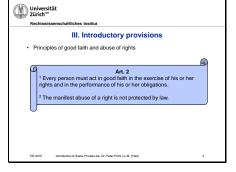
# Folie 1 Universität Zürich Introduction to Swiss Private Law Origins and characteristics of the SCC П. Structure III. Introductory provisions IV. Law of persons ٧. Property VI. Inheritance and family law Folie 2 Universität Zürich I. Origins and characteristics of the SCC Fragmentation of law between and within the cantons in the pre-Napoleonic era Early 19th century: o Adaptation of French law in the west and south o Adaptation of Austrian law in the Berne region o German and autochthonous law in Zurich and Central Switzerland Failed attempts to achieve unificiation throughout the 19th century Eugen Huber's blueprint succeeds in 1907 Folie 3 Universität Zürich NECESTAWNISSONISCHAIRTURCHES INSTITUT 1 Europ person mark act in good man he execute of the six fargent and in the political man of the execution of the six fargent and in the political man of the execution of the six fargent and the political man of the Section 197s Legal consequences of the withdrawal of contracts relating to financial services (1) The performance received is to be restituted at the latest after thiny days. Constitution and the constitution of the const The state of the s 1 Public registers and public deels constitute full proof of the facts widenced by them, unless their content is shown to be incorrect. 2 Such proof of incorrectness does not require to be in any particular form.



# Folie 5



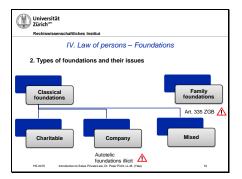


# Folie 7 Universität Zürich IV. Law of persons Foundations - Art. 80-89a, 335 SCC A characteristic institution of Continental Law A driving force for Switzerlands economy and society Folie 8 Universität Zürich IV. Law of persons – Foundations 1. Nature and legal framework Endowment of assets for a particular purpose → independent legal entity, Art. 80 ZGB · Creation inter vivos or testamentary, Art. 81 ZGB Prima facie contradictions when using foundations as will substitutes $_{\odot}\;$ Separation founder/foundation $\Leftrightarrow$ retaining influence on foundation $_{\odot}\;$ Foundation as "eternal" entity $\Leftrightarrow$ distribution of assets to beneficiaries Folie 9 Universität Zürich

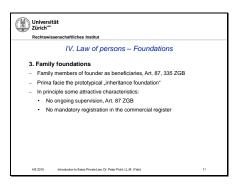
IV. Law of persons – Foundations

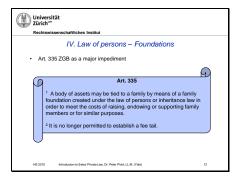
- Separation founder/foundation 
   Pratting founder foundation for the foundation or Drafting foundation documents according to founder's wishes 
   Competence to modify foundation purpose (Art. 86a ZGB)

  - o Founder member of foundation council
- Foundation as "eternal" entity ⇔ distribution of assets to beneficiaries
   Time limited-foundation
  - o Spend down foundation



# Folie 11







IV. Law of persons – Foundations

### BGE 93 II 439 - facts:

Couple F establishes the "Familienstiftung Burg Reichenstein" (family foundation Reichenstein castle) and transfers to the foundation some cash as well as Reichenstein castle, previously bought and renovated by them.



# Folie 14



### IV. Law of persons – Foundations

- Foundation purpose: Maintain the castle which is to serve as country home for the founders and their family and where the founders are to be buried.
- Beneficiaries: Founders, then their children, then the childrens' issue, if no family left the University of Basel.
- Return on foundation assets never really sufficient to maintain castle properly. In particular so since foundation granted a loan to the founder's son. Castle habitable only in summer. Finally rented out to a local businessman.
- Founder's son files a lawsuit against foundation to have it declared void and its assets transferred to him.

# Folie 15



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IV. Law of persons – Foundations

# BGE 93 II 439 - findings:

- Naming as "family foundation" not decisive, founders' subjective intentions regarding purpose and function of foundation to be determined (Wilensprinzip principle of intention  $\Leftrightarrow$  Vertrauensprinzip principle of trust).
- Letter can be taken into account, even though not part of statutes (Andeutungstheorie principle of indication).
- Founders intended a family foundation.
- Art. 335 (1) SCC requires that the assets of a family foundation be used to cover specific needs of the beneficiaries. The type of occasions on which the beneficiaries may be supported must either be those listed in Art. 335 (1) SCC or very similar to them. General maintenance not permitted.




IV. Law of persons – Foundations

### BGE 93 II 439 – findings:

- Foundation at issue does not comply with Art. 335 (1) SCC: No support for specific needs. Reputation, preservation of castle, burial not covered by the provision.
- Also conflicting with Art. 335 (2) SCC: Fee-tail like succession of beneficiaries.

# Folie 17



IV. Law of persons – Foundations

### BGE 93 II 439 - findings:

- However, foundation not to be voided but to be converted into classical foundation:
- Possible because founders would have established classical foundation had they known their family foundation to be illicit (unwritten principle of Swiss law, expressed in § 140 German Civil Code)
- o Purpose: Preservation of Castle
- Beneficial position of family eliminated
- o Foundation to be registered in commercial register

# Folie 18



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IV. Law of persons – Foundations

# BGE 135 III 614 (modified):

- What if the founders had established the foundation under Liechtenstein law which permits maintenance foundations (no provision like Art. 335 SCC)?
   Court: Art. 335 SCC no loi d'application immédiate because not sufficiently essential part of Swiss law (any more):

essential part of swiss law (any more):

Les considérations sur la base desequêre a été introdait l'art. 335 à 2 CC, qui sont d'une part
morales, voire purtaines (il s'appsait de combatter Doisvété) et, d'autre part économiques (il s'appsait des pourfesions de tienne de mainmorte), sont ajuscultur à depasse fer field, à
l'époque actueller, c'est bien plutit la luite contre le châmage que celle contre le désoquement qui
prépeteme une table-désdige prichatie ne Suisse, autement à le combate cette clorière in a plus infina à voir avec la sauvegate d'inférêts supérieurs. Quant sux biens de mainmonte, sis se repporter la faite intégre et de s'utiliser dont totalement étierages au système écourage de la Suisse moderne.

Hence, Liechtenstein family foundation to be given legal effect in Switzerland.

HS 2015 Introduction to Swiss Private Law, Dr. Peter Picht, LL.M. (Yale)


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## IV. Law of persons – Foundations

- In sum: Art. 335 ZGB major impediment to Swiss foundation landscape (and business)
- → no regular, presuppositionless payments permitted, no "family maintenance foundation"
- Changing view on family foundations in Switzerland?

  Majority of scholars critical

  Swiss Federal Court: No "loi d'application immédiate"

# Folie 20



IV. Law of persons – Foundations

# 4. Company foundations

- Company voluntations
   Company/shares constitute essential foundation asset
   Permitted in principle (BGE 127 III 337)
   Attractive to entrepreneurs as a means to preserve their life's work
   Legal and economic concerns remain

- Self-serving foundations illicit
   Underdiversification of foundation assets
   Relatively inflexible
- o State Supervision

# Folie 21



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# IV. Law of persons

- Recognition of foreign law-trusts after adoption of Hague Trust Convention
   Treated as trusts\*, Art. 11 HTC → no transformation into Swiss lawertities

  - In principle application of law according to which trust was created, Art. 11, 6 seq. HTC

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## IV. Law of persons – Trusts

- Application of Swiss law to important aspects of a trust-related case, e.g.
   Transfer of property in trust, Art. 4 HTC
   Mandatory provisions of other pertinent jurisdictions, Art. 15 HTC
   Lois d'application immédiate, Art. 16 HTC; Ordre public, Art. 18 HTC
   (As yet) some legal uncertainty regarding overlap of Swiss law/respective trust law (df. Rybolov/ev case below)
   Trusts in Switzerland promising but legal counsel indispensable

# Folie 23



# IV. Law of persons – Trusts

# BGer 5A\_259/2010 - Piercing the trust-veil in the *Rybolovlev* case:

- Prior to divorce, Dimitri Rybolovlev transfers billion dollar-fortune in Cyprus trusts
- trusts

  When Elena Rybolovlev claims part of this money in divorce proceedings, Swiss courts pierce the veil of the trusts and freeze the assets according to Art. 179 ZGB (interim measure) without paying much heed to HTC

   Prima face discouraging for use of trusts in Switzerland, BUT

   "Bad case → bad law": Blatant attempt to evade marital property rules

   Very strong remaining influence of settlor on trust (assets)

   Veil piercing as yet limited to interim measures, main proceedings-decision still unpublished

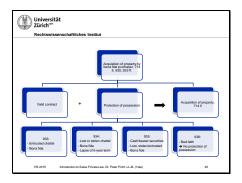
# Folie 24



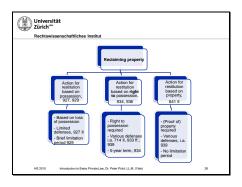
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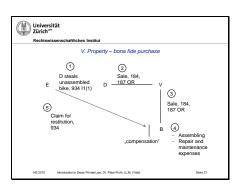
# V. Property

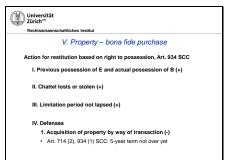
Bona fide purchase – a compromise between the protection of market participants and of the property owner



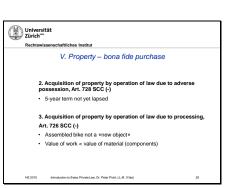
# Folie 26

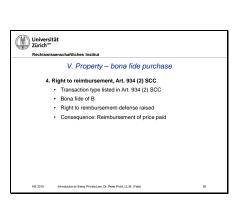






# Folie 29





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V. Property – bona fide purchase

# 5. indemnification for necessary or useful expenditure, Art. 939 SCC

- Bona fide of B
   Necessary/useful expenditure (+): Repair and maintenance
   Potential set-off of fruits, Art. 939 (3) SCC

- V. Summary
   E can claim restitution based on Art. 934 (1) SCC
- Right to reimbursement, Art. 934 (2) ZGB
   Indemnification Art. 939 SCC, potentially set off against fruits collected
- Disputed: Fruits collected to be set off also against right to reimbursement under Art. 934 (2) SCC?

Folie 32



VI. Family and inheritance law

A tree with Germanic and Roman roots – freedom to bequeath, mandatory family participation at death and participation of spouses in the surplus

Folie 33



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VI. Family and inheritance law

# Inheritance law:

- Freedom to make a will, Art. 470 SCC
- Rather extensive forced shares for family members, Art. 471 SCC:
   Issue: ¾ of statutory share → typically (1 spouse, two kids) 3/16
- Parents: ½ of statutory share

   Spouse: ½ of statutory share → typically (1 spouse, two kids) 4/16

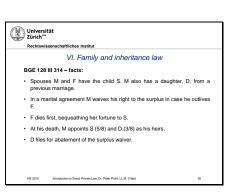
   Protection against evasion by way of inter vivos transactions, Art. 527

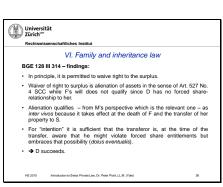
  SCC

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# Folie 35





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VI. Family and inheritance law

# BGE 128 III 314 – findings:

- Cf. also Art. 216 (2) SCC
- Disputed whether independent right to abatement or to be applied together with Art. 527 SCC
   In any case: S could not have claimed abatement, Art. 216 (2) SCC e contrario

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