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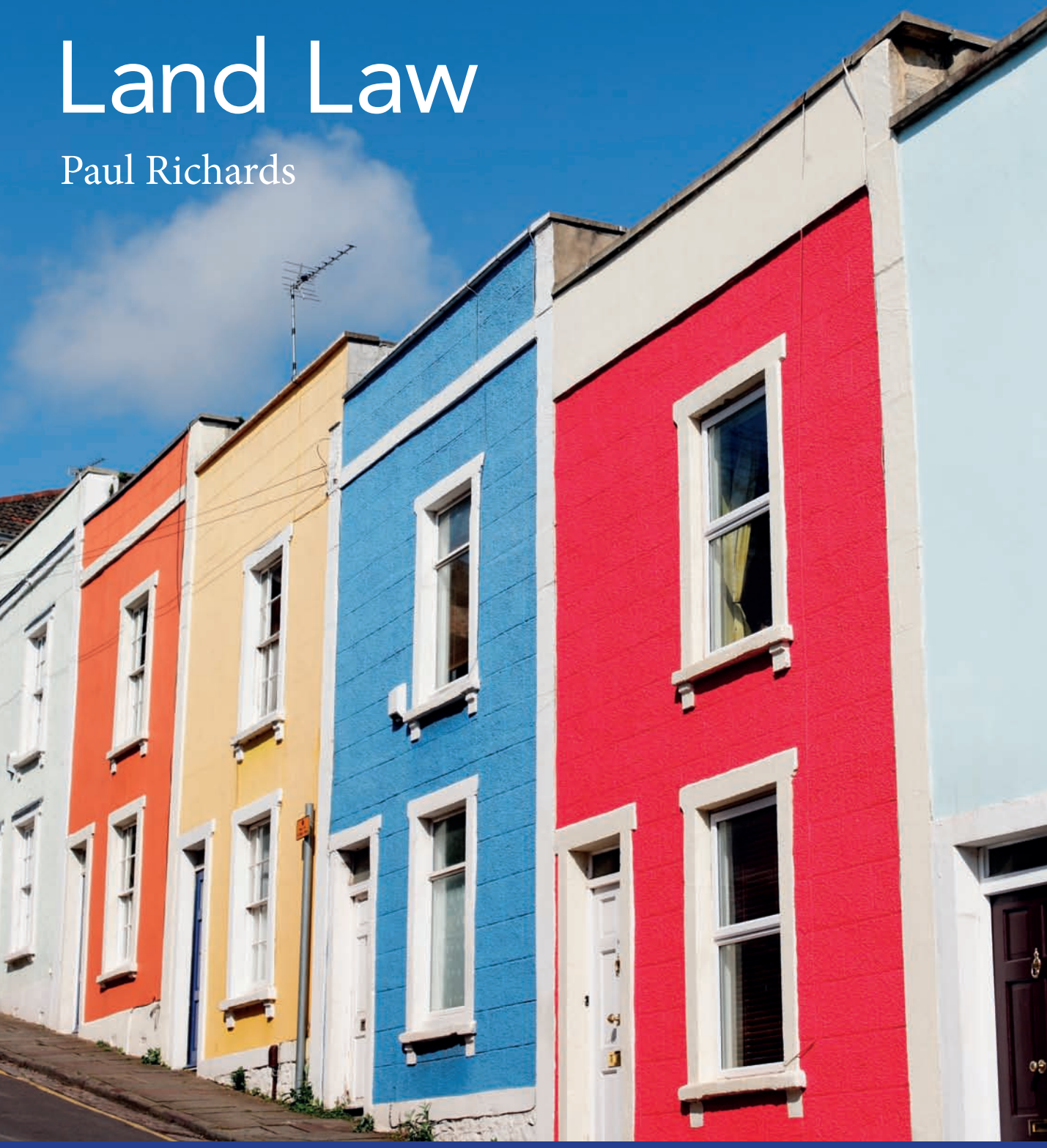
Land Law

Paul Richards



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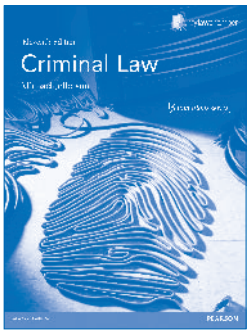

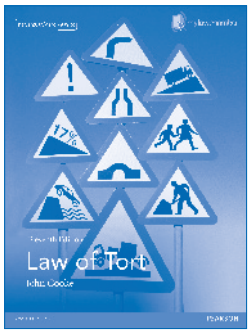

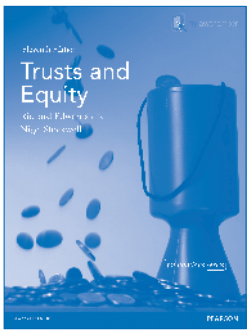

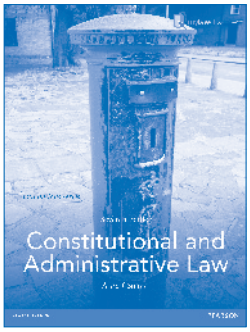

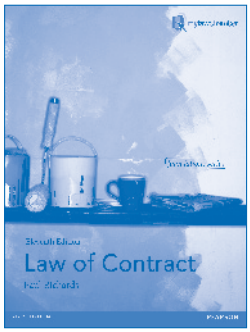

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Brief contents

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Preface

There is no question that Land Law is not easy. Ask any lawyer who has studied the subject and most will say the same thing. But difficulty should not be an excuse to avoid the subject and, anyway, a student aspiring to complete a law degree, with aspirations of qualifying as a solicitor or barrister, has no choice in the matter. Equally, difficulty should not be a reason for not finding the subject fascinating, despite its challenges. Some might say that it is a dry subject – but out of all the legal subjects this is the one which we all recognise, lawyer or not. We all live on the land and thus we interact with it every day. We travel on lanes, roads and motorways, passing rivers, streams, fields, gardens, homes (stately and more modest), offices and factories and all these are governed by the principles which are to be found within this book. To a greater extent than any other legal subject, we have the evidence of it before us. More often than not, the very landscape that is in front of us is carved out of the legal regime that is land law. So what better way to envisage the subject than to close the book, walk around your neighbourhood and visualise the legal principles that lie before you? But land law is about much more than this since it is about relationships: husbands, wives, cohabitees, lenders and borrowers, landlords and tenants, trustees and beneficiaries. The subject is therefore dynamic and, if it is approached in this light, you will become engrossed in its twists and turns and the puzzles that it presents. The language of land law is very different as well and at times you can be forgiven for thinking that you have entered into some sort of Tolkienesque world.

To understand the subject you have to know the language and the only way to do this is to read . . . and then read again until you become conversant with this fascinating world. A word of warning here – I have made no attempt to avoid the use of legal terminology as part of a trendy way of presenting the material. This only presents the material in an artificial manner that is not based in reality and does a disservice to those seeking to gain a full picture of the subject. And land law is indeed a picture, though not one you will recognise at first, since it is conjured up in the form of a jigsaw. The chapters appear as standalone units but to treat them as such will provide you with a shallow understanding of the subject. All the chapters form part of the jigsaw and, as you study each one, so a picture will slowly emerge. Some of you, as with a jigsaw, will see the picture emerge very early on, others may not – but persist and the veil will be raised from your eyes.

This book is not intended to be a 'crammer'; it is far too long to pretend to be such anyway, but is intended to provide you with an understandable and readable insight into the complexities of the subject in a structured, logical manner so that your knowledge and understanding are cumulative. Reading around the subject will also help you to immerse yourself in it and each chapter provides you with some guidance here.

This text is not written as some definitive statement of land law and for this you should refer to texts such as *Elements of Land Law* by Gray and Gray or *The Law of Real Property* by Megarry and Wade. The intention is to provide a halfway house between the student's own lecture notes and these more substantive and authoritative texts.

In time-honoured tradition, all errors and omissions are entirely my responsibility and I welcome any suggestions that readers might think will improve the text.

It would be remiss of me not to thank those who have provided assistance and encouragement in the writing of this book. Thanks therefore go to Donna Goddard and latterly Christine Statham, and to the rest of the team at Pearson Education, for their support in the writing of this book and for the Foundations Studies in Law Series generally. Their ideas, efforts and enthusiasm have contributed greatly to both and I am grateful for their patience when the production of the manuscript appeared to be slow at times. I would also like to express my thanks to the staff of the Law School and my other former colleagues at the University of Huddersfield for their support and advice over the years I spent there. Special thanks are due to Emma Hatfield, Rebecca Kelly and Catherine Stanbury for providing me with advice and acting as a sounding board for parts of the text. In particular I would like to express my profound gratitude to my former secretary, Joanne Battye, who took on the enormous task of typing the manuscript and without whom I doubt this book would have been completed. I am pleased she can now have a 'normal' weekend!

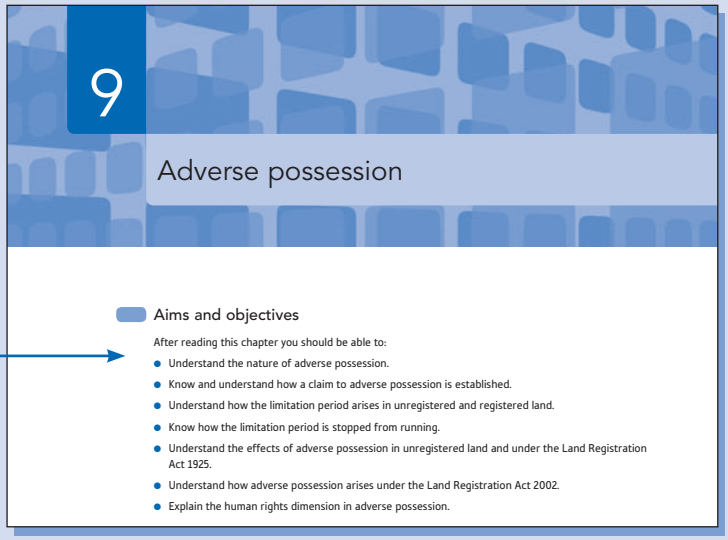
I thank my sons, Phillip and William, for their continued support and companionship and hope that they fulfil their ambitions in life. I also thank my partner, Maggie, for her patience and encouragement – particularly on those 'lost' weekends when I was tied to my desk, working on the manuscript – and for reminding me that I needed to be writing as I reached for a fly fishing rod! I would also like to thank my brother Tony for providing intervals of sanity when we could chat over a meal, usually as a precursor to seeing some atrocious movie.

Following my retirement from being Head of the School of Law at the University of Huddersfield in 2012, it has been a great pleasure to write this book as it has enabled me to return to the sustained academic writing that managing a law school often rendered impossible. It has been a particular joy to write a book on Land Law since this was my first love in entering academic life 35 years ago. I should perhaps add that retired I have not! My involvement in academic life since retirement has proved to have been busier than ever and those visions of practising the gentle art of fly fishing or meandering through my beloved mountains of the Lake District and the Himalaya have so far proved elusive but now this book has been completed . . . ?

Paul Richards
November 2013

Guided tour

Aims and objectives at the start of each chapter help focus your learning before you begin.



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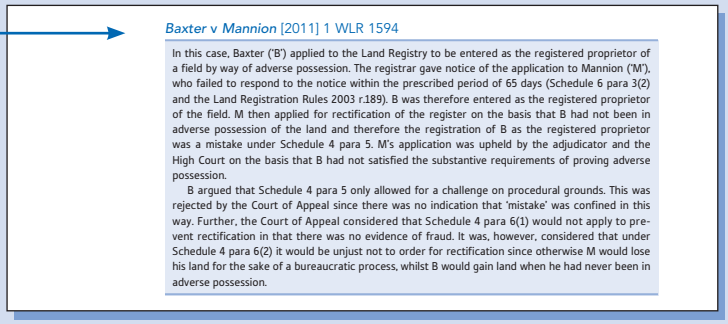
Adverse possession

Aims and objectives

After reading this chapter you should be able to:

- Understand the nature of adverse possession.
- Know and understand how a claim to adverse possession is established.
- Understand how the limitation period arises in unregistered and registered land.
- Know how the limitation period is stopped from running.
- Understand the effects of adverse possession in unregistered land and under the Land Registration Act 1925.
- Understand how adverse possession arises under the Land Registration Act 2002.
- Explain the human rights dimension in adverse possession.

Case summaries highlight the facts and key legal principles of essential cases that you need to be aware of in your study of land law.

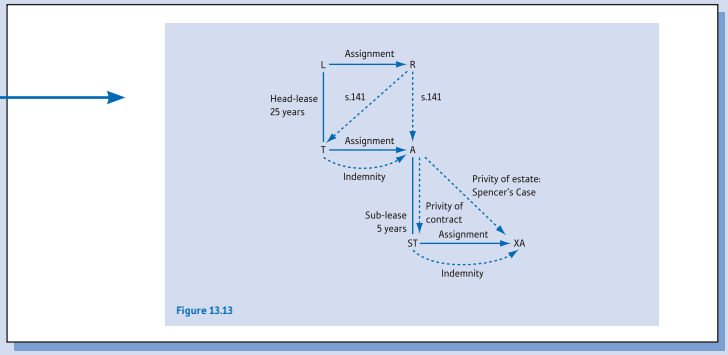


Baxter v *Mannion* [2011] 1 WLR 1594

In this case, Baxter ('B') applied to the Land Registry to be entered as the registered proprietor of a field by way of adverse possession. The registrar gave notice of the application to Mannion ('M'), who failed to respond to the notice within the prescribed period of 65 days (Schedule 6 para 3(2) and the Land Registration Rules 2003 r.189). B was therefore entered as the registered proprietor of the field. M then applied for rectification of the register on the basis that B had not been in adverse possession of the land and therefore the registration of B as the registered proprietor was a mistake under Schedule 4 para 5. M's application was upheld by the adjudicator and the High Court on the basis that B had not satisfied the substantive requirements of proving adverse possession.

B argued that Schedule 4 para 5 only allowed for a challenge on procedural grounds. This was rejected by the Court of Appeal since there was no indication that 'mistake' was confined in this way. Further, the Court of Appeal considered that Schedule 4 para 6(1) would not apply to prevent rectification in that there was no evidence of fraud. It was, however, considered that under Schedule 4 para 6(2) it would be unjust not to order for rectification since otherwise M would lose his land for the sake of a bureaucratic process, whilst B would gain land when he had never been in adverse possession.

Figures and diagrams are used to strengthen your understanding of complex legal processes in land law.



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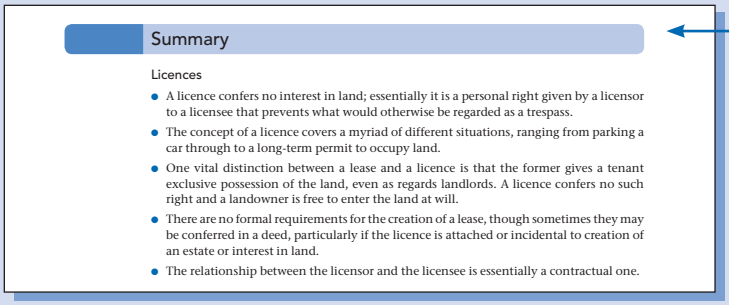
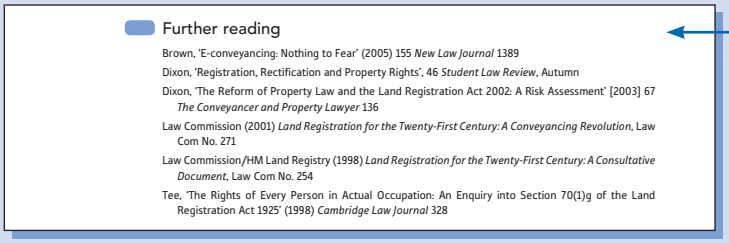


Summary

Licences

- A licence confers no interest in land; essentially it is a personal right given by a licensor to a licensee that prevents what would otherwise be regarded as a trespass.
- The concept of a licence covers a myriad of different situations, ranging from parking a car through to a long-term permit to occupy land.
- One vital distinction between a lease and a licence is that the former gives a tenant exclusive possession of the land, even as regards landlords. A licence confers no such right and a landowner is free to enter the land at will.
- There are no formal requirements for the creation of a lease, though sometimes they may be conferred in a deed, particularly if the licence is attached or incidental to creation of an estate or interest in land.
- The relationship between the licensor and the licensee is essentially a contractual one.

Chapter summaries located at the end of each chapter draw together the key points that you should be aware of following your reading, and provide a useful check for revision.



Further reading

Brown, 'E-conveyancing: Nothing to Fear' (2005) 155 *New Law Journal* 1389

Dixon, 'Registration, Rectification and Property Rights', 46 *Student Law Review*, Autumn

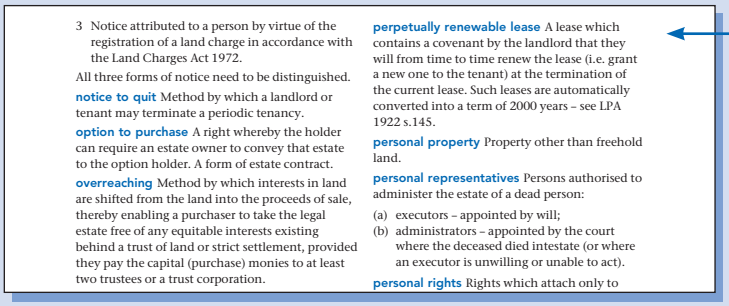
Dixon, 'The Reform of Property Law and the Land Registration Act 2002: A Risk Assessment' [2003] 67 *The Conveyancer and Property Lawyer* 136

Law Commission (2001) *Land Registration for the Twenty-First Century: A Conveyancing Revolution*, Law Com No. 271

Law Commission/HM Land Registry (1998) *Land Registration for the Twenty-First Century: A Consultative Document*, Law Com No. 254

Tee, 'The Rights of Every Person in Actual Occupation: An Enquiry into Section 70(1)g of the Land Registration Act 1925' (1998) *Cambridge Law Journal* 328

Suggestions for **Further reading** at the end of each chapter encourage you to delve deeper into the topic and read those articles which help you to gain higher marks in both exams and assessments.



3 Notice attributed to a person by virtue of the registration of a land charge in accordance with the Land Charges Act 1972.

All three forms of notice need to be distinguished.

notice to quit Method by which a landlord or tenant may terminate a periodic tenancy.

option to purchase A right whereby the holder can require an estate owner to convey that estate to the option holder. A form of estate contract.

overreaching Method by which interests in land are shifted from the land into the proceeds of sale, thereby enabling a purchaser to take the legal estate free of any equitable interests existing behind a trust of land or strict settlement, provided they pay the capital (purchase) monies to at least two trustees or a trust corporation.

perpetually renewable lease A lease which contains a covenant by the landlord that they will from time to time renew the lease (i.e. grant a new one to the tenant) at the termination of the current lease. Such leases are automatically converted into a term of 2000 years – see LPA 1922 s.145.

personal property Property other than freehold land.

personal representatives Persons authorised to administer the estate of a dead person:

(a) executors – appointed by will;
(b) administrators – appointed by the court where the deceased died intestate (or where an executor is unwilling or unable to act).

personal rights Rights which attach only to

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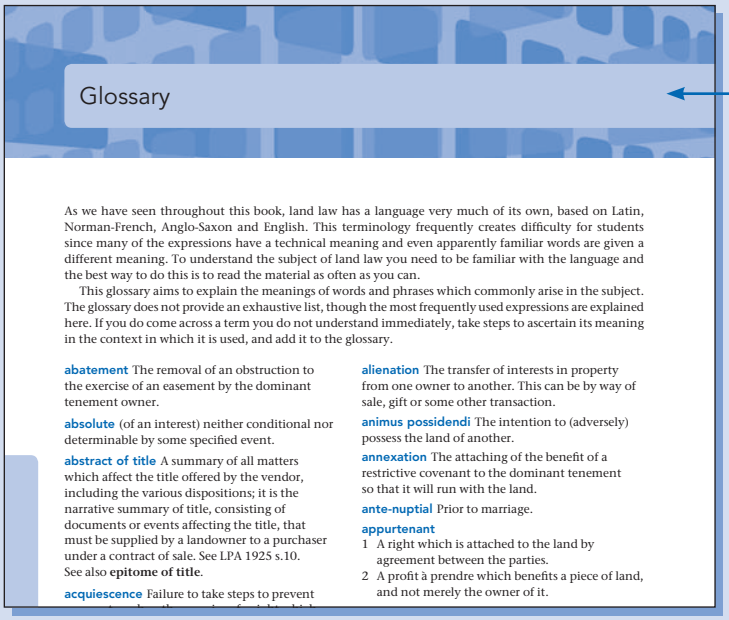

Glossary

As we have seen throughout this book, land law has a language very much of its own, based on Latin, Norman-French, Anglo-Saxon and English. This terminology frequently creates difficulty for students since many of the expressions have a technical meaning and even apparently familiar words are given a different meaning. To understand the subject of land law you need to be familiar with the language and the best way to do this is to read the material as often as you can.

This glossary aims to explain the meanings of words and phrases which commonly arise in the subject. The glossary does not provide an exhaustive list, though the most frequently used expressions are explained here. If you do come across a term you do not understand immediately, take steps to ascertain its meaning in the context in which it is used, and add it to the glossary.

abatement The removal of an obstruction to the exercise of an easement by the dominant tenement owner.

absolute (of an interest) neither conditional nor determinable by some specified event.

abstract of title A summary of all matters which affect the title offered by the vendor, including the various dispositions; it is the narrative summary of title, consisting of documents or events affecting the title, that must be supplied by a landowner to a purchaser under a contract of sale. See LPA 1925 s.10. See also **epitome of title**.

acquiescence Failure to take steps to prevent

alienation The transfer of interests in property from one owner to another. This can be by way of sale, gift or some other transaction.

animus possidendi The intention to (adversely) possess the land of another.

annexation The attaching of the benefit of a restrictive covenant to the dominant tenement so that it will run with the land.

ante-nuptial Prior to marriage.

appurtenant

1 A right which is attached to the land by agreement between the parties.
2 A profit à prendre which benefits a piece of land, and not merely the owner of it.

A full **Glossary** located at the back of the book can be used throughout your reading to clarify unfamiliar terms.

Table of cases

Table of Statutes

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Extracts on page 42, 77 from Midland Bank Trust Co Ltd v Green [1981] 1 AC 513; Extracts on pages 52, 239 from Errington v Errington and Woods [1952] 1 KB 290; Extract on page 59 from National Provincial Bank Ltd v Hasting Car Mart Ltd [1965] AC 1175; Extract on page 71 from Pritchard v Briggs [1980} Ch 338; Extract on page 75 from Lazarus Estates Ltd v Beasley [1956] 1 QB 702; Extract on page 76 from Re Monolithic Building Co [1915] 1 Ch 643; Extract on page 76 from Miles v Bull [1969] 1 QB 258; Extract on page 95 from Yandle & Sons v Sutton [1922] 2 Ch 199; Extracts on pages 105–6, 243 from Yaxley v Gotts [2000] Ch 162; Extracts on pages 108, 246 from Ramsden v Dyson (1866) LR 1 HL 129; Extract on page 142 from National Provincial Bank Ltd v Hastings Car Mart Ltd [1964] Ch 9; Extract on page 142 from Land Registration for the Twenty-First Century: A Conveyancing Revolution, **http://lawcommission.justice.gov.uk/docs/lc271_land_registration_for_the_twenty-first_century.pdf**; Extracts on pages 146–7 from National Provincial Bank Ltd v Hastings Car Mart Ltd [1964] Ch 665; Extracts on pages 148, 150 from Williams & Glyn's Bank plc v Boland [1981] AC 487; Extract on page 160 from Baxter v Mannion [2011] 1 WLR 1594; Extracts on pages 173, 175, 178, 180, 234 from Street v Mountford [1985] AC 809 (HL); Extracts on page 175 from Prudential Assurance Co Ltd v London Residuary Body [1992] AC 386; Extract on page 177 from AG Securities v Vaughan [1990] AC 417; Extract on page 180 from Marcroft Wagons Ltd v Smith [1951] 2 KB 497; Extracts on pages 181, 191 from Bruton v London and Quadrant Housing Trusts [2000] 1 AC 406; Extract on page 191 from Industrial Properties (Barton Hill) Ltd v AEI Ltd [1977] QB 850; Extract on page 196 from National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675; Extract on page 200 from Attorney General of Belize v Belize Telecom Ltd [2009] 1 WLR 1988; Extract on page 207 from Billson v Residential Apartments Ltd [1992] 1 AC 494; Extract on page 211 from Akici v LR Butlin Ltd [2006] 1 WLR 201; Extract on page 218 from Lee-Parker v Izzet [1971] 1 WLR 1688; Extract on pages 176–7 from Aslan v Murphy [1990] 1 WLR 766; Extract on page 237 from Hurst v Picture Theatres Ltd [1915] 1 KB 1; Extracts on pages 243, 248 from Cobbe v Yeoman's Row Management Ltd [2008] 1 WLR 1752; Extract on page 243 from Crabb v Arun District Council [1976] 1 Ch 179; Extracts on pages 246, 252 from Gillett v Holt [2001] Ch 210; Extracts on pages 247, 248 from Thorner v Major [2009] 1 WLR 776; Extract on page 249 from Amalgamated Investment and Property Co Ltd v Texas Commerce International

Bank Ltd [1982] QB 84; Extract on page 251 from Pascoe v Turner [1979] 1 WLR 431; Extract on page 255 from Stack v Dowden [2007] AC 432; Extract on pages 237–8 from Tanner v Tanner [1975] 1 WLR 1347; Extract on pages 244–5 from Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] QB 133; Extracts on pages 274, 276 from J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419; Extract on page 290 from Re Buchanan-Wollaston's Conveyance [1929] Ch 738; Extracts on pages 301, 304, 366 from Mortgage Corporation v Shaire [2001] Ch 743; Extract on page 307 from Re Citro (A Bankrupt) [1991] Ch 142; Extract on pages 300–1 from Transfer of Land: Trusts of Land (Law Com. No. 181), **https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228750/0391.pdf**; Extract on page 333 from WestdeutscheLandesbankGirozentrale v Islington Borough Council [1996] AC 669; Extract on page 335 from Oxley v Hiscock [2005] Fam 211; Extract on page 343 from Burgess v Rawnsley [1975] Ch 222; Extracts on pages 358, 359, 360, 366 from Gissing v Gissing [1971] AC 886; Extracts on pages 358, 362, 363–4 from Lloyds Bank plc v Rosset [1991] 1 AC 107; Extract on page 359 from Pettitt v Pettitt [1970] AC 777; Extract on page 366 from Sharing Homes, **http://lawcommission.justice.gov.uk/publications/sharing-homes.htm**; Extract on page 371 from Cohabitation: The Financial Consequences of Relationship Breakdown – Executive Summary, **http://lawcommission.justice.gov.uk/docs/lc307_Cohabitation_summary.pdf**; Extract on page 385 from Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847; Extract on page 393 from Boyer v Warbey [1953] 1 QB 234; Extract on page 394 from Landlord and Tenant: Privity of Contract and Estate (Law Com. No. 174, 1988), **https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229015/0008.pdf**; Extract on page 409 from Crest Nicholson Residential (South) Ltd v McAllister [2004] 1 WLR 2409; Extract on page 411 from Rogers v Hosegood [1900] 2 Ch 388; Extract on page 414 from Elliston v Reacher [1908] 2 Ch 374; Extract on page 414 from Re Dolphin's Conveyance [1970] Ch 654; Extracts on pages 416, 421, 422 from Rhone v Stephens [1994] 2 AC 310; Extract on page 422 from Re Gadd's Land Transfer [1966] Ch 56; Extract on page 437 from Crow v Wood [1971] 1 QB 77; Extract on page 438 from Copeland v Greenhalf [1952] Ch 488; Extract on page 438 from Reilly v Booth (1890) 44 Ch D 12; Extract on page 441 from London and Blenheim Ltd v Ladbrooke Parks Ltd [1992] 1 WLR 1278; Extract on page 447 from Nickerson v Barraclough [1981] Ch 426; Extract on page 448 from Pwllbach Colliery Co Ltd v Woodman [1915] AC 634; Extracts on pages 449, 451 from Wheeldon v Burrows (1879) 12 Ch D 31; Extract on page 451 from Sovmots Investment Ltd v The Secretary of State for the Environment [1979] AC 144; Extract on page 451 from Wheeler v JJ Saunders Ltd [1996] Ch 19; Extract on page 452 from R v Oxfordshire County Council Ex parte Sunningwell Parish Council [2000] 1 AC 335; Extract on page 463 from Tehidy Minerals Ltd v Norman [1971] 2 QB 528; Extract on page 463 from Swan v Sinclair [1924] 1 Ch 254; Extract on page 464 from James v Stevenson [1893] AC 162; Extract on page 479 from Samuel v Jarrah Timber and Wood Paving Co Ltd [1904] AC 323; Extract on page 481 from Knightsbridge Estates Trust Ltd v Byrne [1939] Ch 441; Extract on page 482 from Rigby LJ in Noakes v Rice [1900] 2 Ch 445; Extracts on pages 482, 483 from G & C Kreglinger v New Patagonia Meat and Cold Storage Ltd [1914] AC 25; Extract on page 486 from Multiservice Bookbinding Ltd v Marden [1979] Ch 84; Extract on page 490 from Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949; Extract on page 492 from Four Maids Ltd v Dudley Marshall (Properties) Ltd [1957] Ch 317; Extract on page 492 from Quennell v Maltby [1979] 1 WLR 318; Extracts on page 495 from China and South Sea Bank Ltd v Tan Soon Gin [1990] 1 AC 536; Extract on page 496 from Cheltenham and Gloucester Building Society plc v Krausz [1997] 1 WLR 1558; Extract on page 520 from Newbiggin v Adam (1886) 34 ChD 582.

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Part 1

Introduction and the acquisition of land

1

Land law – some basic concepts

Aims and objectives

At the end of this chapter you should be able to:

- Understand what is meant by land.
- Distinguish between real and personal property.
- Recognise the objectives in studying land law.
- Gain an understanding of land as a three-dimensional concept.
- Distinguish between fixtures and fittings.
- Classify the different types of property.

Land as legal construct

As a species, we are tied to land, and since mankind ceased to be hunter gatherers and began to settle on a given piece of land, rules emerged as to land ownership and use. It is difficult to imagine any society that does not measure the relationship of its members to each other and the environment in which they live and work. Today the concept of property is central to the social and economic life of our society.

The law of property provides rules that confer the notion of ownership on land and goods. The law is also concerned with our relationship with that property, including the de facto possession of it. To ignore this perspective creates a misconception on the part of the student embarking on the study of the law of property that one is simply looking at a body of rules and principles that regulates one's rights and obligations in relation to that part of the general law relating to property. It is important to establish that, whilst the layperson might talk in terms of owning a 'thing', lawyers do not perceive property in this way but in terms of a multiplicity of interests that might exist within property and which may, in turn, give rise to a variety of different actions. This concept may seem obscure but it can be illustrated by considering that in relation to a piece of land there may be rights pertaining to the land in respect of the owner, a tenant, a building society or bank, the owner of a right of way, a neighbour who has a restrictive covenant over the property, or, indeed, the spouse of the owner.

Another aspect that arises in relation to property, as opposed to one's rights in the property, is the right to exclude others from it. Thus an owner can exclude a trespasser from entering the property. This right to exclude can apply to persons who have competing rights in the property.

Example

A could mortgage his house to Bank B and then take out another mortgage with Bank C. If A becomes insolvent then both B and C may each claim a proprietary interest in the house and will attempt to exert their priority to each other in order to recover the money they have lent to A.

So far we have talked of 'land law' and 'property law' but the two are not necessarily the same thing. By 'land law' we mean that we are studying what is generally referred to as the law of 'real property'. This has a technical meaning but here we are distinguishing land from other forms of property, such as tables, chairs, cars, copyrights, etc. This work is primarily concerned with land law or real property, which to a degree can be used interchangeably, though there are nuances attached to the expression 'real' which we will define and clarify later on.

Undoubtedly, the study of land law is not easy – speak with any lawyer and they will confirm this. Indeed, it was described by Oliver Cromwell as an 'ungodly jumble'! Many students therefore approach this subject with a significant amount of trepidation and the subject has a reputation for being difficult and, for some, uninteresting. It is, however, a dynamic subject and not necessarily academic – after all, we live on and amongst land or real property every day of our lives. The very landscape of the towns, cities and countryside that we live in is a construct that is often derived from legal rules and principles. Sometimes it is easy to think of land law being contained within a text such as this one, but one only has to open one's eyes and look around to see many of the concepts appearing in the world about us as we travel through our towns, cities and countryside.

Land law is different from other areas of law in that it has a terminology and vocabulary all of its own. Many of the terms are derived from Latin, Norman French and the feudal system that underpins the subject. This adds another level of confusion and the student must become conversant with this terminology and vocabulary in order to understand the subject. Essentially, it is like learning a new language and, as with learning a language, the best way of dealing with this is to read and use it as much as possible. Perhaps an example here will give you some idea of the difficulty. When you look in the estate agent's window, you will notice that the properties being sold are often termed 'leasehold' or 'freehold'. The former is fairly self-explanatory at this point, but the expression 'freehold' is known to the lawyer as a 'fee simple absolute in possession'. The expression 'fee' indicates that the estate is one that is capable of being inherited, the expression 'simple' indicates that the estate can pass down through both lineal (father to son to grandson) as well as collateral (father to uncle to a company) descendants – that is, unrestricted rights. The expression 'simple' indicates that there are no conditions attached to the land and 'possession' indicates that there is a present entitlement to the estate/land. This is clearly a bit of a mouthful and largely meaningless to the layperson, so for short we use the expression 'freehold' to describe what it is one is buying.

Unlike many subjects that the student may have studied so far, which can be divided up into distinct topics that can be studied in isolation from each other, land law cannot be studied in a piecemeal fashion. Each topic forms a component of the whole. The subject is

therefore a bit like a jigsaw. The picture comprises many pieces and to view the picture properly one needs to put them all together in the correct place. The same is true of land law, and the more one reads and progresses in one's study of the subject, the clearer the picture becomes.

There are some advantages with land law in that it is a fairly structured subject and because we are dealing with 'property' or 'proprietary' rights in land (a freehold, for example) as opposed to personal rights (a licence), the structure is fairly rigid since proprietary rights can exist for many years – or even centuries – as they attach to the land itself, whilst personal rights are fairly transient and exist between individuals, much like a contract. The subject is also very much statute-based – largely because, in 1925, a whole raft of interconnecting pieces of legislation was created by Parliament and much of the modern law is derived from this body of legislation, though there have been some amendments, such as the Trusts of Land and Appointment of Trustees Act 1996. The subject has nevertheless grown organically from case law and statute law and there is no top-down consolidating legislation that pulls it all into a coherent body of law. Whilst it is imperative to know the modern land law, one also has to know something of its origins since otherwise it is impossible to understand the modern context.

What are the objectives in studying land law?

The objectives are twofold:

(i) to know and understand the rights and liabilities attached to the land; and

(ii) to provide a foundation for the study of conveyancing practice.

What is the distinction between land law and conveyancing? Land law involves the rights and liabilities pertaining to the land in a passive sense, whilst conveyancing is the activity that creates and transfers rights in a piece of land. The two of course overlap and cannot exist in isolation from each other. The result is that, whilst this book is primarily about land law, by its very nature it must include elements of conveyancing, though the finer intricacies of that subject have to be left for further study at a later stage. That is not to say that conveyancing is not important since it is the conveyancing of land from one person to another that defines ownership or 'title' to the property, what piece of land is actually being transferred, how long the transferee may hold the land for, what interests that person may have in relation to adjoining property, what interests others may have over the transferee's property and what restrictions may be placed on the land by public authorities.

The last point is interesting since, whilst we will be mostly dealing with the operation of private law, it is as well to be aware that the public law, such as the requirement for planning permission to develop the land, also has an influence here. This aspect is a relatively modern development and very much a late-nineteenth- and twentieth-century concept. It dictates much of the way our towns and cities are laid out and constructed. Nevertheless, one should not underestimate the influence that private land law has had on our environment by way of restrictive covenants. Victorians, if they could be transported via a time machine to the present, would be astonished at the design of our modern buildings and the materials used in their construction – however, they would also be able to recognise that the way our streets, towns and cities are formed still complies with restrictions developed in their own era. It is therefore important that to understand English land law one must of necessity understand the historical context that lies behind the subject as it is this that underpins the present-day law.

Little of this book will be concerned with planning law as a body of public law – this is a separate subject in its own right. That is not to say that we are inured from its influence and we refer to it when, and if, it is relevant to our study of land law. Our study of land will therefore fall into two broad areas:

(i) rights over one's own land; and

(ii) rights over land owned by another person.

So . . . what is land?

A good starting point here is the definition stated in the Law of Property Act 1925 ('LPA') s.205 (1)(ix):

> 'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditament; also a manor, an advowson, and a rent and other incorporeal hereditament, and an easement, right, privilege, or benefit in, over, or derived from land; . . . and 'mines and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same . . . ; and 'manor' includes a lordship, and reputed manor or lordship; and hereditament 'means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir'.

What emerges from this definition is that it is not really a definition as such, that defines exactly what land is, but it rather informs us in what things land may consist, hence it talks in terms of the fact that 'Land includes . . .'. The other thing we can see from this 'definition' is that it uses some fairly unusual words that are somewhat arcane and not easily understood. It is, however, useful to dissect this provision and look at each element in turn.

'. . . land of any tenure . . .'

Broadly speaking, this takes us back to the estate agent's and how property is described there. You will recall that properties are often described as 'leasehold' and 'freehold'. More will be said about these later on, but basically when we see the expression 'leasehold' we think in terms of land being held for definite periods of time, such as a 999-year lease, a yearly lease or a weekly lease. Freehold land means that the owner can own the land forever and, as such, it is for an indefinite period of time. The land can be sold or passed on through inheritance. A lease can be created out of a freehold estate but not the other way around, since a freehold, by definition, is longer than a lease, so it is not possible to carve something greater out of a limited interest, which is something smaller.

If one looks at a house from a road, it is not possible to tell if it is a freehold or a leasehold estate – one would have to see the title deeds to discern this distinction. Both therefore appear to be land but historically land comprises 'real' property (sometimes referred to as 'realty' – *not* 'reality', which is something entirely different!). We need to distinguish real property from 'personal' property (sometimes referred to as 'personalty' – *not* 'personality', which, again, is something entirely different!). Personal property comprises things such as chairs, tables, etc., which are referred to as 'chattels' in property law. The expression 'chattel' is derived from the Anglo-Saxon word for cattle.

Freehold property is 'real' property whilst leasehold property is 'personal' property. This seems strange since, as stated earlier, if one looks at a house one cannot see if it is freehold

or leasehold, though they are, in fact, very different types of land. The reason that freehold land is real property derives from what could be recovered if one was dispossessed of the land. The expression 'real' is derived from the Latin word 'res' which means 'thing'. Thus, if one were dispossessed of one's land, one could recover the land itself, the 'thing', as opposed to merely receiving damages. The expression 'personal' property is derived from the Latin 'in personam' and here, if there is a dispute about ownership of the property, the courts would either order the return of the item or award damages instead.

One would have thought that the classification of property would have been based on whether it is immoveable or moveable, i.e. land and chattels, Whilst this distinction was, in fact, recognised, leasehold land was regarded as existing outside of the feudal system of landholding and was therefore designated as personal property. Thus, if one was dispossessed of leasehold property, the only redress was damages, as one did not have the right to bring a 'real' action to recover the property itself. In fact, this rule changed in 1499, when it was decided that leaseholders were entitled to recover their land, but by that time leaseholds were firmly established as personal property and there they remain. So the classification of leaseholds as personal property arises from a law that was changed over 500 years ago! To show the connection with land and the personal nature of leaseholds they are designated as 'chattels real'.

'. . . and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way)'

This part of the definition indicates that land includes mines and minerals, which may be owned in their own right, for instance by a mining company, or by the owner of the land itself that sits above the mineral – ('whether or not held apart from the surface'). This requires some qualification since some minerals are excluded from this arrangement; thus gold and silver belong to the Crown as of right – ***Case of Mines*** (1568) 1 Plowd 310. The Crown is also entitled to other minerals by virtue of statutory authority, as in the case of coal (Coal Industry Act 1995) and oil (Petroleum Act 1998).

What the definition also tells us is that land ownership is a three-dimensional concept and it applies not just along a flat horizontal plane but also into the ground and into the airspace above it. Thus we can look at a block of flats and we can see the notion of land not only belongs to those at ground level but also to those in the flats above the land. Similarly, in a street of terraced houses each person will enjoy owning their own part of the street. The principles also apply to underground ownership – you only have to walk along a street and you will very often notice grills at payment level which provide light or access into the underground cellar – indeed, sometimes cellars are converted into flats in their own right.

So if a person owns a house with a piece of garden, what exactly does that person own? The principle is summed in the common law maxim 'cuius est solum eius est usque ad caelum et ad inferos' – 'he who owns the surface owns everything up to the heavens and down to the depths of the earth'.

To the depths of the earth

We have already looked at some aspects of subsoil ownership in terms of minerals but the principle goes further than this since there is a presumption at law that one owns the land and subsoil to the middle of the highway ('ad medium filum') and, of course, some cellars extend beyond the surface boundary of the property owned.

One interesting area to do with the subsoil concerns the issues arising from items found in or on the land and issues involving buried treasure.

As far as items found in the ground are concerned, these belong to the occupier of the land. In the case of ***Attorney General of the Duchy of Lancaster* v *Overton (Farms) Ltd*** [1981] Ch 33 it was held that a hoard of Roman coins was not treasure trove as the coins did not have sufficient gold or silver content and therefore they belonged to the owner of the land and not the Crown.

Objects found on the land will belong to either the finder or the occupier of the land; however, for the latter to claim the property he must demonstrate that he has a 'manifest intention to exercise control over the land'.

This issue arose in the case of ***Parker* v *British Airways Board*** [1982] 1 All ER 834 where a bracelet was found on the floor of an airport terminal. The claimant handed the bracelet to an employee of British Airways, stating that if the owner could not be found then it should be given to him, the claimant. In fact, British Airways could not find the true owner and therefore sold the bracelet. The claimant sued for damages, alleging that he had a better title to the bracelet than the airline. The Court of Appeal held that, since the bracelet was not attached to the land, British Airways did not have automatic priority to the bracelet over the finder who was in the lounge lawfully and not a trespasser. Lord Donaldson stated:

> An occupier of a building has rights superior to those of a finder over chattels on or in, but not attached to, that building if, but only if, before the chattel is found, he has manifested an intention to exercise control over the building and the things which may be on or in it.

The court stated that the test to be used to determine ownership was whether British Airways exercised a 'manifest intention to exercise control over the lounge and all things which might be in it'. The court found that, since British Airways did not regularly search the lounge for any lost objects and, indeed, did not do so at all, it clearly did not have the manifest intention to exercise control over the building and thus the claimant was entitled to the proceeds of the sale.

'Manifest intention' can derive from the nature of the premises themselves and Lord Donaldson considered that a bank vault would be such a place. On the other hand, a waiting room or a car park would not raise a presumption of manifest intention.

It is important that any finder of property is present on the land lawfully in order to claim any objects that he or she finds and, of course, the actual position of the object is important in deciding ownership. Both these aspects can be seen in the case of ***Waverley Borough Council* v *Fletcher*** [1995] 4 All ER 756 where a brooch was found buried in a park by the defendant, using a metal detector. Auld LJ stated that 'The distinction is now long and well established' in regards to items found in or attached to land and items found on land. He stated that an owner or lawful possessor of the land has a superior right to items buried in the ground, whilst in the case of items found on the land the finder has a superior right, provided the owner has not manifested an intention to control the land and things upon it. He stated that such intention will normally be lacking in a shop or other such places, but there would be a high degree of control in a house, or a bank vault. In particular, an owner of an estate who had not occupied it for a considerable period could not claim a better right than a finder, since he or she clearly has no control over the property or anything upon it. In this case, therefore, the defendant could not claim the brooch or the proceeds of sale. One other factor that was taken into account was that the local authority did not permit the use of metal detectors or digging in its parks and therefore the defendant had no licence to be carrying out that type of activity and, in essence, was a trespasser.

Treasure is treated rather differently from the principles we have just been looking at. The principle at common law used to be that gold and silver found hidden in the land belonged to the Crown. There has to be a significant quantity of gold and silver in the contents – hence the fact that in ***Attorney General of the Duchy of Lancaster* v *Overton (Farms) Ltd*** above, the Roman coins were not regarded as treasure since the silver content only represented 10% of the weight. Originally, when treasure was found, the finders of the treasure trove were paid compensation for the find by the Crown. The problem with this approach to treasure trove is that it largely ignored some quite important archaeological finds which did not amount to treasure trove because they were not gold or silver and such items were essentially being lost to the nation. The Treasure Act 1996 abolished the common law principles and provided a more far-reaching definition of what treasure comprises. Under the Treasure Act 1996 s.1:

(1) Treasure is—
  (a) any object at least 300 years old when found which—
    (i) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal;
    (ii) when found, is one of at least two coins in the same find which are at least 300 years old at that time and have that percentage of precious metal; or
    (iii) when found, is one of at least ten coins in the same find which are at least 300 years old at that time;
  (b) any object at least 200 years old when found which belongs to a class designated under section 2(1);
  (c) any object which would have been treasure trove if found before the commencement of section 4;
  (d) any object which, when found, is part of the same find as—
    (i) an object within paragraph (a), (b) or (c) found at the same time or earlier; or
    (ii) an object found earlier which would be within paragraph (a) or (b) if it had been found at the same time.

(2) Treasure does not include objects which are—
  (a) unworked natural objects, or
  (b) minerals as extracted from a natural deposit,
  or which belong to a class designated under section 2(2).

Other categories were added to the definition by virtue of the Treasure Designation Order (2002) SI 2002/2666:

(3) Designation of classes of objects of outstanding historical, archaeological or cultural importance
  The following classes of objects are designated pursuant to section 2(1) of the Act.
  (a) any object (other than a coin), any part of which is base metal, which, when found is one of at least two base metal objects in the same find which are of prehistoric date;
  (b) any object (other than a coin), which is of prehistoric date, and any part of which is gold or silver.

The effect of the above provisions is that any items within the definition which are found in or attached to land or on the surface must be reported to the coroner within 14 days of the find. An inquest is then held to determine the status of the items, whether treasure or not. There is a code of practice to determine if the items will be offered to museums and the rewards that will be paid to finders and landowners. Usually, there is a presumption that a reward will be split 50:50 between the landowner and the finder, unless they have already come to an agreement which the court may have regard to. A finder who is a

trespasser or who has delayed or not reported their find may have their reward reduced or even forfeited.

Up to the heavens

The owner of the land owns the airspace above their property. The expression 'usque ad caelum' is based on Roman law principles which hardly stand up in today's age of airliners and satellites and it is clear that a landowner cannot literally own land to the heavens – even nations in public international law cannot decide where airspace and outer space ends and begins, despite the presence of the Outer Space Treaty 1967.

So how far above one's land does one actually own? The question arose in the case of ***Bernstein* v *Skyviews*** [1978] QB 479 where the owner of a large estate brought an action for trespass against Skyviews for overflying the estate and taking aerial photographs of it. The claimant considered that Skyviews had infringed the airspace above his property. It was held that the owner of land owned such of the airspace as was necessary for the ordinary use and enjoyment of his property and the structures upon it. Above that height the owner of land had no more rights than anyone else and thus aircraft flying at a normal height would not be trespassing in the claimant's airspace. Consequently, he lost his case.

It should also be noted that the Civil Aviation Act 1982 s. 76 provides that no action for trespass lies in respect of an aircraft over property at a height above the ground which, having regard to wind, weather and all the circumstances of the case, is reasonable.

Outside of aircraft, occupation of a person's airspace without their consent constitutes a trespass. Thus in the case of ***Woolerton and Wilson Ltd* v *Richard Costain Ltd*** [1970] 1 WLR 411 in September 1969 the defendants erected a tower crane on a building site which was so confined that the crane could only be positioned in one place, which resulted in the crane's jib overhanging into the plaintiffs' airspace and 50 feet above the ground. The defendants admitted that that they had committed a trespass and offered substantial amounts of money for permission to continue the trespass while the building was being constructed. The plaintiffs nevertheless refused permission, even though there was no risk to their premises, and claimed for an injunction to restrain the trespass. The court held that, whilst it was no excuse that the trespass did not commit any harm and that the proper remedy was to award an injunction, in this case the granting of the injunction would be suspended until November 1970, when the building would be completed.

There are many other cases involving similar sorts of trespass, such as the case of ***Kelsen* v *Imperial Tobacco Co.*** [1957] 2 QB 334 which involved an advertising hoarding encroaching on the airspace of a neighbour's land. It must be stressed that it does not matter if the trespass does not cause any damage or does not interfere with the ordinary use of the land; the fact is that if anything encroaches on to a neighbour's airspace this becomes a trespass.

'. . . and other corporeal hereditament . . .'

The expression 'hereditament' is now quite an old-fashioned one and somewhat obscure. It is the subject of further definition within s.205, where it states:

> . . . and hereditament 'means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir'.

The expression 'hereditament' refers to real property which passed to an heir on intestacy prior to 1926. The expression 'corporeal' (from the Latin *corpus* meaning 'body') tells us that it refers to physical property over which ownership is exercised; thus the expression 'corporeal

hereditament' refers to land, building, trees, minerals, etc. which are part of or fixed to the land that an heir would inherit. The expression therefore describes all the property an heir entitled to real property would inherit. Prior to 1926, there were a number of cases that considered what property formed part of the inheritance and this provision is really there to confirm the decisions in these old cases. It has little relevance in the modern world of property law, though the expression is still useful in describing what land comprises.

Defining what is meant by a corporeal hereditament, however, raises the important question as to what we actually own when we have ownership of a piece of land. Indeed, one of the important questions that arises when purchasing land is what exactly we are buying – not just in terms of the land but the fixtures and fittings that may or may not form part of the purchase.

The issue of fixtures and fittings reveals the issue as to what the land comprises. Land is, of course, an immoveable form of property and chattels are moveables, but when does a chattel become fixed to the land so as to form part of it? The position is summed up in the maxim 'quicquid plantatur solo, solo cedit' meaning 'whatever is fixed to the land becomes part of the land'. To take the example of a tap – clearly this is a moveable object, a chattel, when one picks it up in the shop; however, once it is fitted to the sink it becomes part of it and part of the house itself and therefore part of the land. The tap now changes in characteristic since it changes from being a chattel to being a 'fixture'.

Example

One of the great points of contention that often arises when one is purchasing a house is what items actually come with the house. Let us take another example, a garden urn, which the owner of Blackacre, A, has put on her patio. A now sells the house to B and, prior to B taking possession, A takes the garden urn with her to her new house. Now B quite liked the garden urn when he inspected the property so he is quite upset to find that it has now gone. B considers that the garden urn is part of the deal. If the garden urn is a fixture, then he is indeed entitled to it and can demand that A returns it. On the other hand, if the garden urn is a fitting, then A is entitled to keep the urn and take it with her. The question as to whether an item is a fixture or a fitting is answered by determining the degree to which the chattel is attached or annexed to the land or not.

In the latter part of the nineteenth century it came to be recognised that what was a fixture depended on the purpose for which the chattel was brought on to the land. Thus if the garden urn in our example was brought on the land with the intention that it was to be enjoyed in its own right, then it remains a chattel. It does not matter whether the chattel was attached or secured to the land in any way – for example, the garden urn could have been secured to the land by cement. On the other hand, if the chattel was placed on the land so that it became part of the landscaping of the garden, then it may become a fixture notwithstanding that the chattel, or garden urn, is freestanding and capable of being moved. Thus it is the intention or purpose of the person bringing the chattel on to the land that may provide the answer as to whether a chattel is a fixture or fitting.

The case of ***Holland* v *Hodgson*** (1872) LR 7 CP 328 provides us with two tests to help determine whether a chattel has been annexed to the land. The case concerned whether looms in a factory formed part of the factory or not. Blackburn J stated that whether or not an object is a fixture or fitting depended on two tests:

1 the degree of annexation;
2 the purpose of the annexation.

Blackburn J considered that objects that only rested on the land by virtue of their weight were not usually considered as part of the land; nevertheless, if the intention was that they were part of the land then they would become fixtures. Blackburn J used a pile of stones as an example in his judgment. He stated that a random pile of stones in a field was not part of the land, but if the stones were built into a dry stone wall then clearly the intention is that they would form part of the land. It is for the person claiming that a chattel is part of the land to prove it. An object that is fixed to the land is presumed to be part of the land unless the circumstances indicate that it was intended that the object is to remain a chattel. Here the burden of proof is reversed and it is for the person claiming that the object is a chattel to prove it.

Berkely v *Poulet* [1976] 242 EG 39

This case concerned a dispute as to what items formed part of a piece of land that was sold at an auction. The dispute was concerned with a heavy marble statue weighing nearly half a ton that rested on a plinth, a sundial and some pictures that were set into panelling in a wall of the house.

The Court of Appeal considered the test set out in ***Holland* v *Hodgson*** and concluded that the pictures were placed on the walls to be enjoyed in their own right, as opposed to the intention to make them part of the house. The court considered that the sundial, which had been detached from its own plinth previously, was a chattel rather than a fixture. The statue, despite its weight, was also found to be a chattel since it did not form part of the 'architectural scheme' of the garden – unlike the plinth on which it rested, which the court concluded did form part of the land.

The case of ***Berkely* v *Poulet*** demonstrated that objects may remain as objects despite the fact that they are attached to the land. Thus the purpose of the annexation seems to be more relevant today than simply the degree of annexation. This can be seen by looking at the pictures in the case. Whilst they were clearly fixed within the panelling, it was proven that the intention was that they were not put there to form a permanent part of the property and therefore they remained as chattels and could be removed.

The decision in ***Holland* v *Hodgson*** was also considered later in the case of ***Elitestone* v *Morris*** [1997] 2 All ER 513.

Elitestone v *Morris* [1997] 2 All ER 513

The case concerned a chalet bungalow that rested on concrete blocks but was not attached to them in any way. The blocks were attached to the land. The chalet had been brought on to the land many years earlier and had been occupied by the defendants since 1971. The defendants occupied the land by way of a licence agreement on the basis that the occupier owned the chalet but paid rent to the landowner for the use of the land on which the chalet stood. There was then a change of owner, who increased the rent and served notice on the defendants to remove the chalet. In order to remain on the land, the defendants had to prove that they were Rent Act protected tenants but to do that they had to show that the chalet formed part of the land.

The Court of Appeal held that the chalet did not form part of the land since it was not attached to it and merely rested on it. The defendants appealed to the House of Lords, which reversed the decision of the Court of Appeal.

Their Lordships found that the chalet was not designed to be removed from the land without essentially destroying the chalet. The chalet was not like a mobile home or some other portable building and was not capable of being dismantled and re-erected elsewhere. Their Lordships decided that, whatever the original parties had previously agreed, the chalet had become part and parcel of the land.

Lord Lloyd of Berwick considered the terms 'fixture' and 'chattel' to be confusing in the context of a house or building and proposed a threefold method of classifying an object:

> An object which is brought onto land may be classified under one of three heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.

Lord Lloyd stated that a house that cannot be removed at all except by destruction cannot have been intended to remain as a chattel. It must have been intended to form part of the land. The case therefore gives more weight to the degree of annexation test – i.e. the intention of the parties. Having said this, Lord Clyde considered 'intention' to be misleading and considered that it is the purpose the object is serving that is important, not the intention or purpose of the person who put the building there. The relevant issue is whether the object is 'designed for the use and enjoyment of the land or for the more complete and convenient use of enjoyment of the thing itself', thus applying an objective test as opposed to a subjective one.

The principles set out in ***Elitestone* v *Morris*** were applied in ***Chelsea Yacht and Boat Club* v *Pope*** [2001] 2 All ER 409 where a houseboat was attached to pontoons and was also attached to the river bed by an anchor and lines. The court held that the boat did not form part of the land, despite the fact it was connected to the various service mains. The degree of annexation was insufficient to fix it to the land.

Apart from chalets and temporary buildings, etc. what about ordinary household items? The case of ***Botham* v *TSB plc*** (1997) 73 P & CR D1 provides a good insight into the approaches of the court when considering the status of such items.

Botham v *TSB plc* (1997) 73 P & CR D1

In this case, the bank was entitled to take possession of the appellant's house as the appellant had fallen into arrears with his mortgage repayments. The appellant claimed that he had transferred the contents of the flat to his parents and as such the bank was not entitled to those items. A dispute arose as to which items were fixtures (and therefore the property of the bank) and which were classified as chattels and belonged to the appellant's parents. There were approximately nine different categories of items, most of which were considered to be fixtures and belonged to the bank.

The Court of Appeal came to a different conclusion, however, and looked at the degree to which the chattels could easily be removed from the property. The court considered that bathroom fittings, including mirrors, towel rails, soap dishes, taps and shower heads, and kitchen units were fixtures, given that they were necessary for the use of the rooms concerned, based on the degree of annexation and permanence involved. On the other hand, the white goods which formed part of the kitchen, along with the units, had only a slight degree of annexation, which was not sufficient for them to become fixtures, given their intended purpose and relatively short working life. In any event, if these had been on hire purchase, ownership would not have passed immediately to the householder until he had paid for them. The carpets and curtains were not capable of becoming fixtures, due to their temporary attachment and lack of permanent improvement to the building. Gas fires, although having both functional and decorative effects, were not capable of being fixtures, having a low degree of annexation. Light fittings attached to walls or ceilings, some of them on tracks, were held to be chattels, though light fittings that were fixed into recesses were regarded as having sufficient degree of annexation or permanence to be regarded as fixtures.

The case is useful in that it gives some idea of how the courts approach the issue of fixtures in property law. Suffice it to say that the cases in this area turn very much on their

facts. The application of the traditional rules in ***Botham*** provides a practical solution to the problem – however, the law is very much a rough and ready set of guidelines built around the somewhat anachronistic principle of 'quicquid plantatur solo, solo cedit'. This in itself was a Roman law principle that does not sit well in a common law system but was nevertheless adopted by the medieval courts. The development of the law in terms of its degree and purpose rules is not a very satisfactory way of dealing with the matter, although in ***Botham*** at least the Court of Appeal applied the principles in a pragmatic manner. The issue of whether an item was intended to form a permanent improvement so that its removal would substantially damage the building or remove the usefulness of the item seems as good a way as any of deciding the matter.

'. . . and other incorporeal hereditament, and an easement, right, privilege, or benefit in, over, or derived from land . . .'

Just as 'corporeal hereditament' refers to physical property, so the expression 'incorporeal hereditament' refers to property that has no physical form and is intangible. The expression describes all sorts of rights that exist over the land. It can, as the definition indicates, mean rights such as easements, which may be such things such as private rights of way (not public rights of way, which are part of the law of highways). It may also refer to such things as riparian rights – for instance, the right to fish on someone's property. Incorporeal hereditaments may also take the form of restrictive covenants in which a landowner is limited in the way they may use their property. Many of these rights or interests will be discussed in much greater detail later on but it is important to understand that, as far as land law is concerned, we are concerned with proprietary rights. Proprietary rights are those which attach to the land and therefore they affect a landowner and his or her successors in title to the property. They are not therefore personal rights, as one finds between parties to a contract, which only affect those parties. To be a proprietary right, the right must be capable of being defined – what it is or is not; it must be capable of being transferred to a new owner; and, finally, it must exist for a reasonable period of time – in other words, it is not something that exists for a fleeting period of time: ***National Provincial Bank Ltd*** **v** ***Ainsworth*** [1965] AC 1175.

These rights can be expressly agreed between the parties – for instance, when a landowner is selling a part of their land to another. An example in the circumstances is where the landowner wishes to restrict what the purchaser can do with the land. For instance, the landowner may sell the property for residential purposes only since they do not want to be affected by any industrial activities taking place on the land or suddenly wake up one morning to find a pig farm next to their back garden. Sometimes the law implies these rights – for example, if a person purchases a piece of land that is surrounded by land belonging to someone else then they would not be able to gain access to their land without committing a trespass over the other's land. Here the law will imply a right of way since otherwise the surrounded piece of land would be moribund and useless. Such a scenario involves what the law refers to as a 'landlocked close', which it will not allow. Thus these rights can be vital in order to be able to enjoy or make use of one's own property.

Rivers, lakes and the sea

So far, we have talked a great deal about the meaning of land and how it is defined by reference to the LPA 1925 s.205 (1)(ix). However, this provision makes no mention of

rivers, lakes and the sea. In order to find any reference to water in defining land we have to look at the Land Registration Act ('LRA') 2002 s.132(1) which states:

> . . . 'land' includes –
>
> (a) buildings and other structures,
> (b) land covered with water, and
> (c) mines and minerals, whether or not held with the surface;

On the face of things, this seems very straightforward and land covered with water – whether by a pond, lake, stream, river or the sea – is included in our definition of land. But all is not quite so simple since, with flowing water, it depends whether it is flowing through a defined channel or whether it seeps or percolates through the ground. It also depends on whether the flowing water is tidal or not. Thus rights in relation to water are not quite so straightforward and it is all a bit of a tangle.

Let us take a relatively simple part first: the sea and tidal waters. The presumption at law is that the Crown owns the foreshore. Although the Crown is the only true absolute owner of land, it may have granted ownership to another body for the exploration or extraction of minerals from the sea bed, for instance. Apart from the issue of ownership, non-owners also have navigation rights in certain channels. Similarly, the public have fishing rights in tidal waters though certain activities such as salmon netting in estuaries are specifically licensed by the government. However, it is true that some have distinct rights in law to do this that are analogous to a riparian right. Some of these rights go back many centuries. The public have a right to take bait from the foreshore in order to fish and have the right to collect shellfish from the foreshore whilst the tide is out.

In relation to the ownership of ponds and lakes, ownership of land continues beneath the water – as the definition above indicates, 'land' includes 'land covered with water'.

With regards to other matters relating to water, an owner of land has no property rights in water as regards water that percolates through their land or flows through it in a defined channel. Thus in ***Home Brewery Co. Ltd*** **v** ***William Davis & Co. (Leicester) Ltd*** [1987] QB 339 it was held that, where water percolates from higher ground, the owner of the lower property has no obligation to receive that water and may, if they so wish, dam or hold the water back, provided they do not act unreasonably in doing so. By the same token, at common law, a landowner may draw off any amount of water with no regard to their neighbours. Having said this, the Water Resources Act 1991, as amended by the Water Act 2003, now restricts such use without a licence unless the water is being used for the landowner's domestic needs.

Where water runs through a defined channel, the owner of land again has no property rights in the water, though they do have certain rights. Perhaps the most common of these is in relation to fishing, where the landowner has sole rights to fish. Sometimes there is a public right of navigation down a river but this right is for that alone and there is no right to fish. Here the right of navigation is similar to a right of way over land. Where an owner owns the land on one bank of a non-tidal river then their riparian rights only extend to the middle of the river, the presumption at law being that one owns the land and subsoil to the middle of the river ('ad medium filum'). Similar principles apply to highways.

Landowners also have rights with regard to the flow of a watercourse in that the landowner is entitled to an unaltered flow of water in terms of volume. This is subject to the upper landowners making ordinary and reasonable use of the water. There is no right of action if the level of the water decreases unless this causes damages or amounts to the tort of nuisance. A landowner has reciprocal duties with regards to landowners downstream of their property.

As stated at common law, a landowner may make ordinary and reasonable use of water within a water course. This includes the right to abstract water for domestic purposes, or farming or, in some areas, industrial processes, even if this means exhausting the water flow. In addition, the landowner can make extraordinary use of the flow, provided the water is restored to the river in the same quantity as it was originally abstracted. These common law rights are subject to very severe regulation by way of statute and no doubt in an age of global warming and water shortages such legislation will become more stringent in the future. Broadly speaking, it is an offence for a landowner to abstract water without a licence from a water authority, unless it is used for domestic purposes or agricultural purposes other than irrigation by way of spraying.

The classification of property

In looking back through the above chapter we can see that property is divided into two types: real property and personal property. Real property has a very specific meaning and in fact refers to freehold property which will be discussed in detail later on. It will be recalled that the expression 'real' relates to the ability to recover property in medieval times if one was dispossessed of it. All other property is personal property, which originally only gave a right to damages.

Personal property, in turn, is divided into chattels real and chattels personal. Chattels real refers to leasehold land. It will be recalled that whilst this is of course land, it owes its classification to a rule that ceased to exist 500 years ago; however, to show its links with land we have the reference to 'real' in its description.

Chattels personal are also subdivided into choses in action and choses in possession. The expression 'choses' originates from the French, meaning 'thing'. Choses in possession are physical property such as a chair, table or pen. They gain this classification since, if one is dispossessed of this property, it can be recovered by re-taking the item itself – taking physical charge of it. Choses in action are items that may have a physical form – however, the value in the item does not rely on that physical form but lies in the inherent value 'within' the item. For instance, a cheque is simply a piece of paper with no or little inherent value. It gains its value by what is written on the cheque – i.e. 'I promise to pay X £5000 signed Z'. Other examples of a chose in action are share certificates, copyrights and patents. The expression 'chose in action' derives from the fact that the property is personal property which can only be claimed or enforced by action and not by taking physical possession, as with choses in possession.

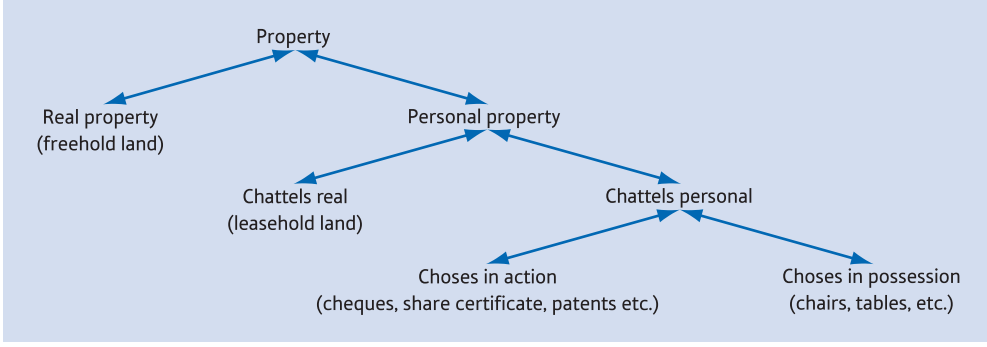

Figure 1.1

Summary

Land as legal construct

- Whilst property law provides rules relating to land and goods, it is also concerned with one's relationship with that property and other interested parties.
- Property law is concerned with one's rights in the property and the right to exclude others from it.
- There is a distinction between 'land law' and 'property law' – i.e. there is a distinction between 'real' property and 'personal' property.

The objectives in studying land law

- To know and understand the rights and liabilities attached to a piece of land.
- To provide a foundation for the study of conveyancing.

So . . . what is land?

Law of Property Act 1925 s.205(1)(ix)

> 'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditament; also a manor, an advowson, and a rent and other incorporeal hereditament, and an easement, right, privilege, or benefit in, over, or derived from land; . . . and 'mines and minerals' include 'any strata or seam of minerals or substances in or under any land, and powers of working and getting the same . . .'; and 'manor' 'includes a lordship, and reputed manor or lordship; and 'hereditament' means 'any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir'.

'. . . land of any tenure . . .'

- Freehold land is held for an indefinite period of time, whilst leasehold land is held for a defined period of time.
- There is a distinction between 'real' property ('land') and 'personal' property ('chattels').
- Freehold land is classified as 'realty' based upon an action to recover the 'res' ("thing"); hence the expression a 'real' action that allows the 'thing' itself to be recovered, as opposed to simply an award in damages.
- Leasehold land is classified as 'personal' property based upon an action 'in personam'; hence the expression a 'personal' action. Such actions formerly only allowed damages to be awarded but later allowed the property itself to be recovered.

'. . . and mines and minerals . . .'

The principle of 'cuius est solum eius est usque ad caelum et ad inferos' – 'he who owns the surface owns everything up to the heavens and down to the depths of the earth'.

1. To the depths of the earth:

- Objects found in the ground belong to the occupier of the land
- ***Attorney General of the Duchy of Lancaster* v *Overton (Farms) Ltd*** [1981] Ch 33.

- Objects found on the land will either belong to the finder or the occupier of the land; however, for the latter to claim the property they must demonstrate that they have a 'manifest intention to exercise control over the land'.
- (***Parker* v *British Airways Board*** [1982] 1 All ER 834).
- Treasure – at common law, gold and silver found hidden on the land belonged to the Crown; however, now see the Treasure Act 2006.

2. Up to the heavens:

The owner of the land owns the airspace above their property:

Bernstein* v *Skyways [1978] QB 479

Woolerton and Wilson Ltd* v *Richard Costain Ltd [1970] 1 WLR 411

Kelsen* v *Imperial Tobacco Co. [1957] 2 QB 334

'. . . and other corporeal hereditament . . .'

The expression 'hereditament' refers to real property which passed to an heir on intestacy prior to 1926. The expression 'corporeal' (from the Latin '*corpus*' meaning 'body') tells us that it refers to physical property over which ownership is exercised; thus the expression 'corporeal hereditament' refers to land, building, trees, minerals, etc. which are part of or fixed to the land that an heir would inherit. The expression therefore describes all the property an heir entitled to real property would inherit.

Fixtures and fittings

Whatever becomes fixed to the land becomes part of it and in this respect it is important to distinguish between fixtures and fittings. In doing this, one must recognise the difference between moveables and immoveables, as in the case of taps. Once the tap becomes fitted to a sink in the house it becomes immoveable, a fixture, and becomes part and parcel of the land.

In determining whether an item is a fixture or a fitting in ***Holland* v *Hodgeson*** (1872) LR 7 CP328 it was stated that two tests are used:

(i) the degree of annexation;

(ii) the purpose of the annexation.

Berkely* v *Poulet [1976] 242 EG 39

Elitestone* v *Morris [1997] 2 All ER 513

Chelsea Yacht and Boat Club* v *Pope [2007] 2 All ER 409

Botham* v *TSB plc (1997) 73 P & CR D1

'. . . incorporeal hereditament . . .'

This describes property that has no tangible form: for instance, easements and restrictive covenants. To be a proprietary interest the right must be capable of being definable; must be capable of being transferred to a new owner; and must exist for a reasonable period of time:

National Provincial Bank Ltd* v *Ainsworth [1965] AC 1175

Rivers, lakes and the sea

This is referred to in the Land Registration Act 2002 s.132(1). Land covered by water falls within the definition of land; however there are exceptions:

- Sea and tidal waters: The presumption at law is that the Crown owns the foreshore, though it may grant ownership to other bodies – for example, for the exploration of minerals. The public have fishing rights in tidal waters but note that specific licences may be required for certain activities, such as salmon netting.
- Flowing waters: An owner of land has no property rights in water as regards water that percolates through their land or flows through it in a defined channel: ***Home Brewery Co. Ltd* v *William Davis & Co. (Leicester) Ltd*** [1987] QB 339. See also: Water Resources Act 1991, as amended by the Water Act 2003.
- Where water runs through a defined channel the owner of land has no property rights in the water, though they do have certain rights – for example, fishing rights.
- Note: Public rights of navigation down a river. Owners of one bank of a non-tidal river have riparian rights to the middle of the river.
- See also rights of abstraction.

The classification of property

Real property = Freehold land

Personal property: Chattels real and chattels personal: choses in action and choses in possession.

Further reading

Baker, *An Introduction to English Legal History*, Oxford University Press (2007)

2

Estates and interests in land – an historical perspective

Aims and objectives

After reading this chapter you should be able to:

- Understand the nature of the feudal system.
- Understand the doctrine of tenures.
- Understand the doctrine of estates.
- Understand the nature of words of limitation.
- Know the origins of the common law and equity.
- Understand the nature of legal and equitable rights, with particular reference to the notion of the trust.
- Understand the impact of the bona fide purchaser of the legal estate for value without notice with particular reference to the doctrine of notice.
- Recognise the development of other equitable interests.
- Understand how equitable rights are created.

Introduction

Having seen what is meant by property in Chapter 1, we now need to see what rights and interests one can acquire in real property. For our purposes here we include leaseholds, even though these are, strictly speaking, personal property. In order to examine and understand what rights and interests one can acquire in real property we have to look back into history to the Norman Conquest in 1066.

When William invaded England, he brought a large army and rapidly established a strong central administration. This administration was based around the Curia Regis, or King's Court. The Curia Regis exercised judicial, administrative and political functions and comprised the King and his barons. William regarded England as his own personal property but he set about rewarding the barons, bishops and his other followers for the help they gave him in recovering England from Harold and the Anglo-Saxons. The barons wanted land as their reward and therefore William set about dividing his new kingdom into large estates and gave these to his chief supporters. William retained ownership of the land and indeed this principle remains the same today. It is important to remember

that there is only one absolute owner of property – the Crown. The principle can be seen in modern times – i.e. the law relating to inheritance. Thus if a person dies without making a will, intestate, with no close relatives then his property reverts to the Crown as bona vacantia.

In return for the King's giving his barons and important followers large tracts of land, these 'tenants' not only had to swear fealty to the him but also had to provide him with services. Thus if a large piece of land was granted to A in Yorkshire he not only had to pay homage and swear fealty to the King, he might also have to provide his King with 100 armed horsemen for 40 days each year. This was the condition on which the land was held and, of course, it enabled the King to maintain an army. On the other hand, if B was given a large piece of land in Cheshire, as well as paying homage and swearing fealty, he might have to provide the King with 50 baskets of wheat or 10 cows.

The barons, as well as providing the King with certain services, would, in turn, divide their land up into smaller pieces or parcels of land for their principal followers, who would, in turn, have to provide services to them. This process of subinfeudation, or dividing the land up, continued down to the smallest piece of land, known as the manor. Pieces of land within the manor would also be given to the lord of the manor's immediate servants and agricultural labourers in return for the services he required. In this way, the whole of England was divided and sub-divided so that the social and economic organisation was based on landholding in return for services or 'tenure' and formed the basis of the feudal system.

The large landowners were known as 'tenants in capite' as they held their land directly from the King. The persons who actually occupied the land were known as 'tenants in demesne' wherever they appeared on the feudal ladder. Whether as tenants in capite or agricultural tenants, those persons that occupied land within the feudal system were known as 'mesne lords'. The process ensured that there is no land in England and Wales without an owner: 'nulle terre sans seigneur' (no land without a lord) since, even if no owner could be found, the land always belonged to the Crown. The feudal lords, whether the King or lords of the manor, were obliged to hold a court for their tenants in order to decide local disputes as to landholding. The Curia Regis was the King's Court and it was from this that a centralised system of justice developed into the common law courts. It was from this system of courts that the common law emerged.

The feudal system therefore looked like this:

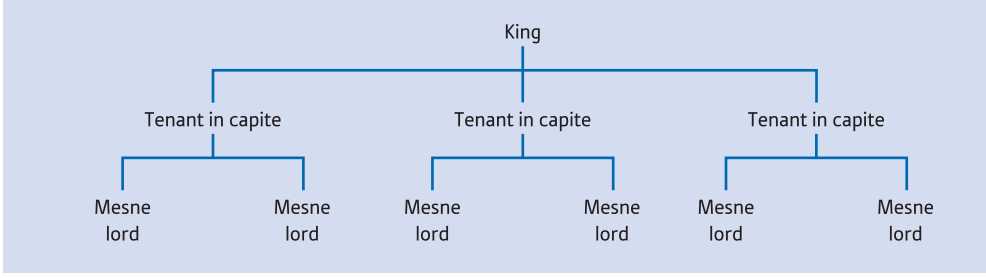

Figure 2.1

In addition to the King requiring services from his tenants in capite, he also controlled land by way of time. Generally speaking, William only made grants of land to a tenant for that tenant's lifetime, although it became common for the King to renew the grant in favour of the tenant's heir when the tenant died. Eventually, the life tenancy evolved into

a 'fee tail', whereby the land would pass from the tenant to his descendants – i.e. from father to son, to grandson, to great grandson, etc. Still later, a 'fee simple' also evolved, where the land could pass to the tenant's heirs, whether descendants or not – i.e. from father, to son, to nephew, to the Church, etc. Both life and fee simple tenancies continue to exist today; however, fee tails were abolished by the Trusts of Land and Appointment of Trustees Act 1996.

The different tenancies were known as 'estates' and each estate designated how long a tenant held the land for. It is very important in this context not to mix up the notion of an estate being a tract of land with that of a concept of time. It is common in everyday language to talk of 'my landed estate' referring to a 1000-acre estate, but in the law when one refers to an estate one is referring to how long a person is to hold the land for. This difference is summed in the quotation from ***Walsingham's Case (1579) 2 Plowd 547*** which stated:

> . . . the land itself is one thing and the estate in the land is another, for an estate in land is a time in land, or land for a time.

The effect of this is that, whilst tenants in capite and tenants in demesne held estates in land, neither owned the land itself and each held it from the Crown. Indeed, as stated earlier, to this day all land is held from the Crown and the fee simple is the closest one comes to outright ownership of the land.

Two basic doctrines therefore emerge from the feudal system:

- the doctrine of tenures; and
- the doctrine of estates.

The doctrine of tenure

Generally

Under the feudal system, several different forms of land tenure existed. Essentially, the relationship between each lord and his tenant was a form of contract. The tenant performed his service in return for a landholding and was liable to forfeit his holding if he failed to perform his service or committed a crime or was found to be disloyal to his lord. In turn, the lord would protect his tenant and guaranteed his tenant's title against all comers. The lord also held a court for himself and his tenants. In fact, the relationship was something more than a contract since there was a bond of trust between the lord and the tenant that was sealed by the tenant paying homage to his lord.

The system of tenures progressed through each layer of the feudal system until one came to the very lowest, and poorest, in the order. These villeins, or serfs, simply had a small piece of land to work for their own purposes. Of course, being at the very bottom of the system, those in this category were always tenants, never mesne lords, since there was no one beneath them.

The lowest tenants, as opposed to villeins, usually held a 'manor' or 'vill'. Manors were usually quite small communities that were often gathered in a village around a fortified house. The village would often have a church and though this was based on ecclesiastical landholding that was centred around a parish, sometimes the local lord of the manor would have the right to appoint the priest by way of a right of patronage or 'advowson'. Essentially, the manor was a feudal state in its own right since all the tenants within it swore allegiance to their local lord, who held his own court. This local court controlled

many of the activities within the manor, whether agrarian activities or controlling the conduct of the population within the manor. It might also control the production of flour and ale. The manors also had their own customs that were enforced through the local or seignorial courts until such time as the royal courts took over their jurisdiction by way of justices 'on circuit'. It was this and the enforcement of local customs with regard to landholding that gave rise to the development of the common law of England and, in particular, the evolution of the law of real property. These developments eventually weakened the jurisdiction of the local courts, leading to their demise, though the last were only abolished by the Courts Act 1971.

The services provided by tenants fell into three broad categories: military, civil and spiritual.

Military tenure

Knight service was the principal military tenure whereby a tenant was obliged to provide a number of armed horsemen, usually for 40 days. Military service imposed on a tenant in capite could be passed on to his tenants in turn by subinfeudation so that tenant in capite could meet his obligations to the King through his own tenants.

Another form of military service was 'castleguard' which, as the term suggests, required castle guarding duty. Yet another type of military service was 'cornage', which required a tenant to patrol borders.

Over a period of time, many of the traditional military services were commuted to a money payment known as 'scutage' and, whilst this was similar to the modern-day concept of rent, the jurist Henry de Bracton still considered it to be a form of military tenure.

Civil service

These types of service were usually provided by the tenants in capite for the monarch. The services were generically referred to as 'grand serjeanty' and were really personal services. These services were many and various and included putting food on the monarch's plate, looking after his wine, holding his head if he was seasick, counting his chessmen on Christmas Day and tending his garden. By the time Edward I (1272–1307) came to the throne, many of these types of tenure were in retreat – some became obsolete, others were changed to knight's service or commuted to payments of money. Some of the ceremonial favours were retained, with some even existing well into modern times: for instance, the duty to support the monarch's right arm holding the sceptre during the coronation can still be seen today.

'Petty serjeanty' referred to types of tenure which required the tenant to provide, not services, but small items such as horses, arrows, armour, wine or food.

Spiritual tenures

The two main types of tenure found here were 'divine service' and 'frankalmoign'. Divine service arose where land was granted to an ecclesiastical body or church in return for specific spiritual services, such as saying prayers for the lord on his birthday or Christmas Day. The service could include other favours, such as giving alms to the poor at Easter.

Frankalmoign arose where land was granted to an ecclesiastical body where no services were required to be performed and no 'fealty' or oath of allegiance was required. Thus, if land was granted to the local abbey but no specific services were required of the abbey, it was said to hold by way of frankalmoign.

Other types of tenure

Lower down the social order of the feudal system, the types of tenure were less defined. Peasants generally provided agricultural duties; these were either fixed or unfixed. If a peasant was required to help his lord by sowing his fields or helping with the harvest at certain times of the year, this type of tenure was called 'common socage', which was a free tenure and is the origin of the expression 'freehold' which we are all familiar with today. The expression 'socage' eventually became a generic term that referred to all forms of free tenure, other than knight service, serjeanty or spiritual service. On the other hand, if the peasant was required to provide services as and when his lord required him to do so, this type of tenure was called 'villeinage', which was an unfree tenure.

The majority of the land after the Norman Conquest was held in unfree tenure and here the tenant held the land at the will of the lord and could be evicted at any time. The tenant had no right of redress in the local seignorial court; nor would the royal courts protect him. Over a period of time, customs emerged that gave the tenant protection from his lord unless he had committed some act that merited the forfeiture of his land by the lord. These customary rules became more important since the common law itself would not recognise the rights of the tenant.

By the fifteenth century, the royal courts began to give protection to tenants of villein land against their lord and therefore the tenant was now protected not only by custom but by the common law itself. In practice, what was occurring here was that the common law would recognise the local custom and then enforce it. Where the tenure was recognised by the common law, it became known as 'copyhold'.

The expression 'copyhold' derived its name from the way the tenure could be transferred or conveyed to another. Copyholds could only be transferred by a process of surrender and admittance within the lord's court, where the tenant surrendered his land to the lord, who then admitted another to it. The process was recorded in the records of the court and the person to whom the land was transferred would be given a copy of the record to prove his title, hence the expression 'copyhold'. In time, these became valuable forms of tenure for the tenant and his heirs since the rent payable to the lord could not be increased and thus the value to the lord depreciated.

The 'incidents' of tenure

The services that a tenant rendered to his lord were not the only rights that the lord was entitled to. These 'incidents' of tenure imposed certain obligations on the tenant or certain rights in the landlord. So if A failed to perform certain services to his lord, B, then B's remedy was to seize A's chattels, such as cattle, and keep them until A performed his service to B. Thus B could levy 'distress' against A's goods: he 'distrained' them, and if A continued not to perform his service B could 'forfeit' (take) A's land and keep it.

Another significant incident was 'escheat'. In granting a tenure to a tenant, the lord might specify that the tenant would only have the land for his lifetime. On the tenant's death, escheat gave the lord the right to re-take the land to retain it or give it to another tenant. Often the landlord would find it convenient to give the land to the tenant's son since he might know the land and the other tenants and so there was some continuity in the management of the land.

The lord could grant the land to a tenant and his heirs, in which case the land would pass to the tenant, then his son, then his grandson, etc. It should be noted, however, that the expression 'heirs' did not necessarily mean direct heirs, such as sons, but also any blood

relatives. These could be issue or collateral relatives such as brothers, sisters or nephews and nieces.

Escheat therefore is the right of a superior lord to re-take land on termination of a tenancy (that is, a feudal tenancy *not* a lease). If there was no mesne lord to whom the land could escheat, the land would be held directly from the King. The rule still applies today since, as we have seen, if a person dies without leaving close relatives, within the terms of the Administration of Estates Act 1925 s.46, the deceased person's estate devolves to the Crown as bona vacantia in lieu of any right of escheat (s.47(3)).

The demise of tenure

In truth, the doctrine of tenure as a means of giving land in return for services did not last very long, probably only around 200 years. Two pressures brought about the demise of tenure.

Firstly, in the feudal system there was theoretically no limit to the number of levels that could be created within the feudal pyramid or ladder. In their work *The History of Law* Vol. I at p.233 Pollock and Maitland stated:

> . . . theoretically there is no limit to the possible number of rungs, and . . . men have enjoyed a large power, not merely of adding new rungs to the bottom of the ladder, but also inserting new rungs in the middle of it.

This process of adding new rungs, known as 'subinfeudation', could arise by a tenant attempting to raise money by giving a purchaser a sub-tenancy – i.e. the purchaser becomes a tenant of the vendor himself. This process tended to extend the feudal ladder. For a while, subinfeudation was preferable to the vendor since it did not require the lord's consent and also because it could give the vendor an 'incident' or 'seignory' that might provide a benefit in the future – for instance, the possibility of an escheat from the purchaser.

The real loser here was the lord – mainly because of the potential loss of incidents of tenure. One of these was the incident of wardship, whereby, if a tenant died, leaving an heir who was an infant, the lord had the right to manage the land and take any profits until the heir came of age, subject to the lord having to pay for the heir's education and upbringing. In the context of subinfeudation, if the tenant subinfeudated (i.e. created another rung) during his lifetime he could, as part of the transaction, take a largely nominal service that was essentially worthless in favour of a large cash price. In this situation, when the lord took the seignory or wardship on the tenant's death, he would only have the benefit of a nominal seignory/service and the cash value would be in the tenant's wallet as cash, following the subinfeudation process.

Another effect of subinfeudation was that, as more rungs were added to the feudal ladder, there was less likelihood that an escheat would arise.

The second aspect that contributed to the demise of tenure was 'substitution'. A tenant, rather than subinfeudate, could convey his land to a new owner by way of substitution. This meant that the new owner took over the tenant's position on the feudal ladder. Originally, a tenant required the lord's consent to substitute – however, at some point in the thirteenth century it seems that the general rule developed that a tenant could transfer or 'alienate' his land by substitution without the lord's consent. This created two problems for the lord: firstly, the lord had no discretion over who was now to become his tenant: it could, for instance, be someone who proved to be a very poor tenant in terms of his husbandry of the land. Secondly, an old tenant could substitute in favour of a young tenant and therefore deprive the lord of his seignory of escheat and the possibility of obtaining valuable fees.

Undoubtedly, the greater evil as far as the lords were concerned was subinfeudation – not just for the reasons set out above, but also because the continued process extended the feudal ladder and made it unwieldy. This process was brought to a halt by the statute Quia Emptores in 1290. This enactment prevented tenants from alienating their land to others by way of subinfeudation and required transfer or alienation to take place by substitution. The enactment represented a shift of public policy in favour of the free transfer of land, but it had another profound consequence in that it heralded the end of the feudal system as no new mesne tenures could be created except by the monarch. The effect of this was that the feudal pyramid became flattened so that now fee simple owners of land held it directly from the Crown as tenants in chief. Quia Emptores is still operational today and continues to regulate the archaic doctrine of tenure. It ensures that any conveyances of fee simple estates must be out-and-out transfers, with no feudal or seignory services being capable of being reserved. The effect therefore was to make transfers commercial transactions and not ones of feudalism.

The statute did not apply to the Crown and thus all land is held by a subject in tenure from the Crown. This was an important exception since it meant that the Crown would have to transfer the land to a tenant with no possibility of an escheat. Consequently, if no mesne lord emerged, the land reverted to the Crown.

The doctrine of tenure was further eroded by subsequent legislative enactments, particularly the Tenures Abolition Act 1690, which converted all tenures into 'free and common socage' (or 'freehold tenure') and copyhold. Subsequently, the Law of Property Act 1922 converted all copyhold into freehold tenure: that is, socage. Thus all tenures were reduced to a common freehold tenure held directly from the Crown so that, technically, only the Crown holds the ultimate title to land and the closest an individual comes to holding absolute ownership is by way of freehold tenure. One word of warning needs to be given, however – freehold tenure has nothing whatsoever to do with the expression 'freehold' which we see in estate agents' windows. Although the expressions are the same, it is important to recognise that freehold tenure refers to the *quality* of the tenure whilst, as we shall see next, 'freehold' refers to the duration (or quantity) of the estate.

The doctrine of estates

Generally

As already mentioned, an 'estate' refers not to an area of land but to a period of time. It can be seen therefore that the ownership of land is a very different concept from that of ownership of chattels. In the case of chattels ownership is an absolute concept – there is either ownership by one or more persons or nothing at all. In the case of land, ownership is not absolute since it is held in tenure from the Crown. Furthermore, in relation to land there can be a multiplicity of estates and interests arising concurrently in the same piece of land and these are each related to a period of time, a 'temporal slice' or, more simply: 'For how long is the land to be held by a tenant?'

The doctrine of estates is of vital importance to the understanding of land law. It is useful to see this in an historical context first of all, but it is important to bear in mind that the Law of Property Act 1925 brought about radical changes to the doctrine of estates.

Prior to 1925, the common law divided estates into two classes: estates of freehold and estates of less than freehold (better known today as leases). Do not confuse freehold estates with freehold tenure or socage – the two are not the same, though the expression 'freehold' is often used to describe both.

Estates of freehold

At common law there were three freehold estates:

(a) the fee simple estate;

(b) the fee tail estate; and

(c) the life estate.

Fee simple

Generally

This type of estate is the primary one in land law as it is the one that comes closest to absolute ownership and is the largest estate a tenant can have in terms of time since potentially it can exist for an unlimited duration. The point is illustrated by referring back to Walsingham's case which was referred to on page 22. Here it was further stated that 'he who has the fee simple in land has a time in the land without end, or land for a time without end'.

The concept of the fee simple estate was that it existed as long as the original tenant or any of his heirs survived. The word 'fee' denotes that the estate is one of inheritance. The word 'simple' indicates that the estate will pass to any heirs, whether they be blood relatives or otherwise. Further, if the original tenant sold or transferred his fee simple to another person, that person would also be able to pass his estate to his own general heirs. The estate thus became virtually perpetual and would only end if a tenant died without leaving any heirs, at which point it would escheat to his lord, nowadays the Crown.

Types of fee simple

There are various forms of fee simple that require consideration.

Fee simple absolute The expression 'fee simple' has already been explained above but the word 'absolute' merely means that it stands to be potentially perpetual in that the fee simple itself is not subject to an event which might bring it to a premature end.

Determinable fee simple This type of fee simple will automatically cease on the occurrence of an event, which may never occur. Here the occurrence of the event will bring the fee simple to its natural end and the estate will then revert to the person who originally granted it.

Example

If a grantor (X) grants a fee simple to a grantee (Y) until she becomes a solicitor, when Y becomes a solicitor her fee simple estate comes to an end and the estate then reverts to X. The estate therefore comes to the end of its natural existence.

It is important that a determinable fee simple is distinguished from a conditional fee simple, which we will discuss next. Essentially, the difference lies in the words of the grant; thus words such as 'until', 'so long as' or 'whilst' tend to create a determinable fee since these set out the natural boundary or 'end point' of the estate.

Conditional fee simple This may take two forms: a condition precedent or a condition subsequent. With a *condition precedent*, the grantor sets a condition that marks the commencement of the fee simple. Thus the existence of the fee simple depends on the condition being met.

Example

X grants a fee simple estate to Y if he marries Z. When Y marries Z, he will take the fee simple absolute, which may then carry on indefinitely. Another example might be if A grants a fee simple to B if she qualifies as a solicitor. Again, once B qualifies as a solicitor, she takes a fee simple absolute.

In a fee simple subject to a condition subsequent, the occurrence of the condition brings the premature end to the fee simple absolute.

Example

X grants a fee simple to Y provided he does NOT marry Z. Here Y takes the fee simple absolute but this is brought to an end if he enters the forbidden marriage. Another example might be if X grants a fee simple to Y provided that she continues to practise as a solicitor. If Y decides to leave her profession, she will forfeit her fee simple.

A conditional fee subject to a condition subsequent is very different from a determinable fee simple and great care must be taken to distinguish between the two. In the former there is a clause added that defeats the existence of the fee simple, whilst in the latter the determining event sets out the duration or limits of the estate. Just as in a determinable fee simple, in a condition subsequent the words can provide a guide as to what is taking place: words such as 'provided that', 'but if', 'on condition that' or 'if it should happen' often point to a fee simple subject to a condition subsequent.

Fee tail

The expression 'fee' here again demonstrates that this is an estate of inheritance, whilst the word 'tail' indicates that the estate will continue whilst the grantee and his linear descendants continue to exist. Thus the estate will pass from father to son, to grandson, to great grandson, and so on. This is an example of 'male tail' but more rarely there can exist a 'female tail' whereby the estate passes from mother to daughter, to granddaughter, etc. Where the fee tail can pass through either sex, it is known as a 'general tail'.

It is worth noting that the 'fee tail' estate is sometimes referred to as an 'entail' or an 'entailed interest' or an 'estate tail'. The terms are all synonymous, though an 'entailed interest' generally refers to an equitable fee tail.

Fee tails are largely of historic interest since they were abolished by the Trusts of Land and Appointment of Trustee Act 1996 so that, since 1 January 1997, no new fee tails can be created. Any attempt to create such an estate will result in a fee simple absolute being created. Fee tails that existed before the above date can continue to exist, but on the death of the heir, the estate will be converted to a fee simple absolute for his or her descendant.

It should be noted that after the Law of Property Act 1925 fee tails could only exist as equitable interests, but more about this later on page 66.

Life interests

This type of estate exists for the lifetime of the grantee only, after which it terminates and reverts back to the grantor. Very often, the extent of the estate is measured by the life span of the tenant – however, it is possible for the extent of the estate to be measured by some other person's life: for example, 'a grant to A for as long as B lives'. This type of life estate is known as a life estate 'pur autre vie'.

What happens if the life estate owner predeceases the person on whom the extent of the estate depends – for example, if land is granted by X to A on the life of B but A predeceases B? Here A's estate passes to his own heirs until such time as B actually dies, when it will pass to X's heirs.

It is also possible to have life interests that are determinable or subject to a condition subsequent, just as we have seen in fee simple estates.

After the Law of Property Act 1925, life estates can only exist as an equitable interest in land.

Estates of less than freehold

Leases for a definite period of time

Originally at common law, only the three freehold estates above were recognised. Estates of less than freehold – or leaseholds, as we will now call them – were regarded as inferior and developed completely separately from the common law system of estates. Leaseholds developed as contracts that bound only the parties to the contract and, as such, were not regarded as property in terms of land ownership. Hence, as we have already seen in Chapter 1, leaseholds were regarded as personal property and holders were not fully protected against the claims of interlopers. Thus, where a leaseholder was deprived of his land, his only remedy lay in damages – a personal action – as opposed to a right in rem giving him a right to recover the land itself, a real action. It is for this reason that leasehold property remains a personal property classified as a 'chattel real'. However, the law eventually gave leaseholds full protection as a proprietary interest in the land and they became part of the law of estates.

In contrast with the estates of freehold, whose duration is of an indefinite period of time, leaseholds are characterised by durations either of a definite or certain period of time or capable of being made definite or certain. A tenant may therefore hold the land for a fixed term of certain duration – for example, a lease to X for 999 years, or a lease to Y for 99 years, or a lease to Z for 1 year. A word of warning needs to be given here. Occasionally, the grant of a lease may look very similar to a freehold estate – for example, a grant to 'A for 50 years if A so long lives'. On the face of things it appears that this is a life interest since, if A is already 50 years old, the probability is that she will die before her lease expires as she would then be 100 years old. The grant therefore appears to be the same as a grant 'to A for life'. Notwithstanding, it is important to remember that the maximum duration of the lease is set by the definitive time period of 50 years and therefore the estate remains a leasehold, not a freehold estate.

Another aspect of a lease being granted for a definite period of time is that it is impossible for the holder of a lease to create a freehold estate out of it. The reason for this is that a freehold estate being for an indefinite period of time could outstrip the period of the tenancy. Thus a leaseholder with a 999-year lease could not grant a fee simple absolute since this could exist almost in perpetuity and outlast the lease. In such a case the leaseholder is attempting to grant something greater than they themselves have, which is, of course, not possible. Effectively, in attempting to make such a grant, the leaseholder would merely be assigning his 999-year lease (or what remains of it) to the grantee.

Leases for a period of time capable of being made certain

Whilst we tend to think of leases for 999 years, 99 years or 1 year, etc. leases from month to month or year to year are also properly regarded as leases, even if it may look as though they may carry on indefinitely. The reason for this is that such tenancies are capable of

being made definite by either party giving notice to the other. Thus at common law in a monthly tenancy either the landlord or the tenant could terminate the lease by giving the other one month's notice. From this moment the length of the lease (or tenancy – the terms are synonymous, though we tend to call leases for one year or more 'leases' and leases for shorter periods 'tenancies') becomes certain and becomes a lease for a 'fixed term of certain duration'. This position is now defined in the Law of Property Act 1925 s.205 (xxviii) which states:

> Term of years absolute means a term of years . . . but does not include any term of years determinable by life or lives . . . and in this definition 'term of years' includes a term for less than a year, or for year or years and a fraction of a year or from year to year.

Whilst leases and tenancies exist for a definite period of time, or for periods capable of being made certain, there are two particular types of tenancy that do appear to be for an indefinite period; these are tenancies at sufferance and tenancies by will. A tenancy at sufferance arises where a lease or tenancy has been terminated but the tenant remains in possession or 'holds over' without the landlord's permission. In such a situation, the tenant cannot be considered a trespasser since their original entry on to the property is lawful, but once the landlord enters the property, the tenant does indeed become a trespasser and they can be ejected from the premises. The expression 'tenancy at will', however, belies the fact that the tenant does not have an interest in land as such. It is considered that such tenancies arose in order to prevent a tenant acquiring an estate by way of adverse possession by virtue of their occupation of the land and thus preventing the landlord from establishing their title to the land.

A tenancy at will is a type of tenancy that continues indefinitely, although it can be brought to an end by either party giving notice to the other. Clearly, until this is done, there is a relationship of landlord and tenant between the parties; however, because there is no defined duration within the tenancy, no estate arises in relation to the land. This type of tenancy is therefore precarious and since the tenant has no estate as such he cannot transfer anything to a third party.

Words of limitation

Words of limitation define the estate to be taken by a transferee either in an inter vivos conveyance or in a will. The words mark out the extent or length of time for which the estate to be transferred. It is important to bear in mind that, technically, the words do not themselves convey the estate to a transferee. Originally, the correct word or phrase was required to limit the estate, thus to convey an estate of inheritance such as a fee simple, the word 'heirs' was required to be contained in the conveyance. To create a fee tail, the conveyor would have to ensure that the conveyance indicated that it was to an individual and then to their linear descendants. Thus it was usual to convey land to 'A and the heirs of his body'.

In modern times, the process has been simplified by the Law of Property Act 1925 s.60(1) which provides:

> A conveyance of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the grantee the fee simple or other the whole interest which the power to convey in such land, unless a contrary intention appears in the conveyance.

The effect of this is that a grantor is assumed to transfer to the grantee the maximum estate that the grantor holds in the land, unless the grantor expressly states that the transfer will be for a lesser interest.