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Part I

Introduction
Chapter 1

Introduction to land law

1.1 How to study land law

Land law is an interesting and challenging subject, involving profound questions about the way we choose to live our lives, for land is vital to human life. In any society – even our technological, high-speed one – the use of land is of the utmost importance. Where the supply of land is limited, as in England and Wales, the problems can be acute. The dry and legalistic façade created by the artificial language and technical concepts of land law tends to conceal the fundamental issue: land law is really just about the sharing out of our limited island.

Land law has been developing ever since people got ideas about having rights over certain places, probably beginning with the cultivation of crops. Through the long process of development, there have been periods of gradual change, and also more dramatic times, such as the Norman conquest of 1066, the property legislation of 1925 and, most recently, the Land Registration Act 2002. By and large, lawyers have continued to use and adapt the words and ideas of their predecessors. Although land law has kept its feudal roots and language, it is a thoroughly contemporary subject concerned with realities of daily life and existence. However, the law and its terminology can seem obscure (sometimes as though cloaked in the fog, rather than the mists, of time), so it is perhaps best at the start to treat it like a foreign language. The vocabulary soon becomes natural, especially through reading the reports of cases. Reading about the same topic in different books will also help. When encountering a technical term, especially for the first time, the most important thing that a law student can do is to pause and be sure that she knows what it means in context. Only then is it safe to continue. There is a searchable glossary available on the companion website to help with this task.

As explained further below, land lawyers tend to be principally, but not exclusively, concerned with various rights to land, called ‘interests in land’. They might talk about someone ‘owning land’ or ‘owning property’, but really they mean someone owning an interest in the land, or, more technically, having property in the land. These interests (the ‘property’) are not the land itself (the earth and the buildings), but abstract concepts, such as the freehold and the lease. When ownership of a building is transferred from one person to another:

The building has not moved. What is transferred by a transfer of property is the bundle of rights and obligations relating to that building (R (on the application of the Lord Chancellor) v Chief Land Registrar [2006] QB 795 (QB) per Stanley Burnton j at [25]).

The different types of abstract interest in land recognized by English law are introduced in Chapter 2, and the most important are considered in more detail in Part II of this book.

The first thing to do when studying any aspect of land law is to grasp the definition thoroughly. That means asking:

- what does it mean; and
- how do I recognize it?
This helps to avoid two of the most depressing things that can happen to land law students. The first is staring at a problem without having any idea of what it is about. The second (possibly worse) is recognizing what the problem is about, but feeling incapable of writing anything down. If in doubt, start by identifying the interests in the land.

Some authors compare land law to playing chess: there are various ‘pieces’ (which correspond to interests in land), and they can be moved about according to strict rules. Others liken the rules which constitute land law to a complicated machine: moving one lever, or adjusting one valve, will have a significant affect on the end product. The owner of an interest in land has limited freedom of action, and one small change in her position can affect the relative value of other interests in the land. In practical terms, the complicated connections within the machine mean that one part of the subject cannot be fully grasped until all the others have been understood. There is no single starting place: it is necessary to watch the machine, piece by piece, until the connections become clear. It is useful, from the beginning, to ask, ‘What would happen if...?’; if one lever is moved, what interests will be affected, and why?

As a consequence of the complex definitions and the interdependent rules, land law may only make sense when the course is nearly complete. However, in the meantime, it is necessary to make mistakes in order to grasp the way the rules relate to one another. It will eventually come together, with hard work and faith and hope; the charity, with any luck, will be provided by the teacher.

The language used by land lawyers expresses the way in which they think they see the world. This is a world in which people’s relationships to land can only occur within the legal structure of interests in land, so lawyers squeeze the facts of ordinary life into the pre-existing moulds of ‘the interests’. A land law student’s job is to learn the shapes of the moulds and imitate the squeeze; then she will be able to operate the whole machine. Finally, armed with this knowledge and skill, she may begin to question whether land law really does operate like this in practice.

1.2 Land law rules

Land law is made up of rules in statutes and cases; case law rules are further divided into legal and equitable rules. That is, the rules were created:

- by an Act of Parliament; or
- by either
  - a court of ‘common law’; or
  - a court of ‘equity’.

The development of these two sets of rules is well described by others (for example, Part II of Cheshire, 2011, and Simpson, 1986). It is merely outlined here.

The customs which became known as the ‘common law’ were enforced with extraordinary rigidity by judges who followed the strict letter of the law. Aggrieved citizens (in the absence of crusading television journalists and Internet-based campaigns) wrote begging letters to the King. These received replies from his ‘secretary’, the Chancellor, who employed the King’s power to override the decisions of the King’s judges. Appealing to the Chancellor’s conscience (or to ‘equity’) grew in popularity, and from about 1535 the Chancellor’s court (Chancery) was regularly making decisions overriding the law in the King’s court.

However, this new system of justice did not set out to replace the rules of law, but merely to intervene when conscience required it: *Equity therefore does not destroy the law,*
nor create it, but assist it (Dudley and Ward v Dudley [1705] Pr Ch 241, 24 ER 118 at 244, 120). The courts of common law and the Court of Chancery existed separately, each with distinct procedures and remedies, to the great profit of the legal profession. Eventually, things became intolerably inefficient (see, for example, the seemingly perpetual case of Jarndyce v Jarndyce in Charles Dickens’ Bleak House), and the two courts were merged by the Judicature Acts 1873 and 1875. Despite this merger, lawyers continued to keep the legal and equitable rules and remedies separate. (There is an account of legal and equitable interests today in Section 2.3.2 below.)

The year 1925 is an emotive date for land lawyers because it saw a major revision of the rules of property law in England and Wales. The law was actually changed by a very large Law of Property Act in 1922, but that Act was not brought into force; instead it was divided into a number of shorter statutes all dated 1925.

The 1925 statutes contained many radical reforms. They also contained ‘wordsaving’ provisions, some of which had appeared in earlier statutes. At one time, lawyers were ‘paid by the yard’, so the more words they used, the better for their bank balances. In the 1925 Acts, Parliament ensured that many common promises in land transactions no longer needed to be spelt out in full because they would be implied by statute. In effect, the customs of conveyancers (lawyers who manage the transfer of land) became enshrined in statute. Significant examples of such provisions that will be encountered when studying land law are set out in Table 1.1.

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One of the aims of the 1925 legislation was to make conveyancing (the buying, selling, mortgaging and other transfers of land) simpler in order to revive the depressed market in land and to make it easier to deal with commercially. It is impossible to say whether it had this effect. Certainly, the reasons for the great increase in home ownership in the twentieth century were not connected to the reforms, some of which were inappropriate to the modern world of owner-occupation. More recent statutes have introduced further reforms to better reflect modern attitudes to land ownership and to equip land law for the electronic age (including, for example, the Trusts of Land and Appointment of Trustees Act 1996 and the Land Registration Act 2002, respectively).

Most of the statutory rules used by today’s land lawyers are found in the following statutes:

- **Law of Property Act 1925** (usually abbreviated to ‘LPA 1925’) expressly referred to in all but one chapter of this book;
Land Registration Act 2002 (usually ‘LRA 2002’) which replaced the LRA 1925: see, especially, Chapter 15;

Trusts of Land and Appointment of Trustees Act 1996 (‘TOLATA’ in this book) which replaced the Settled Land Act 1925 and amended the LPA 1925: see, especially, Chapter 11;

Land Charges Act 1972 (usually ‘LCA 1972’) which replaced the LCA 1925: see Section 16.3 below.

Care should be taken when citing or referring to a particular statute, as there are often Acts of Parliament with similar (or even identical) names from different years.

1.3 The legal and social landscape

Land law is one branch of the wider discipline of property law. Traditionally, property law was divided into the rules that applied to land (the law of ‘real property’) and the rules that applied to every other type of property (the law of ‘personal property’). Over time, further branches have been added, including the law of ‘intellectual property’, which is concerned with the ownership of ideas (including patents, trade marks and copyright).

Before studying the rules of land law, it is important to take time to consider the following questions:

- What do we mean by ‘property’?
- Why are there special rules for land?
- What is land law about, or, to put in another way, what are all these rules for?

1.3.1 Property rights

English law recognizes a distinction between rights that are ‘personal’ and rights that are ‘property’ rights. Most other legal systems recognize a similar distinction, although the terminology differs. Personal rights are rights that regulate a particular relationship between a limited group of people, usually because they have each entered the relationship voluntarily (the law of contract) or because one person has acted in breach of her legal obligations to the others (the law of torts). Property rights are much more powerful: they are rights that are capable of binding third parties. When the law recognizes a person as having ‘property’ in an object, it is recognizing that she has a significant degree of control over that object – a degree of control that necessarily limits the rights exercisable by others in respect of the same object.

This description of property rights is all very well, but it only takes us so far. It enables us to identify which interests are given proprietary character by English law, but it does not provide us with a tool for deciding when and whether new rights should be added to the list – or, indeed, whether some rights should be removed. Not all the interests now recognized as proprietary have always been so. Both leases and freehold covenants are relatively late additions, and the twentieth century saw a determined effort by some judges to raise certain types of licence to proprietary status (see Chapter 3).

Few concepts are quite so fragile, so elusive and so frequently missed as the notion of property... Our daily references to property therefore tend to comprise a mutual conspiracy of unsophisticated semantic allusions and confusions which we tolerate – frequently, indeed, do not notice (Gray and Gray, 2009, para 1.5.1).
In the case of *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 (HL), Mr Ainsworth left his wife, who continued to live in the former matrimonial home. The matrimonial home was originally owned by Mr Ainsworth, but when he incorporated his business he transferred the house to his new company and used the house to secure the company’s debts. When the company failed to repay its debts, the bank sought possession of the house from Mrs Ainsworth. The House of Lords had to decide whether Mrs Ainsworth’s occupation of the house amounted to a property interest in it; in other words, was her right to occupy the house as Mr Ainsworth’s wife binding on the bank? This kind of problem, where a transaction between buyer and seller (or a borrower and a lender) involves a third person’s interest in land, appears in various forms throughout this book. It is a kind of eternal triangle, as in Figure 1.1. In this case, Mr Ainsworth is the seller (granting a mortgage is equivalent to a sale for these purposes), and the bank is the buyer.

![Figure 1.1](image_url)  
*Figure 1.1  The eternal triangle*

Although their Lordships were sympathetic to Mrs Ainsworth’s plight, they felt unable to give her interest proprietary status. Lord Wilberforce said:

*Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability (at 1247–48).*

There is, as Kevin and Susan Gray, in particular, have observed, a certain circularity in this approach. What rights bind third parties? Proprietary ones. What rights are proprietary? Those capable of binding third parties. In fact, the question ‘What rights should be recognized as having the power of property?’ is one that must be answered by the society of which the law is part. Different societies will answer the question in different ways, and the same society may answer the question differently at different times. These issues are explored in more detail in chapter 1.5 of Gray and Gray (2009).

### 1.3.2 Land

Almost all legal systems have special rules about the ownership of land that do not apply to other types of property. This reflects the significance of land to human beings and its distinctive characteristics when compared with other types of resources.

At the most basic level, human beings are land animals; they need somewhere to put their bodies, a piece of land on which to ‘be’. On the emotional plane, humans must have contact with land, their roots in the earth. Physically, they need air to breathe and space in which to move about, eat and shelter. All these are provided by land.

As a resource, land has other special characteristics. Except in the rare cases of land falling into, or being thrown up from, the sea, it is geographically fixed and immovable;
it is also ultimately indestructible. Its nature means that the boundaries between one piece of land and another are normally touching, so neighbouring owners are aware of one another’s business. Further, to its occupant one piece is never exactly the same as another: each is unique. Even in apparently uniform tower blocks, each floor, each flat, has its own particular characteristics.

The permanence and durability of land are matched by its flexibility. It has an infinite number of layers, and is really ‘three-dimensional space’. A plot of land can be used by a number of people in different ways simultaneously: one person can invest her money in it, while two or more live there, a fourth tunnels beneath to extract minerals and half a dozen more use a path over it as a short-cut, or graze their cattle on a part of it.

Land can be shared consecutively as well as simultaneously; that is to say, people can enjoy the land one after another. The great landowning families traditionally created complicated ‘settlements’ of their estates, whereby the land would pass through the succeeding generations as the first owner desired. Each ‘owner’ only had it for a lifetime and could not leave it by will because, at death, it had to pass according to the directions in the settlement. In this way, the aristocratic dynasties preserved their land, and consequently their wealth and their political power.

These characteristics of land mean that the law has developed special rules relating to property in land. It is important, therefore, to know whether a particular object or resource is real property (land) or personal property. The rules for determining this are considered in Section 2.1 below.

By now, it should be clear that in English law, the word ‘personal’ is used to describe both a type of right and a type of property. It is possible to have personal rights over land (for example, many of the licences discussed in Chapter 3) and property rights (ownership) over personal property.

1.3.3 Land and society

It has already been observed that each society develops its own cultural attitudes to its land. These attitudes are coloured by the kind of land (for example, desert or jungle), because this determines the uses to which it can be put. The view taken of land is also influenced by its scarcity or otherwise, and by the economic system. In places where land was plentiful, it was not normally ‘owned’. When European colonists arrived in America, the indigenous people believed that:

the earth was created by the assistance of the sun, and it should be left as it was... The country was made without lines of demarcation, and it is no man’s business to divide it... The earth and myself are of one mind. The measure of the land and the measure of our bodies are the same... Do not misunderstand me, but understand me fully with reference to my affection for the land. I never said the land was mine to do with as I chose. The one who has the right to dispose of it is the one who created it (McLuhan, Touch the Earth (Abacus 1972) 54).

Similarly, native Australians regarded the land with special awe. As concluded in one of the cases about Aboriginal land claims, it was not so much that they owned the land, but that the land owned them (Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141). Native title was recognized as part of Australian land law in the landmark case of Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1. A traditional African view was that the land was not capable of being owned by one person but belonged to the whole tribe:

land belongs to a vast family of which many are dead, a few are living and countless numbers still unborn (West African Lands Committee Cd 1048, 183).
In early English land law, the fundamental concept was ‘seisin’. The person who was seised of land was entitled to recover it in the courts if she was disseised. Originally, ‘the person seised of land was simply the person in obvious occupation, the person “sitting” on the land’ (Simpson, 1986, 40). Seisin thus described the close relationship between a person and the land she worked and lived on. This simplicity was refined and developed over centuries, and the concepts of ownership and possession took over. Nevertheless, actual possession can still be of great importance in land law, for example, in claims of adverse possession (see Chapter 13).

Over the past three or four hundred years, the land law of England and Wales has been developing alongside the growth of capitalism and city living. There has been a huge population increase. In 1603, there were about four million people in Britain; by 2001, there were some 59 million on the same area, about 235,000 square kilometres (that is, about 4,000 square metres of surface area per person, although, of course, most people are confined to a comparatively tiny urban space). During the second part of the twentieth century, there was also an enormous increase in the number of ordinary people who owned land. The percentage of households living in owner-occupied accommodation (a house or a flat) more than doubled between 1971 and 2001 to nearly 70 per cent (Census 2001). However, this trend reversed in the early years of the twenty-first century as more and more people were unable or unwilling to take on the responsibilities of owner occupation. By the time of the 2011 Census, the percentage of households living in owner-occupied accommodation had fallen to 64 per cent, with a corresponding increase in the percentage of households renting accommodation from private and social sector landlords.

For the majority of owner-occupiers, the land they own is subject to a huge debt in the form of a mortgage. Despite this, the land will probably be regarded as both a home and an investment. It is an expression of the landowners’ personality and a retreat from the world; at the same time, it represents a status symbol and, they hope, an inflation-proofed savings bank and something to leave to their children (or to be used to finance health care at the end of their lives). For other people (for example, those who rent their home on a weekly tenancy), home ownership, with its apparent psychological and financial advantages, may be only a hope for the future. In the meantime, their relationship with their land may be less secure, subject to the authority of a landlord. However, in a lawyer’s view, tenants are also ‘landowners’, albeit for a limited period of time and subject to certain restrictions (see Section 2.3.1 below and Chapters 5 and 6).

It can be seen from this brief survey of land use in England and Wales that the same piece of land may be subject to a number of levels of ownership (for example, by a landlord and by a tenant, both of whom may have also granted mortgages to financial institutions). What is more, there are different motivations for owning land. Different people will have different expectations of their property, and one of the tasks of the land lawyer is to try to reconcile these various demands when they come into conflict. The main three motives for owning land are set out in Table 1.2, with examples of how they influence land law. (For more detail, see Gray and Gray, 2009, paras 1.5.40–57.)

In order to maximize the value of land, ownership must be capable of being freely and safely traded, while people who have lesser interests in the land must also feel secure. The market certainly seems to have an influence on the development of the law. When there was a slump at the end of the nineteenth century, judges tried to ensure that liabilities attached to land (that is, the lesser, third-party interests) were minimized so that the land would be attractive to buyers. Conversely, periods of booming prices, such as the 1970s, 1980s and the early 2000s, tend to stimulate a greater interest in the security
of such lesser, third-party interests. A falling market, such as that of the early 1990s and that of the end of the first decade of the twenty-first century, produces its own response, significantly influenced by the interests of lenders, such as building societies and banks (see Chapter 7).

Table 1.2 Three underlying motives for land ownership

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<td>The law must reflect the reality of land use and give value to the interests of those in actual occupation. Parliament may need to intervene to protect the vulnerable from the unscrupulous. However, land must also be freely and conveniently transferable to enable its enjoyment.</td>
<td>Seisin (see Section 1.3.3 above). Protecting the interest of people in occupation: paragraph 2 of schedule 3 to the LRA 2002 (see Section 15.8.2 below). Parliamentary protection for residential tenants and residential mortgagees (see Chapters 5, 6 and 7).</td>
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<td>Land as an investment</td>
<td>Interests in land are treated as investment assets: they need to be freely marketable and realizable, free from the risk of undisclosed interests. It is more convenient to think of interests in land as abstract concepts than as physical land.</td>
<td>National Provincial Bank Ltd v Ainsworth [1965] AC 1175 (HL) (see Section 1.3.1 above). The doctrine of overreaching (which transfers beneficial interests from the land to the proceeds of sale of the land; see Section 11.6.1 below).</td>
</tr>
<tr>
<td>Land as a community resource</td>
<td>Land needs to be managed and protected for the wider good of society rather than the profit of the individual owner.</td>
<td>Private rights, such as covenants (see Chapter 9). State intervention, such as planning regulations (planning law lies beyond the scope of this book). The conservation of nature and natural resources (see Rodgers, 2009).</td>
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### 1.4 Human rights

The Human Rights Act 1998, which came into force on 2 October 2000, means that the rules and practices of land law are now open to challenge if they offend against rights contained in the European Convention on Human Rights. The Act requires the courts to interpret legislation ‘in a way which is compatible with the Convention rights’ (s 3). It is directly applicable against public authorities (s 6), which include courts and tribunals, central and local government and any body exercising functions of a public nature. In R (on the application of Weaver) v London & Quadrant Housing Trust [2010] 1 WLR 363 (CA) the Court of Appeal had to decide whether evicting a social tenant for non-payment of rent was a public act or a private act within section 6(5). The majority concluded that the housing association was acting publicly: the status of an act depends upon the context in which it occurs (in this case, the provision of social housing) not the nature of the right being exercised (in this case, contractual).

The extent to which the Act is applicable in a dispute between two private individuals (what is known as its ‘horizontal’ effect) is uncertain. It may be that it has wider...
horizontal effect than originally intended, since the section 3 requirement applies even if the parties are private individuals, and section 6 prevents the courts (as public bodies) from interpreting common law as well as statute in a way which is incompatible with Convention rights. This does not mean that the Convention rights must be referred to explicitly in every judgment; what matters is that the rules that the court is applying are themselves Convention compliant. For example, giving due consideration to the factors set out in section 15 of TOLATA 1996 (see Section 11.5.2 below) will ordinarily be sufficient to discharge the duty to balance the Convention rights of the parties without further reference to the Human Rights Act (National Westminster Bank plc v Rushmer [2010] 2 FLR 362 (Ch)).

In the context of land law, the most important Convention rights are:

- Article 1, Protocol 1 – the right to peaceful enjoyment and protection of possessions;
- Article 8 – the right to respect for a person’s private and family life and home;
- Article 6 – the right to a fair and public hearing; and
- Article 14 – the right to enjoy Convention rights without discrimination.

Article 1, Protocol 1 guarantees a person’s right to enjoy her property free from interference from the state except where such interference is in the public interest and in accordance with the law. This might well allow the compulsory purchase of a person’s land by a local authority, for example. It certainly permits long leaseholders to buy the freehold of their land under the Leasehold Reform Act 1967 because it is in the interests of social justice that they should be able to do so (see James v UK (1986) 8 EHRR 123 and Section 5.6 below).

Under Article 8, no public authority may interfere with the exercise of the right to respect for a person’s private and family life and home, except in accordance with the law and to the extent that it is necessary in a democratic society. In Harrow LBC v Qazi [2004] 1 AC 983, the House of Lords held that the Article concerned rights of privacy rather than property. Consequently, it could not be used to defeat contractual and proprietary rights to possession, including the powers of a local authority to recover possession from a former tenant. However, in Connors v UK (66746/01) (2005) 40 EHRR 9, the European Court of Human Rights at Strasbourg decided that there were circumstances in which the exercise by a public authority of an unqualified proprietary right under domestic law to repossess its land would constitute an interference with the occupier’s right to respect for his home. For repossession in these circumstances to be lawful, it must be shown that the authority had sufficient procedural safeguards in place to ensure that so serious an interference with the occupier’s rights was justified and proportionate in the circumstances of the case.

For a number of years after Connors, the House of Lords continued to hold that the relevant question in Article 8 cases was not whether repossession was a proportionate remedy in the particular case, but whether the statutory scheme under which possession was being sought was Article 8 compliant (see, for example, Kay v Lambeth BC [2006] 2 AC 465 (HL) and Doherty v Birmingham City Council [2009] 1 AC 367 (HL)). However, in Manchester City Council v Pinnock [2011] 2 AC 104 (SC) the Supreme Court accepted that English courts must consider the question of the proportionality of a local authority’s action within the circumstances of the individual case, provided that the issue was raised by the claimant (see, also, Hounslow LBC v Powell [2011] 2 AC 186 (SC)). This is unlikely to give rise to a flood of successful challenges to eviction. First, the reasoning in Pinnock is expressly confined to cases
concerning local authorities (at [50]): it does not apply to private landlords. Second, the proportionality of a local authority's action is only one of a number of factors that the court must take into account. In most cases, it is likely to be outweighed by others, including the local authority’s proprietary interest in the land and its duty to properly manage and allocate its housing stock.

The effect of the Human Rights Act and the Convention rights it incorporates will be further discussed where relevant during the course of this book.

Summary

1.1 In your approach to land law, it is essential to grasp the language and definitions of interests in land as well as the rules about them.

1.2 The rules of land law are based on those found in case law. However, many of the rules have been significantly modified by Parliament, and land law is increasingly concerned with statutory interpretation. The most important statutes are:

- Law of Property Act (LPA) 1925;
- Land Registration Act (LRA) 2002;
- Trusts of Land and Appointment of Trustees Act (TOLATA) 1996; and
- Land Charges Act (LCA) 1972.

1.3 Land law is primarily concerned with rights of property (ownership) in land. The status of particular rights in land will depend upon the values and priorities of individual societies. There are a number of different reasons why a person might wish to enjoy ‘ownership’ of land. Where land is shared, these different motivations can give rise to conflict, which the law must resolve.

1.4 The provisions of the Human Rights Act 1998 must be considered when considering land law issues.

Further Reading

Burn and Cartwright, *Cheshire and Burn’s Modern Law of Real Property* (18th edn, Oxford University Press 2011) ch 1
Thompson, ‘Possession Actions and Human Rights’ (2011) 75 Conv 421
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