

朗文·培生法学基础系列·影印本  
Foundation Studies of Law

# 土地法

L a n d L a w

第五版 5th Edition

[英]黛安·查佩尔 Diane Chappelle 著



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本书剔除了大量冗长艰涩、已经退出历史舞台的规则和原理，呈现在读者面前的是简明扼要的适用于当前英国的土地法内容。对于初学英国乃至英美法系的土地法的入门者来讲，本书是非常适宜的指引。

本书的作者饶有兴趣地将土地法比喻成魔术(magic)，而将学习土地法的学生比喻成学习魔术的哈利·波特和他的伙伴们。开卷有益，愿你在阅读本书和学习英国土地法的过程中，能够如本书的作者所希望的那样，穿越痛苦和艰难，体味到幸福和愉悦。



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## 导 读

“土地是一切生产和生存的源泉。”土地是人类生存的家园,无论在地球上的哪个国度,土地向来都是被视为生命繁衍和人类延续的基础。当土地的稀缺性使其从大自然恩赐的无主物成为被一定主体所拥有的财产之后,人们对于土地的占有和使用就被赋予了各种权利形态。从某种意义上讲,土地法就是为规制因人类占有和利用土地所衍生的种种法律关系而生。

英国土地法的艰涩难懂与高深莫测足以让很多人望而却步,劳德·布勒斯(Lord Bryce)就曾说过,英国的不动产法从来就没有简单易懂过,而正是这一点使其与产生于更为文明时代的法律区别开来。克劳姆(Cromwell)则毫不避讳地将其称为“转弯抹角、难以容忍的一团糟”。直到大约1880年左右,如果谁想作一个关于土地法的讲演,谁就有义务先就许多既晦涩难懂又笨拙粗俗的规则进行一番道歉。梅特兰(Maitland)则悲观地认为:“当我们想教会年轻人掌握这样的语言时,只有两条路可以走——要么教授保持沉默,要么修改法律。”经过一百多年的演变,可以说,时至今日,英国土地法中很多繁杂的内容已经隐退,例如土地保有制度(tenure)几乎全部被取缔,但是土地法艰涩的名声依旧,大多数法学院的教授和学生还是将其视为畏途。

英国土地法之所以特别难,学者认为大概有两个原因:首先,其近乎诡辩的推理技术很难梳理;其次,或许更为重要的是,土地法并没有关注形象的土地利用,而是注重抽象存在的土地上的地产(estate)和利益(interests)。而对于中国学生来讲,学习英国土地法就更是难上加难:语言障碍是首当其冲的,同时英国的土地法与大陆法系的物权法有着根本性的差异。以所有权制度为例,大陆法系国家秉承了罗马法中的绝对所有权理念,其物权制度是以所有权为核心建构起来的,尽管也存在他物权和所有权权能的分离,但是这些权益的存在都来源于一个绝对的、明晰的所有权。而英国法则继承了日耳曼法的土地所有权观念,其使用权(或称用益权)与所有权呈现天然分离的状态,所有权的绝对性并不如大陆法系的明确。在其体系中,自始至终,根本就不存在如此的所有权的概念(甚至也不存在物权的概念)。甚至在讲到对土地的有的时候,有很多词都可以翻译成雷同于所有权的概念:ownership, title, estate, interest等等。英国法的产权观念,着重土地的占有事实胜于所有权,凸显土地的经济利用性,甚至逐渐转向土地的证券化(信托),而不为物权的独占性所困扰,于是就会出现在一块土地上可以同时并存几个相互独立的产权,而同时通过一些具体规则来明确权利的运行。

因此,在英国土地法领域中活跃着与大陆法几乎迥然不同的术语和概念。比如地

产(estate),这一术语是从持续时间(a time in the land)来讲一个土地拥有者的权益的多少;他可能是对他的土地享有“无条件继承的不动产权”(fee simple),也可能是终身占有的地产权(estate for life),或者是为期数年的租赁权。如果说地产表述的是在土地上的所有权的性质和程度,那么土地上的利益(interest in land)表述的则是土地上的某一权利与其他权利之间的关系以及某人所拥有的权利的类型,包括了抵押人(mortgagor)与抵押权人(mortgagee)、地役权(easement)人和收益权(profits a prendre)人、租金负担权(rent-charges)人的权利。在英国法体系中,土地法基本上是普通法,但是我们必须同时意识到衡平法的重要性,土地法受到衡平法的影响不可谓不深。通过信托的方法和对抵押的衡平法解释,英国枢密大臣建立起了一套地产上的衡平法利益的原则体系。法律与衡平(Law and Equity)对应于两种审判体系“普通法”与“衡平法”,1875年之前,它们分别独立运转,两者对财产法都有很大的贡献,现在尽管已经合而为一,但是土地上的权益仍然区分为“法定的”和“衡平法上的”权益,因此具有非常重要的地位。当然英国土地法上还有更多的基本概念和原理,需要读者在阅读和学习的过程中注意梳理和掌握。

本书的特点在于其体系的简洁明快,内容的深入浅出。正如同作者在其著作中所阐述的那样,以往的很多同一领域的教材都是很优秀的,但是大都是为教师和专家而写,而本书却为学生而写。正是基于这个定位,我们在阅读本书的时候,可以不时体察到作者的良苦用心和匠心独运。首先,在体系上与大部头的财产法教材不同的是,本书就分为三个部分,第一部分从最基本的内容着手,阐述了有关土地法的基本原理,回答了什么是土地和土地法,存在于土地上的具体财产权利类型以及英国的土地制度现状;在介绍了取得土地上权益的一般程序和规则之后,着重介绍了对抗性占有(adverse possession)和所有权的禁止翻供(proprietary estoppel);还介绍了土地上权益的保护途径以及可能会导致权益丧失的方式。第二部分介绍地产(the legal estate)。在就地产问题进行初步的介绍之后,分专章阐述了若干具体的地产类型,包括“绝对无条件继承的不动产权”(the fee simple absolute in possession)、“限制授予土地契据”(strict settlement)、土地信托(trusts of law)和“有年限租用的地产”(terms of years absolute)。第三部分则介绍土地上的利益(interests in land)。具体介绍了按揭制度(mortgages)、地役权(easement)、收益权(profits a prendre)、租金负担(rent-charges)、限制契约(restrictive covenants)和地产合同(estate contracts)等内容。其次,在行文上,作者也没有从刻板的规则出发,而是采用了大量的设问,在提出一个又一个的问题之后再逐个予以解决,使读者能够直接抓住问题的关键,有的放矢地进行学习。再者,强调内容的符合时代性和强调实用性也是本书的特点,本书剔除了大量冗长艰涩、已经退出历史舞台的规则和原理,呈现在读者面前的是简明扼要的适用于当前英国的土地法内容,同时在介绍完任何章节的内容之后,作者都会专门阐述相关制度如何在实践中应用。可以说,对于初学英国乃至英美法系的土地法的入门者来讲,本书是非常适宜的拐杖和指引。

我国的物权立法正处于关键时刻,毫无疑问,土地以及土地上的权利问题是物权立法中的墙角石(cornerstone)。尽管目前民法学界正在草拟的物权法草案基本禀承了大陆法系的概念和体系,但是我们也不得不承认,20世纪以来,随着“从注重物的归属到注重物的利用的转变”或者“用益物权逐渐成为物权的中心”等观点日益被普遍接受,他物权对所有权的限制也日益加强,相信不拘泥于概念逻辑的条条框框、而注重土地的经济利用性的英国土地法中的一些理念还是可以尝试被引入,在试图解决我国目前在土地归属与利用之间的矛盾时发挥其得天独厚的优势。

本书的作者饶有兴趣地将土地法比喻成魔术(magic),而将学习土地法的学生比喻成学习魔术的哈利·波特和他的伙伴们。开卷有益,愿你在阅读本书和学习英国土地法的过程中,能够如本书的作者所希望的那样,穿越痛苦和艰难,体味到幸福和愉悦。

金锦萍

2003年4月于美国密苏里州堪萨斯城

## PREFACE TO FIFTH EDITION

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I often feel that, when it comes to studying Land Law, students feel a bit like Harry Potter and his friends, Ron and Hermione, in Professor Trelawney's Divination Class. It's a complete mystery to them, and Harry is not at all surprised when, attempting to read Ron's tealeaves, he foresees 'trials and suffering'. However, as he looks deeper into the cup he sees 'a thing that could be the sun. Hang on – that means "great happiness" – so you're going to suffer but be very happy ...' (*Harry Potter and the Prisoner of Azkaban* by J K Rowling, Bloomsbury, 1999). Although they have their textbook, *Unfogging the Future*, this does not seem to help very much. Nothing seems to make any sense. Luckily, Professor Trelawney is there to help them unravel the mysteries of her magical subject.

Believe it or not, Land Law is magic, too. Well, at least I think so. Hopefully, my book will help to unfog Land Law for you and lessen any trials and suffering. My wish is that you all find the great happiness that success in a Land Law exam brings. (Of all the subjects studied in a law degree, a pass in Land Law is the equivalent of catching the golden snitch in quidditch!) Who knows, you may even fall under Land Law's spell, like I did, and be very happy without any suffering at all.

Of course, we all need others to help us succeed. I am no exception and have the following people to thank: Pat at Headquarters for commissioning this Fifth Edition and for getting the cover I wanted; Jill in Hemel Hempstead for her patience and generous deadlines; J K Rowling for Harry; my students, past and present, for the happiness they give me; and Sue and Lorie for always being here. There are also those without whom your happiness cannot be complete, and in my case it is Tim, my own personal weaver of magic spells. Finally, like all good witches, I have my black cat, Coke, who is very wise and knows just how the world wags – a wonderful companion.

*Diane Chappelle*  
*Liverpool 2001*

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