

ALISON CLARKE & PAUL KOHLER

Property Law

Commentary and Materials



CAMBRIDGE

This page intentionally left blank

Property Law

This is an innovative examination of the law's treatment of property. It looks at the nature and function of property rights in resources ranging from land to goods and intangibles, and provides a detailed analytical exposition of the content, function and effect of the property rules which regulate our use of these resources, and the fundamental principles which underpin this structure of rules. It draws on a wide range of materials on property rights in general and the English property law system in particular. The book includes the core legal source materials in property law along with readings from social science literature, legal theory and economics, many of which are not easily accessible to law students. These materials are accompanied by a critical commentary, as well as notes, questions and suggestions for further reading.

ALISON CLARKE is Senior Lecturer in Laws at University College London. She has devised and taught innovative property law courses for undergraduate law students and specialised postgraduate courses in property-related areas in insolvency and maritime law. She spent two years seconded to the Law Commission to work on reform of the law of mortgages and formerly practised as a solicitor in a commercial practice specialising in land transactions. She has written widely on theoretical aspects of property, with particular emphasis on communal land rights and evolving patterns of land usage, whilst continuing to maintain links with law in practice by giving lectures and seminars to professional lawyers on ship mortgages and commercial property.

PAUL KOHLER splits his time between academe and business. A former Sub-Dean at UCL and Head of Best Practice at Nabarro Nathanson, he is currently a law lecturer at New College, Oxford, and is Chairman of LLT (a legal education provider). He works with some of the leading law firms in the UK as a knowledge management and change consultant specializing in the application of new technology to transform working practices. Paul has devised and taught innovative property courses for over a decade and researched and written widely in the field.

The Law in Context Series

Editors: William Twining (University College London) and
Christopher McCrudden (Lincoln College, Oxford)

Since 1970 the Law in Context series has been in the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political, and economic contexts from a variety of perspectives. The series particularly aims to publish scholarly legal writing that brings fresh perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of other disciplines, but most also appeal to a wider readership. In the past, most books in the series have focused on English law, but recent publications include books on European law, globalisation, transnational legal processes, and comparative law.

Books in the Series

Anderson, Schum and Twining: *Analysis of Evidence*

Ashworth: *Sentencing and Criminal Justice*

Barton & Douglas: *Law and Parenthood*

Bell: *French Legal Cultures*

Bercusson: *European Labour Law*

Birkinshaw: *European Public Law*

Birkinshaw: *Freedom of Information: The Law, the Practice and the Ideal*

Cane: *Atiyah's Accidents, Compensation and the Law*

Clarke & Kohler: *Property Law: Commentary and Materials*

Collins: *The Law of Contract*

Davies: *Perspectives on Labour Law*

de Sousa Santos: *Toward a New Legal Common Sense*

Diduck: *Law's Families*

Elworthy & Holder: *Environmental Protection: Text and Materials*

Fortin: *Children's Rights and the Developing Law*

Glover-Thomas: *Reconstructing Mental Health Law and Policy*

Gobert & Punch: *Rethinking Corporate Crime*

Harlow & Rawlings: *Law and Administration: Text and Materials*

Harris: *An Introduction to Law*

Harris: *Remedies in Contract and Tort*

Harvey: *Seeking Asylum in the UK: Problems and Prospects*
Hervey & McHale: *Health Law and the European Union*
Lacey & Wells: *Reconstructing Criminal Law*
Lewis: *Choice and the Legal Order: Rising above Politics*
Likosky: *Transnational Legal Processes*
Maughan & Webb: *Lawyering Skills and the Legal Process*
Moffat: *Trusts Law: Text and Materials*
Norrie: *Crime, Reason and History*
O'Dair: *Legal Ethics*
Oliver: *Common Values and the Public–Private Divide*
Oliver & Drewry: *The Law and Parliament*
Picciotto: *International Business Taxation*
Reed: *Internet Law: Text and Materials*
Richardson: *Law, Process and Custody*
Roberts & Palmer: *Dispute Processes: ADR and the Primary Forms
of Decision-Making*
Scott & Black: *Cranston's Consumers and the Law*
Seneviratne: *Ombudsmen: Public Services and Administrative Justice*
Stapleton: *Product Liability*
Turpin: *British Government and the Constitution: Text, Cases and Materials*
Twining & Miers: *How to Do Things with Rules*
Twining: *Globalisation and Legal Theory*
Twining: *Rethinking Evidence*
Ward: *A Critical Introduction to European Law*
Ward: *Shakespeare and Legal Imagination*
Zander: *Cases and Materials on the English Legal System*
Zander: *The Law-Making Process*

Property Law

Commentary and Materials

Alison Clarke and Paul Kohler



CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 2RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521614894

© Alison Clarke and Paul Kohler 2005

This publication is in copyright. Subject to statutory exception and to the provision of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press.

First published in print format 2005

ISBN-13 978-0-521-13464-7 eBook (EBL)

ISBN-10 0-521-13464-9 eBook (EBL)

ISBN-13 978-0-521-61489-4 paperback

ISBN-10 0-521-61489-9 paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication, and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.

Contents

<i>Preface</i>	<i>page</i>	xvii
<i>Acknowledgments</i>		xix
<i>Table of cases</i>		xxii
<i>Table of statutes</i>		xxxv
<i>Table of statutory instruments</i>		xliv
<i>Table of treaties</i>		xlvi
<i>Table of EC legislation</i>		xlvi
Part 1 The concept of property		1
1 Property law: the issues		3
1.1 Basic definition		3
1.2 Illustrative example		3
1.2.1 John		4
1.2.2 Dr A and Dr B and the acquisition and transmission of property interests		13
1.2.3 The drugs company: constraints on the exercise of property rights		14
2 What we mean by 'property'		17
2.1 Introduction		17
2.1.1 Property as a relationship and as a thing		17
2.1.2 Conceptualising 'things'		18
2.1.3 Distinguishing property rights from other rights relating to things		18
2.1.4 Rights and other entitlements: Hohfeld's rights analysis		19
2.1.5 Hohfeldian analysis of dynamic property relationships		24
2.1.6 Property rights, property interests and ownership		26
2.2 Private property, communal property, state property and no property		35
2.2.1 Introduction		35
2.2.2 Distinguishing no-property, communal property, state property and private property		36

2.3	Economic analysis of property rights	42
2.3.1	What economic analysis seeks to achieve	42
2.3.2	Key concepts in the economic analysis of property rights	45
2.4	Things as thing and things as wealth	50
2.4.1	Functions of things	50
2.4.2	The idea of a fund	51
2.4.3	Thing versus wealth	51
2.4.4	Related conceptions	52
3	Justifications for property rights	59
3.1	Introduction: general and specific justifications	59
3.2	Economic justification of property rights	59
3.2.1	Property and scarcity	59
3.2.2	Viability of single property systems	78
3.2.3	Criteria for measuring the success of a particular form of ownership	80
3.3	John Locke's justification for private property	81
3.3.1	What Locke was attempting to establish	81
3.3.2	The political context	82
3.3.3	The problem of consent	83
3.3.4	Locke's justification for original acquisition	83
3.3.5	The nature of Locke's commons	84
3.3.6	Why mixing labour with a thing should give rise to entitlement	84
3.3.7	The sufficiency proviso	87
3.3.8	The spoilation proviso	89
3.3.9	The theological dimension to Locke's theory	90
3.3.10	Present relevance of Locke's theory	90
4	Allocating property rights	107
4.1	Introduction	107
4.2	The first occupancy rule	108
4.2.1	Intuitive ordering	108
4.2.2	Preservation of public order	109
4.2.3	Simplicity	110
4.2.4	Signalling	110
4.2.5	The bond between person and possessions	111
4.2.6	The libertarian justification	111
4.2.7	The communitarian objection	112
4.2.8	Economic efficiency	112
4.3	New things	122
4.4	Capture	128

4.5	Colonisation and property rights	138
4.5.1	Introduction	138
4.5.2	The <i>Milirrpum</i> decision and the doctrine of <i>terra nullius</i>	140
4.5.3	Mabo (No. 2)	143
4.5.4	Developments since <i>Mabo</i> (No. 2)	150
	Part 2 The nature of proprietary interests	153
5	Personal and proprietary interests	155
5.1	Characteristics of proprietary interests	155
5.1.1	General enforceability	155
5.1.2	Identifiability of subject-matter	156
5.1.3	Significance of alienability	157
5.1.4	Requirement for certainty	159
5.1.5	The <i>numerus clausus</i> of property interests	159
5.1.6	Vindication of property rights	160
5.1.7	Termination	161
5.1.8	Property rights and insolvency	163
5.2	Special features of communal property rights	167
5.2.1	Present scope of communal property	167
5.3	Aboriginal land rights	173
5.3.1	Nature of native title	173
5.3.2	Alienability	173
5.3.3	Abandonment	174
5.3.4	Variation	174
5.3.5	Extent of native title	175
5.3.6	Is native title proprietary?	175
6	Ownership	180
6.1	The nature of ownership	180
6.1.1	The basis of ownership	180
6.1.2	An outline of the difficulties encountered in any consideration of ownership	182
6.2	The contents of ownership	192
6.2.1	An introduction to Honoré's analysis	192
6.3	The roles played by ownership	212
6.3.1	As a legal term of art	212
6.3.2	As an amorphous notion	216
6.4	The limitations of ownership	217
6.4.1	Nuisance	217
6.5	Restrictive covenants	250
7	Possession	259
7.1	The nature of possession	259
7.1.1	Introduction	259

7.1.2	Possession, ownership and proprietary interests	259
7.1.3	What is possession?	261
7.2	Possession of land	271
7.2.1	Leases and licences	271
7.2.2	Possession and particular use rights	278
7.3	Possession of goods: bailment	280
7.3.1	Nature of bailment	280
7.3.2	Rights, duties and obligations of bailor and bailee	281
7.4	Protection of possession	282
7.4.1	Protection of property rights by protection of possession	282
7.4.2	Tort and the protection of property rights	282
7.4.3	Self-help remedies	286
7.4.4	Unlawful eviction and harassment	291
7.4.5	Trespassing and the criminal law	292
8	Fragmentation of ownership	297
8.1	Introduction	297
8.2	Present and future interests	297
8.2.1	Interests in possession, in reversion and in remainder	298
8.2.2	Absolute entitlements, contingent entitlements and mere expectancies	299
8.2.3	When interests vest	302
8.2.4	Alienation, management and control	303
8.2.5	Interests of contingent duration	304
8.2.6	Requirement of certainty	306
8.2.7	Successive interests in land and the doctrine of tenures and estates	307
8.2.8	Restrictions on the power to create future interests	311
8.3	Legal and equitable interests	311
8.3.1	Origin of the legal/equitable distinction	311
8.3.2	Legal and equitable interests now	312
8.3.3	The significance of the legal/equitable distinction	313
8.3.4	Three common fallacies	313
8.4	Fragmentation of management, control and benefit	320
8.4.1	Corporate property holding	320
8.4.2	Managerial property holding	332
8.5	Group ownership	339
8.6	General and particular use rights	342
9	Recognition of new property interests	345
9.1	Why are certain interests regarded as property?	345
9.1.1	The function of property	345
9.1.2	The danger of property	346
9.1.3	The requirements of property	347

	9.2 The dynamic nature of property	348
	9.2.1 The recognition and limits of the covenant as a proprietary interest	349
	9.2.2 The recognition of a proprietary right to occupy the matrimonial home	353
	9.3 The general reluctance to recognise new property rights	356
	9.3.1 The facts of <i>Victoria Park Racing v. Taylor</i>	356
	9.3.2 The views of the majority	357
	9.3.3 The views of the minority	357
	9.3.4 The significance of the case	358
	9.4 A comparative confirmation and an economic critique	368
	9.5 The future of property	371
	9.5.1 The new property thesis	373
	9.5.2 The emergence of quasi-property	376
	 Part 3 The acquisition and disposition of property interests	 381
10	Title	383
	10.1 What we mean by ‘title’	383
	10.2 Acquiring title: derivative and original acquisition of title	384
	10.2.1 Derivative acquisition: disposition or grant	384
	10.2.2 Original acquisition	384
	10.3 Relativity of title	386
	10.4 Proving title	387
	10.4.1 Role of registration	388
	10.4.2 Possession as a root of title	389
	10.4.3 Provenance	390
	10.4.4 Extinguishing title by limitation of action rules	391
	10.4.5 Relativity of title and the <i>ius tertii</i>	393
	10.5 The nemo dat rule	393
	10.5.1 Scope of the <i>nemo dat</i> rule	394
	10.5.2 General principles applicable to all property	396
	10.5.3 The application of the <i>nemo dat</i> rule to goods	397
	10.5.4 The application of the <i>nemo dat</i> rule to money	398
	10.5.5 The application of the <i>nemo dat</i> rule to land	402
	10.6 Legal and equitable title	403
11	Acquiring title by possession	406
	11.1 Introduction	406
	11.2 The operation of adverse possession rules	406
	11.2.1 Unregistered land	407
	11.2.2 Registered land	407
	11.2.3 What counts as ‘adverse’ possession	407
	11.2.4 Effect on third party interests	409

11.3	Why established possession should defeat the paper owner	410
11.4	Adverse possession and registration	412
11.5	Good faith and the adverse possessor	413
11.6	Goods	443
	11.6.1 Taking and theft	444
	11.6.2 Protection of title by tort	444
	11.6.3 The limitation act 1980 and title to goods	444
	11.6.4 Finders	445
12	Transfer and grant	448
	12.1 Derivative acquisition	448
	12.2 Formalities	448
	12.2.1 Nature and content of formalities rules	448
	12.2.2 Registration and electronic transactions	451
	12.2.3 Validity and enforceability against third parties	452
	12.2.4 Effect of compliance on passing of title	453
	12.2.5 Transactions excepted from formalities rules	453
	12.2.6 Deeds and prescribed forms	454
	12.2.7 Why have formalities rules	455
	12.2.8 Disadvantages	460
	12.3 Contractual rights to property interests	471
	12.3.1 Estate contracts and the rule in <i>Walsh v. Lonsdale</i>	471
	12.3.2 Application to property other than land	472
	12.3.3 The failed formalities rule	473
	12.3.4 Options to purchase, rights of pre-emption and rights of first refusal	479
	12.4 Unascertained property	484
	12.4.1 The problem of identification	484
	12.4.2 Unascertained goods	484
	12.4.3 Other unascertained property	485
13	Acquiring interests by other methods	489
	13.1 Introduction	489
	13.2 The difference between adverse possession and prescription	489
	13.3 Why long use should give rise to entitlement	490
	13.4 Rationale	492
	13.4.1 Ascendancy of the presumed grant rationale	492
	13.4.2 Effect of the ‘revolting fiction’	493
	13.5 When long use gives rise to a prescriptive right	494
	13.5.1 The problem of negative uses	494
	13.5.2 Rights that can be granted but not acquired by prescription	496
	13.6 User as of right and the problem of acquiescence	497
	13.7 The future of prescription	498

	Part 4 Proprietary relationships	569
16	Co-ownership	571
	16.1 Introduction	571
	16.2 The classical approach to co-ownership: joint tenancies and tenancies in common	572
	16.2.1 Basic concepts	572
	16.2.2 A comparison of joint tenancies and tenancies in common	576
	16.2.3 Use of co-owned property	591
	16.2.4 Sale and other dispositions of co-owned property	596
	16.3 Other forms of co-ownership	599
	16.3.1 Commonhold	599
	16.3.2 Unincorporated associations	599
	16.3.3 Extending the limits of co-ownership: public trusts	605
17	Leases and bailment	609
	17.1 Introduction	609
	17.2 Leases and bailments compared	609
	17.2.1 Consensuality	609
	17.2.2 Contract	610
	17.2.3 Enforcement	610
	17.2.4 Duration and purpose	611
	17.2.5 Beneficial use	611
	17.2.6 Proprietary status	612
	17.2.7 Inherent obligations of the possessor	612
	17.3 Leases	613
	17.3.1 Nature of the lease	613
	17.3.2 Alienability	640
	17.3.3 Effect of alienation on enforceability	645
	17.4 Bailment	648
	17.4.1 Essential features of bailment	648
	17.4.2 Categories of bailment	649
	17.4.3 Characteristics of bailment	650
	17.4.4 Liabilities of the bailee	651
	17.4.5 Is bailment proprietary?	653
18	Security interests	657
	18.1 The nature and function of security	657
	18.1.1 Nature of security	657
	18.1.2 Function	658
	18.1.3 Efficiency	661
	18.1.4 Use of security	662

18.2	Forms of security	663
18.2.1	Property transfer securities: the mortgage	663
18.2.2	Possessory securities: pledge or pawn	664
18.2.3	Hypothecations: the charge	664
18.2.4	Liens	665
18.2.5	Property retention securities	665
18.2.6	Charge by way of legal mortgage	665
18.3	Control over the terms of the relationship	669
18.3.1	Equitable supervisory jurisdiction	669
18.3.2	The <i>Kreglinger</i> principles	670
18.3.3	Statutory intervention	672
18.4	Enforcement of security	684
18.4.1	Remedies	684
18.4.2	Possession	685
18.4.3	Sale	686
18.4.4	Duties on enforcement	687
	<i>Bibliography</i>	698
	<i>Index</i>	709

Preface

Property law tends to be regarded by students as both dull and difficult. The main objective of this book is to demonstrate that it is neither. The book is based on the Property Law seminars we devised and taught in the Faculty of Laws at University College London. Like the seminar course, the book looks at the nature and function of property rights in resources ranging from land to goods and intangibles, and provides a detailed analytical exposition of the content, function and effect of the property rules which regulate our use of these resources, and the fundamental principles which underpin their structure.

We draw on a wide range of materials on property rights in general and our property law system in particular, including core legal source materials on selected topics as well as readings from social science literature, legal theory and economics. Inevitably the coverage is not comprehensive, but we have included notes, questions and suggestions for further reading to provide a starting point for anyone wanting to take matters further. As in any other property law book, we draw on a lot of material from decided cases, but to keep the book at a manageable length we have put most of the edited case extracts we use, together with some other materials, on the associated website, www.cambridge.org/propertylaw/ rather than in the book itself. This has enabled us to use much longer extracts than would otherwise have been feasible, and also to introduce a much wider range of materials.

We have both been involved in teaching all the topics covered in this book, but have taken separate responsibility for different parts of the book: Chapters 1–5, 7–8, 10–15 and 17–18 were written by Alison Clarke, and Chapters 6, 9 and 16 by Paul Kohler.

The content of the book has been greatly influenced by the many stimulating contributions made to seminars by students over the years, and by our colleagues who have taught on the seminar course with us at UCL and elsewhere: our thanks go to all of them, and to our respective families and friends for their help and encouragement.

Finally, the book is dedicated by Alison to Leo, and by Paul to his partner, Samantha, and his four daughters, Eloise, Tamara, Bethany and Saskia, whose endless disputes on the ownership and possession of each other's clothes has taught him more about the fundamentals of property than any number of cases in the Court of Chancery.

ALISON CLARKE

PAUL KOHLER

November 2004

Acknowledgments

We would like to thank the following for permission to reproduce the following materials:

- the American Association for the Advancement of Science, Washington, for the extract from Hardin, ‘The Tragedy of the Commons’ (1968) 162 *Science* 1243;
- Basic Books, for the extracts from Robert Nozick, *Anarchy, State, and Utopia*, reprinted by permission of Basic Books, The Perseus Books Group;
- Bernard Rudden and Oxford University Press, for the extracts from Rudden, ‘Things as Thing and Things as Wealth’ (1994) 14 *Oxford Journal of Legal Studies* 81, and from Lawson and Rudden, *The Law of Property* (3rd edn, Oxford: Clarendon Press, 2002);
- Carol M. Rose and the *University of Chicago Law Review*, for the extracts from Rose, ‘Possession as the Origin of Property’ (1985) 52 *University of Chicago Law Review* 73, copyright © 1985 by the University of Chicago;
- the *Columbia Law Review*, for the extract from Lon Fuller, ‘Form and Consideration’ (1941) 41 *Columbia Law Review* 799, reprinted with the permission of the *Columbia Law Review*;
- the Council of Mortgage Lenders, for the extract from its *Statement of Practice: Handling of Arrears and Possessions* (Council of Mortgage Lenders, 1997);
- David Fox, for the extract from his article, ‘Bona Fide Purchase and the Currency of Money’ (1996) *Cambridge Law Journal* 547;
- David Haddock and the *Washington University Law Quarterly*, for the extract from Haddock, ‘First Possession Versus Optimal Timing: Limiting the Dissipation of Economic Value’ (1986) 64 *Washington University Law Quarterly* 775;
- David Sugarman and Kluwer Law International, for the extract from Sugarman and Warrington, ‘Telling Stories: Rights and Wrongs of the Equity of Redemption’, in J. W. Harris (ed.), *Property Problems: From Genes to Pension Funds* (London: Kluwer, 1997), reprinted with the permission of Kluwer Law International;
- Dhammika Dharmapala, Rohan Pitchford and the *Journal of Law, Economics, and Organization*, for the extract from Dharmapala and Pitchford, ‘An Economic Analysis of “Riding to Hounds”: Pierson v. Post Revisited’ (2002)

18 *Journal of Law, Economics, and Organization* 39, reprinted with permission of Oxford University Press;

- Gregory S. Alexander and the University of Chicago, for the extract from Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776–1970* (Chicago: University of Chicago Press, 1997), copyright © 1997 by the University of Chicago;
- Guido Calabresi, A. Douglas Melamed and the *Harvard Law Review*, for the extract from Calabresi and Melamed, ‘Property Rules, Liability Rules and Inalienability: One View of the Cathedral’ (1972) 85 *Harvard Law Review* 1089;
- Harold Demsetz and the American Economic Association, for the extract from Demsetz, ‘Towards a Theory of Property Rights’ (1967) 57 *American Economic Review* 347;
- James Grunebaum and Routledge and Kegan Paul (Taylor & Francis Group), for the extracts from Grunebaum, *Private Ownership* (London and New York: Routledge and Kegan Paul, 1987);
- Jeremy Waldron and Oxford University Press, for the extracts from Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988);
- Margaret Jane Radin and the *Washington University Law Quarterly*, for the extracts from Radin, ‘Time, Possession, and Alienation’ (1986) 64 *Washington University Law Quarterly* 739;
- Matthew Kramer, for the extracts from his book, *John Locke and the Origins of Private Property: Philosophical Explorations of Individualism, Community, and Equality* (Cambridge: Cambridge University Press, 1997);
- New York University Press, for the extracts from J. Roland Pennock and John Chapman (eds.), *Nomos XXII: Property* (New York: New York University Press, 1980);
- Oxford University Press, for the extracts from A. M. Honoré, *Making Law Bind* (Oxford: Clarendon Press, 1987), from Markesinis and Deakin, *Markesinis and Deakin’s Tort Law* (5th edn, Oxford: Clarendon Press, 2003), from Alison Clarke, ‘Property Law’ (1992) 45 *Current Legal Problems Annual Review*, and ‘Use, Time and Entitlement’ (2004) 57 *Current Legal Problems* 239, from Peter Birks, ‘Five Keys to Land Law’, in S. Bright and J. Dewar (eds.), *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998), and from A. W. B. Simpson, *A History of the Land Law* (2nd edn, Oxford: Clarendon Press, 1986);
- Paddy Ireland and the *Modern Law Review*, for the extract from Ireland, ‘Company Law and the Myth of Shareholder Ownership’ (1999) 62 *Modern Law Review* 32;
- Peter Luther, for the extract from his article, ‘Williams v. Hensman and the Uses of History’ (1995) 15 *Legal Studies* 219;
- Princeton University Press, Terry L. Anderson and Fred McChesney (eds.), *Property Rights: Co-operation, Conflict, and Law* (Princeton: Princeton University Press, 2003), reprinted by permission of Princeton University Press;

- Richard A. Epstein and the *Washington University Law Quarterly*, for the extracts from Epstein, 'Past and Future: The Temporal Dimension in the Law of Property' (1986) 64 *Washington University Law Quarterly* 667;
- Richard Posner and Aspen Publishers, for the extract reprinted from Posner, *Economic Analysis of Law* (6th edn, New York: Aspen Publishers, 2002), with the permission of Aspen Publishers;
- Robert Ellickson and the *Journal of Law, Economics, and Organization*, for the extract from 'A Hypothesis of Wealth-Maximising Norms: Evidence from the Whaling Industry' (1989) 5 *Journal of Law, Economics, and Organization* 83, reprinted with permission of Oxford University Press;
- Roy Goode and Penguin Books, for the extract from R. M. Goode, *Commercial Law* (2nd edn, London: Penguin Books, 1995), reproduced by permission of Penguin Books Ltd;
- Stephen Munzer, for the extract from *A Theory of Property* (Cambridge: Cambridge University Press, 1990);
- Sweet & Maxwell and Tony Weir, for the extract from Weir, *A Casebook on Tort* (10th edn, London: Sweet & Maxwell, 2004);
- Sweet & Maxwell, for the extract from Roper *et al.*, *Ruoff and Roper on the Law and Practice of Registered Conveyancing* (2nd looseleaf edn, London: Sweet & Maxwell, 2003);
- Transaction Publishers, for the extract from Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Harcourt, Brace & World, 1932), reprinted with the permission of Transaction Publishers;
- the Yale Law Journal Company and William S. Hein Company, for the extract from Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; and
- Yoram Barzel, for the extract from his book, *Economic Analysis of Property Rights* (2nd edn, Cambridge: Cambridge University Press, 1997)

Felix S. Cohen, 'Dialogue on Private Property', was first published in (1954) 9 *Rutgers Law Journal* 357 and is reprinted with permission.

Crown copyright material is reproduced with the permission of the Controller of HMSO and the Queen's Printer for Scotland.

Table of cases

- A-G v. Antrobus [1905] 2 Ch 188 503
A-G v. Doughty (1752) 2 Ves Sen 453 497
A-G v. Pawlett (1667) Hard 465 675
A-G and Newton Abbot RDC v. Dyer [1947] Ch 67 506, 510
A-G (ex rel. Yorkshire Derwent Trust Ltd) v. Brotherton [1991] 3 WLR 1126,
HL 602
A-G for Ontario v. Orange Productions Ltd, 21 DLR (3d) 257 (1971) 218
Abbey National Building Society v. Cann [1991] 1 AC 56, HL 561
Abbey National plc v. Moss [1994] 1 FLR 307, CA 598
Ackroyd v. Smith 10 CB 164 166
Advocate (Lord) v. Young (1887) LR 12 App Cas 544, HL 264
AG Securities v. Vaughan, Antoniadis v. Villiers [1998] 2 All ER 173, CA rvsd
[1990] AC 417, HL 274, 275, 278, 578, 579
Agard v. King (1600) Cro Eliz 775 620
Agnew v. IRC [2001] UKPC 28, [2001] 2 AC 710, [2001] 3 WLR 454 665, 668
Ahmed v. Kendrick (1988) 56 P&CR 120 582
AIB Finance v. Debtors [1997] 4 All ER 677 affd [1998] 2 All ER 929, CA 686, 696
Albany Home Loans Ltd v. Massey [1997] 2 All ER 609, CA 685, 695, 696, 697
Aldred's Case 9 Co Rep 57b 497
Aliakmon, The. *See* Leigh and Sullivan Ltd v. Aliakmon Shipping Co. Ltd, The
Aliakmon
Allen v. Flood [1898] AC 1, HL 31
Aluminium Industrie Vaassen BV v. Romalpa Aluminium Ltd [1976] 1 WLR 676,
CA 665
American Express International Banking Corp v. Hurley [1985] 3 All ER 564 696
Antoniades v. Villiers [1988] 3 WLR 139, CA rvsd [1990] AC 417, HL sub nom AG
Securities v. Vaughan, Antoniadis v. Villiers 578
Ashburn Anstalt v. Arnold [1989] Ch 1, CA 156, 564
Ashworth Frazer Ltd v. Gloucester City Council [2001] 1 WLR 2180, HL 645
Atwood v. Bovis Homes Ltd [2000] 3 WLR 1842 343
AVX Ltd v. EGM Solders Ltd (1982) Times, 7 July 650, 651, 653
Ayerst (Inspector of Taxes) v. C & K (Construction) Ltd [1976] AC 167, HL 338, 339

- Bacon (MC) Ltd, Re [1990] BCC 78 658
- Baker v. Archer-Shee [1927] AC 844, HL 335
- Bakewell Management Ltd v. Brandwood [2004] UKHL 14 491
- Bamford v. Turnley (1862) 3 B&S 66, 122 ER 27, [1861–73] All ER Rep 706 366
- Bank of New Zealand v. Greenwood [1984] 1 NZLR 525, NZ HC 234
- Barclays Bank Ltd v. Quistclose Investments Ltd [1970] AC 567, HL 318
- Barker v. Stickney [1919] 1 KB 121, CA 350, 352
- Bashall v. Bashall (1894) 11 TLR 152, CA 469
- Bates v. Donaldson [1896] 2 QB 241, CA 644
- Beckett Ltd (Alfred F) v. Lyons [1967] Ch 449, CA 506
- Bettison v. Langton [2001] UKHL 24 40, 167, 168, 170, 171, 542
- BHP Petroleum Great Britain Ltd v. Chesterfield Properties Ltd [2002] 2 WLR 672, CA 647
- Billson v. Residential Apartments Ltd [1991] 3 WLR 264, CA rvsd [1992] 1 AC 494, HL 288, 289
- Bircham & Co., Nominees (2) Ltd v. Worrell Holdings Ltd [2001] EWCA Civ 775 479, 480, 481, 484
- Bishop of Bath's Case, The 6 Co Rep 35b 620
- Bishopsgate Motor Finance Corp Ltd v. Transport Brakes Ltd [1949] 1 KB 322 394, 395, 396
- Blount v. Layard [1891] 2 Ch 681n, CA 506
- Bollinger v. Costa Brava Wine Co. Ltd [1960] Ch 262 378
- Boyle's Claim, Re [1961] 1 WLR 339 567
- Bradford Corp v. Pickles [1895] AC 587, HL 224, 234, 495
- Breen v. Williams (1995–6) 186 CLR 71, Aus HC 378
- Bridges v. Hawkesworth (1851) 21 LJ QB 75 267
- Bristol Airport plc v. Powdrill. *See* Paramount Airways Ltd, Re, Bristol Airport plc v. Powdrill
- Bristol & West Building Society v. Henning [1985] 2 All ER 606, CA 584
- British Telecommunications plc v. One in a Million Ltd [1999] 1 WLR 903, CA 378
- Broadwick Financial Services Ltd v. Spencer [2002] EWCA Civ 35, [2002] 1 All ER (Comm) 446 670, 673, 683, 684
- Brown & Root Technology Ltd v. Sun Alliance and London Assurance Co. Ltd [2000] 2 WLR 566, CA 552
- Brunner v. Greenslade [1971] Ch 993 252
- Bruton v. London & Quadrant Housing Trust [1998] QB 834, [1997] 4 All ER 970, [1998] 3 WLR 438, CA rvsd [2000] 1 AC 406, [1999] 3 WLR 150, HL 272, 276, 277, 403, 612, 637, 638, 639, 640
- Bryant v. Foot (1867) LR 2 QB 161 500, 502
- Buchanan-Wollaston's Conveyance, Re, Curtis v. Buchanan-Wollaston [1939] Ch 738, CA 597
- Buckinghamshire County Council v. Moran [1990] Ch 623, CA 267, 408, 432, 438, 443

- Bull v. Bull [1955] 1 QB 234, CA 530, 596
Burgess v. Rawnsley [1975] Ch 429, CA 583, 584, 585, 586–90
Burrows v. Brent London Borough Council [1996] 4 All ER 577, [1996] 1 WLR 1448 633, 635
- Carroll v. Manek (2000) 79 P&CR 173 410
Carter v. Carter (1857) 3 K&J 617 520, 521, 522
Casborne v. Scarf (1738) 2 Jac & W 194 675
Castellain v. Preston (1883) 11 QBD 380, CA 656
Centaploy Ltd v. Matlodge Ltd [1974] Ch 1 617
Chandler v. Thompson (1811) 3 Camp 80, 170 ER 1312 364
Chasemore v. Richards 7 HLC 349 497
Chatsworth Estates Co. v. Fewell [1931] 1 Ch 224 255
Cheshire Lines Committee v. Lewis & Co. (1880) 50 LJQB 121, CA 617
Chhokar v. Chhokar [1984] FLR 313, CA 560
Chowood Ltd v. Lyall (No. 2) [1930] 2 Ch 156, CA 434
Chowood's Registered Land, Re [1933] Ch 574 567
Christie v. Davey [1893] 1 Ch 316 220, 223, 224, 231
Chun v. Ho [2003] 1 FLR 23, CA 593
Churcher v. Street [1959] Ch 251 354
Citro (a bankrupt), Re [1990] 3 WLR 880 598
City of London Building Society v. Flegg [1988] AC 54, HL 518, 526, 527, 531, 535, 554
Coggs v. Bernard (1703) 2 Ld Ray 909, 91 ER 25 649, 650, 651, 652
Cole, Re, ex p. Trustee of Property of Bankrupt v. Cole [1964] Ch 175, CA 450, 456, 470
Cooper v. Stuart (1889) LR 14 App Cas 286 142, 144
Cope v. Sharpe (No. 2) [1912] 1 KB 496, CA 198
Corin v. Patton (1990) 169 CLR 540, Aus HC 577
Cosslett (Contractors) Ltd, Re [1998] Ch 495, [1997] 4 All ER 115, [1998] 2 WLR 131, CA 663, 665, 668
Costello v. Chief Constable of Derbyshire Constabulary [2001] 3 All ER 150, CA 286, 446, 447
Cottage Holiday Associates Ltd v. Customs and Excise Comrs [1983] QB 735 614
Cowcher v. Cowcher [1972] 1 WLR 425 577
Crago v. Julian [1992] 1 WLR 372, CA 450
Crawley Borough Council v. Ure [1996] QB 13, CA 621
Creelman v. Hudson Bay Insurance Co. [1920] AC 194 544
Cresswell (Trustees of the Cobbett Settlement) v. Proctor (Trustees of the Convent of the Holy Family) [1968] 1 WLR 906, CA 255
Cresswell v. Sirl [1948] 1 KB 241, CA 198
Cuckmere Brick Co. Ltd v. Mutual Finance Ltd [1971] Ch 949, CA 687, 688

- Dalton v. Angus. *See* Public Works Comrs v. Angus & Co., Dalton v. Angus & Co.
 De La Warr (Earl) v. Miles (1881) 17 Ch D 535, CA 504
 De Mattos v. Gibson (1859) 4 De G&J 276 350, 351, 352
 Dear v. Reeves [2001] EWCA Civ 277 479, 481, 484
 Dearle v. Hall; Loveridge v. Cooper (1823) 3 Russ 1, 38 ER 475 514
 Delgamuukw v. British Columbia [1997] 3 SCR 1010 175, 179, 280
 Denley's Trust Deed, Re, Holman v. HH Martyn & Co. Ltd [1969] 1 Ch 373 602,
 603, 604, 605, 607, 608
 Dennis v. Dennis (1971) 45 ALJR 605 595
 Diplock, Re, Diplock v. Wintle [1951] AC 251, CA 318
 Director-General of Fair Trading v. First National Bank plc [2001] UKHL 52 673
 Doe d Warner v. Brown (1807) 8 East 165; 103 ER 305 617
 Dolphin's Conveyance, Re, Birmingham Corp'n v. Boden [1970] 1 Ch 654 252
 Donoghue v. Stevenson. *See* McAlister (or Donoghue) v. Stevenson
 Downsview Nominees Ltd v. First City Corp Ltd [1993] AC 295, [1993] 3 All ER
 626, [1993] 2 WLR 86 685, 686, 687, 688, 695, 696
 Draper's Conveyance, Re, Nihan v. Porter [1969] 1 Ch 486 587, 588, 589
 Drummond, Re, Ashworth v. Drummond [1914] 2 Ch 90 601
 DPP v. Barnard (1999) Times, 9 November 292
 Duggan v. Governor of Full Sutton Prison [2004] EWCA Civ 78 649
- EC Commission v. Germany: C-361/88 [1991] ECR I-2567, ECJ 371
 EC Commission v. Germany: C-59/89 [1991] ECR I-2607, ECJ 371
 Elias (Emile) & Co. Ltd v. Pine Groves Ltd [1993] 1 WLR 305 252
 Ellenborough Park, Re, Re Davies, Powell v. Maddison [1956] Ch 131, CA
 280, 343
 Elliston v. Reacher [1908] 2 Ch 374, CA 252
 Epps v. Esso Petroleum Co. Ltd [1973] 1 WLR 1071 434
 Equity and Law Home Loans Ltd v. Prestidge [1992] 1 All ER 909, CA 584
 Errington v. Errington and Woods [1952] 1 KB 290, CA 629
 Essex Plan Ltd v. Broadminster (1988) 56 P&CR 353 633
 Evers's Trust, Re, Papps v. Evers [1980] 1 WLR 1327, CA 596–8
 Eves v. Eves [1975] 1 WLR 1338, CA 530
 Ezekial v. Fraser [2002] EWHC 2066 393
- Facchini v. Bryson [1952] 1 TLR 1386, CA 629
 Fairweather v. St Marylebone Property Co. Ltd [1963] AC 510, HL 443
 Family Housing Association v. Jones [1990] 1 WLR 779, CA 277
 Ferrishurst Ltd v. Wallcite Ltd [1999] 1 EGLR 85, CA 564
 First National Securities v. Hegerty [1985] QB 850, CA 582
 Folkestone Corp v. Brockman [1914] AC 338, HL 505
 Ford v. Hopkins Hil 12 W 33 400
 Foskett v. McKeown [2001] 1 AC 102, HL 487

- Foster v. Warblington UDC [1906] 1 KB 648, CA 627
Four-Maids Ltd v. Dudley Marshall (Properties) Ltd [1957] Ch 317 685, 696
Fowley Marine (Emsworth) Ltd v. Gafford [1968] 2 QB 618, [1968] 1 All ER 979,
CA 263, 264, 269, 279
Freeguard v. Royal Bank of Scotland plc (1998) 79 P&CR 81 514, 515, 554
Fuller v. Judy Properties Ltd (1992) 64 P&CR 176, CA 642
- Gafford v. Graham (1998) 77 P&Cr 73, CA 256
Gartside v. IRC [1968] AC 553, HL 335
Ghen v. Rich 8 Fed 159 (DC Mass 1881) 137
Gibbs and Houlder Bros & Co. Ltd's Lease, Re, Houlder Bros & Co. Ltd v. Gibbs
[1925] Ch 575, CA 644
Gilbert v. Spoor [1983] Ch 27, CA 255
Gillie, Re, ex p. Cornell (1996) 70 PCR 254 595
Gissing v. Gissing [1971] AC 886, HL 584
Glaister-Carlisle v. Glaister-Carlisle (1968) Times, 22 February, CA 450, 468–70
Goldcorp Exchange Ltd (in receivership), Re [1995] 1 AC 74 318, 485
Goldsworthy Mining Ltd v. Federal Comr of Taxation (1973) 128 CLR 199,
Aus HC 265
Goodman v. Saltash Corp (1881–2) LR 7 App Cas 633, HL 169
Gotha City v. Sotheby's [1998] 1 WLR 114, (1998) Times, 8 October, CA 445
Grand Junction Co. Ltd v. Bates [1954] 2 QB 160 666
Grant v. Edwards [1986] Ch 638, CA 530
Grant's Will Trusts, Re, Harris v. Anderson [1979] 3 All ER 359 601, 604, 605
Gray v. Taylor [1998] 1 WLR 1093, CA 275, 277
Greene King plc v. Stanley [2001] EWCA Civ 1966 457
Greenwich London Borough Council v. Regan (1996) 72 P & CR 507, 28 HLR 469,
CA 635
Grove-Grady, Re, Plowden v. Lawrence [1929] 1 Ch 557, CA 606
Gurasz v. Gurasz [1970] P 11, CA 353
- Halsall v. Brizell [1957] Ch 169 344
Hammersmith and Fulham London Borough Council v. Monk [1992] 1 AC 478,
HL 617, 620, 621
Hanlon v. Law Society [1980] 2 All ER 763, CA affd [1980] 2 All ER 199, HL 215
Harman v. Glencross [1985] Fam 49 353
Harris v. Flower (1904) 74 LJ Ch 127, CA 344
Harrold v. Plenty [1901] 2 Ch 314 474
Harvard Securities Ltd (in liquidation), Re, Holland v. Newbury [1998] BCC
567 486, 487, 488
Harvard Securities Ltd or Hunter v. Moss [1994] 1 WLR 614 486
Hasbro v. Clue Computing 66 F Supp 2d (D Mass 1999) 132
Haslem v. Lockwood (1871) 37 Conn 500 124

- Hawkesley v. May [1956] 1 QB 304 587, 588
- Hepburn v. A. Tomlinson (Hauliers) Ltd [1966] AC 451, HL 655, 656
- Hill v. Tupper (1863) 2 H & C 121, 159 ER 51 155, 160, 164–6, 271, 274, 279, 347, 356, 357, 359, 625
- Hindcastle Ltd v. Barbara Attenborough Associates Ltd [1997] AC 70, HL 161
- Hodgson v. Marks [1971] Ch 892, CA 463
- Holliday (a bankrupt), Re, ex p. Trustee of the Property of the Bankrupt v. Bankrupt [1981] Ch 405, CA 598, 599
- Hollywood Silver Fox Farm Ltd v. Emmet [1936] 2 KB 468 223, 232
- Houlder Brothers & Co. Ltd v. Gibbs. *See* Gibbs and Houlder Bros & Co. Ltd's Lease, Re, Houlder Bros & Co. Ltd v. Gibbs
- Hounslow London Borough Council v. Twickenham Garden Developments Ltd [1971] Ch 233 633
- Hue v. Whitely [1929] 1 Ch 440 503, 504
- Hughes v. Cork [1994] EGCS 25, CA 409
- Hunt v. Luck [1902] 1 Ch 428, CA 518, 519
- Hunter v. Canary Wharf Ltd; Hunter v. London Docklands Development Corp [1997] AC 655, HL 36, 37, 45, 219, 220, 221, 222, 223, 224, 232, 234, 344, 358, 496, 602
- Hunter v. Moss [1993] 1 WLR 934 affd [1994] 1 WLR 452, CA 485, 487, 488
- Hypo-Mortgage Services Ltd v. Robinson [1997] 2 FLR 71, CA 563, 565
- International Drilling Fluids Ltd v. Louisville Investments (Uxbridge) Ltd [1986] Ch 513, CA 643, 644
- International News Service v. Associated Press 248 US 215 (1918) 365, 367, 377
- J A Pye (Oxford) Ltd v. Graham [2002] Ch 676 rvsd [2001] EWCA Civ 117, [2001] 2 WLR 1293 rvsd [2002] UKHL 30 268, 407, 408, 412, 429, 430, 433, 438, 442, 443
- Jackson v. Jackson 9 Ves Jun 591 580, 582, 587
- Javad v. Aquil [1991] 1 WLR 1007, CA 618
- Johnson v. McIntosh 21 US (8 Wheat) 543 (1823) 120, 121
- Johnson v. Shaw [2003] EWCA Civ 894 434, 438
- Johnson v. Wyatt (1863) 2 De GJ & Sm 18, 46 ER 281 364
- Jones v. Bates [1938] 2 All ER 237, CA 503, 504, 506
- Jones v. Challenger [1961] 1 QB 176, CA 596, 598
- Jones v. Maynard (1849) 2 Ex 804 262
- Jones v. Morgan [2001] EWCA Civ 995 671
- Kataria v. Safeland plc [1998] 05 EG 155, CA 289
- Keeves v. Dean, Nunn v. Pellegrini [1924] 1 KB 685 643
- Kennet Properties' Application, Re (1996) 72 P & Cr 353 255
- Keppell v. Bailey 2 My & K 517 165

- KH Enterprise v. Pioneer Container, *The Pioneer Container* [1994] 2 AC 324,
[1994] 2 All ER 250 649, 650, 652, 655
- Kinch v. Bullard [1999] 1 WLR 423 585
- Kingsnorth Trust Ltd v. Tizard [1986] 1 WLR 783 517, 518, 522, 563
- Kling v. Keston Properties Ltd (1983) 49 P&CR 212 561
- Knight v. Lawrence [1993] BCLC 215, [1991] BCC 411, [1991] 01 EG 105 696
- Knightsbridge Estates Trust Ltd v. Byrne [1939] Ch 441, CA 683
- Kreglinger v. New Patagonia Meat and Cold Storage Co. Ltd [1914] AC 25,
HL 669, 670–2, 677, 683, 684
- Kuwait Airways Corp v. Iraqi Airways Co. [2002] UKHL 19 284
- Lace v. Chantler (or Chandler) [1944] KB 368, CA 621, 623
- Lake Shore and MSR Co. v. Kurtz 10 Ind App 60 (1984) 27
- Lambeth London Borough Council v. Rogers (2000) 32 HLR 361; [2000] 03 EG
127, CA 634, 635
- Lawrence v. South County Freeholds Ltd [1939] Ch 656 258
- Leahy v. A-G for New South Wales [1959] AC 457 600, 601, 604, 605
- Leigh and Sullivan Ltd v. Aliakmon Shipping Co. Ltd, *The Aliakmon* [1986] 2 WLR
902, HL 472, 477, 478
- Leighton v. Theed (1702) 1 Ld Ray 707 620
- Lipinski's Will Trusts, *Re*, *Gosschalk v. Levy* [1977] 1 All ER 33 603, 604, 605
- Lloyds Bank Ltd v. Bank of America National Trust and Savings Association [1938]
2 KB 147, CA 215
- Lloyds Bank plc v. Carrick [1996] 4 All ER 630, CA 460, 470, 471, 559
- Lloyds Bank plc v. Rosset [1991] 1 AC 107, CA 333, 565
- Lodge v. Wakefield Metropolitan City Council [1995] 38 EG 136, CA 266
- London and Blenheim Estates Ltd v. Ladbroke Retail Parks Ltd [1992] 1 WLR
1278, CA 343, 344
- London County Council v. Allen [1914] 3 KB 642, CA 349
- London Wine Co. (Shippers) Ltd, *Re* [1986] PCC 121 485, 486
- Lows v. Telford (1875–6) LR 1 App Cas 414, HL 263, 267, 268
- Lyons (J.) & Sons v. Wilkins [1899] 1 Ch 255, CA 367
- Mabo v. State of Queensland (No. 2) (1992) 175 CLR 1, Aus HC 5, 76, 139, 140,
142, 143–8, 149, 150, 151, 152, 171, 173, 174, 179, 206, 279, 308
- McAlister (or Donoghue) v. Stevenson [1932] AC 562, HL 366, 368
- McDowell v. Hirschfield Lipson & Rumney and Smith [1992] 2 FLR 126, [1992]
Fam Law 430 586
- McElfresh v. Kirkendall 36 Iowa 224 (1873) 33
- McGruther v. Pitcher [1904] 2 Ch 306, CA 352
- McKerrell, *Re*, *McKerrell v. Gowans* [1912] 2 Ch 648 579
- McPhail v. Dalton [1971] AC 424, HL 608
- McPhail v. Persons (names unknown) [1973] Ch 447, CA 263, 288

- Malayan Credit Ltd v. Jack Chia-MPH Ltd [1986] AC 549 579
- Malory Enterprises Ltd v. Cheshire Homes (UK) Ltd [2002] EWCA Civ 151,
[2002] 3 WLR 1 561, 565, 567
- Manchester Airport plc v. Dutton [2000] QB 133 633
- Mann v. Brodie (1884–5) LR 10 App Cas 378, HL 503
- Marchant v. Charters [1977] 3 All ER 918, CA 273, 276, 650
- Marcq v. Christie Manson & Woods Ltd (t/a Christie's) [2003] EWCA Civ
731 284
- Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd [1969] 1 QB
219 478
- Martin's Application, Re (1989) 57 P&Cr 119, CA 255
- Mayhew v. Suttle (1854) 4 E&B 347; 119 ER 137 629
- Medforth v. Blake [1999] 3 All ER 97, CA 686
- Midland Bank v. Cooke [1995] 4 All ER 562, CA 584
- Midland Bank Trust Co. Ltd v. Green [1981] AC 513, HL 458, 518
- Midland Railway Co's Agreement, Re, Charles Clay & Sons Ltd v. British Railways
Board [1971] Ch 725, CA 617
- Milirrpum v. Nabalco Pty Ltd (1971) 17 FLR 141 76, 140–3, 144, 148, 158, 169,
175–8, 181, 206, 279
- Miller v. Jackson [1977] QB 966, [1977] 3 All ER 338, CA 219, 228, 229, 230, 249
- Miller v. Race (1758) 1 Burr 452 399, 401, 402
- Mills v. Silver [1991] Ch 271, [1991] 2 WLR 324, CA 344, 505
- Milmo v. Carreras [1946] KB 306, CA 638, 640, 641
- Mitchell v. Ealing London Borough Council [1979] QB 1 650, 651, 652, 653
- Mogul Steamship Co. v. McGregor (1889) 23 QBD 59 30
- Monsanto plc v. Tilly [2000] Env LR 313, CA 285
- Montagu's Settlement Trusts, Re, Duke of Manchester v. National Westminster
Bank Ltd [1987] Ch 264 318
- Moore v. Regents of the University of California 51 Cal 3d 120; 793 P 2d 479
(1990) 3, 8, 9, 10, 12, 13, 14, 16, 372
- Morris v. Baron & Co. [1918] AC 1, HL 452
- Mortgage Corp Ltd v. Shaire, Mortgage Corp Ltd v. Lewis Silkin (a firm) [2001]
Ch 743 598
- Mount Carmel Investments Ltd v. Peter Thurloe Ltd [1988] 1 WLR 1078, CA
264, 443
- Mount Eden Land Ltd v. Straudley Investments Ltd (1996) 74 P&CR 306, CA 645
- Multiservice Bookbinding Ltd v. Marden [1979] Ch 84 672
- Murdoch and Barry, Re 64 DLR (3d) 222 (1976) 583
- Murray, Bull & Co. Ltd v. Murray [1953] 1 QB 211 631
- National Anti-Vivisection Society v. IRC [1948] AC 31, HL 606
- National Provincial Bank Ltd v. Ainsworth [1965] AC 1175, HL 158, 348, 353,
354, 355, 359, 360

- National Trust for Places of Historic Interest or Natural Beauty v. White [1987] 1 WLR 907 344
- Neilson-Jones v. Fedden [1975] Ch 222 582, 586, 588, 589
- Neville Estates Ltd v. Madden [1962] Ch 832 601, 604
- New Windsor Corp v. Mellor [1975] 1 Ch 380, [1975] 3 All ER 44, CA 169, 172, 278, 279, 602
- Nisbet and Potts' Contract, Re [1906] 1 Ch 386, CA 410
- Norwich and Peterborough Building Society v. Steed [1993] Ch 116, CA 567
- Notting Hill Housing Trust v. Brackley [2001] EWCA Civ 601 621
- O'Keefe v. Secretary of State for the Environment and Isle of Wight County Council [1996] JPL 42 504
- Oxfordshire County Council v. Oxford City Council [2005] EWHC 175 172
- Paddington Building Society v. Mendelsohn (1985) 50 P&CR 244, CA 566
- Paepcke v. Public Buildings Comr of Chicago 263 NE 2d 11 (1970) 606
- Palfrey v. Palfrey (1974) 229 EG 1593, CA 409, 443
- Palk v. Mortgages Services Funding plc [1993] Ch 330, [1993] 2 All ER 481, [1993] 2 WLR 415, CA 685, 688, 695, 696
- Panavision v. Toepfen 945 F Supp 1296 (CD Cal 1996) 131
- Paragon Finance plc v. Staunton, Paragon Finance plc v. Nash [2001] EWCA Civ 1466, [2002] 2 All ER 248, [2002] 1 WLR 685 672, 673, 684
- Paramount Airways Ltd, Re, Bristol Airport plc v. Powdrill [1990] Ch 744 654
- Parker v. British Airways Board [1982] QB 1004, CA 267, 444, 445, 446, 447, 651
- Peacock v. Custins [2001] 13 EG 152, CA 344
- Pemberton v. Southwark London BC [2000] 1 WLR 1672, CA 634, 635
- Pettitt v. Pettitt [1970] AC 777, HL 584
- Phillips v. Halliday [1891] AC 228, HL 509
- Pierson v. Post 3 Cai R 175, 2 Am Dec 264 (1805) 128, 129, 130, 426
- Pilcher v. Rawlins (1871–2) LR 7 Ch App 259 516, 519–22
- Pimms Ltd v. Tallow Chandlers in the City of London [1964] 2 QB 547, CA 644
- Pioneer Container, The. *See* KH Enterprise v. Pioneer Container, The Pioneer Container
- Port Line Ltd v. Ben Line Steamers Ltd [1958] 2 QB 146 351, 352
- Powell v. McFarlane (1979) 38 P&CR 452 263, 266, 268, 408, 438
- Predeth v. Castle Philips Finance Co. Ltd [1986] 2 EGLR 144, 279 EG 1355, CA 696
- Prestige Properties Ltd v. Scottish Provident Institution [2002] EWHC 330 (Ch) 434
- Pritchard v. Briggs [1980] Ch 338, CA 301, 302, 479, 480, 481, 482, 483, 512
- Prudential Assurance Co. Ltd v. London Residuary Body [1992] 2 AC 386, HL 307, 472, 609, 617, 618, 619, 620, 621, 622, 623, 624

- Prudential Assurance Co. Ltd v. Waterloo Real Estate Inc [1999] 17 EG 131,
CA 269
- Public Works Comrs v. Angus & Co., Dalton v. Angus & Co. (1881) LR 6 App Cas
740, HL 492, 496, 497, 501
- Queens Club Garden Estates Ltd v. Bignell [1924] 1 KB 117 617
- Quennell v. Maltby [1979] 1 All ER 568, CA 697
- Quinn v. Leathem [1901] AC 495, HL 29
- R. v. Cavendish [1961] 2 All ER 856, [1961] 1 WLR 1083, CCA 266, 267, 270
- R. v. Kelly [1999] QB 621, CA 13, 16, 372
- R. v. Oxfordshire County Council, ex p. Sunningwell Parish Council [2000] 1 AC
335, [1999] 3 All ER 385, [1999] 3 WLR 160, HL 169, 170, 171, 172, 490, 494,
497, 499–507, 510
- R. v. Secretary of State for Transport, ex p. Factortame Ltd: C-48/93 [2001] 1 AC
524, HL 538
- R. v. Suffolk County Council, ex p. Steed and Steed (1996) 75 P&CR 102, CA 502,
504, 505
- R. (Beresford) v. Sunderland County Council [2001] 1 WLR 1327 affd [2001]
EWCA Civ 1218, CA rvsd [2003] UKHL 60, [2004] 1 AC 889, HL 39, 438, 497,
510, 511
- R. v. Somerset County Council and ARC Southern Ltd, ex p. Dixon [1998] Env LR
111, (1998) 75 P&CR 175 608
- R. v. Tower Hamlets London Borough Council, ex p. Von Goetz [1999] 2 WLR
582, CA 216
- R. v. Warner [1969] 2 AC 256, HL 266, 267, 270
- R. v. Westminster City Council and London Electricity Board, ex p. Leicester
Square Coventry Street Association (1990) 59 P&CR 51 251, 256–8
- Radaich v. Smith (1959) 101 CLR 209, Aus HC 274
- Rains v. Buxton (1880) 14 Ch D 537 431
- Ramnarace v. Lutchman [2001] UKPC 25, [2001] 1 WLR 1651, [2002] 1 PC&R
28 631, 632
- Read v. J Lyons & Co. Ltd [1945] KB 216, CA 219
- Recher, Re [1972] Ch 526 604, 605
- Regent Oil Co. Ltd v. J. A. Gregory (Hatch End) Ltd [1966] Ch 402, CA 666
- Remon v. City of London Real Property Co. [1921] 1 KB 49, CA 619
- Rhone v. Stephens [1994] 2 WLR 429, HL 251
- Ridley v. Taylor [1965] 1 WLR 611, CA 255
- Ropaigalach v. Barclays Bank plc [1999] 3 WLR 17, CA 290, 685, 686, 696
- Royal Bank of Scotland v. Etridge (No. 2) and other appeals, Barclays Bank plc v.
Coleman, Bank of Scotland v. Bennett, Kenyon-Brown v. Desmond Banks & Co.
(a firm) [2001] 3 WLR 1021, HL 456
- Russel v. Russel (1783) 1 Bro CC 269 474

- Saunders v. Vautier (1841) Cr & Ph 240, 10 LJ Ch 354 352, 603
- Sedleigh-Denfield v. O'Callahan and others (Trustees for St Joseph's Society for Foreign Missions) [1940] AC 880, HL 219
- Shaw v. Applegate [1977] 1 WLR 970, CA 256
- Shiloh Spinners Ltd v. Harding [1973] AC 691, HL 162
- Sierra Club v. Morton, 403 US 727 (1972)
- Smallwood v. Sheppards [1895] 2 QB 627 614
- Smith (Administrator of Cosslett (Contractors) Ltd) v. Bridgend County Borough Council [2001] UKHL 58, [2002] 1 AC 336 668
- Smith v. Seghill Overseers (1875) LR 10 QB 422 629
- Smith's Lease, Re, Smith v. Richards [1951] 1 All ER 346 644
- Somma v. Hazlehurst [1978] 1 WLR 1014, CA 275
- Southern Rhodesia, Re [1919] AC 211 142, 144
- Southport Corp v. Esso Petroleum Co. Ltd [1954] 2 QB 182, CA 218
- Southwark London Borough Council v. Williams [1971] Ch 734, CA 285
- Spalding (A. G.) & Bros v. A W Gamage Ltd and Benetfink & Co. Ltd (1915) 84 LJ Ch 449, HL 377
- Spence v. Union Marine Insurance Co. Ltd (1868) LR 3 CP 427 487, 595
- Spinks v. Taylor 266 SE 2d 857 (NC App 1980) 295
- Spiro v. Glencrown Properties Ltd [1991] Ch 537 480, 481, 482
- Sports (or Sport) and General Press Agency Ltd v. Our Dogs Publishing Co. Ltd [1917] 2 KB 125, CA 367
- Spur Industries v. Webb 404 P 2d 700 (1972) 229
- St Helen's Smelting Co. v. Tipping (1865) 11 HL Cas 642 224, 233
- Stamp Duties Comr (Queensland) v. Livingston [1965] AC 694 317, 337, 338
- Standard Chartered Bank Ltd v. Walker [1982] 3 All ER 938, [1982] 1 WLR 1410, CA 696
- Stapylton Fletcher Ltd (in administrative receivership), Re; Re Ellis Son & Vidler Ltd (in administrative receivership) [1994] 1 WLR 1181 485, 487
- State Bank of India v. Sood [1997] Ch 276, CA 523, 525, 527, 529, 535, 536
- Stephens v. Anglian Water Authority [1987] 1 WLR 1381, CA 234
- Stirling v. Leadenhall Residential 2 Ltd [2001] EWCA Civ 1011, [2001] 3 All ER 645 627, 634, 635
- Stockholm Finance Ltd v. Garden Holdings Inc [1995] NPC 162 561
- Strand Securities Ltd v. Caswell [1965] Ch 958, CA 561
- Strathcona (Lord) Steamship Co. Ltd v. Dominion Coal Co. [1926] AC 108 351, 352
- Street v. Mountford [1985] AC 809, HL 274, 276, 613, 628, 630, 631, 632, 633, 637
- Sullivan v. Earl of Caithness [1976] 2 WLR 361 265, 269, 653
- Sutcliffe v. Chief Constable of West Yorkshire [1996] RTR 86, (1995) 159 JP 770, (1995) Times, 7 July, CA 650, 651, 652
- Swiss Bank Corp v. Lloyds Bank Ltd [1979] Ch 548, HL 351, 352

- Taddy & Co. v. Sterious & Co. [1904] 1 Ch 354 351
- Tapling v. Jones (1865) 11 HLC 290; 11 ER 1344 364
- Tehidy Minerals Ltd v. Chamberlain (1969) 20 P&CR 633, CA 269, 436, 443
- Tehidy Minerals Ltd v. Norman [1971] 2 QB 528, CA 491
- Thames Guaranty Ltd v. Campbell [1985] QB 210, CA 395, 487
- Thomas v. Sorrell (or Sorrel) (1673) Vaugh 330 632
- Thompson v. Salah [1972] 1 All ER 530 666
- Tinsley v. Dudley [1951] 2 KB 18, CA 652
- Tucker v. Farm and General Investment Trust Ltd [1966] 2 QB 421, CA 124, 127
- Tulk v. Moxhay (1848) 2 Ph 774 250, 251, 252, 253, 254, 256, 349, 350, 357, 358, 614
- Turner v. Myerson (1918) 18 STR (NSW) 133 439
- United Bank of Kuwait plc v. Sahib [1997] Ch 107, CA 459, 473, 474, 476
- United Scientific Holdings Ltd v. Burnley Borough Council [1978] AC 904, HL 615
- University of Westminster, Re, University of Westminster v. President of the Lands Tribunal [1998] 3 All ER 1014, CA 255
- Vandervell v. IRC [1967] 2 AC 291, HL 317, 318
- Vandervell's Trusts (No. 2), Re, White v. Vandervell Trustees Ltd [1974] Ch 269, CA 318, 319, 453
- Verrall v. Great Yarmouth Borough Council [1981] QB 202, [1980] 1 All ER 839, CA 160, 273
- Victoria Park Racing v. Taylor (1937) 58 CLR 479, Aus HC 18, 356, 357, 358, 359, 360–8, 377
- Wade v. Kramer, 457 NE 2d 1025 (1984)
- Wait, Re [1927] 1 Ch 606, CA 472, 475, 478, 485
- Walsh v. Lonsdale (1882) 21 Ch D 9, CA 163, 405, 452, 460, 471, 472, 473, 475, 476
- Ward Lock & Co. Ltd v. Operative Printers' Assistants' Society (1906) 22 TLR 327, CA 367
- Waring (Lord) v. London and Manchester Assurance Co. Ltd [1935] Ch 310 687
- Warnborough Ltd v. Garmite Ltd [2003] EWCA Civ 1544 671
- Warnink (Erven) BV v. J Townend & Sons (Hull) Ltd [1979] AC 731, HL 379
- Waverly Borough Council v. Fletcher [1996] QB 334, CA 446
- Wear Breeze, The. *See* Margarine Union GmbH v. Cambay Prince Steamship Co. Ltd
- Webb v. Bird 10 CB (NS) 268, 13 CB (NS) 841 497
- Webb v. Polemount [1966] Ch 584 559
- West Sussex Constabulary's Widows, Children and Benevolent (1930) Fund Trusts, Re, Barnett v. Ketteringham [1971] Ch 1 319

- Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669, HL 299, 313, 314–20, 333
- Western Australia v. Ward [2002] HCA 28 151
- Western Bank Ltd v. Schindler [1976] 3 WLR 341, CA 685, 686, 696
- Westminster City Council v. Clarke [1992] 2 AC 288, HL 277, 633
- Wettern Electric v. Welsh Development Agency [1983] 2 WLR 897 273
- Wheeler v. Mercer [1957] AC 416, HL 618
- White v. City of London Brewery Co. (1889) LR 42 Ch D 237, CA 686
- White v. White [2003] EWCA Civ 924 598, 599
- Wik Peoples v. Queensland (1996) 187 CLR 1 151, 152, 175, 264, 265, 269, 280
- Wilkes v. Spooner [1911] 2 KB 473, CA 523
- Wilkes, Re, Child v. Bulmer [1891] 3 Ch 59 587, 588, 589, 590
- Williams v. Hensman (1861) 1 J&H 546; 70 ER 862 580, 582, 584, 585, 586, 587, 589, 590
- Williams & Glyn's Bank Ltd v. Boland [1981] AC 487, HL 460, 464, 532, 534, 556, 557, 559, 561, 563, 565, 566
- Wilson v. Anderson [2002] HCA 29 151
- Wilson v. Bell (1843) 5 Ir Eq R 501 580, 582, 587, 588
- Wilson v. First County Trust Ltd (No. 2) [2003] UKHL 40 455, 460, 470
- Winder v. DPP (1996) Times, 14 August 292
- Winkfield, The [1902] P 42, CA 656
- Winter Garden Theatre (London) Ltd v. Millennium Productions Ltd [1948] AC 173, HL 273
- Woolwich Building Society v. Dickman [1996] 3 All ER 204, CA 566
- Yorta Yorta Aboriginal Community v. Victoria [2002] HCA 58, Aus HC 151
- Young v. Hitchens (1844) 6 QB 606, 115 ER 228 128, 129

Table of statutes

United Kingdom

Administration of Estates Act 1925 336

ss. 1, 3 336

s. 9 336

ss. 45, 46 336

Administration of Justice Act 1970

s. 36 686

Agricultural Holdings Act 1948

s. 5 507

Charging Orders Act 1979 659

Children Act 1989

s. 15 599

Commonhold and Leasehold Reform Act 2002 571, 599, 614, 615

Commons Registration Act 1965 169, 171, 494, 499, 502, 504

s. 15 171

s. 22 171

s. 22(1) 499, 502

s. 33 543

Companies Act 1985

s. 36A 454

Companies Act 1989 454

s. 1 455

s. 2 455

Consumer Credit Act 1974 455, 460, 672

s. 127 460

s. 127(3) 460, 461

ss. 137–9 673, 684

Contracts (Rights of Third Parties) Act 1999 156, 352

Contracts of Employment Act 1963

s. 4 507

Countryside and Rights of Way Act 2000

s. 68 491

s. 98 171

Criminal Justice and Public Order Act 1994

Part V (ss. 61–80) 292

Criminal Law Act 1977 291

Part II (ss. 6–13) 288

s. 6 268, 291

s. 7 292

s. 8 292

s. 9 292

Enterprise Act 2002 661

Environmental Protection Act 1990

ss. 79–82 602

Factors Act 1889 215

s. 2 215

Family Law Act 1996 313, 627

s. 30 354, 355, 594

s. 31 354, 355

s. 31(10), (12) 355

Part IV (ss. 30–63) 599

Family Law Reform Act 1969

Part II (ss. 14–19) 596

Finance Act 2003 459

Forcible Entry Acts 291

Highways Act 1980

s. 31(1) 503

Hire-Purchase Act 1965

ss. 5–9 507

Housing Act 1985 637, 639

s. 19(3) 639

s. 65(2) 277

s. 79 638

s. 80 638

s. 85 636

ss. 91–3 641

Housing Act 1988 617

ss. 27–32 291

Human Rights Act 1998 375, 471, 599

-
- Inheritance (Provision for Family and Dependents) Act 1975 576
- Insolvency Act 1986 479, 654
- ss. 335A–337 598, 599
 - ss. 335A(3) 599
- Interpretation Act 1978
- s. 6(c) 528
- Land Charges Act 1972 459, 518, 519
- Land Registration Acts 515, 541, 543
- Land Registration Acts 1925–1988 396
- Land Registration Act 1925 538, 539, 557, 558–61, 665
- s. 70(1)(c) 565
 - s. 70(1)(g) 558, 560, 562, 563
 - s. 83 566, 568
 - s. 83(10) 568
- Land Registration Act 1988 539
- Land Registration Act 1997 540, 549, 566
- Land Registration Act 2002 392, 406, 407, 412, 413, 428, 434, 435, 436, 438, 442, 515, 538, 539, 540, 542, 543, 549, 553, 555, 557, 558, 559, 562, 563, 565, 666
- ss. 2–4 542
 - s. 4 540
 - s. 23(1) 666
 - s. 27 545
 - s. 27(1) 441, 545, 553
 - s. 27(5) 441
 - s. 28 552, 554
 - s. 29 545, 546, 554
 - s. 29(2)(a)(i), (ii) 554
 - ss. 32–9 543
 - s. 32(3) 543
 - ss. 40–7 543
 - s. 60 541
 - s. 60(3) 541
 - s. 61 541
- Part 8 (ss. 91–5) 451
- s. 91(4), (5) 455
 - s. 93 546, 549, 551
 - s. 96 442
 - s. 115 301, 302, 480, 482, 484
 - s. 115(1) 483, 484
- Sch. 1 557
- Sch. 3 554, 556
- Sch. 3, para. 1 557

Land Registration Act 2002 (cont.)

- Sch. 3, para. 1(a), (b) 557
- Sch. 3, para. 2 557, 562
- Sch. 3, para. 2(b), (c) 562
- Sch. 3, para. 2(c)(i) 563
- Sch. 3, para. 3 557
- Sch. 3, para. 3(1) 557
- Sch. 3, para. 3(1)(a) 557
- Sch. 3, para. 3(2) 557, 558
- Sch. 6, para. 1 407, 434
- Sch. 6, para. 1(1) 441
- Sch. 6, para. 2 407
- Sch. 6, para. 2(1)(a) 434
- Sch. 6, para. 2(1)(b)–(e) 434
- Sch. 6, para. 5(2)–(4) 435
- Sch. 6, para. 11 441
- Sch. 6, para. 11(1)–(3) 442
- Sch. 8 566, 567
- Sch. 8, para. 1(1)(a)–(h) 566
- Sch. 8, para. 5 566

Landlord and Tenant Act 1927

- s. 19 644
- s. 19(1) 643
- s. 19(1)(a) 643
- s. 19(1)(b) 643

Landlord and Tenant Act 1954

- Part II (ss. 23–46) 616, 618, 643

Landlord and Tenant Act 1985 272, 638

- s. 11 637, 638, 639
- s. 17 638

Landlord and Tenant Act 1987

- Part III (ss. 25–34) 614

Landlord and Tenant Act 1988 643

- s. 1(6) 643

Landlord and Tenant (Covenants) Act 1995 642, 644, 646, 647, 648, 655

- s. 2(1)(a) 646
- s. 3 645, 646
- s. 3(6) 646
- s. 3(6)(a) 646
- s. 22 643
- s. 28(1) 646

Law of Property (Miscellaneous Provisions) Act 1989 454, 476

- s. 1 453, 454

- s. 1(2), (3) 454
- s. 2 450, 452, 453, 456, 458, 464, 471, 473, 474, 476, 477, 480, 481, 586, 588
- Law of Property (Miscellaneous Provisions) Act 1994
 - s. 14 336
- Law of Property Act 1925 214, 215, 304, 313, 441, 523, 524, 526, 532, 591, 596, 601, 666, 667
 - Part I (ss. 1–39) 526
 - s. 1 309, 313, 325, 542
 - s. 2 526, 528, 536
 - s. 2(1) 523, 524, 531
 - s. 2(1)(ii) 527, 528, 536
 - s. 2(2) 524, 531
 - s. 2(3) 524
 - s. 7 305
 - s. 12 527
 - s. 14 526, 527, 535
 - s. 26(3) 532
 - s. 27 524, 526, 528
 - s. 27(2) 523
 - s. 30 596, 598
 - s. 34(2) 578, 579, 580
 - s. 36(2) 584, 587, 588, 589, 590
 - s. 40 452, 453, 476, 477, 588
 - s. 52 23, 441, 450, 452, 453, 454, 464, 473
 - s. 52(1), (2) 450
 - s. 53 464, 473
 - s. 53(1)(a), (b) 450
 - s. 53(1)(c) 450, 600, 605
 - s. 53(2) 454
 - s. 54(2) 449, 450
 - s. 62 393, 395
 - s. 63 486
 - s. 84 252, 254, 255, 369
 - s. 84(1) 252
 - s. 85(1) 666
 - s. 87(1) 666
 - s. 91 684
 - s. 99 667
 - s. 101 24
 - s. 101(1)(i) 396, 667, 686
 - s. 103 687
 - s. 104 396, 687
 - s. 109(2) 685

Law of Property Act 1925 (cont.)

- s. 141 646
- s. 142 646
- s. 146 289
- s. 188 574, 594, 595
- s. 196(3) 585
- s. 199(1)(ii) 516, 517
- s. 205(1)(i), (ii), (iii) 524
- s. 205(1)(v) 214
- s. 205(1)(xxviii) 531

Sch. 1, Part I 305

Leasehold Reform Act 1967 272, 614

Leasehold Reform, Housing and Urban

Development Act 1993 272

Legal Aid Act 1974 215

Limitation Act 1623 500

Limitation Act 1980 172, 391, 407, 412, 430, 444, 625

ss. 2–4 444

s. 3 445

s. 3(2) 445

s. 4 445

s. 15 407, 442

s. 17 407

s. 32 407, 445

Sch. 1, para. 1 407

Sch. 1, para. 8(4) 408

Local Government Act 1972

s. 131(1) 256

Local Government and Housing Act 1989

s. 104 216

London Building Act 1930 499

Married Women's Property Act 1882

s. 17 468, 469

Matrimonial Causes (Property and Maintenance)

Act 1958

Matrimonial Causes Act 1973

s. 24 596, 599

s. 37 354

Matrimonial Homes Act 1967 312, 627

Matrimonial Homes Act 1983

s. 1(11) 533

Merchant Shipping Acts 655

-
- Merchant Shipping Act 1894 545
s. 34 352
- Merchant Shipping Act 1988 537, 545
- Merchant Shipping Act 1995 396, 538, 545
- Navigation Act 1660 537
- Perpetuities and Accumulations Act 1964 603
s. 4(4) 605
s. 15(4) 603
- Prescription Act 1832 501, 502, 504
- Protection from Eviction Act 1977
s. 1 290
s. 2 290
ss. 2–4 291
s. 3 290, 617
s. 3A 290
s. 5 617
- Public Trustee Act 1906
s. 4 531
- Rent Acts 627, 634, 643
- Rentcharges Act 1977 542
- Rights of Way Act 1932 502, 503, 504, 505
s. 1(1) 502, 503, 504
- Road Traffic Act 1972
s. 3 602
- Sale of Goods Acts 475
- Sale of Goods Act 1893 216, 473, 478
s. 4 453
ss. 16–19 478
- Sale of Goods Act 1979 485
s. 16 484
s. 17 450, 484
s. 18 450
s. 20A 485
s. 20B 485
s. 21(1) 396
ss. 23–6 396
s. 23 396
s. 24 396
s. 25 396

Sale of Goods (Amendment) Act 1994

s. 1 396

Sale of Goods (Amendment) Act 1995 485

School Sites Act 1841 431

Settled Land Act 1925

s. 72(1) 531

s. 94(1) 531

Torts (Interference with Goods) Act 1977 283, 285, 286

s. 2 284

s. 2(2) 283

s. 7 392

s. 8 392

s. 10 599

Treasure Act 1996 447

Trusts of Land and Appointment of Trustees Act 1996 342, 527, 529, 535, 591,
594, 596, 598, 621

s. 4 591

s. 12 591, 593, 594, 598

s. 12(2) 593

s. 13 591, 592, 593, 594

ss. 14–15 598, 599

Sch. 2, paras. 3, 4 594

Sch. 3, para. 4 524

Wills Act 1837 601

Australia

Native Title Act 1993 150, 151, 169, 172, 173, 174, 279

preamble 150

ss. 3, 10, 11, 223, 225 150

s. 223(1), (2) 179

s. 225(a), (b) 179

Native Title Amendment Act 1998 151, 175

Wireless Telegraphy Act 1905–1936 360

Canada

Constitution Act 1982

s. 35(1) 280

New Zealand

Land Transfer Act 439

Limitation Acts 439

United States

Eviction Remedies Act 1981 295

Table of statutory instruments

Land Registration Fee Order 2003, SI 2003 No. 2092 568

Land Registration Rules 2003, SI 2003 No. 1417 294, 539

r. 131 539

rr. 136–8 539

r. 136(3) 539

r. 189 434

r. 194 434

Registration of Title Order 1989, SI 1989 No. 1347 540

Treasure (Designation) Order 2002, SI 2002 No. 2666 447

Unfair Terms in Consumer Contracts Regulations 1994, SI 1994 No. 3159 673

Unfair Terms in Consumer Contracts Regulations 1999, SI 1999 No. 2083 673

Vehicular Access Across Common and Other Land (England) Regulations 2002,

SI 2002 No. 1711 491, 492, 510

reg. 11(1)–(4) 492

Table of treaties

European Convention on Human Rights and Fundamental Freedoms 1950

375, 460, 549

Art. 1 412, 413

Art. 6(1) 461

Art. 8 375

Protocol 1, Art. 1 375, 430, 461

Moon Treaty 373

Outer Space Treaty 373

Table of EC legislation

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L95, 21 April 1993, p. 29 673

Part 1

The concept of property

Property law: the issues

1.1. Basic definition

To put it at its simplest, property law is about the legally recognised relationships we have with each other in respect of things. We will want to expand and qualify this statement later – what kinds of relationship, what kinds of thing? – but our starting point is an introduction to the moral, political, social and economic context in which property law operates.

1.2. Illustrative example

Consider the following hypothetical situation, a variation of facts which actually occurred in California in 1976 and which became the subject of a celebrated decision of the Supreme Court of California, *Moore v. Regents of the University of California*, 51 Cal 3d 120; 793 P 2d 479 (1990).

John went into hospital to undergo an exploratory operation to aid diagnosis of unexplained stomach pains he had been suffering. During the course of the operation, Dr A removed tissue from John's stomach lining and stored it so that he could carry out further analysis if his initial diagnosis proved to be incorrect. No further analysis proved necessary: Dr A's initial diagnosis was confirmed, John was successfully treated and made a full recovery, and Dr A gave no further thought to the tissue sample.

By chance, however, it became included in material that Dr B was using in research he was carrying out at the hospital. This material included primary cells (i.e. cells taken directly from the body) taken from a number of different patients in the hospital. Dr B was trying to produce a cell line from these primary cells: it is difficult to locate a gene responsible for producing a particular substance or effect using primary cells, because primary cells typically reproduce a few times and then die. One can, however, sometimes continue to use cells for an extended period of time by developing them into a 'cell line', a culture capable of reproducing indefinitely. This is not, however, always an easy task. 'Longterm growth of human cells and tissues is difficult, often an art', and 'the probability of succeeding with any given cell sample is low' (the *Moore* case). Dr B managed to develop from one

of John's primary cells a cell line containing genetic material with the potential for development into a cheap, effective and safe cure for AIDS. Dr B sold this cell line to the Columbian Drug Company Ltd for £10 m.

The drugs company, which already owned the patents for a very expensive, not very effective treatment for AIDS, and also for various palliatives for AIDS symptoms, bought the cell line to delay the development of a new drug. It believed, on the advice of its accountants, that it would be in its own financial best interests to continue to market its existing products for as long as possible, and not take steps to develop the new drug until a similarly cheap and effective cure seemed likely to emerge from elsewhere.

What rights and interests might each of these four protagonists plausibly lay claim to in respect of the cell line and its commercial exploitation?

1.2.1. John

Any legally protected interest that John might have in the cell line must derive from an interest in the cell out of which it was developed, which itself must derive from whatever interest John had in the cell when it was still part of his body. Does John own his body, and, if he does, does it follow that he also owned his body cell?

1.2.1.1. The unexcised body cell and the question of ownership

At one level, it might seem strange to question whether one owns a part of one's own body, but on closer consideration the issue is rather complex. We need first to take a brief look at what we mean by ownership. We consider the concept in detail in Chapter 6, where we see that, although 'ownership' is often used loosely as a synonym for 'property', it is more accurately used to describe a particular type of property interest – specifically, the most extensive property interest that any individual can have in a mature legal system that recognises the institution of private property. Most Western legal systems recognise the concept of ownership, but characteristically they also recognise lesser property interests as well (such as the right you acquire in a car if you hire it for a fortnight, or the right I acquire over your land if you grant me a right of way over your driveway to reach my garage). For the moment, however, we will concentrate on ownership itself, not on these other types of property interest.

We see in Chapter 6 that, in attempting to formulate a concept of ownership which would be recognisable in any developed Western market economy, Honoré identifies eleven 'standard incidents' of ownership. He sees these incidents as characteristic of a Western conception of ownership (by which he means ownership by an individual, as opposed to ownership by the state or by a corporation or by a group of people). They are not to be applied mechanistically: he is not suggesting that you cannot possibly be said to be an owner of a thing in any mature legal system if the law does not recognise you as having each one of these incidents. What he does say is that, if you do enjoy all these incidents in relation to a particular thing, most mature legal systems would say you owned it – together

they are sufficient conditions for ownership, but no one of them is a necessary condition. We look at all eleven of these incidents in Chapter 6, but for present purposes six of them are of particular interest. According to Honoré, in a mature legal system you would typically be said to be the owner of a thing if you have:

- 1 The right to possess the thing. Possession has a technical meaning and a special significance in English law, which we look at in Chapter 7. For present purposes, you have the right to possess something when the law allocates exclusive physical control of it to you.
- 2 The right to use the thing. Unlike possession, use is not a technical term. Here Honoré confines use to *personal* use and enjoyment, so he would say that you have the right to use something if you may, at your discretion, make whatever personal use and enjoyment of the thing you wish (leaving aside, for present purposes, use in a way that harms others – this is something we will consider later).
- 3 The right to manage, which is essentially the right to control the use of the thing, in the sense of being entitled to license others to make personal use of it.
- 4 The right to the income of the thing. This covers both any naturally accruing profits – the apples produced by your apple tree – and also what Honoré describes as ‘a surrogate of use, a benefit derived from forgoing the personal use of a thing and allowing others to use it for reward’, for example income produced from capital you invest, or rent received from a flat you let out.
- 5 The right to the capital. This is the right to deal with the thing itself in any way you choose (although again we must put aside for the moment a dealing which harms others). It includes the right to sell or give it away, or to consume it or damage it or destroy it, or to dictate who should have it when you die.
- 6 The right of transmissibility. This is quite complex: it concerns the *interest* you have in the thing (i.e. the rights and other claims you have over it) rather than the thing itself. Your interest is transmissible if it is capable of being transferred intact to someone else, in the sense that the consequence of the transfer would be that the transferee would acquire all the rights and claims that you had had in that thing, and you would cease to have them. In other words, a transmissible interest is the antithesis of an interest that is purely personal. My right to legal protection for my reputation is a good example of a right that is not transmissible in English law. If it was transmissible, I would be able to sell it to you, with the result that *you* (and not I) would be entitled to complain and recover damages if a tabloid newspaper published a libellous article about *me*. There are other examples of interests in things that are inherently personal and not transmissible. In Chapter 9 we look at a long-standing controversy (now resolved by Parliament) over the nature of the right that a wife has to occupy her matrimonial home when it is solely owned by her husband (rather than jointly owned, as would now be more usual). It was always accepted that, as long as the couple remain married, she does have such a right, enforceable *personally* against her husband. The issue was whether it was a *property* right that could be enforced against anyone else – specifically, whether her estranged husband could cause her to be evicted from what had been their matrimonial home by selling it to someone else: if her right was a property right, the buyer would have been bound by it and would have had no more right to evict her

than her husband had had; whereas if it was enforceable only personally against her husband it would not affect the buyer and he could evict her. We see later that one of the reasons why the courts were reluctant to recognise that this right was a property right was that it is inherently non-transmissible: my right to occupy the house that my husband and I have been living in as our matrimonial home could not conceivably be held by anyone other than me – if transferred to anyone else, it would necessarily become different in nature. We can also note here why the issue of transmissibility is controversial: if we were to say that transmissibility was a *necessary* condition for an interest to qualify as a property interest, it would exclude a significant category of rights from proprietary status.

Which of these incidents characterise John's relationship to parts of his body while they still form part of his body? As long as we are talking about a small cell in an expendable bit of one's stomach lining, there seems no particular problem with the first five incidents (although some are rather difficult to visualise). However, the sixth does not seem right: we surely would not expect any legal system to treat John's rights in his body parts as transmissible. Whatever rights a legal system recognises we have in our body tissue *while it is still part of our bodies*, they are almost certainly going to be very different from those (if any) it would want to confer on someone who acquires a bit of that tissue after it has been excised: both the moral and the physical context have changed. If this is true, it means that, while we might have a legal system that allows John a right to sell *this bit of body tissue*, his *interest* in it (or at least the interest he has while it is still part of his body) is not transmissible – the buyer will acquire a different set of rights from those that John had when the tissue was still part of his body.

Once we start talking about more important bits of unexcised body tissue, or about live bodies as a whole, the other incidents begin to look inappropriate as well, or at least not acceptable without significant qualifications. The right to possess your body and unexcised parts of it might initially seem unproblematic. In any legal system operating in a society which respects personal autonomy we would expect the law to allocate exclusive physical control over our own bodies and body parts to us. However, even here there may be controversial claims to make exceptions. Can young children (or mentally incapacitated adults) really be given the right to exclusive physical control over their own bodies, and, if not, who should have the ultimate control? Their parents? The state? And what about, for example, hunger strikers, or adult individuals who refuse medical treatment that could benefit them (perhaps blood transfusions) or prevent harm to others (treatment for infectious diseases, or medication to prevent violent behaviour)? And, once we are past this first incident of ownership, everything becomes even more dominated by difficult moral, political and social issues. The second and fifth incidents – the right to use our bodies in any way we want and our right to deal in the capital interest in them – raise fundamental questions about the nature of the society in which we want to live. The first and obvious point is that an absolute right to use our bodies as we want would leave us free to behave in ways that harm,

affront or annoy others. A balance must inevitably be struck between our freedom to behave as we want and the rights of others to be free from harm, affront and annoyance, but it is not easy to arrive at a consensus as to where the balance should be struck. Another difficult issue, and if anything even more controversial, is that a right to use our bodies as we choose, and an absolute right to deal in the capital of our bodies, would leave us free to harm ourselves. Is it necessary, or morally or pragmatically justifiable, for the law to curtail our freedom to abuse, harm or destroy ourselves or parts of our bodies?

The right to destroy the thing is only one aspect of the right to the capital interest in a thing. The other aspects – the right to sell it or to give it away – also cause problems when applied to human bodies. Should I be entitled to sell or donate an essential part of my body, without which I cannot function at all, such as my liver, my brain or my heart? Would it make any difference if I was dying anyway, and the donation was for a transplant to someone else which could not succeed if the organ was removed after my death? Rather different, but no less complex, issues arise when we start talking about body parts without which one could function tolerably well, and the removal of which would not be life-threatening – should I be entitled to sell, for example, a limb, an eye, or a kidney? And would it make a difference if it was not a sale but a donation, or if it was prompted by altruism, familial love or duty, or by an inability to withstand family pressure? And what about renewable body parts such as blood, hair, bone marrow, sperm or ova? Should we have an absolute right to sell such body parts to anyone in any circumstances, or should it be absolutely prohibited, or permitted only in some circumstances and subject to certain conditions? It quickly becomes apparent that very different considerations apply depending on the type of body product, and that sale and donation raise quite different issues.

The second and third incidents – the right to manage and the right to income – may also cause us varying degrees of disquiet. Most people would agree that respect for bodily integrity dictates that, if anyone should have the right to permit others to make use of parts of my body, it should be me and no one else. Similarly, if anyone should be entitled to any profits or income accruing from my body or from unexcised body parts, it should be me and no one else. Nevertheless, a formidable range of philosophical, moral, religious and political objections could be made to a legal system that always and in all circumstances allowed me to forgo personal use of parts of my body (or, indeed, the whole) and to license others to make surrogate use of it, whether for my reward or theirs.

So, if we were slavishly to adopt Honoré's incidents here (something he would not himself have advocated), we might be tempted to conclude that you can 'own' some of the small/inessential parts of your body, or at least those not regarded as having any moral, religious or reproductive significance, but not the essential parts. Initially, this may seem a strange conclusion, but it tells us some important things about ownership. First, it tells us that legal systems typically recognise ownership of some things but not of others. Secondly, it demonstrates that, when

deciding whether a particular type of thing should or should not be ownable, a legal system is likely to be influenced by a wide range of pragmatic and principled considerations. The same considerations will not necessarily apply in relation to all types of thing, or if they do apply will not carry the same weight – consider, for example, the considerations that would be relevant in deciding whether to recognise ownership of white tigers, water supplies in a desert, sunlight or weapons of mass destruction.

Thirdly, it tells us that ownership is too simple a concept to encompass all the different types and ranges of rights and interests in things that we would expect a mature, efficient and humane legal system to provide. Many of the difficult questions posed above could more appropriately be answered by giving John property rights in his body which fall short of ownership, or by giving him personal rather than property rights. These crucial questions of what amounts to a property right, and the distinction between property and personal rights, are explored in the next four chapters. The specific question of the extent to which English law does in fact recognise property in human bodies and body parts is something we return to in the ‘Notes and Questions’ section at the end of this chapter.

1.2.1.2. John’s interest in the excised body cell

Meanwhile, we have to return to the question of whether John had a property interest in the cell *after* it had been removed from his body. This was the precise issue faced by the Supreme Court of California in the case on which this story is based, *Moore v. Regents of the University of California*, 51 Cal 3d 120; 793 P 2d 479 (1990). The *Moore* case, being a decision of the American courts, is not determinative of the issue in this jurisdiction, but it provides a good illustration of the spectrum of moral and philosophical standpoints taken by common law judges on such issues. In the *Moore* case, there was only one doctor involved, not two as in our fictitious example, and the cell was removed from Moore’s body in the course of an operation to remove his spleen, as part of his treatment for hairy-cell leukaemia. Moore had consented to the operation and to the removal of his spleen, but he had not been told that the doctor in charge of his treatment had already spotted the potential value of his cells and had already decided to take and use them for a particular research project. The issue was whether Moore had any cause of action against that doctor. It was decided that he had, but the majority held that he had only a personal action for breach of the doctor’s disclosure obligations, not an action in conversion, which is the cause of action available to someone who can show an unlawful interference with property rights. The issue that divided the majority from the minority was therefore whether Moore could be said to have property rights in the cells which had been removed from his body. If he had been able to show that he had, this would have given him a basis for a claim to a share in the gigantic profits now being made out of the cell line developed from his body tissue. The majority conclusion was that, for the purposes of conversion law at least, a person cannot be said to have ‘property’ or ‘ownership’ in his own body

cells once they have been excised from his body (although they were careful to emphasise that ‘we do not purport to hold that excised cells can never be property for any purpose whatsoever’). The reasoning which led the majority to this conclusion is important: broadly, they said that to decide otherwise would inhibit socially important medical research, and would give Moore ‘a highly theoretical windfall’. The minority, on the other hand, felt strongly that to deny that we have property rights in our own bodies violates the ‘profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona’, as Mosk J put it. Also, they were persuaded by the argument that, because the profits to be made from the cell line were a product of both the researcher’s skill and Moore’s cell, they accordingly ought to be shared proportionately between them (an argument we come across again in Chapter 3). Here, however, we want to note some rather more general points not fully articulated in the *Moore* case, and which we can best appreciate by moving back to our fictitious example, where the question of John’s property rights is still open.

1.2.1.3. Continuity of interests and John’s interest in the cell line

Assuming for the moment that John does have a property interest in the excised cell, it is worth spelling out why that might give him a proprietary claim in respect of the cell line and the profits made and to be made from it. His claim is essentially a mechanistic one, and it tells us some important (if rather obvious) things about the way property interests behave and the way they are allocated by a legal system. His argument is that, if he had a property interest in his body cell when it was still part of his body, that property interest must necessarily still continue for as long as the cell itself continues to exist, despite changes in form and/or enhancements in value, unless and until something happens to extinguish the interest. Moreover, as long as the *interest* continues to subsist, he must necessarily continue to hold it unless it can be shown to have been passed on to someone else. Property interests do indeed have this mechanistic quality. Leaving aside interests which are specifically limited in time (for example, a ten-year lease of a shop), a presumption of continuance exists, and a person will be presumed to continue to hold an interest which has become vested in him unless there is positive evidence that it has been divested, for example by a sale or gift (we do not lightly find that someone has simply abandoned a property interest). This feature of property interests – essentially, they stay put unless positively ended or moved – is important. Property interests in things carry with them liabilities as well as rights. Also, unlike personal interests, they affect everyone who comes into contact with the thing in question. For both these reasons, it is essential that we know at any given time exactly who has what interests in what thing – consider, for example, the case of contaminated land, or a share in a company on which a dividend has just been declared.

So, if we accept for the purposes of this argument that John did own his cell when it was a part of his body, we need to ask whether anything happened *to the cell* that would have extinguished or modified his interest, or alternatively whether at

some stage he disposed of his interest before the cell was developed into a cell line. We know that two things happened to the cell. The first was that it ceased to be part of his body, and we have already said that this event causes such a profound change in John's relationship to it that we might be justified in saying that it changes the nature of his interest, or even extinguishes it altogether. The second thing that happened was that Dr B exercised his skill on it to develop it into a cell line. In other words, as the minority dissent in *Moore* pointed out, even if we assume that John's cell was *an* ingredient in or component of the cell line, it was not the only one: the cell line was the irreversible product of two things – the cell and Dr B's skill and labour. Sophisticated legal systems will necessarily have rules about what happens when things of different ownership become physically and irreversibly mixed. To a certain extent, similar considerations should apply if one of the ingredients is a physical process (such as heat) rather than a tangible thing. The addition of human skill or labour to a thing raises some of the same considerations but also quite different ones. There is an argument that exploitation of resources to the benefit of society as a whole can best be achieved by conferring property interests on those who expend skill and labour on things, regardless of whether in any particular case their contribution has added value to the thing in question. This is the basis of John Locke's arguments justifying property rights that we consider in Chapter 3, and it also forms the basic premise of intellectual property law. In the *Moore* case, it was regarded as axiomatic by the majority. They took the view that the value to society of promoting medical research was so high that it was justifiable – in fact necessary – to allocate the whole of the property interest in the cell line to the doctor: to allow Moore even a proportionate share in the valuable commodity produced when the doctor mixed his skill and labour with Moore's cell would unacceptably lower the incentive for doctors to carry out medical research on human tissue.

There are other things to be said about Dr B's position, and about Dr A, but first there are some other points to be made about John's proprietary claims.

1.2.1.4. Enforceability of John's interest in the cell line

If John had a property interest in the cell line produced by Dr B which was enforceable against Dr B, does it necessarily follow that it would also be enforceable against the drugs company once the cell line had been sold to the company? We see in Chapter 2 that it is a fundamental characteristic of a property interest in a thing that it is enforceable against everyone who comes into contact with that thing. However, that statement requires some qualification. Common law systems have developed fairly complex sets of rules curtailing the enforceability of interests where, as here, there has been a fragmentation of ownership, as we see in Chapters 14–15 where we look at enforceability in detail. In particular, there are circumstances in which a property interest in a thing will be extinguished by a sale of the thing. The reason for this is that, in a market economy, a legal system that recognises multiple interests in a thing has to reconcile conflicting aims. On the one hand, the full benefits of private property ownership depend on security of

interest, and this is best served by a rule that property interests are enforced by law against all the world in all circumstances. On the other hand, the free marketability of resources is hindered by the presence of multiple interest holders whose interests cannot be overridden. For the market to function properly it must be easy for the ownership of resources to pass to those who value them most, but transactions become prohibitively expensive if they require the concurrence of multiple interest holders, especially if their existence is not easily discoverable and identification is difficult. We look more closely at these arguments in Chapter 2. The point we are concerned with here is that most systems balance these competing aims by allowing for some circumstances in which lesser property interests in things can be overridden on a sale of a larger interest in the thing.

In order to understand how this works, it is necessary to appreciate that there are at least two ways of structuring multiple property interests in things, either of which could apply if we conclude that both John and Dr B have property interests in the cell line. One of them is by co-ownership: we could say that John and Dr B co-own the cell line in shares proportionate to the value of their respective contributions. If we adopt Honoré's view of ownership, we would then say that they co-own each of the incidents of ownership. Alternatively, ownership can be fragmented, so that some rights and liabilities become split off and vest in one person while the rest remain vested in or are transferred to someone else. As we see in Chapter 8, only set patterns of fragmentation are permissible, but it would be possible to adopt a pattern of fragmentation which, in effect, gave Dr B all the Honoré incidents of ownership except the right to income, with that right being shared proportionately between John and Dr B. We would then say that Dr B owned the cell line, but his ownership was subject to or encumbered by John's property interest (consisting of a right to a share in the income). However the multiple interests are structured (i.e. whether by co-ownership or by fragmentation) it is the person who holds what Honoré calls the capital interest in the thing who has the capacity and power to sell the thing itself (that, after all, is what the capital interest is). In the case of co-ownership, the capital interest is co-owned, and so there can be no sale or other transfer of ownership without the concurrence of each of the co-owners (although we see later how English law uses the trust to get round the inconvenience this can cause when dealing with co-owned land). If, however, ownership has been fragmented, the capital interest in the thing may well be held by only one of the interest holders. So, for example, if a landowner grants a five-year lease to a tenant, the tenant acquires the right to possess the land for five years (and, in the Honoré classification, the rights to use, income and control for the same period) while the landlord retains the right to capital (and, incidentally, a present right to have possession, use, income and control revert to him in five years' time).

In the interests of marketability, the common law has evolved rules which enable the holder of the capital interest to transfer full ownership of the thing in certain circumstances, so effectively obliterating or overriding any other property

interest in the thing held by someone else. In the rules as originally devised by the common law the crucial factors were payment and notice: a *buyer* from the holder of the capital interest in a thing would not be affected by certain types of property interest affecting that thing unless she had notice of them (we consider below why this privilege was, and still is, confined to buyers). This notice rule, which still operates in some areas of property law as we will see later, has the disadvantage of giving such interest holders no reliable means of ensuring that their interests will remain enforceable – at any time their interest might be obliterated by a sale, without the interest holder becoming aware of the fact. A more sophisticated approach is to substitute registration for notice, and make provision for such interest holders to register their interests. It then becomes possible to adopt a rule that registered interests are enforceable against the whole world in all circumstances, whereas unregistered interests are unenforceable against buyers of the capital interest. Such a system has advantages for everyone concerned: property interest holders whose interests are capable of being overridden on a sale are given the means to ensure that their interest will always and in all circumstances be enforced against the whole world. Holders of the capital interest can easily prove their ability to transfer full ownership by pointing to the absence of any registered interests, and buyers need only check the register to find out exactly what they are buying. However, universal registration of all property interests in all things is not feasible, or even desirable, for reasons we look at more closely in Chapter 10, and in most cases of multiple interest holding there is a measure of uncertainty about enforceability of the individual interests, and a corresponding uncertainty for any buyer who wants to acquire full ownership as to whether there do in fact exist lesser interests in the thing that might be enforceable against her. This uncertainty helps to explain why the majority in *Moore* was so convinced that it would inhibit the development of therapeutic medical treatments if the person from whose body the cell was taken (*Moore*) was treated as having a property interest in the cell line apparently owned by the doctor. There is no registration system in operation for human cells, and so drugs companies would be deterred from buying or investing in cell lines in the possession of researchers because of the difficulty of establishing whether or not researchers in possession of cell lines had the power and capacity to pass on full ownership in any particular case.

1.2.1.5. Tracing into exchange products: property rights in Dr B's £10 m

To complete the picture on John's property interests, it should be noted that, if he loses his interest in the cell line because it gets overridden on a sale to the drugs company, he may be able to make a proprietary claim against the £10 m the drugs company paid Dr B for the cell line. If this claim succeeds, John's interest will, in effect, shift from the cell line to its proceeds of sale. This results from the doctrine of tracing (largely outside the scope of this book) which allows a claimant whose interest in a thing ceases because the thing itself has passed into the hands of someone against whom his interest is not enforceable, to make an equivalent

proprietary claim against any asset received in exchange for the thing. Tracing therefore goes some way towards redressing the imbalance caused by restricting the enforceability of property interests. It prevents a seller, like Dr B, whose ownership interest in a resource was encumbered by a lesser property interest, from being unjustly enriched (the price the drugs company paid Dr B was for the cell line free from John's interest, not the lower price it would have paid for the interest Dr B himself had, i.e. the cell line encumbered by John's interest), and gives John an equivalent property interest to replace the interest he has lost. Exceptions to enforceability generally operate only in favour of purchasers, i.e. those who provide value in exchange for the thing (donees are of no relevance in the marketplace, and so there is no need to give them the same privilege over interest holders). Limiting the privilege to those who provide value in exchange for the resource ensures that the seller will be left holding an asset which can be made available as a compensation for the interest holder whose interest has been overridden. Of course, it may not be much help in any particular case – Dr B might have made a bad bargain and sold the cell line for less than it was worth, or he might have disappeared with the money, or spent it, or gone bankrupt, before John realised what had happened.

1.2.2. Dr A and Dr B and the acquisition and transmission of property interests

We have already seen that Dr B has formidable arguments in support of a claim to have acquired a property interest in the cell line by virtue of having used his skill and labour to develop the cell line from the cell. If the cell itself had been ownerless property when he acquired it, his argument would have been unassailable, both in Lockean theory and in English intellectual property law. The question of whether this is affected by any property interest in the cell that John might have had has already been touched upon. What about Dr A: did he acquire any prior interest in the cell which might affect the question of Dr B's rights in the cell line? Unless we adopt an absolute rule that no one can ever have any property rights in human bodies and excised body parts (and we see in *R. v. Kelly* [1999] QB 621, noted at the end of this chapter, why this would not be a sensible rule), Dr A's claim to have a property interest in the cell looks good, although the precise nature of his interest and the route by which he acquired it will vary depending on the view we take of John's rights. If John had property rights in his cell which (whether or not transformed in nature) survived its excision from his body, Dr A would seem to have a claim to the cell justifiable on the same grounds as those that justify Dr B's claim to the cell line: it was, after all, Dr A's skill and labour that removed the cell from John's body. Alternatively, it might be possible to spell out of John's consent to the operation and to the removal of the cell an implied transfer of his rights in the cell to Dr A (in English law, a gift of a chattel – which is what a cell is – requires an intention to make the gift coupled with physical transfer, both of which could be found here). Even if John's rights in the cell automatically ceased as a matter of law as soon as it was excised from his body (which is what the majority on the *Moore*

case would have said), Dr A would have a good case. His case would be based on the argument of first occupancy – i.e. that ownerless property should be allocated to the person who first takes possession of it (notice the difference between this and Locke's labour/desert argument). We see in Chapter 3 and elsewhere that first occupancy has a strong pull in the allocation of property rights, and in particular that it forms the basis of the common law principle that title to things can be derived solely from factual possession. The important point here, however, is that the presumption of continuity of interest which we have already noted will apply here as well. If Dr A has acquired property rights in the cell by any of these routes, they do not appear to have been dislodged by anything that was done by Dr B, unless we can say that the transformation brought about to the cell by Dr B's work is so dramatic as to justify saying that, in the case of this particular irreversible mixture (what is now Dr A's cell with Dr B's skill and labour), property in the mixture should be allocated wholly to the mixer for the policy reasons which persuaded the majority in the *Moore* case. There is no other reason for saying that Dr A's rights have been extinguished: Dr B is not a purchaser. There are certainly no grounds for saying that Dr A has abandoned his interest. Putting something on one side and then forgetting it exists does not constitute abandonment: because property entails obligations and liabilities as well as rights, abandonment has to be made much more difficult than that. Dr A's interest must therefore be presumed to have continued and to have been enforceable against Dr B.

1.2.3. The drugs company: constraints on the exercise of property rights

We end by looking at the position of the drugs company. We assume that it has acquired ownership of the cell line free from any interest of John, Dr A or Dr B. The issue we want to highlight now is one raised by its proposal to suppress development of the cell line: do property holders have public responsibilities or are they free to exercise property rights taking into account only their own private self-interest? If we think that the public interest should be taken into account, at least where the asset is a unique resource of public importance, as this cell line is, then it may be that it is not appropriate for the asset to be the subject of private ownership at all: it ought instead to be publicly owned. We look at this question of the relative merits of private, public and communal property in the next chapter. However, if we conclude that economic efficiency dictates private ownership, does that necessarily mean that it is desirable or inevitable that the drugs company as private owner must be left free to do whatever it wants with the cell line, even if that means leaving it up to the drugs company to decide whether or not to exploit this potentially valuable public resource for the maximum public benefit?

There are two aspects of this to note here and consider more fully in later chapters. It is certainly not an inevitable feature even of private property that a property owner should be free to do whatever it wants with its assets. It is essential to keep in mind that property rules do not operate in a legal vacuum. There will necessarily be private law constraints to prevent harm to others and to reconcile

incompatible uses of resources, for example by neighbouring landowners. In addition, it is possible – perhaps even inevitable – to have some degree of public control over the exercise of private property rights. For example, intellectual property law could impose compulsory licensing on the drugs company, making it a term of any patent it granted to the drugs company (without which it would have no legally protected rights in the cell line) that the scientific details were publicly recorded, and requiring the drugs company to license others to exploit it on payment of a fee to the company. Similarly, competition law might intervene to prevent it abusing its monopoly or dominant position, opening the market in its treatments to competitors. The use it can make of the cell line and of other types of human tissue will also be controlled by various regulatory bodies, who in current English law exercise close control over what can and cannot be done with human tissue. Other types of resource can be expected to attract other types of public regulation. To give an obvious example, planning, environmental and health and safety laws impose controls designed to protect the public interest which will regulate the use we make of a wide range of assets including land, buildings of historic, national or artistic significance, other structures built on land, machinery, natural resources such as minerals, growing crops and animals, and artificial constructs such as rubbish tips.

The second aspect of the freedom of action element in private ownership is the complicating factor of corporate ownership. As we see in Chapter 2, analysis and argument on the nature of property tends to proceed on the assumption that the private interest holder is an individual human being. Do the same considerations apply where, as in our example, the interest holder is a corporation? Ownership of corporate resources is vested in a legal fiction, the corporation, but the corporation can only act by human agents. As a matter of strict law, assets owned by a corporation are managed by one group of people – the directors – solely for another group of people – the shareholders – who, for reasons we look at in Chapter 8, may have no effective control over the actions of the managers. Does this cause corporate owners to behave differently from individual owners? Does it alter the picture if the corporate owner is a global enterprise, economically larger and stronger than many of the nation states in which it operates, and not wholly under the legal or social control of any one legal or social system? The economic effects of the actions of a corporate owner are felt by a constituency which is wider than its shareholders (for example, its employees, its customers and suppliers, and the community in which it operates). In deciding how the corporation uses its assets, are its directors required or even entitled to take the interests of these other constituents into consideration? The actions of individual human owners also of course affect the same wide constituency, but human owners can choose to act altruistically in the use of their assets: if a drugs company was a private individual it could choose to market the drug as cheaply as possible in order to maximise the benefit to the public even if it makes less or no profit for the owner itself. Can a corporate owner do that? Also, human owners routinely acknowledge moral

responsibilities in dealing with their assets (for example, towards members of their family, or even to employees or colleagues or customers) and their use of their assets can be motivated by positive desires to confer benefits that they have no legal responsibility to confer (for example, perhaps, to amass as large a fortune as possible to leave to their children when they die), by desires for non-financial rewards such as fame or public esteem, or even vindictive desires to cause harm to others even at a loss to themselves. It is not at all clear how far corporate owners can or should do the same. Should we be making special rules to ensure that, so far as possible, the behaviour of a corporate owner replicates that of an honourable, altruistic human owner, or should we acknowledge the inevitable differences and treat corporate ownership as different in kind from individual private ownership? We return to these questions in Chapter 8, where we look at corporate ownership in the general context of the structures the law uses to enable assets to be held on behalf of and for the benefit of others, and the issues arising out of these varying types of split property holding.

Before doing so, however, we need to refine our notion of property, and this is the subject of the next chapter.

Notes and Questions 1.1

- 1 Read *Moore v. Regents of the University of California*, 51 Cal 3d 120; 793 P 2d 479 (1990) and *R. v. Kelly* [1999] QB 621, either in full or as extracted at www.cambridge.org/propertylaw/.
- 2 Explain the arguments of the majority and the minority in *Moore*. Which do you find more convincing?
- 3 Why did the Court of Appeal in *Kelly* not feel able to accept that human body parts are always 'property'? On what basis did they nevertheless find that Kelly and Lindsay had been rightly convicted?
- 4 How does the approach of the English Court of Appeal in *Kelly* differ from the approach of the Supreme Court of California in *Moore*? Do you consider that either court gave proper consideration to the question of whether human body parts ought to be regarded as property?
- 5 In English law concentration has shifted to the question of the treatment of body parts removed at *post mortem* examination and retained (in particular at how far relatives have any say in the process) and public enquiries have been held into the practice of organ retention at the Bristol Royal Infirmary and the Alder Hey Hospital in Liverpool. For an account of these developments and an analysis of the legal issues they raise see Mason and Laurie, 'Consent or Property?'