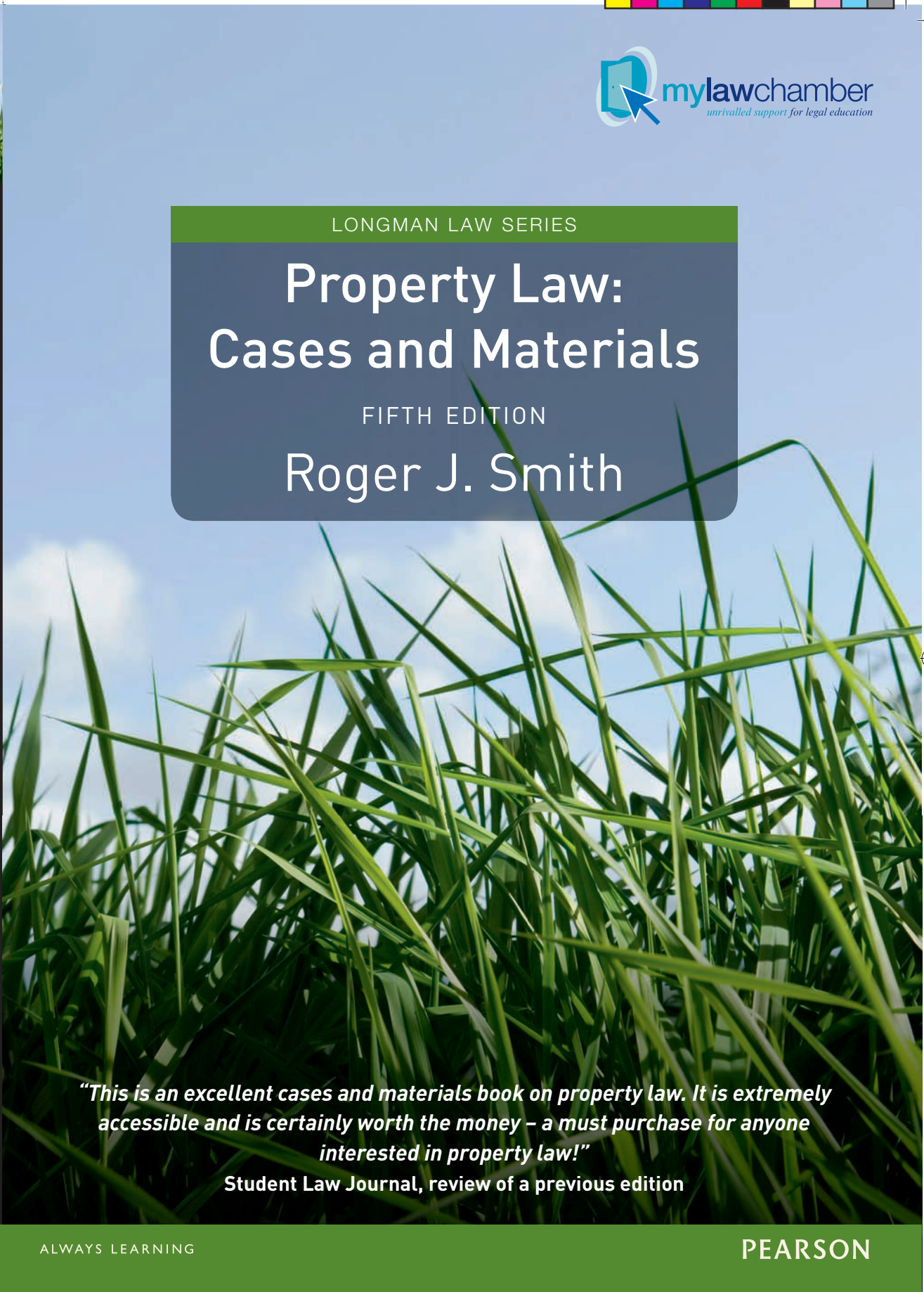
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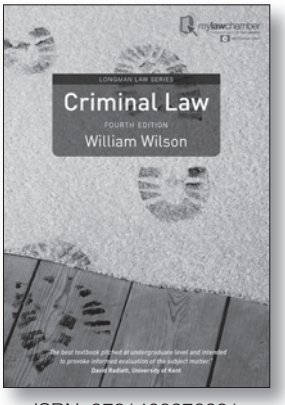

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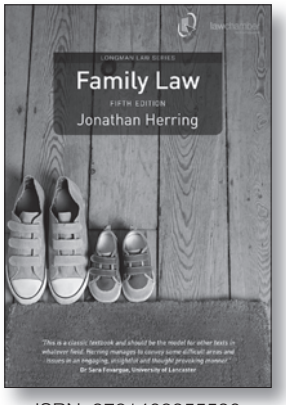

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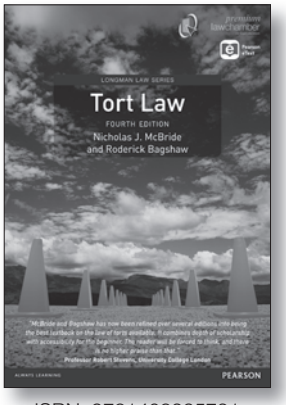

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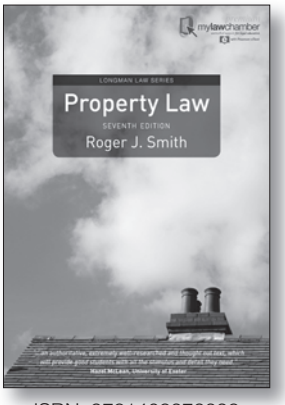

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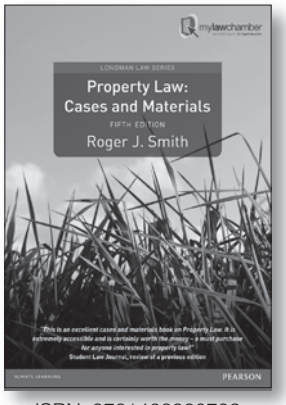

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In memory of Professor John Usher

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Preface

Although the years since the fourth edition have seen relatively little legislation, there have been large numbers of leading cases. One high-profile example in the human rights context is *Manchester City Council* v *Pinnock*, in which the Supreme Court overruled no fewer than three recent House of Lords decisions on the impact of Article 8. The previous edition saw the inclusion of the House of Lords decision in *Stack* v *Dowden*, relating to ownership of the family home. As the preface to the previous edition noted, it is 'quite possibly a pointer to a much changed approach to this difficult topic'. The new edition deals with the impact of *Stack* as shown by the subsequent cases. Very recently, we have the decision of the Supreme Court in *Jones* v *Kernott*. Though this may assist in the application of *Stack* in joint names cases, considerable uncertainties remain. On the very same day as *Jones* v *Kernott* was decided, we have the decision of the Supreme Court in a very different area: how far must a lease have a certain maximum duration? *Mexfield Housing Co-operative Ltd* v *Berrisford* may disappoint in that it does not challenge the old certainty rule, even though the lease was held to be effective on its facts. The Law Commission has also been active, with a comprehensive report on easements and freehold covenants.

Finally, this edition includes some suggested reading at the end of each chapter. It should be mentioned that many chapters include extracts from writings. Where that is the case, those writings are not included as suggested reading. They may still be well worth reading in full!

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Part I
Introductory matters

1
Basic property principles

In this chapter, we will consider some of the basic principles and distinctions to be observed in property law. Most of them will be further developed in later chapters and, as in many subjects, the basic principles may be more readily comprehended once some of the more detailed material has been considered.

1. General principles

We will investigate ideas of property through two contributions to the literature. These relate specifically to land, though many of the principles apply to all forms of property.

Extract 1.1.1

Peter Birks, 'Before We Begin: Five Keys to Land Law', in *Land Law: Themes and Perspectives* (eds Bright and Dewar) pp 457–463, 467–468, 470–473, 476–486 (footnotes omitted)

Land Law is a complex subject. It is not in the end a very difficult one. It is less unstable than other areas of the law. Yet it is hard to get into. The purpose of this chapter is to make access easier. It is impossible to improve access to a completely unknown quantity. The first section, therefore, asks what kind of category we are trying to understand.

WHAT KIND OF CATEGORY?

The name 'land law' suggests a simple contextual category: all the law about land. The law does use many such categories, ordered only by the alphabet: all the law about aviation, banks, commerce, dogs, education, and so on. They take as their subject some aspect of life, just as a non-lawyer would identify it. But in this case things are not quite so straightforward. By the end of this section we will have formulated a more complex proposition: land law, as generally understood, is a contextual subset of a legal-conceptual category.

. . .

The core of land law

A target has a centre. Taking land law as a simple contextual category, we can identify at least five topics . . . Four of these must on reflection be located in the second or third circles, just outside the bull's-eye at which we are aiming. They matter, but they do not relieve us of the intellectual necessity of mastering the core. Two belong largely in public law. One of these comprises the social control essential if the environment is to be protected. The other is the housing law which applies to local government tenancies. Within private law, a third unit lies in the law of civil wrongs and deals with the duties imposed by the law for regulating the behaviour of neighbours towards each other, especially through the torts of nuisance and trespass to land.

Fourthly, there is the structuring of mega-wealth, the mission of the old Lincoln's Inn conveyancers. That is breaking away, not specifically land law any longer but wealth management. Its principal vehicle is the trust, often enough offshore, in which land becomes just one kind of asset in a rolling fund. Fifthly and last of all, there is the unit at the very centre of the target. When lawyers speak of land law, it is usually to this core that they refer.

Every business needs premises, every factory needs a site. For most of us as private individuals our home is the centre of our lives. Functionally, this core of land law has the task of providing the structure within which people and businesses can safely acquire and exploit land for daily use, to live and to work. To discharge that function, it has to have its own conceptual apparatus. The proper content of this fifth unit thus becomes the nature, creation, and protection of interests in land. Those interests and their implications are the conceptual apparatus of our land law.

The word 'interests' is slightly evasive. The law recognizes different kinds of rights, among them property rights. By 'interest' we mean 'property right'. The category of all property rights (or, in other words and more simply, 'the law of property') is a legal-conceptual category. It differs from, say, the law of dogs in that its subject is a legal concept, the concept of a proprietary right. The core of land law is the subset formed when the conceptual category of 'property right' is confined to one context: the law relating to property rights in land. To focus on that core is neither to downgrade the importance of the units in the next circles nor to forget that in real life all the units which we have identified, and others, cohere together.

Land law in this core sense is, therefore, a contextual subset of a legal-conceptual category. There is a recurrent problem. Property rights in land have roots a millennium deep in a pre-commercial society in which land and wealth were virtually synonymous. The structuring of landed wealth, and the power that went with it, was then land law's principal mission. The subject of land law – the law, that is, of the recognized proprietary interests in land – is therefore intellectually entangled in a history not always obviously relevant to its contemporary function.

THE FIVE KEYS

The five keys have one-word tags: Time, Space, Reality, Duality, and Formality. There is a pervasive theme which has its own label: Facilitation. This might be said to be the string on which the five keys hang. There is also a complication. All five keys have to be turned together. Exposition is easiest when each point has a natural priority. Here there is no natural priority, and no expository device to achieve what King Arthur intended when he seated his knights at a round table.

Facilitation

Some areas of law are primarily concerned to inhibit undesirable conduct. This is most obviously true of the law relating to wrongs, whether criminal or civil. Even there, behind the inhibition, lies a facilitative goal – namely, to allow civilized life to be conducted free from the fear of harm. The wrong of nuisance facilitates the enjoyment of land, but primarily by inhibiting unreasonable interference. By contrast, other areas are primarily facilitative. The law of contract, for example, helps people do something which by and large they want to be able to do – namely, to make reliable agreements.

Like contract, land law is primarily facilitative. Each of the five keys, though some more obviously than others, can be seen as facilitating the achievement of goals which people routinely want to achieve. . . .

A landowner may be willing to pay a large sum for a permanent proprietary right to prevent building on the neighbouring land. The first instinct is to facilitate, but there are arguments the other way. Should he be able to sterilize the economic use of that land? In fact the law does allow such a right to be created. Restrictive covenants, as property rights, are a relatively new invention. . . .

TIME

Although bits do occasionally wash away or slip into the sea, land is in general permanent. For most human purposes we have to regard it as lasting for ever. There is a powerful urge to deal in slices of time. It is not confined to land. The institution of the trust makes it relatively easy to turn all kinds of wealth into an enduring fund, and that facility in turn excites and to a degree gratifies the urge to deal in slices of time. However, it is the natural permanence of land which makes slices of time a dominant feature of land law.

Two motivations

Why do people want to deal in slices of time? It is an urge which has been fed from at least two sources. One is essentially commercial, the other not.

The commercial motivation

Commercial motivation means, in plain words, the desire to get money out of land. There are all sorts of ways of getting money out of land. For instance, one can farm the land and sell the produce. The most extreme method of all is to sell one's whole interest in the land. That means selling the whole slice of time over which one has control. The largest interest in land – the greatest slice of time – is 'for ever'. In everyday conversation I tend to say 'my house' or 'the house I own'. In all probability, what I actually have in my house is 'for ever', a slice of time measured by the length of time the land will last. There is no harm in calling that ownership. That is what in effect it is. But in the technical language of the law that huge slice of time measured by the life of the land itself is called a fee simple. The fee simple in the land on which my house stands is worth about £200,000. I could mortgage it or sell it. But there is another possibility. I could keep 'for ever' and deal instead in a shorter slice of time.

The commercial motivation for dealing in lesser slices of time is to realize in money some of the value of the land without giving up one's whole interest. The lease is the proprietary interest which most obviously facilitates this. I might let my land for a fixed number of years, say for ten years. . . .

The family motivation

The primary non-commercial motivation for dealing in slices of time is concern for one's family. In obsolescent aristocratic terms this might be restated as a dynastic motivation. The idea of benefiting the different generations of one's family is perfectly natural. . . .

The evolution of the doctrine of estates

In ordinary language the sentence 'Mr Smith has an estate in Suffolk' suggests a goodish patch of Constable landscape of which Mr Smith is the owner. But in land law an estate is a slice of time. The doctrine of estates is the learning which tells you what slices of time the law allows or has allowed a landowner to deal in. A 'life estate' was a recognized estate at common law.

. . .

SPACE

Mention of a piece of land by name – as, for example, Lord's Cricket Ground or Wembley Stadium – brings to mind an image of the surface of the land. But the surface is merely a cross-section of a space which, in a flat-earthish sort of way, we still think of as stretching infinitely up and down. Modern cosmology requires modification of the image of that space, but some of the mind's worst problems in comprehending its true shape have been overtaken by much humbler science. First balloons and then aeroplanes necessitated a rethink. The tube in which estates subsist has had to be cut off in order to deprive the surface-owner of exclusive control of the upper air. . . .

REALITY

In the technical language of the law 'real' never denotes the opposite of 'illusory' or 'fake'. It is usually an anglicization of the adjective from *res*, which is Latin for 'thing'. Hence, 'real' always indicates that something has some quality of or relation to a thing. If a creditor, about to lend money, asks for real security, he means that he wants to be able to turn against a thing for the purpose of obtaining what is due to him. That contrasts with personal security. A guarantee will allow the creditor an extra recourse, against the person of the guarantor. We could talk about 'thing-security' and 'person-security'. We do not. We distinguish instead between real and personal security.

A lawyer cannot be frightened of technical meanings. It helps, however, if each word pressed into technical service has just one technical meaning. Here there is more than one. The law uses 'real' to mean 'in some significant way thing-related', but the nature of the relation is not always the same. Very importantly, there is a difference between the 'reality' which is indicated in the contrast between real and personal property and the 'reality' indicated in the contrast between real and personal rights. Though the distinction between real and personal property is ancient and venerable, it is nowadays far less important than the distinction between real and personal rights.

Realty and personalty

There is an almost perfect match between the category of real property and land. If a lay person hears 'real property', or 'real estate', or 'realty', what will come to mind will be an image of land. For most lawyers the effect will be the same. Some lawyers may just manage to remind themselves that they should be thinking more abstractly, not of the land itself, but of interests in land. 'Personal property' or 'personalty' similarly evoke cars, cows, televisions, crockery, pictures, money, and a host of other moveable things. In fact the correlation is not quite perfect. A lease of land, however long, is technically personalty, and some moveable things are heirlooms and fall within the category of realty. The right to call a parson to the freehold in a church, called an advowson, was always realty.

In what sense is realty 'thing-related' and in what sense are personal things like cars not 'thing-related'?. . . .

. . . In some actions you could recover the thing itself. Those actions came to be called 'real actions', 'real' meaning 'thing-related' in the simple sense that the person claiming would recover the very thing claimed. . . . It is almost a perfect truth that the category of specific recoverability extended no further than land. Hence the near-perfect correlation between realty and land.

Real rights and personal rights

We move now to the kind of 'reality' or 'thing-relatedness' which matters in the modern law. The key proposition is that land law is, centrally, the law of real rights in land. The slice of time which we call a lease, or, less commonly, a 'term of years', is for historical reasons personalty or personal property, but it is indisputably a real right in land and as such central to land law. A fee simple is similarly a real right in land, the greatest of all.

People's wealth – their 'property' in the widest sense of that slippery word – consists in rights of two kinds, real rights and personal rights. It is important to say at once that there are different ways of expressing this distinction. 'Real' and 'personal' here anglicize the Latin labels *in rem* and *in personam*. Many people prefer to use the Latin labels. The Latin tells us that a right *in rem* is a right in or against a thing, while a right *in personam* is a right in or against a person.

One can change to different language. A right *in personam* can be called an obligation. A right *in personam* and an obligation are one and the same thing, but looked at from different ends. I have an overdraft. I owe my bank £1,000. The bank has a right *in personam*, the person

here being me. I have an obligation to pay. The relationship can be named from either end, and in practice we usually name it from the liability end. Hence we very frequently speak, not of the law of personal rights or of rights *in personam*, but of obligations. As for rights *in rem*, if we drop both the Latin and the latinate English, they usually become 'property rights' or 'proprietary rights'. We sometimes use 'property' loosely to mean 'wealth'. In that loose sense 'property' wobbles. Sometimes 'my property' evokes and is intended to evoke specific things, such as cars and clothes and cottages. Sometimes, and rather more technically, 'my property' denotes mere rights vested in me, such as a fee simple, a lease, ownership, or the obligations of my debtors. Whichever the focus, the loose notion of property as wealth is too broad to be useful in analysis. To think clearly the law has to draw a bright line between two classes of right, both of which can fall within the loose notion of wealth.

The bright line distinguishes between property and obligations. When that line is drawn, property clearly has a narrower and much more technical sense. Within wealth, taken as including all assets, the law of obligations is the law of rights *in personam* and the law of property is the law of rights *in rem*. Hence a 'property right' or 'proprietary right' is a real right, is a right *rem*. The law of property is the law of all known real rights, and land law is the law of real rights in land.

What is the difference? The practical difference bears on this question. Against whom can the right be demanded? 'Demandability' is intelligible but not really English. But another word for 'to demand' is 'to exact', which gives us 'exigible' and 'exigibility'. A right *in rem* is a right the exigibility of which is defined by the location of the thing. The exigibility of a right *in personam* is defined by the location of the person. Where I have a right *in personam* the notional chain in my hand is tied round that person's neck. Where I have a right *in rem*, the notional chain in my hand is tied around a thing. Between me and the car which I own there is such a chain.

. . .

DUALITY

There is duality where a proposition is true in one conceptual dimension but is falsified or heavily modified in another. Our land law is shot through by instances. There is one of ubiquitous and fundamental importance – namely, the duality between law and equity. There is another, now of fading significance, which emanates from tenure. A third consists in the difference between beneficial interests and security interests. A fourth, perhaps inessential at the point of access to the subject, turns on the relativity of title.

Law and equity

Proprietary rights in land can be legal or equitable. The mind can cope with the proposition that English law is different from Scots law. It is more difficult to accept the existence within English law itself of two legal systems with different answers to many questions. Yet for centuries that was the position. The courts of common law administered common law, and the court of chancery administered its own law, called equity. And on many issues the court of chancery took a position different from that of the courts of common law. The institutional duality was abolished more than a century ago. Modern courts administer both law and equity, and the conflicts' rule laid down by statute is that, where law and equity differ, equity prevails. The conceptual duality continues. In some areas it has weakened and will weaken further. But, wherever the law of trusts has a role to play, the duality is here to stay. Where there is a trust, the law says *A* is owner but equity disagrees and prefers *B*. Or we might put it the other way about: wherever equity thinks *B* should be owner, even though the common law takes a different view, there is a trust. *A*, the owner at common law, becomes a trustee for *B*.

The law of trusts was equity's principal creation, and trusts have become the distinctive feature of the Anglo–American law of property. [Trusts are considered later in this chapter.]