.

21. *Gulliver d. Corris v Ashby*, (1766) 4 Burr 1930, 1941 ("so silly a condition as this is").

22. *In Re Neeld*, at 466 (Cross J.).

23. Stone, *supra* note 17, at 657.

24. *Re Bouverie*, *Bouverie v Marshall*, (1952) 1 All ER 408, (1952) Ch. 40; *Re Woods Will Trusts*, *Wood v Donnelly*, (1952) 1 All ER 740, (1952) Ch. 406; *Re Murray*, *Martins Bank Ltd v Dill*, (1955) Ch 69, (1954) 3 All ER 129, CA;

also declared the clauses contrary to public policy “in so far as they affect the names of married women or their husbands”²⁵ and force either the wives not to adopt their husbands’ or husbands to adopt their wives’ family name. The courts’ eagerness “to control these relics of feudalism”²⁶ came to a halt in 1962 when the Court of Appeal concluded that the “wind of change developed against these clauses in a number of authorities . . . was but a light, fickle and variable breeze.”²⁷ Even the dissenting Lord Evershed thought that “if clauses of this kind, which have been part of the conveyancing system in our country for very many years, ought now to be treated as contrary to public policy, that is a matter for Parliament rather than for the courts.”²⁸ Parliament not having intervened, the name and arms clauses continue to be a feature of English law of surnames, allowing people to transfer their own names, and sometimes their coats of arms, at the same time as their property.

In the 21st century, the contrast with French law could not be more striking. Modern French law ignores such possibility, and the clause is conspicuous by its absence in current law books. Yet, like in English law, the name and arms clause had been a feature of the French law of surnames for hundreds of years. The clause was part of the mechanism of the *saisine*, a concept born in the Middle Ages. Literally, *saisine* means the action of seizing, of taking over and in that sense, there may well be a connection with the English concept of *seisin* which refers to feudal possession.²⁹ Legally though, the *saisine* is the *use* of a “thing” (*choses*) corporeal or incorporeal which closes, with time passing by, the possibility for others to complain about it.³⁰

and *Re Howard's Will Trusts*, *Levin v Bradley*, (1961) Ch 507, (1961) 2 All ER 413.

25. Stone, *supra* note 17, at 656.

26. *Id.* at 656.

27. *In Re Neeld*, at 354 (Lord Upjohn, for the majority).

28. *Id.* at 347.

29. The scope of this article did not allow us to investigate the matter, but it would be an interesting subject for a legal historian. See for example, E. LEHR, *ÉLÉMENTS DE DROIT CIVIL ANGLAIS* § 368 (Larose-Forsel 1885), who uses the term of “saisine” to translate the “livery of seisin” of English law. Whether the author knew of the Middle Ages concept remains to be investigated, in a future research project.

30. LEFEBVRE-TEILLARD, *supra* note 10, at 44.

Applied to the name,³¹ the *saisine* has exactly the same feature as the name and arms clause in English law. It will allow for the use of the name by persons other than those in the direct male line and who are still part of the same household. Indeed, a nobleman who has only daughters or has no heirs at all can transfer, to his son-in-law, grandson, or nephew, his name which would otherwise become extinguished for lack of direct male heirs. The clause would be inserted either in his daughter's wedding contract or in his will, often on the condition that if other collateral male heirs exist they would consent to the transfer.³²

Like in English law, assumption of the name was sufficient to satisfy the clause. After all, the *saisine* is about the use of the name for a certain period of time—the longer the better. Still, on both sides of the Channel, those who changed their name to comply with a clause may wish to secure their new name (and position) by seeking the Crown's approval, in the form of, in French law, a letter patent,³³ and in English law, a royal licence, an Act of Parliament, or more rarely a letter patent.³⁴

With similar origins as its English counterpart, the name and arms clause in old French law served the same purpose: perpetuating a name in connection with arms and an estate, primarily within the nobility. Hence, the French Revolution, with its quest to abolish any sign associated with the nobility, should have seen the disappearance of the clause. However, despite its feudal origins, the practice survived the turmoil of the Revolution. In the first half of the 19th century, the *Cour de cassation* (hereinafter, Court of Cassation) the French supreme court for civil and criminal matters, and even the *Conseil d'Etat* (hereinafter,

31. The "saisine" has been used in other areas, like inheritance law. See P. OURLIAC & J. L. GAZZANIGA, *HISTOIRE DU DROIT PRIVE* 207-209 (1985).

32. LEFEBVRE-TEILLARD, *supra* note 10, at 46; 2 DENISART, *COLLECTION DE DECISIONS NOUVELLES ET DE NOTIONS RELATIVES A LA JURISPRUDENCE ACTUELLE* 256 (Desaint 1766); and 12 GUYOT, *REPertoire UNIVERSEL ET RAISONNE DE JURISPRUDENCE CIVILE, CRIMINELLE, CANONIQUE ET BENEFICIALE* 175 (Visse 1784).

33. LEFEBVRE-TEILLARD, *supra* note 10, at 107-109.

34. One is recorded in 1317 about arms, in DOM PEDRO DE ALCAZAR, *LAW OF ARMS IN MEDIEVAL ENGLAND*, available at <http://www.sca.org/heraldry/laurel/lexarm.html> (last visited November 6, 2008).

Council of State),³⁵ decided a few cases attesting to the use of name and arms clauses either in wedding contracts³⁶ or in wills.³⁷

But that the practice survived was a Pyrrhic victory, and by the second half of the 19th century, English and French laws stopped converging. Indeed, the context in which the clause was born and has developed has fundamentally changed in France, but not in England. Whereas the liberty to change names remained in English law, it was abolished in French law with the law of *6 fructidor an II* (1794). From then on, nobody could assume a new name by reputation as was the practice before the Revolution, or as is still the practice in English law. In order to use a new name, one has to ask for an official change of name *prior* to that use and in accordance with the administrative procedure established by law of *11 germinal an XI* (April, 1803). Copied more or less on the administrative procedure used before the Revolution for the letters patent granted by the King,³⁸ the procedure means that the person has to establish what would later be called a “legitimate reason” to change his name.³⁹

Whether a name and arms clause can constitute such “legitimate reason” after the Revolution is unclear. The procedure is mainly administrative and only extensive research in the French Government’s archives would allow for an accurate answer. However, one case of 1831 shows that the French Government, at least in the early 19th century, was not necessarily adverse to the name and arms clause.⁴⁰ An *ordonnance* (hereinafter, ordinance) of 1815, taken in accordance with the procedure of 1803, authorised the son-in-law to take the names (and title) of his wife’s father,⁴¹ once the latter died. Better, the same case reveals that sixteen years later, the Council of State, the French ‘supreme court’⁴² for administrative matters, is not hostile *per se* to the clause. Indeed, the court considered that the period of one year to

35. CE, December 16th, 1831 S. 1832 II 103.

36. Cass. Civ., January 13th, 1813, S. 1812-1814, 1, 259.

37. Cass. Req., November 16th, 1824, S.V. 1822-1824, 1, 561; S. 1825, 1, 148. The case was actually cited by the plaintiffs in *Du Boulay*.

38. LEFEBVRE-TEILLARD, *supra* note 10, at 128-130.

39. The requirement is in the French Civil Code, article 60 al.1.

40. CE, December 16th, 1831 S. 1832 II 103.

41. *Id.*

42. Until the law of May 24th, 1872, the Council of State was not fully independent (possibility for its decisions to be overturned).

oppose the ordinance does not start at the time when the ordinance was granted but at the time when the condition realises itself, i.e., here, at the time when the father dies and leaves his name to his son-in-law. In other words, the Council of State adapted the administrative procedure to the specific features of the name and arms clause.

Even the Court of Cassation may not be completely opposed to the name and arms clause in this first half of the 19th century. Indeed, in 1813, the Court rejected the argument that to promise to bear another's name as part of a wedding contract is, in principle, contrary to the law of 6 *fructidor an II*.⁴³ Thus, the lack of liberty to change one's name established by this law does not render the name and arms clause invalid *per se*. However, it does endanger its survival, even though there may not be a direct antagonism to the practice. Indeed, the loss of liberty to change one's name goes hand in hand with the obligation to comply with the procedure set out in the law of 11 *germinal an XI*, an obligation that the French courts, whether Council of State or Court of Cassation, enforce strictly.

As a result, as long as the beneficiary of a name and arms clause does not use the procedure, he will be considered as not having complied with the clause. This is so even if he believed he had already been authorised to change his name because the French Government had granted an ordinance stating he could change his name, but obviously without having respected the procedure of law of 11 *germinal an XI*.⁴⁴

This loss of liberty to change names renders the name and arms clause a much less attractive tool in French law. Its drafter runs the risk that his wishes may not be respected despite the willingness of those benefiting from the clause to comply with it. If we add the fact that the procedure is costly⁴⁵ and involves a risk of the request being rejected by the Government, in the long term the clause would only lose its appeal and by the mid-nineteenth century onwards, there is no case law attesting of the practice.⁴⁶

43. Cass. Civ., January 13th, 1813 S.1812-1814, 2, 259.

44. CE, December 16th, 1831 S. 1832, 2, 103; Cass. Req. April 22nd, 1846 S. 1848 I 417.

45. LEFEBVRE-TEILLARD, *supra* note 10, at 190 and n. 9. The procedure became less costly closer to the 20th century.

46. The last case is of 1846: Cass. Req., April 22nd, 1846 S. 1848 I 417.

Certainly, the clause is still mentioned in books related to donations and wills, but the authors never cite a case less than fifty to sixty years old, and they all affirm the necessity to comply with the procedure of law of *11 germinal an XI*.⁴⁷

In 1910, E. Perreau suggested that the clause was rarely used and he noted indeed that “for more than sixty years, our case law reports do not contain any decision on this question.”⁴⁸ Thereafter the clause ceased to be mentioned anywhere. Hence, after centuries of similar practice, French law finally departed from English law. The impossibility to assume one’s name by reputation without prior authorisation finally got the better of the name and arms clause.⁴⁹ This is however only part of the story. If the name and arms clause disappeared in French law, it is also because it faced a new challenge at the end of the 19th and beginning of the 20th century. Associated with the concept of property until then, the name and arms clause could only be affected by the movement among French scholars to condemn the idea that the name could be property, an idea which will be from then on considered as the correct interpretation of what the name is. In that sense, French and English law have never been so far apart, for even if English law does not consider the name property, it still allows for the name and arms clause to be used in contracts and wills.

47. See M. TROPLONG, DES DONATIONS ENTRE VIFS ET TESTAMENTS, OU COMMENTAIRE DU TITRE 2 DU LIVRE 3 DU CODE NAPOLEON 276, §256 (H. Plon 1872): *la condition de prendre le nom du testateur est très légale, et elle met l’héritier dans l’obligation d’y satisfaire,*” the author however cites no other cases than a 1836 one (July 4th, 1836, D. 1836, 1, 302); *id.* G. BAUDRY-LACANTINERIE & M. COLIN, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL: DES DONATIONS ENTRE VIFS ET DES TESTAMENTS 77, § 177 (Larose 1895).

48. PERREAU, *supra* note 11, at 156.

49. Nowadays, the Council of State refuses to grant a change of name as a condition to execute a will or to the person wishing to take that of his mother. See respectively, D. Pepy, *Les changements de nom dans le droit français*, in ETUDES ET DOCUMENTS DU CONSEIL D’ETAT 1966-67 31, 36; and F. Bernard, *Le Conseil d’Etat et les changements de nom*, ETUDES ET DOCUMENTS DU CONSEIL D’ETAT 1977-1978 67, 78. The law 57-133 of February 8th, 1957 (following a law of July 2nd, 1923) remedied only partly to the loss of names due to lack of a direct male line. See I. De Silva, *Le changement de nom devant le Conseil d’Etat: le relèvement du patronyme menacé d’extinction. Conclusion sous CE n. 236470 du 19 mai 2004*, REVUE DE DROIT PUBLIC ET DE SCIENCE POLITIQUE 1153, 1159 (2004); and F. Petit, *La mémoire en droit privé*, RRJ 17, 38-39 (1997).

B. The Theoretical Justification of the Practice: Dispelling Confusion

Confusion stems as much from the evolution French law went through, as from French law contrasted with English law. Until the early 20th century, the name was considered to be property in French law, in contradiction to the English law's understanding that the name is not, as the Privy Council reminded the plaintiffs in the 1869 case of *Du Boulay*. Afterwards, because of the movement among French scholars in the 1900s, French law adopted what is apparently the same position as English law, but on grounds which make one wonder if the two laws of surnames mean the same thing. To dispel this confusion, we must first understand English law's approach to the act of disposing of one's name, for it reflects on French law's original conception of the name. This initial analysis will shed light on the subsequent rationales French law had adopted, highlighting where the confusion lies.

In *Du Boulay* the Privy Council affirmed for the first time the accepted understanding that the name was not property in English law. Strictly speaking, the case does not involve a name and arms clause, but rather raises the issue of whether a person can protect her/his name against use by another in English law. Nonetheless, the judgment's wording is broad enough for the decision to encompass the name and arms clause within its declaration that the name is not property. A comparison between the name and the arms or the title reinforces this conclusion. Indeed, a title is "an incorporeal and impartible hereditament, inalienable and descendible."⁵⁰ In other words, it is property,⁵¹ though it cannot be

50. 35 HALSBURY'S LAWS OF ENGLAND § 906, at 568 (4th ed. 1994) v. "Peerages and Dignities." See notably *Earl Cowley v Countess Cowley*, (1901) AC 450, at 457-458.

51. Note that the first meaning of the word "title" is not a dignity, but refers to "a right of property . . . with reference either to the manner in which the right has been acquired or as to its capacity of being effectively transferred," OSBORN'S CONCISE LAW DICTIONARY (Sweet & Maxwell, 10th ed. 2005), v. "Title."

sold.⁵² Similarly, arms are considered property,⁵³ although “the right to bear arms is a dignity conferred by the Crown, and not an incorporeal hereditament.”⁵⁴

As a consequence, both title and arms are protected against assumption and use by another without grant,⁵⁵ whereas the name can be assumed and used freely without formality.⁵⁶ If there is “a personal right to bear arms”⁵⁷ and title, there is no right to bear name, just a liberty to do so. Thus, to dispose of one’s own name in a will is not a sign of a right of property on the name, but rather the exercise of the liberty to make one’s will conjoined to the liberty to assume names by reputation.⁵⁸ It is not so much about disposing of or transferring a thing, object of property, than exercising a liberty to assume a name in order to be able to maintain its existence. The fact that English Law insists so much on the name and arms clause being a voluntary assumption of a name rather than a transfer of it can be seen in *Doe d Luscombe v Yates* (1822)⁵⁹ where the beneficiary of the will had assumed the testator’s name of Luscombe *before* he came into possession of the estate, i.e. before the name and arms clause took effect.⁶⁰ If the

52. A contract for the purchase of a title is contrary to public policy and void. *Parkinson v College of Ambulance Ltd and Harrison*, (1925) 2 KB 1.

53. *Stubs v Stubs*, [1862] 1 H & C. 257; *In re Croxon*, *Croxon v. Ferrers*, [1904] 1 Ch. 252, 258. Note that the common law courts do not have jurisdiction, see HALSBURY’S, *supra* note 50, at § 970, p. 599.

54. 42 HALSBURY’S LAWS OF ENGLAND § 749 (4th ed. 1994) v. “Settlements”; and *Manchester Corp’n v Manchester Palace of Varieties Ltd*, (1955) P 133, (1955) 1 All ER 387.

55. Title: *Earl Cowley v Countess Cowley*, (1901) AC 450, 460; *see* 2 JARMAN ON WILLS 1532, 1533 (8th ed 1951).

Arms: *In re Croxon*, *Croxon v. Ferrers*, (1904) 1 Ch. 252, 258; *In re Berens*, *In re Dowdeswell*, *Berens-Dowdeswell v. Holland-Martin*, (1926) 1 Ch. 596, 604-605; and *Barlow v Bateman*, 3 P. Wms 65, on appeal (1735) 2 Bro Parl Cas 272, HL.

56. *Doe d Luscombe v Yates*, (1822) 5 B & Ald 544; *Davies v Lowndes*, (1835) 1 Bing NC 597; *Bevan v Mahon-Hagan*, (1893) 31 LR Ir 342, CA; and *Barlow v Bateman*, (1730) 3 P Wms 65.

57. *In re Berens*, at 605.

58. *In re Neeld*, at 353-354; *Re Howard's*, at 523; *In re Berens*, at 604-605; and *Du Boulay*, at 447.

59. *Doe d Luscombe*.

60. John Luscombe Manning was required to assume the name of Luscombe once he had “attained the age of 21 years” and be entitled to the estate. However, during his minority, he assumed the testator’s name of

name and arms clause was a transfer of the name-property, the name could not be used before the clause became effective, i.e. before Luscombe inherited the estate. However, Luscombe, like any donee, did not need the clause to be able to bear the name: he retained the possibility to assume the testator's name, whether or not the latter drafted the clause.

That English law puts the emphasis on the liberty to assume another's name rather than on the transfer of name-property by the testator does not surprise when compared to what we know of the origin of the name and arms clause in French law. The French medieval concept of *saisine* is the prolonged *use* of a "thing" that does not create a right of ownership, but that extinguishes the right of others to complain about the use.⁶¹ Like in English law, what matters is that there is an assumption of a name for a period of time long enough for the person to secure the use of his name, a bit like an adoption, rather than a donation.⁶² The emphasis is on the liberty to change name rather than on the testator's supposed right to transfer the name. And because, like in English law, the French *saisine* is neither property nor possession, the name is not property, but rather the object of an exercise of liberty. But whereas English law will retain this approach, French law will progressively drift away from it by superposing the concept of property on the notion of *saisine* and its related feature, the name and arms clause.

The association between name and property results from a combination of factors which taken separately are not conclusive and demonstrate how problematic the assimilation between name and property can be. It all started when, at the end of the Middle Ages, French lawyers ceased to understand the concept of the *saisine*. Trained in Roman law, they turned towards the more familiar concepts of possession and property to explain the features of the *saisine*. In his commentaries of the *Justinian Code*, Balde († 1400) affirmed that the name was *bien hors du commerce* (a thing outside commerce), in order to highlight the fact that the right on the name as known in the *saisine* does not incorporate the right to

Luscombe and was known thereafter by this surname instead of his own surname.

61. LEFEBVRE-TEILLARD, *supra* note 10, at 44.

62. *Id.* at 46.

sell the name.⁶³ The link he established between the name and “goods” (*biens*) made it tempting later on to try to qualify the right attached to the name, and what is better suited than the right to property, which concerns goods?⁶⁴

Under that light, the clause mechanism seems to point towards an act of disposition, indicative not of possession, but more of a property right on the name. There is a donation of a name rather than an adoption as it was understood in the Middle Ages. The onus is thus on the transfer from testator to donee rather than on the donee’s liberty to assume a new name. For French lawyers, this correlation between name and property is comforted by the fact that the surname has become hereditary in the sense that the father gives his name to his children. Again, the emphasis on the person who “transfers” the name rather on the one who “receives” it.

This use of Roman law to reshape rationales underlying existing practices is not surprising. France, like most continental countries, had been deeply influenced by Roman law—much more than England ever had been.⁶⁵ So although French and English laws continue to recognise the name and arms clause and the liberty to assume a new name, by the late 18th century, the rationale provided changed dramatically, introducing confusion about what the name is and is not.

The artificial character of the link made between name and property can be seen in the wording used to describe the French law of surnames, just before the 1789 Revolution. In 1780, one of the most important encyclopaedias of French law, the *Repertoire Guyot*, stated that “the name is an *inalienable* property of each family and *household*. It suffices to enjoy this property/ownership to be a *male* descendant of who bears the name.”⁶⁶ One can immediately see that the features of the original *saisine* remain: the name cannot be *sold*, and the name and arms clause, used mainly by the nobility because the name is a symbol of the

63. *Id.*

64. *Id.* at 83.

65. Even the *seisin*, which we do not know so far whether it is related to the *saisine*, is described as feudal possession, implying a different kind of possession than that of Roman law. OSBORN’S, *supra* note 51, at v. “seisin.”

66. Desessarts, in GUYOT, *supra* note 32, at 168 (author’s translation and emphasis added), also cited in LEFEBVRE-TEILLARD, *supra* note 10, at 84, n. 149.

household, depends on the existence, or rather absence, of a *male* line to which the name can be transferred. Thus, the declaration that the name is property is more a standard clause than the result of a careful analysis of both the name and the concept of property. The forgotten *saisine* which remains in its features has been dressed up with the ill-suited concept of property.

This evolution of French law would not have had such an impact if it were not for the success the new explanation enjoyed in the 19th century. Far from being dispelled, the confusion found a new life, except that it was not perceived as such, but rather as the correct view of what the name is. The case of *Du Boulay* is a testament to this understanding of the law. The plaintiffs whose arguments were based on French law cited the *Dictionnaire du Notariat* (Dictionary of the Notary), affirming that the name is property.⁶⁷ One would then think that when the presentation was criticised in the late 19th and early 20th centuries, the confusion would disappear. Certainly, scholars demonstrated that the name could not be disposed of by the father and thus be hereditary like property is.⁶⁸ So in that sense, one of the factors that led to the conclusion the name was property has been rejected.

However, concerning the name and arms clause, the link previously made between property right and liberty to dispose of the name is never questioned, even by those maintaining that the name is property,⁶⁹ nor by those considering that the name could not be property. Indeed, the reason why the name cannot be property anymore is because it cannot be disposed of . . . by a name and arms clause, for the *disposée* of the clause cannot change his name on his own accord but must ask at the very least the Government's authorisation! In other words, instead of

67. *Du Boulay*, at 440, 443.

68. M. PLANIOL, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL CONFORME AU PROGRAMME OFFICIEL DES FACULTÉS DE DROIT* § 398 at 152 (LGDJ, 4th ed. 1906); and 1 PLANIOL & RIPERT, *TRAITÉ PRATIQUE DE DROIT CIVIL* 141 (1952). For Planiol, it is the legislation (*loi*) that obliges the father's name to be adopted as a sign of the father-child relationship. The criticism is not without weaknesses. If it is true that the Civil Code provides for the nomen to be a sign of possessing the status of son or daughter, it is nonetheless notoriously silent concerning the surname to be given at birth. Until the reforms of 2002 and 2003, custom dictated that the legitimate child should have his father's name.

69. SALVETON, *LE NOM EN DROIT ROMAIN ET EN DROIT FRANÇAIS* 305 (thèse 1887), cited by PH. NERAC, *LA PROTECTION DU NOM PATRONYMIQUE EN DROIT CIVIL (ÉTUDE DE JURISPRUDENCE)* 15 (PUF 1979).

disappearing, the emphasis put on the testator disposing of the name, is strengthened by the disappearance of the liberty to assume one's name.

The name and arms clause is not analysed anymore as the conjunction of two liberties, that of making one's will and that of changing names, but as simply the act of writing a will that opposes the principle of immutability of names and that cannot therefore survive. Perreau, at the heart of the movement combating the name presented as property in the 1900s, clearly links the impossibility to dispose of the name with the prohibition to change one's name at will. "What instability, indeed, what difficulties, what confusion and what frauds, in family and business relationships, if anybody could modify his name as freely as the composition of his estate (*patrimoine*)!"⁷⁰ Thus, Perreau associates property with both liberty to dispose of the name and liberty to assume another's name: loss of the latter implies loss to dispose of the name and thus loss of property rights.⁷¹ Paradoxically, but easily understandable as the concept of the *saisine* had not yet been rediscovered,⁷² Perreau's reasoning perpetuates the original confusion introduced after the 15th century, whereas the original intention of the author is to dispel the confusion between name and property!

The argument definitely loses its apparent logic when compared with English law. To follow Perreau's line of reasoning means that English law should affirm that the name is property as it not only accepts the practice of the name and arms clause but also recognises the liberty to change names. And yet, English law refuses to consider the name to be property, clearly distinguishing it from the title and arms. Hence, although English and modern French laws appear to agree that the name is not property, their understanding rests on an analysis of their respective practices which are contradictory. However, as before, this contradiction

70. E. Perreau, *De l'incessibilité du nom civil*, REVUE CRITIQUE DE LEGISLATION 548, 550 (1900).

71. "It appears to us that the Government's authorisation would be necessary nowadays, otherwise we would be confronted to a true cession of the name", i.e. to the name being a thing object of property, *see* Perreau, *supra* note 70, at 552.

72. The major work of A. Lefebvre-Teillard has not yet been written. In addition, legal history has just been introduced as part of the curriculum in French law schools.

does not rest much on what is property in relation to the name. Rather it builds on an historical misconception to which has been added a new twist by the loss of the liberty to change names in French law.

The introduction of the concept of extra-patrimonial right to explain the particularities of the modern French law of surnames only reinforces this evolution. Indeed, at the same time that Perreau demonstrated the name cannot be property, he used a new concept developed by German scholars as explained by Saleilles⁷³ and which put the emphasis on what is a person in relation to his/her name. The name is the object of an extra-patrimonial right characterised by four elements: not at disposal, not to be seized, not transmittable, and not prescribed by time.⁷⁴ Opposed to property rights, the concept puts the emphasis on what is a person intrinsically. The person's identity that the name reveals is confused with the immutability of the person⁷⁵ as a human being.

As a result, it made it difficult for French law to conceive that the liberty to dispose one's name is not a liberty to dispose of the person's identity and essence. It's as if to recognise both liberties would be allowing the person to sell him/herself like a vulgar object of trade, of property. This particular conception of a person marks the divergence between French and English laws. Thus, what is at stake behind the liberty to dispose or not of one's name is not so much a reflection of what is property than a vision of what is a person, since the 20th century introduction of the concept of extra-patrimonial right in French law. Whether a similar conclusion could apply to the protection of one's name against the use by another remains to be demonstrated.

73. R. Saleilles, *Le droit au nom individuel dans le code civil pour l'empire d'Allemagne: Note sous l'article 12 du Code civil allemand*, REVUE CRITIQUE DE LEGISLATION 94 (1900).

74. Among the many studies about extra-patrimonial rights from which is derived the personality right, see NERSON, *supra* note 3; and P. Kayser, *Les droits de la personnalité. Aspects théoriques et pratiques*, REV. TRIM. DR. CIV. 45, spec. 492 (1971).

75. Perreau, *supra* note 70, at 559; M. Gobert, "Le nom ou la redécouverte d'un masque", I 2966 JCP § 4, 20 (1980); M. Gobert, *Rapport de synthèse*, in LA NOUVELLE LOI SUR LE NOM (ARTICLE 43 DE LA LOI DU 23 DECEMBRE 1985) 185, 197 (LGDJ 1985); Munday, *supra* note 9, at 94. Similarly, to the philosopher Hume, identity coincides with immutability, *Treatise of Human Nature* (1739), Book I, Part IV, section IV; also quoted in S. FERRET, L'IDENTITÉ 20 (GF Flammarion 1998).

II. TO PROTECT ONE'S NAME:
THE EXERCISE OF A PROPERTY RIGHT?

Both English and French laws offer protection against the use of a name by another. Indeed, like Roman law before,⁷⁶ they recognise that a person cannot use another's name for purposes of fraud.⁷⁷ Beyond this specific situation however they diverge significantly. Even if there is no intention to defraud, French law offers to a person legal protection as long as he has not consented to the use, whereas English law refuses to do so. This divergence of practice would not have been of any significance for our debate if French law had not affirmed for a long time that the name was property, implying that the legal action available to protect the name was the exercise of a property right on the name. It is this understanding that the plaintiffs in *Du Boulay* put forward in support of their claim that the Privy Council should prohibit the defendant to bear the name of Du Boulay. Not contesting that French law recognised a property right,⁷⁸ the Privy Council affirmed the difference with English law: the "mere assumption of a name by a stranger . . . whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress."⁷⁹ Thus, the traditional interpretation of the case is that in English law the name is not property. Could it be then that to protect one's name against the use by another is a sign of a property right? An analysis of the argument in French law reveals confusion about the name being property (A), a confusion the doctrine will try to dispel in the early 20th century, offering a specific vision of the name in contrast to the English law's approach (B).

A. *The Source of the Confusion*

The possibility for a person to oppose the use of her name by another arose in the Middle Ages with our already-encountered

76. LEFEBVRE-TEILLARD, *supra* note 10, at 43-46; and HOULLIER DE VILLEDIEU, *supra* note 11, at 36-37.

77. *Du Boulay*, at 440-441; Cass. Civ., June 22nd, 1971, D. 1971, somm. 181.

78. French law was applicable at the time in St Lucia, *id.* at § 3.

79. *Id.* at 441.

French law concept of the *saisine*. Indeed, the *saisine* has two-tiers: the first, the name and arms clause, is to be exercised when the name is about to be extinguished for lack of direct male heirs, *on the condition* that if other male heirs exist they have to consent to the transfer; the second, correlative of the first, is for the male heirs to protect their “right” on the name by forbidding anybody, including close relatives, to bear their names *if they have not consented that they do so*.

Like for the name and arms clause, what matters is to ensure that the noble name remains within the family or persons to be trusted, in order to avoid confusion with commoners. This protection of the name as the symbol of a household is particularly important in a world where there is, in principle, liberty to use another’s name as long as it is without fraud. If the protection were not available, anybody could exercise his liberty to change names and take a noble name. Thus the nobility needs specific protection and the *saisine* provides it by opening a legal action to all members of a family who do not need to prove damage or fraud. Those features of the civil action will pass the test of time untouched. However, the original context in which they were born will be lost and, like the name and arms clause, by the end of the 18th century until the early 20th century, the legal action will be presented as the exercise of a property right in respect to both the holder of the action (1) and the requirement not to prove damage (2). The confusion could not be greater.

1. The Holder of the Action

Because of the purpose served by the *saisine*, to protect one’s name is to protect not simply the name one bears but also the name of the family one belongs to but does not bear. Thus the legal action is opened to a variety of persons who have in common their interest in maintaining the household name intact. Because the concept of the *saisine* was misunderstood, as we have seen with the name and arms clause, French lawyers started to present in 1780 “the name [as] an *inalienable* property of each family and household”⁸⁰ in order to explain the specific characteristic of the legal action. The expression survived the turmoil of the French

80. Desessarts, *in* GUYOT, *supra* note 32, at 168, v. “Nom” (author’s translation and emphasis added).

Revolution, and during the 19th century the courts did not hesitate to declare that “the family name is their exclusive property,”⁸¹ that “the name is part of the persons’ status and belongs exclusively to the members of the family,”⁸² or that “the family name is a property . . . to which even the State cannot impair/infringe without the consent of the family.”⁸³

Until the early 20th century, scholarly works maintained the confusion and alongside the courts, they continued to affirm that the legal action to protect one’s family name is the exercise of a property right. Some, however, recognised that a true property right only offers legal protection to the owner of the property, not to the owner’s family. In order to provide a more adequate explanation, they developed two lines of arguments. Either they presented the name as a special type of property shared with several people,⁸⁴ or they considered the name an example of co-ownership.⁸⁵ In any case, they did not question the affirmation of the name being property. To the contrary, they perpetuated an explanation which associated the name with the ill-suited concept of property whereas the origins of the legal action they tried to explain rested on the *saisine*, which resisted any assimilation to property. Understanding that the unchecked affirmation did not and could not rest on solid grounds shed light on English law’s understanding in *Du Boulay*. Because analysis of French legal history demonstrates that there is no link between protecting the name and property, *a contrario*, there cannot be a link between lack of protection of the name and lack of property rights in the name. Thus when English law affirms the name is not property, it

81. Paris, March 20th, 1826, S.V. 1825-1827, 2, 214 ; S. 1826 II 214.

82. Paris, March 22nd, 1828 S.V. 1828-1830, 2, 60. Was at stake here the action of a father against the use of his name by his illegitimate son born out of adultery.

83. Douai, December 26th, 1835 S. 1837 II 188; similarly, Riom, January 2nd, 1865, D. 1865, 2, 17 ; Agen, June 26th, 1860, D. 1860, 2, 141. Overall, see E. Agostini, *La protection du nom patronymique et la nature du droit au nom*, DALLOZ chr. 313 (1973).

84. For example, J. A. LALLIER, DE LA PROPRIÉTÉ DES NOMS ET DES TITRES (Giard 1890); it echoes the Court of Appeal of Riom, January 2nd, 1865 D.P. 1865, 2, 17 “a right sui generis.”

85. 4 J. BONNECASE, SUPPL. TRAITE DE DROIT CIVIL DE BAUDRY-LACANTINIERE § 290, at 566 (1928); for a summary, see M. Herzog-Evans, *Autonomie de la volonté et nom. Un plaidoyer*, RRJ 48-49 (1997); and NERAC, *supra* note 69, at 15-17.

cannot be because it does not protect the name against use by another (except for fraud).

A similar conclusion applies to the other characteristic of the legal action recognised in French law and related to the conditions in which it operates.

2. *The Conditions of the Legal Action*

According to the traditional presentation, those entitled to bring a civil law suit to protect their name against use by another are not required to prove the existence of damage (*prejudice*). Assumption of the name suffices to justify their legal action. In the original context of the *saisine*, this condition is not a surprise. The noble name is sufficiently known for its assumption by a third party to create injury to the family members by the association it brings between the stranger and the family. In practice, there is damage, except that it is an implicit but obvious consequence of the assumption. Proving the assumption equals proving the damage, and there is no need to require additional evidence.⁸⁶

However, the original context of the civil action being lost, scholars will be puzzled by the affirmation that there is no proof of damages, especially when compared to the conditions surrounding another legal action available to protect against the use of surnames by another, for the latter apparently requires the opposite, i.e. proof of damage. Indeed, when a person tries to obtain confirmation of his new surname, he has to request a letter patent to the Crown, a procedure which evolved to incorporate a period of time during which people could oppose the change of name.

Originally, this procedure developed as a consequence to the name and arms clause and is thus closely related to the other legal action the male heirs had. It is the nobility that has an interest in opposing the grant of a letter patent, if it has not already engaged in direct legal action before the courts. That interest, in its

86. See the example given by LEFEBVRE-TEILLARD, *supra* note 10, at 48 where the Rochechouart-Mortemart sued their cousin Francois de Pontville-Rochechouart for not bearing the name Rochechouart without their consent, but as a result of a name and arms clause. Centuries later, the family of Rochechouart-Mortemart will be embroiled in another law suit, Cass. Civ. 1ère, January 31st, 1978 JCP 1979 II 19 035.

substance, does not differ from the one at stake in the civil action. Nonetheless, contrary to the civil courts, the Crown will expressly require its proof, probably as a means to retain full discretion on whether or not to grant the letter patent.⁸⁷ The administrative procedure being incorporated into the law of *11 germinal an XI*, and now into article 61 of the French Civil Code, proof of damage continues to be required, in contrast to the courts' opposite affirmation.

But like during the *Ancien Régime*, the difference does not really exist and some modern scholars have demonstrated this.⁸⁸ Indeed, despite continuing to affirm that no proof of damage was required, the civil courts never went on to accept *any* assumption of name as justifying the plaintiff's legal action. Paul Dupont (the John Smith of England) will never succeed in protecting his surname of Dupont if he restricts himself to prove that another used it. The courts require more than that mere assumption and are in that sense respectful of the original purpose of the legal action.

The protection given to the name was born out of the necessity for the nobility to maintain the prestige of a name and its associated arms and estate. It is this prestige of a name that remains a constant preoccupation for the courts. Assumption of an ordinary name requires proving a specific damage suffered;⁸⁹ by contrast, assumption of a prestigious name or a name with originality can be sufficient. In other words, the protection of the name the courts offer still depends on the same rationale that existed at the origin of the protection; the context may have changed for the nobility has been abolished, but the foundational principles remain because they can easily be transferred to non noble names.⁹⁰

87. LEFEBVRE-TEILLARD, *supra* note 10, at 105, spec. n. 237.

88. CARBONNIER, *supra* note 4, at 192; P. Kayser, *La défense du nom de famille d'après la jurisprudence civile et d'après la jurisprudence administrative*, 10 REV. TRIM. DR. CIV. 21, 27-29 (1959); and NÉRAC, *supra* note 69, at 158-161.

89. Nérac demonstrated this caselaw element, *id.* at 158-159. He even underlines that the civil and administrative courts hold the same line of approach, *id.* at 160.

90. One could even argue that the new nobility of the 19th century are those celebrities and stars a lot of people seem to aspire to be, like in the previous centuries, people aspire to nobility.

This debate would not matter much if it had not been at the centre of a controversy about whether or not the name is property. To explain the (unchecked) affirmation that there is no need to prove damage before the civil courts, scholars consider that the condition of the legal action is a sure sign of a property right being exercised. Indeed, not to require proof of damages is, in French law, a particularity of property law where assumption of the object of property suffices to create the damage. Thus, the existence of legal action born out of the *saisine* seems to confirm that the name is property, and in the 19th century, the civil courts appeared to be justified in affirming that the right to the name embodied by the protection is a property right. Obviously, to declare that the name is property completely ignores the reality of the case law. For if the name was property, any name, whether common or rare, would deserve protection, because any thing, object of property, deserves protection, whether an old battered book or the priceless edition of an author's work. And yet, the courts adopt a different approach.

It raises the question of how the debate about whether or not the name is property could have been so sidetracked and confused. That the old concept of the *saisine*, from which was born the first legal action, was lost, cannot be overstated as the cause of the problem. Even lawyers who in the early 20th century challenged the concept of the name being property took for granted the courts' affirmation that there was no need to prove damage. Planiol, for example, acknowledged that "if the name is a property, it is possible for a person who bears it to ask others to respect it, without the need to prove that the assumption causes damage."⁹¹ But having demonstrated that the name cannot be property, he concluded that the civil courts erred in not requiring proof of damage and that the opposite stand taken by the Council of State should prevail in the other legal action available to protect one's name.⁹² In other words, Planiol challenged what constitutes the original feature of the legal claim born out of the *saisine*. The irony is that historically, the *saisine*, and therefore the name, never was property; thus, to affirm, like Planiol did, that the name is not property, should not cause the very characteristic of the legal action derived from the *saisine* to be disputed.

91. PLANIOL, *supra* note 68, at 152, § 400.

92. *Id.* at 153, § 400.

Interestingly enough, Planiol sensed the original context of the legal action, albeit he reached the wrong conclusions. For him, the confusion between property and the name rests on the association between the surname and the name of the land acquired by the nobility.⁹³ He is not too far from the truth when noticing the link between the French law of surnames and the nobility: the *saisine* served the nobility's interests which were often linked at the time with interests in the land. However, the relationship between the two never implied for the name to be property. It is the French lawyers of the *Ancien Régime* who joined the two together in imitation of Roman law, rather than by identification of the name to the land or to a title (i.e. to property). The same lack of historical knowledge and analysis about what the name really is led them and others to infer that the supposed absence to prove damages was a sure sign of property. To understand how this interpretation spread dispels any doubt that comparison with English law could create confusion as to the nature of the name. The affirmation in English law that the name is not property should not be associated with the quasi-absence, in English law, of a civil action to protect one's name. Analysis of French law shows that there is no link between the two.

In the French civil action to protect the name, the absence of proof of damage, said to be a sign of property, is more a rhetorical affirmation than a conclusion having any sound substantial basis. Certainly, that it remained unquestioned⁹⁴ and unchecked until the middle of the 20th century⁹⁵ contributed to the confusion between name and property in French law.⁹⁶ Nonetheless, and strangely enough, it is not the analysis of the courts' practice that will lead to the affirmation that the name is not property.

93. *Id.* at 152; and PLANIOL & RIPERT, *supra* note 68, at 141.

94. Carbonnier wondered if the divergence between the civil and administrative courts was not exaggerated, CARBONNIER, *supra* note 4, at 192.

95. *Id.* at n. 79.

96. Even after those studies, confusion reappears from time to time, *see* R. LINDON, *LES DROITS DE LA PERSONNALITÉ* 177 (1983), who considers that the protection of the name can be explained as much by the theory of property right as by the concept of personality right.

B. The Rejection of the Confusion

The doctrinal reaction against the property nature of the name arose at the end of the 19th and beginning of the 20th century, in two stages. The confusion between name and property proved to be easy to dispel with regard to civil actions. If the name were property, it would mean that several persons possess the name and exercise the same rights on this thing.⁹⁷ However, in French law, a property right implies an exclusive ownership on an object, on a thing; there cannot be two owners of one thing with the same rights. Thus, the name could not be property.

In relation to the conditions of the legal action, the doctrine did not directly criticise the link made between a civil action in property law and one related to the protection of names, because in both cases, according to the courts, there is no need to prove damage.⁹⁸ Rather, they tried to demonstrate that the alleged practice reflected other concepts than property rights. They were helped in that by recent developments in case law.

By the late 19th century, the courts extended the protection of the name against personal use to use for literature purposes. They did so on the basis of property rights in the name,⁹⁹ although they required the plaintiff to prove damage and an interest to claim. As scholars observed, such requirement was adverse to the concept of property rights; more importantly, what was defended was not the name as property/good, but the name as the embodiment of a person and his/her personality or civil status. Linking this analysis of the protection against artistic use to that of the protection against personal use, the doctrine proposed a renewed interpretation of the French law of surnames that radically breaks with the concept of property rights.

At the turn of the 20th century, to protect one's name against use by another is no longer viewed as a sign of a property right, but

97. PLANIOL, *supra* note 68, at 151; PLANIOL & RIPERT, *supra* note 68, at 141; and 1 RIPERT & BOULANGER, *TRAITE DE DROIT CIVIL D'APRES LE TRAITE DE PLANIOL* 377 (LGDJ 1956).

98. To the exception of Planiol, *id.*

99. Trib. Seine, February 15th, 1882, S. 1882, 2, 21; *see* LEFEBVRE-TEILLARD, *supra* note 10, at 183-184.

the consequence of the name being an element of civil status¹⁰⁰ and the object of an extra-patrimonial right.¹⁰¹ As we have seen regarding the disposal of a person's name, the emphasis is put on the intrinsic values a person carries with him, without looking at their monetary/economic worth.¹⁰² It is the person who is at stake; because the name embodies a person both in its individual and family dimensions, it deserves protection whenever another person uses it, even if there is no fraud. Thus to the name is attached an extra-patrimonial right, not a property right.

The new rationale did not lead to challenge the traditional presentation that the civil courts do not require proof of damage when the personal use of another's name is at stake. Nothing is said about the contradiction of using the same rationale for the two actions but differentiating on their conditions. And if the link with the administrative procedure available to protect one's name is not made anymore, again the latter procedure is said to rest on proof of damage and is still in contrast with the civil action for personal use—even though nowadays, some scholars argue that there is no difference.

Nonetheless, the concept of extra-patrimonial right definitely excludes any reference to property right. In that sense, French law finally reached the same conclusion as English law: the name is not property. Yet, behind this common perception of what the name is not, lies a different conception of the person. English law does not know the concept of extra-patrimonial rights and presents its own limited protection of the name as part of the law of torts,¹⁰³ notably the protection of the name against its use for artistic purposes when that use falls within the remits of the tort of defamation. Certainly, French law does not ignore this link with torts as the legal actions are predicated on articles 1382 and 1383 of the Civil Code.¹⁰⁴ However, the related case law does not fall under those articles but under article 57 of the Civil Code, which is related to the registration of birth. And none of the torts textbooks

100. A. Colin, D. 1904 II 1, commentary under Paris January 21st, 1903. A. COLIN & H. CAPITANT, COURS ELEMENTAIRE DE DROIT CIVIL FRANÇAIS 360 (Daloz 1923).

101. PERREAU, *supra* note 11.

102. There are other extra-patrimonial rights: right to life, right to honour, right to one's own image, right to privacy.

103. *Du Boulay*, at 446-447; and *Cowley*, at 460.

104. Influence of Planiol, PLANIOL, *supra* note 68, at 153, § 401.

analyse the case law, leaving this aspect of the law to the books dealing with Introduction to French Law or Law of Persons (*droit des personnes*). It is as if French law's vision of the person and his/her name supersedes any other approach. It is not simply that the name is not property; it is that the name cannot be property because it incarnates the person. It is this vision that will ultimately maintain the difference that arose, in the early 19th century, between English and French laws in relation to another feature of the law of surname: the liberty to change names. How this liberty figured in the debate about the name being property needs now to be investigated.

III. TO CHANGE ONE'S NAME: AN INDICATION OF A PROPERTY RIGHT?

The liberty to change one's name was never argued as the exercise of a property right. In English law it still exists, and in French law it existed despite the name being associated at the time with property. Paradoxically, it is the loss of liberty to change names in French law which reinforced the claim that the name was property; a claim made, as we have seen, in relation to both the name and arms clause and the protection against use by another. The origin of the issue is indeed the establishment of the immutability principle (A), the stringent effects of which the courts set to counteract by maintaining the rhetorical but convenient affirmation that the name was property (B) before the doctrine moved away from such confusion.

A. The Origin of the Issue: Establishing Immutability of Names in French Law

The liberty to change names was a basic feature of the French law of surnames until the Revolution, as much as it was, and still is, in English law. However, during the three centuries preceding the Revolution, the French monarchy conducted a policy to restrict the liberty to change names in order to control the nobility, which was seen as a threat to the Monarch's power, as well as with a view to strengthen the civil registry applicable to all subjects. The Crown used two tools: the procedure of letters patent and the ordinance of 1667 on civil procedure. With the first, which gave

discretion to the Crown to refuse or accept the request, the Crown tried to control the change of names and arms the nobility undertook. However, despite the progressive increase of letters patent since the 16th century, their numbers remained low.¹⁰⁵

With the ordinance of 1667, the Crown found a more efficient way to restrict the liberty to change names. Indeed, the ordinance of 1667, by requiring proof of age, marriage and death by the civil register rather than by witnesses' testimony,¹⁰⁶ progressively obliged ordinary people to keep the name they had been registered under at birth and later at marriage. Establishing an efficient civil status registry enabled the monarchy to create more obstacles for people to change their names.

Hence, compared with England, France took a rather different path. Where France strengthened the monarch's power, the English monarchy abandoned the inclination to impose absolutism. As a consequence, the relationship between the State and its citizens or subjects was that of fierce non-interference. For matters concerning only the individual, like the name—and as long it was not linked with claiming a title—the English Crown could not intervene without being perceived as an arbitrary power infringing on civil liberties.¹⁰⁷ As a result, the civil status registry would not be imposed before the middle of the 19th century, but it would never be associated with control of the name. In addition, a person's actual and official names can be different from what has been written on the birth certificate.¹⁰⁸

105. It is inferior to the number of letters patent to secure legitimacy, LEFEBVRE-TEILLARD, *supra* note 10, at 106, notably n. 241.

106. LEFEBVRE-TEILLARD, *supra* note 10, at 94-95; G. Sicard, *L'identité historique*, in *L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE* 115, 133-137 (Pousson-Petit dir., Bruylant 2002).

107. J. Pousson-Petit, *L'identité de la personne humaine au Royaume-Uni*, in *L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE* 343, 345-351 (Pousson-Petit dir., Bruylant 2002); and J. Pousson-Petit, *Conclusion*, in *L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE* 979, 982 (Pousson-Petit dir., Bruylant 2002).

108. The Birth Registration Act 1953 does not allow for a change of surname to be registered on the birth certificate. Thus a change of surname will be recorded most of the time by deed poll, 35 HALSBURY'S LAWS OF ENGLAND § 1276, at 770 (4th ed. 1994) v. "Personal Property;" and J. F. JOSLING, CHANGE OF NAME 23-46 (Oyez Pub. Ltd 1980).

Nonetheless, the difference between England and France *until* the Revolution should not be overstated. In France, the King's attempts to curb the liberty to change name never led to the adoption of a general ordinance to prohibit changes of the name without his authorisation. However absolute the power of the King was, it was never so absolute as to override Roman law and custom, on both of which the liberty to change names rests.¹⁰⁹ It is thus not surprising that most lawyers up to the middle of the 18th century agreed that people were at liberty to change name,¹¹⁰ and the practice reflected this liberty. In the rare cases where letters patent were sought to secure a change of name, they would sometimes be granted 50 years after the change occurred.¹¹¹

Therefore, the lack of liberty to change names is a "recent invention"¹¹² in the French law of surnames. It is with the Revolution in 1789 that the monarchy's aspiration to control mutability of names became a reality. The Revolution not only confirmed the civil status registry, with its emphasis on the name as a means of identification, but it also took the step in 1794 to affirm the immutability of names; this was extended to all citizens with the abolition of the nobility on August 4th, 1789. The breach with the past was consumed, and the French law of surnames ceased to be similar to its English counterpart. The various governments following the Revolution never questioned the revolutionary legislation, but rather reinforced it in 1803 by creating a procedure to change names—inspired by the previous system of letters patent—and in 1858, by criminalising the assumption of names when it included an assumption of titles.

This importance of the principle of immutability of names cannot be over emphasised, not only because it introduced a major shift between the English and French laws of surnames, but because it led to a misunderstanding about the origins of the

109. LEFEBVRE-TEILLARD, *supra* note 10, at 109.

110. *Id.* at 103-104

111. *Id.* at 109. In this example, the will was drafted in 1662, the name and arms taken in 1692, but the change of name secured only in 1747 by letters patent, the claimant wishing "to prevent any matter of trouble and to secure better the right that the ascendant and father transmitted to him" (author's translation).

112. Herzog-Evans, *supra* note 85, at 56; F. Thibaut, *Le nom patronymique et l'attitude de l'Etat français à l'égard des changements de nom*, RRJ 17, 21 (1989).

French law of surnames, which fuelled in return a propensity in the 19th century to declare the name to be property, up to the point that the created story found its way to the Privy Council in the 1869 case of *Du Boulay*.

At the end of the Revolution, doctrine and the courts asserted that the former monarchy forbade all changes of names that it did not authorise. Although a myth, this historical perspective resulted from a series of works, notably that of La Roque, in his treatises on nobility (1678) and on the name (1681).¹¹³ He not only falsified an ordinance of 1555, where the King indeed forbade the change of names (though not in the terms the author mentioned), but he also conveniently forgot to mention that the ordinance was actually never registered, and thus never applied.¹¹⁴ This presentation echoed the monarchy's need, and later the Revolution's wishes, to ascertain control on the name as an element of civil status. Such an opportunity to find an "old" text ascertaining the principle of immutability of names was too good to be discarded and the fabricated historical justification of the principle found its way in to one of the main legal dictionaries¹¹⁵ just before the Revolution broke. Given that the author of the 1785 text, Henrion de Pansey, became President of the Court of Cassation after the Revolution, it is hardly surprising that nobody questioned the source. Certainly Merlin,¹¹⁶ who was not necessarily on good terms with De Pansey, tried to research the matter, but was only able to find that the

113. GILLES-ANDRE DE LA ROQUE, *TRAITE DE LA NOBLESSE ET DE TOUTES SES DIFFERENTES ESPECES* (1678), *availalbe at* <http://gallica.bnf.fr> (last visited November 6, 2008); and GILLES-ANDRE DE LA ROQUE, *TRAITE DE L'ORIGINE DES NOMS ET DES SURNOMS, DE LEUR DIVERSITE, DE LEURS PROPRIETES, DE LEURS CHANGEMENS, TANT CHEZ LES ANCIENS PEUPLES QUE CHEZ LES FRANÇAIS, LES ESPAGNOLS, LES ANGLAIS, LES ALLEMANS, LES POLONAIS, LES SUEDOIS, LES ITALIENS AUTRES NATIONS* (1681).

114. The deception was uncovered by A. Lefebvre-Teillard to which this paragraph is indebted, see LEFEBVRE-TEILLARD, *supra* note 10, at 96-101.

115. GUYOT, *supra* note 32.

116. Merlin (1754-1838), said Merlin de Douai (of Douai—a French town), was a solicitor before one of the highest courts in France before the French Revolution, *le Parlement de Paris*; and he edited the original edition of the *Repertoire Guyot* in 1784-1785. During the Revolution, he proposed to abolish feudality and to establish one single supreme court, the future Court of Cassation. A very active supporter of the Revolution throughout the ten years it lasted, he managed to escape the onslaught of the Terror and, with Napoleon in power, became in 1801 the *Procureur Imperial* to the Court of Cassation.

ordinance of 1555 was probably not registered; he was unable to undo completely the Ariane's thread that the story represented. Hence, the ordinance of 1555 found its way into the nineteenth-century French law of surnames as a text that supposed to support the idea that the immutability of names had always been an essential feature of the French law of surnames, long before the Revolution chose to enact the law of *6 fructidor an II*. Lawyers forgot that the French law of surnames was actually different, although the cases between 1800 and 1850 reveal that citizens needed a bit more persuasion and time to become accustomed to the new prohibition on the change of names without the prior authorisation of the government.¹¹⁷

The deception about what the actual French law of surnames was prior to the Revolution could have remained of no consequence for the purpose of this study, but it found its way in to the very case where English law affirms its divergence with French law, at least as understood at the time by French lawyers. Indeed, in *Du Boulay*, the Privy Council had to examine what the French law of surnames was prior to and after the French Revolution. According to the treaty of 1815, French law applied to the Caribbean island of Saint Lucia. Not surprisingly, the discussion turned to whether the ordinance of 1555 had ever been applied.¹¹⁸ The plaintiffs argued it had, and in support of their argument referred to the 1823 case of *Les Heritiers de Preaux de Longchamps*.¹¹⁹ The French Court of Cassation concluded that the ordinance of 1555 "although might not have been registered, was however the manifestation of the royal prerogative"¹²⁰ according to which "to the King only belongs the authorisation to change names."¹²¹ Furthermore, the Court of Cassation considered that as

117. See for example CE May 24th, 1851 S. 1851 II 665. In a decision about the validity of a change granted in accordance with the correct procedure of the law of *germinal an XI*, the Council of State notes that "the investigation reveals that, for a long time, Eugene and Jacques-Jules had been in possession of the name Gaubert," being known in their locality (i.e. the island of Martinique) by that name.

118. With the added difficulty that Saint Lucia was a colony and as such must have had its laws specially registered.

119. Cass. Req., November 16th 1824, S.V. 1822-1824, 1, 561; S. 1825, 1, 148.

120. Cass. Req., November 16th 1824, S.V. 1822-1824, 1, 561, 563.

121. *Id.*

such, the ordinance of 1555 applied to the French Caribbean island of Guadeloupe, an island which had the same legal status as Saint Lucia while both were under French dominion. Clearly the decision supports the plaintiffs' arguments. However, Lord Phillimore, for the Privy Council, never addressed the case; at least not in his written opinion transcribed in the Law Reports. In addition, he adopted the opposite conclusion to that of the Court of Cassation: "at all events, it is not shown that this unregistered ordinance ever formed part of the law of Saint Lucia."¹²² How one can then explain such divergence of understanding?

Certainly, Lord Phillimore gave an accurate description of the French law of surnames prior to the Revolution, noting that "Merlin, in his *Repertoire* . . . says that the ordinance not having been registered, never became law in France."¹²³ Yet, he also added that according to the Dalloz dictionary, "the courts hold a contrary opinion,"¹²⁴ a quote which the 1823 French case illustrated. So why was there such a departure from the Court of Cassation's own interpretation? Several explanations can be put forward: the difficulty to know French law precisely (the 1823 case does not seem to have been discussed before the courts, and one wonders if it ever has been); or the social background of the defendant (the illegitimate son of a former slave of the plaintiffs' family—upholding French law as interpreted by the Court of Cassation may have served to maintain the social division). It may also be the Privy Council was reluctant to condone an interpretation it probably sensed as being inaccurate. Indeed, analysing the 1823 case cited by the plaintiffs reveals a hidden agenda for the French Court: affirming at all costs the immutability of names.

If the Court of Cassation relied so heavily on the ordinance of 1555 as enouncing a principle that has always been recognised, it is because it needed a legal basis to refuse the change of name undertaken by one of the parties. The Court of Cassation could not rely on the ordinance of 1803, which prohibits changes without Governmental approval, as it had been registered in Guadeloupe only in 1823, a few years after the facts took place. The Court of Cassation also knew that the validity of the ordinance of 1555 was

122. *Du Boulay*, at 446.

123. *Id.*

124. *Id.*

an issue, but to be faithful to historical truth would then have forced the Court to validate the change of name done without authorisation. At a time when the French Government was painstakingly enforcing the opposite principle, such course of action would have opened the door to much trouble and lawsuits. The Court of Cassation was not ready to take the risk, and preferred enforcing a supposedly ever-existing principle of immutability embodied in the ordinance of 1555. One can see here the driving force that modelled the French law of surnames during the 19th century. Immutability of names had to be maintained at all costs.

This emphasis on immutability of names in French law clearly contrasts with the English law perception of allowing complete freedom to choose and change names. Again, it may explain why the Privy Council was reluctant to follow the Court of Cassation. But for our debate about whether the name is or is not property, this emphasis only matters because of what it created. To insist so much on immutability meant that the French courts were sometimes placed in a difficult position when plaintiffs asked for a rectification of the civil status registry in situations where clearly at stake was a change of name rather than a modification of a clerical error on the registry books. The only way out was to resort to the traditional view that the name was property, as the plaintiffs in *Du Boulay* reminded the Privy Council.

B. Solving the Issue: Promoting Property Rights vs Promoting Extra-Patrimonial Rights

Rectification of civil status registry could only be granted if there had been a mistake in the transcription of the name in the registry. But what constituted a mistake? Some people argued that they used to bear a name with *de* for example, and that by mistake the particle (*particule*) was dropped, or that they bore another name in addition to the one on the registry or in substitution to the one registered, and that by mistake the other name was dropped on the birth certificate. Except that the so-called mistake was often a deliberate move rather than the result of a civil officer's absentmindedness. During the Revolution, to register the *de*—often but not always a sign of nobility—was a sure sign of trouble, if not a death sentence in some circumstances in the middle of the Reign of

Terror in France. Some people had to go as far as changing their entire name such as “leroy” (literally “the king”) to survive those difficult times. So to drop part of one’s name to avoid being suspected of being a counter-revolutionary was a deliberate move for survival. In that sense, there was no error and the principle of immutability of names should have meant that the courts had to refuse the request for rectification of the civil register. On the other hand, the courts could not be insensitive to the plight of the plaintiffs, who acted more by constraint than by choice; they were tempted to accede to the request, but they could only do so if they found a legal basis that would weight enough to counteract the effect of the principle of immutability that they paradoxically promoted. If they found it, they would then just need to ensure that the claim was genuine and not an indirect way to gain a name that the plaintiffs never had or abandoned long before the Revolution.

The French law of surnames, at the time, offered them the perfect reason: the name was property and thus the claimants just had to prove they “owned” the name, “possessed” it, i.e. used it for a long time before the crucial years of the Revolution. In other words, in order to resolve the dilemma they felt they faced, the courts used the old features of what was historically the *saisine*, and used the theoretical background which superseded the medieval concept, i.e. property rights. With the old features of the *saisine*, they found a way to establish a criterion to assess whether or not the claim was genuine. It sufficed to ask if there was a “use of long tempo” as the old French law of surnames defined it (use which is public, quiet, not contested, and for a long time—a notion broad enough to give them flexibility in analysing the facts of a particular case). With the theoretical background created by lawyers at the end of the Middle Ages, they had a principle as strong as the principle of immutability, so strong in fact, that the courts could use it to downplay the stringent effects of the principle of immutability without appearing to neglect the principle of immutability. After all, property was a right engraved in the French Declaration of Human Rights and with liberty, it was a key foundation of the Civil Code. How could the Government oppose a property right without being accused, at least implicitly, of undermining the very foundational elements of France? Therefore, the concept of property conveniently found a new life. Originally

a way to integrate the medieval law of the *saisine* to the prestigious Roman law, without questioning the freedom to change names as recognised by custom and supported by Roman law, it became a tool to instil more liberty into what became a very rigid system governed by the principle of immutability of surnames and of civil registry.

As a consequence, the more emphasis there was on immutability, the more emphasis there was on property rights. Yet, the association between name and property rights did not result from a logical analysis of the concept of property in relation to the features of the French law of surnames. Rather, it was based on policy matters estranged to the concept of property. When the concept of property was at last dropped—in the beginning of the 20th century, after scholars demonstrated it was inappropriate and illogical—the issue remained: how to find a balance between affirming immutability of names and allowing for some changes that take place over time? To resolve it, the courts simply went on applying the same criteria without referring anymore to the original explanation put forward in the 19th century. Hence, this last debate confirms how the interrogatory about whether or not the name is property has been tainted in French law by factors independent from the concept of property, factors like the immutability of surnames. The contrast with English law could not be greater.

Even now, that both English and French law agree that the name is not property, they still differ in what this affirmation reveals about their conception of the person in relation to his name. English law sees the name as part of the one's personal privacy, free from interference from the State; French law, despite recognising to the person an extra-patrimonial right to protect his name, does not consider the person to be at liberty to choose and change surnames.¹²⁵ Therefore, the real philosophical and legal

125. The evolution of French law is towards more autonomy granted to the person in choosing names (see Acts 2002-2003), see Herzog-Evans, *supra* note 85, at 65; S. Shindler-Viguie, *La liberté de choix du nom des personnes physiques*, art. 35942 DEFRESNOIS 1409, 1410, 1425 (1994); J.-J. Lemouland, *Le choix du prénom et du nom en droit français*, in *in L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE* 631, 669 (Pousson-Petit dir., Bruylant 2002); and H. Lécuyer, *L'identité de la personne (Pour l'abrogation des lois des 4 mars 2002 et 18 juin 2003 sur le nom de famille)*,

divergence between modern English and French law is thus not on whether or not the name is property, but on what the relationship is between a person and her/his name.

CONCLUSION

To our original question, “is the name property?”, the answer is certainly “no” with regards to three elements of the law of surnames: whether a person can or cannot dispose of one’s own name, protect it, and change it. Although until the beginning of the 20th century French law used to affirm the name was inalienable property, it did so more for lack of a better suited concept to explain the features of its law of surnames, or to serve other purposes, than out of a flawless analysis of the concept of property. It is because the medieval concept of the *saisine*, which was neither property nor possession, had been lost that French lawyers integrated other notions, like property, to provide a theoretical justification of the law of surnames.

Amid the confused history of the French law of surnames, English law appears to act as a focal point, especially concerning two of the features French law used to have before the 1789 Revolution, i.e. the liberty to dispose of one’s name by contract or will and the liberty to change one’s name without prior authorisation of the Government. Its affirmation that the name is not property appears to match the historical sources of the French law of surnames, although it remains to be proved whether the two have identical origins. The latter, contrasted with the dramatic changes French law underwent from the 1789 Revolution onwards, highlights how its vision of the person and his/her name, which lies behind the affirmation that the name is not property, is now very different from that of French law. English law opted for freedom, refusing to consider that a person’s identity depends on her name; French law opted for control, partly because of the importance attached to the name as part of the civil status, and partly because it identifies the person with his name.

The debate about the nature of the name is not on whether the name is property or not, but on what the relationship should be

131 LES PETITES AFFICHES 31 (July 1st, 2004). But the contrast with English law remains striking.

between a person and his name. And yet, albeit outside the scope of this article, some issues remain which partly leave open the debate about whether or not the name is property. The concept of “privacy” as developed in U.S. law borrows both from the concepts of property and personality; and in French law, some argue for the name used for artistic purposes to be part of the *patrimoine*, object of property rights, challenging the traditional classification established in the beginning of the 20th century.¹²⁶ More sketches to answer our question need to be done . . .

126. M. Bui-Leturcq, *Patrimonialité, droits de la personnalité et protection de la personne, une association cohérente*, DROIT PROSPECTIF-RRJ 767, 781 (2006).