# MEGARRY & WADE

# THE LAW OF REAL PROPERTY

Seventh Edition

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SWEET & MAXWELL

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CHAPTER 1

# *INTRODUCTION*



## Section 1. Real Property in Perspective

**1–001** English real property law has tended to have an unenviable reputation for complexity. Until comparatively recently, this reputation was thoroughly deserved, but that is no longer the case. For 150 years, the objective of reformers has been to make dealings in land as simple as dealings in stocks and shares.[1] As a result of the statutory reforms of real property law,[2] particularly those in 1925[3] and since, the process of dealing in land has been simplified so much that this objective is now close to realisation. About three-fifths of all the land in England and Wales is now registered at HM Land Registry,[4] and the titles are computerised and publicly accessible on the internet. It seems likely that the electronic transfer of title to land will be possible in the very near future.[5]

Although the content of the law of real property is increasingly statutory, it is however in no sense a statutory code. It is therefore still essential to have an understanding of the substratum of common law and equitable principles upon which the statutory framework has been overlaid,[6] together with some grasp of the way in which the subject has developed historically.[7]

[1] For the beginnings of the process and the first proposals for the registration of title to land, see S. J. Anderson, *Lawyers and the Making of English Land Law 1832–1940,* (1992), pp.63 *et seq.*

[2] The process began with the Conveyancing Act 1881.

[3] Usually referred to as "the 1925 property legislation". For a brief explanation, see below, para.1–016.

[4] See below, para.7–001.

[5] The legislative framework for the introduction of electronic conveyancing now exists, and it is likely to be introduced in the near future: see below, paras 7–157 *et seq.* Since July 1996, securities on the London and Dublin Stock Exchanges have been traded electronically under the CREST system. Gilt-edged securities are also traded electronically.

[6] As registered title has gradually become the norm, some of the best-known features of this underlying framework—particularly the difference between legal and equitable interests (explained in Ch.4)—have declined in importance.

[7] For an outline of the main statutory developments affecting land law, see below, paras 1–016—1–017.

**1–002** **Scope of the subject.** It is not easy to distinguish accurately between real property and conveyancing. In general, the former is static, and the latter dynamic. Real property deals with the rights and liabilities of land owners, whereas conveyancing is concerned with how rights in land may be created and transferred. The two inevitably overlap and there is no scientific dividing line between them. In reality, real property and conveyancing are not so much separate (but closely related) subjects, but two parts of the one subject of land law.[8]

The material in this book has been arranged in such a way as to minimise the amount of repetition and preliminary explanation. Those topics that can be understood in isolation have been treated in the later chapters. However, the main principles are explained first, because they constantly interact. They are not easy to grasp on initial acquaintance. This is due in part to their historical origins and partly to the technical language which is a feature of the subject. The glossary of terms which precedes this chapter may be helpful in relation to the latter.

The purpose of this chapter is threefold. First, it provides a brief guide to the subjects that are examined in this book. Secondly, it gives an idea of the nature of real property and introduces a number of the most important technical terms. Finally, it introduces those aspects of the law on human rights that are most likely to affect the law of real property.

**1–003** After this introductory chapter, Chapters 2 and 3 give an account of tenures and estates respectively. *Tenure* means the holding of land on certain terms and conditions. It refers to the *manner* in which the law allows a person to hold land. Points of tenure are extremely rare in practice today[9]; but historically tenure was the fundamental doctrine of land law. It is therefore examined first. *Estates* are of much greater importance in both theory and practice. The term "estate" refers to the duration of a landowner's interest. He may hold his land in fee simple, i.e. as absolute owner; or he may hold it for a limited interest—for his life or under a lease for a period of years.[10] He will then be said to have an estate in fee simple, or for life, or for a term of years, as the case may be. Chapter 3 explains the classification and nature of the various estates, and the rules for their creation, Chapter 4, "Possession of Land", provides an analysis of the nature of estate ownership and the fundamental importance of possession in the law of real property.

Chapter 5, "Law and Equity", contains the fundamental doctrine which has given a peculiar dual character to English land law. "Law" and "equity" are used in a technical sense. They correspond to the two systems of justice, "common law" and "equity", which were administered in separate courts until 1875. The character of the law of property has been significantly influenced by their interaction. Equity mitigated the rigour of the ancient

[8] Ch.15 provides an introduction to conveyancing law.

[9] They tend to arise principally in relation to the Crown's rights to land.

[10] One of the three limited forms of estate, the entail, can no longer be created as a result of recent legislation: see below, para.3–031.

common law in the interests of justice and at the expense of tradition and formality. Although the two systems have been administered together for over 120 years, interests in land are still classified as "legal" or "equitable" with consequences that are still important, though much less so than formerly. This is a typical example of a distinction that can only be understood historically, but which nonetheless underpins the 1925 property legislation. In Chapter 6, "The Legislative Transformation of the Law of Real Property and the Protection of Estates and Interests", there is a description of how statute has transformed and developed the law of real property both in 1925 and subsequently. Its underlying theme is how legal estates and equitable interests are protected. It explains the reduction of legal estates to just two by the Law of Property Act 1925, the protection of land charges, the development of registration of title, and the extension of overreaching. It considers whether it is possible to create new equitable interests and how personal rights may affect third parties through the law of torts and the imposition of constructive trusts.

**1–004** Chapter 7, "Registration of Title", gives a detailed account of the system of registered title under which a computerised official register of title is rapidly replacing the cumbersome practice of examining title deeds. The whole of England and Wales has been subject to compulsory registration since December 1, 1990, and the range of dealings with unregistered land to which the requirement of compulsory registration applies has been extended so that most dispositions of unregistered land must now be completed by registering the title. As the registered system is now the predominant one, it is considered before the older unregistered system, which it replaces. Chapter 8, "Unregistered Conveyancing: Titles and Incumbrances", explains the workings of the principles of common law and equity where title is unregistered. The two systems combined to shape the practice of buying and selling land and to protect a variety of subsidiary interests over it such as mortgages and restrictive covenants. These rules were modified by a statutory requirement that a number of subsidiary rights should be registered if they were to bind third parties. This traditional system of conveyancing is rapidly disappearing and is being replaced by the system of registered title mentioned above.

Chapter 9, "Perpetuities and Accumulations" is concerned with future interests. If A gives land to B for life and, after B's death, to C in fee simple, C has a future interest for the period of B's life. There are limits to the future interests which the law allows. In particular the period of time during which they can take effect is limited by the rule against perpetuities, now reformed by statute. Its near relation, the rule against accumulations, prevents income from being added to capital for an excessive period.

**1–005** The next four chapters are concerned with trusts in the law of real property. Chapter 10 explains the ways in which trusts have been employed in relation to real property both in the past and now. Chapter 11 describes how trusts of land are created whether expressly or otherwise, and it examines the constitution of trusts and the formalities required to create a trust. It also introduces the law relating to trustees.

Chapter 12 is concerned with trusts of land and the Trusts of Land and Appointment of Trustees Act 1996. After 1996, a unitary system of trusts of land replaced the previous tri-partite structure of settlements (which were concerned with successive interests in land and were governed by the Settled Land Act 1925), trusts for sale and bare trusts (which were regulated to varying degrees by the Law of Property Act 1925). It ceased to be possible to create settlements under the Settled Land Act 1925 after 1996, though existing ones continued. The trust of land, as its name suggests, applies to all types of trusts of land, whether the interests are successive or otherwise. Apart from Settled Land Act settlements created before 1997, virtually all other trusts (whenever created) are now trusts of land and subject to the provisions of the Trusts of Land and Appointment of Trustees Act 1996. The elaborate rules governing the transfer and management of settled land are now found in the Appendix to this book.

In Chapter 13, "Co-ownership", the subject of concurrent (rather than successive) interests in land is considered. Such interests are very common and they arise, for example, where X and Y are entitled to a particular piece of land in equal shares. The share of each is merely a part interest in the whole. The device of the trust of land is employed in virtually all cases of co-ownership as a means of giving effect to the rights of the owners.

**1–006** Chapter 14, "Wills and Intestacy", describes the legal machinery for succession on death, both in the case where a person dies leaving a will of his property and in the case where he does not. This is followed in Chapter 15, "Contracts of Sale", by an account of the rules governing the formation and effect of agreements to sell land. This chapter provides a general introduction to the law of conveyancing. Chapter 16, "Proprietary Estoppel", explains the operation of this ancient doctrine, now much used in relation to informal dealings with land. If an owner of land in some way leads another person to believe that he has or will enjoy some right or benefit over that property, and that person acts to his detriment in that belief, an "equity" is said to arise in favour of the claimant. The court may give effect to that "equity" by granting the claimant some right or redress that is appropriate in the circumstances, whether over the land or otherwise.

**1–007** The next five chapters are devoted to leases and tenancies which explain the general law of landlord and tenant, the most litigated area of land law. Chapter 17, "The Nature of Leases and their Creation", is concerned with the characteristics of leases, both as contracts and as interests in land, how they differ from licences, the different types of leases and tenancies, and how they are created. Chapter 18, "The Determination of Leases", explains the nine different ways in which a lease may be brought to an end. Chapter 19, "Common Obligations of Landlord and Tenant", examines some of the principal obligations of landlord and tenant. There is an explanation of the obligations implied by law in the absence of express provision and of the position of the parties under a lease that contains the so-called "usual covenants".[11] The final part of the chapter looks

[11] For the meaning of the word "covenant", see below.

at the position of certain covenants that are commonly found in leases, such as the covenants to pay rent, and not to assign, underlet or part with possession without the landlord's consent. Chapter 20 is "Leasehold Covenants". A covenant is a promise made by deed, usually in a conveyance or a lease. Most covenants in leases are capable of binding successors in title. The rules which govern the transmission of the benefit and the burden of such covenants differ according to whether the lease was granted before 1996 (when they are a complex amalgam of ancient common law and more modem statute) or after 1995 (when the rules are contained in the Landlord and Tenant (Covenants) Act 1995). Chapter 21, "Leasehold Conveyancing", explains the particular rules of conveyancing that apply to the grant and assignment of leases. The general principles of landlord and tenant do not apply to all types of leases. In fact, Parliament has, for many years, regulated different types of tenancies. In Chapter 22, "Security of Tenure", there is an account of these special statutory provisions which apply to specific kinds of tenancy, e.g. tenancies of houses and flats, tenancies of shops and offices, and tenancies of farms and farmland. These controls, which are a statutory system of their own and merit a book to themselves, have in fact been substantially relaxed over the last 20 years. Chapter 23, "Fixtures", examines how the law determines whether something that has been attached to land has become part of the land for the purposes of the law and whether, if it has, a person with a limited interest in the land may remove it when his interest terminates. It is not specifically an aspect of the law relating to landlord and tenant, but, in practice, it most commonly arises in that context. It is therefore treated at this stage of the book.

**1–008** The next three chapters are concerned with mortgages. A mortgage is a conveyance of land for the purpose of securing a loan of money, under which the lender is given power to sell the land or take various other steps in relation to it if the debt, or the interest upon it, is not paid when due. Chapter 24 explains the nature of mortgages and how they are created. Chapter 25 is an account of the rights of the parties under a mortgage or charge over land. Chapter 26 addresses the difficulty subject of the priority of competing mortgages and charges over land.

There are then five chapters which are devoted to what are called incorporeal hereditaments. These comprise a class of rights over land, some of them rather curious. The best-known and most important are easements and *profits à prendre.* An easement is a right over a neighbour's land, such as a right of way or a right of light. A profit is similar, except that it is a right to remove something from the land, such as a right to work gravel, to graze animals, or to take game or fish. Chapter 27 explains the nature of easements and profits. The ways in which they are created is addressed in Chapter 28, and the means by which they may be extinguished are set out in Chapter 29. Chapter 30 surveys some of the species of easements and profits and their particular characteristics. Chapter 31, "Other Incorporeal Hereditaments", deals with the other miscellany of rights that are also classified as incorporeal hereditaments, such as rentcharges (most of which will be phased out in 2037 under the Rentcharges Act 1977), what is left of the law on tithes, and franchises.

**1–009** Chapter 32, "Freehold Covenants", explains the principles that apply to covenants affecting freehold (as opposed to leasehold) land. The principles differ markedly from those which apply to leasehold covenants. Only the burden of a negative or *restrictive* covenant, such as a covenant not to use a house for business purposes, can pass on the sale of the land affected by it so as to bind the person into whose hands it has come. Although restrictive covenants were part of the law of contract, they have developed into a doctrine of property. Because it is not possible for the burden of positive covenants to bind the covenantor's successors in title,[12] Parliament has intervened, and has, in the Commonhold and Leasehold Reform Act 2002, introduced a new system of freehold ownership called commonhold, under which it is possible to set up schemes in which the burden of such covenants will be reciprocally binding on properties within the scheme. This is explained in Chapter 33, though it is, in practice, virtually never used. Licences are mere permission to go on to or use land belonging to another. Although there were attempts to transform them into property rights, this transformation was abruptly reversed. In Chapter 34, "Licences", there is an account of the nature of licences, the different ways in which they may be created, and how they may be terminated. The chapter also examines the statutory right of spouses and civil partners to occupy the common home.

**1–010** The last part of the book deals with certain miscellaneous (but not unimportant) subjects. In Chapter 35, "Adverse Possession and Limitation", an explanation is given as to how a squatter can become the owner of unregistered land by (in most cases) 12 years' occupation of it. The much more limited scope for adverse possession in relation to registered land, introduced by the Land Registration Act 2002, is also explained. Finally, Chapter 36, "Disabilities", examines the position of those, such as minors and mental patients, who are less able to dispose of land than other people. In particular, this considers the effect of the Mental Capacity Act 2005.

## Section 2. Meaning of "Real Property"

**1–011** In common with so many expressions in English law, the explanation of the term "real property" is historical.

In early law, property was deemed "real" if the courts could restore to a dispossessed owner the thing itself, the "*res*", and not merely give compensation for the loss. Thus if X forcibly evicted Y from his freehold land, Y could bring a "real" action by which he could obtain an order from the court that X should return the land to him.[13] But if X took Y's sword or glove from him, he could bring only a personal action, which gave X the choice of either returning the article to Y or paying him its value. In consequence a distinction

[12] Though a number of devices exist which, in practice, enable the burden of positive covenants to run with the covenantor's land.

[13] For real actions, see below, paras 4–014 *et seq.*

was made between real property (or "realty"), which could be specifically recovered, and personal property (or "personalty"), which could not. In making this distinction, English law follows the natural division between immovables (i.e. land) and movables, but with one important exception. In general, all interests in land are real property, except leaseholds (or "terms of years") which are classified as personalty.

**1–012** This peculiar exception initially arose because leases fell outside the feudal system of landholding by tenure. Originally leases were treated as personal business arrangements under which one party allowed the other the use of his land for a rent.[14] Such personal contracts did not create rights in the land itself which could attract feudal status. Leases helped to supply a useful form of investment at a time when there was little other. Money either might be employed in buying land and letting it out on lease in order to obtain income from the capital, or in buying a lease for a lump sum which could be recovered with interest out of the produce of the land. Such commercial transactions were more in the sphere of money than of land. The classification of leaseholds as personal property was discovered to be advantageous. Leases were immune from feudal burdens and could be bequeathed by will before wills of freeholds were allowed.[15] In this way the illogical position continued until it became too well settled to alter.

Leaseholds are still, therefore, personalty in law. However, having been recognised so long as interests in land and not only contractual rights,[16] they have been classed under the paradoxical heading of "chattels real". "Chattels" indicates their personal nature,[17] "real" shows their connection with the land.[18]

**1–013** Although strictly speaking a book on real property should exclude leaseholds, it has long been usual to include them, and this course is adopted here.

The legislation of 1925 abolished many of the remaining differences between the legal principles applicable to realty and personalty respectively. For example, before 1926, if a person died intestate (i.e. without a will), all his realty passed to his heir, while his personalty was divided between certain of his relatives. After 1925, however, realty and personalty both pass on intestacy to certain relatives. Nevertheless, the distinction may still sometimes be relevant.

Real property is subclassified into corporeal and incorporeal hereditaments,[19] though this classification is of little practical importance. "Hereditament" indicates property which descended to the heir on intestacy before 1926, i.e. realty as opposed to personalty. Corporeal hereditaments are lands,

[14] Below, para.3–009.
[15] Below, para.3–010.
[16] Below, para.3–015.
[17] Cattle were the most important chattels in early days, hence the name.
[18] See *Smith v Baker* (1737) 1 Atk. 386 at 385; *Ridout v Pain* (1747) 3 Atk. 486 at 492, per Lord Hardwicke L.C. ("*extradictions* out of the real").
[19] See further, below, para.27–001.

buildings, minerals, trees and all other things which are part of or are fixed to land. They are the physical matter over which ownership is exercised. By contrast, incorporeal hereditaments are not things at all, but rights. Certain rights were classified as real property, so that on intestacy before 1926 they also descended to the heir, rather than to the relatives entitled to personalty. The most important incorporeal hereditaments are easements and profits,[20] but there are others also.[21]

## Section 3. The Basis of the Law of Real Property

**1–014** **1. Common law, equity and statute.** The origin of the law of real property is the origin of the common law itself.[22] In this context, "common law" means the law which was applied to the country as a whole by the king's ordinary courts, as opposed to the local feudal and customary laws which varied from place to place and were administered in each locality free from central control until the middle of the twelfth century. The centralised judicial system established in the two centuries after the Norman Conquest—particularly in the reign of Henry II—resulted in a body of new and uniform rules, although some of the old customs survived in the form of local variations of common law.[23]

The new rules were laid down and developed by the decisions of the judges in particular cases. Centralised records were kept and a systematic body of doctrine began to develop. "Common law" came to mean the ordinary judge-made law of the three central royal courts.[24] This was then contrasted with statute. Statutory reform of the land law was by no means unknown or insignificant. For example, the Acts of Edward I had a significant effect on the development of real property, and one of them necessarily remains in force today.[25] With time, these statutes came to be regarded as of a piece with the judge-made rules, and the "common law" might, in a suitable context, include these ancient statutes, for the purposes of contrast with more modern parliamentary legislation.

**1–015** A third force entered the field in the form of equity. As shall be explained,[26] certain interests in land were not protected by the courts of common law but were protected by the Chancellor, the royal official who dispensed the Crown's residuary powers of redressing wrong. It was the Chancellor who first compelled trustees to carry out their trusts. He also devised remedies for cases where, owing to non-compliance with some formality, the result at

[20] See above, para.1–008, and below, Ch.27. Rentcharges (below, para.31–014), though formerly important, are in the process of being phased out with some material exceptions.

[21] See below, Ch.31.

[22] See below, paras 4–015 *et seq.*

[23] The local courts continued to function, but their jurisdiction came to be limited to small claims, particularly in relation to minor wrongs.

[24] The King's Bench, Common Pleas and Exchequer.

[25] Statute *Quia Emptores* 1290, below, para.2–015.

[26] Below, paras 5–003 *et seq.*