



LONGMAN LAW SERIES

Property Law: Cases and Materials

SIXTH EDITION

Roger J. Smith

Property Law: Cases and Materials

Property Law

Cases and Materials

Sixth Edition

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Preface

The years since the previous edition have seen a steady stream of cases and these have been duly incorporated in this new edition. Two areas stand out. Unsurprisingly, human rights cases have continued to flow. Particular mention may be made of *Malik v Fassenfelt* and *McDonald v McDonald* on the horizontal effect of Article 8 (respect for home, etc.) and *Sims v Dacorum BC* (Supreme Court) on the termination of joint periodic tenancies. However, it is registration of title that has seen the most interesting developments. Leaving aside the perennially litigated area of overriding interests (on which, see *Chaudhary v Yavuz*), forgery has provided the basis for much modern analysis. This was investigated in *Fitzwilliam v Richall Holdings Services Ltd* and *Swift 1st Ltd v Chief Land Registrar*, the latter case also dealing with indemnity. Whether rectification can affect successors in title (to the proprietor involved in the 'mistake' triggering rectification) has attracted much attention in the past few years. We now have a full and authoritative Court of Appeal analysis in *Gold Harp Properties Ltd v Macleod*.

Although there have been no cases on the family home of the importance of *Stack v Dowden* and *Jones v Kernott*, there has been some guidance as to how the post-*Stack* principles operate. This chapter has been substantially re-ordered and rewritten, adopting the structure in the eighth edition of *Property Law*.

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Text

Extract 1.1.1 from ‘Before we begin’ by Peter Birks (footnotes omitted) in *Land Law: Themes and Perspectives*, 1st ed., Oxford University Press (Bright, S. and Dewar, J. (eds.) 1998) pp. 457–63, 467–8, 470–3, 476–86, by permission of Oxford University Press; Extract 1.1.2 from ‘The idea of property in land’ by Kevin Gray and Susan Francis Gray (footnotes omitted) in *Land Law: Themes and Perspectives*, 1st ed., Oxford University Press (Bright, S. and Dewar, J. (eds.) 1998) pp. 15–6, 18–21, 27–31, 35–40, 51, by permission of Oxford University Press; Extract 1.2.1 from *Property and Justice (some footnotes omitted)*, 3rd ed., Oxford University Press (Harris, J. W. 1996) pp. 149–51, by permission of Oxford University Press; Extract 1.3.2 from *Baker v Archer-Shee* [1927] AC 844; Extract 2.2.1 from *X v Y* (2004) ICR 1634; Extract 2.3.1 from *Manchester City Council v Pinnock* [2010] 3 WLR 1441 (SC); Extract 3.1.1 from *The Law of Property*, 3rd ed., Oxford University Press (Lawson, F. H. and Rudden, B. 2002) pp. 77–80, 90, by permission of Oxford University Press; Extract 3.1.2 from *Lord Bernstein of Leigh v Skyviews & General Ltd* [1978] QB 479; Extract 3.1.3 from *Bocardo SA v Star Energy UK Onshore Ltd* [2011] 1 AC 380; Extract 3.1.4 from *Re Moore* (1888) 39 Ch D 116; Extract 3.1.5 from *Re Wilkinson* [1926] Ch 842; Extract 3.1.6 from *Re Macleay* (1875) LR 20 Eq 186; Extract 3.1.7 from *Re Rosher* (1884) 26 Ch D 801; Extract 3.1.11 from *Blathwayt v Baron Cawley* [1976] AC 397; Extract 3.1.12 from *Re Tuck’s Settlement Trusts* [1978] Ch 49; Extract 3.1.13 from *Doherty v Allman* (1878) 3 App Cas 709; Extract 3.1.16 from *Re Cartwright* (1889) 41 Ch D 532; Extract 3.1.18 from *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175; Extract 3.2.2 from *Manchester Trust v Furness* [1895] 2 QB 539; Extract 4.1.3 from *Moffatt v Kazana* [1969] 2 QB 152; Extract 4.1.5 from *Hibbert v McKiernan* [1948] 2 KB 142; Extract 4.1.7 from *Parker v British Airways Board* [1982] QB 1004; Extract 4.1.8 from *Waverley BC v Fletcher* [1996] QB 334; Extract 4.1.10 from *Elwes v Brigg Gas Company* (1886) 33 Ch D 562; Extract 4.2.2 from *JA Pye Oxford v Graham* [2000] Ch 676; Extracts 4.2.5, 4.2.8 from *Buckinghamshire CC v Moran* [1990] Ch 623; Extracts 4.2.10, 4.2.13 from *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419; Extract 4.2.11 from *George Wimpey & Co Ltd v Sohn*

[1967] Ch 487; Extract 4.2.14 from *Hyde v Pearce* [1982] 1 WLR 560; Extract 4.2.16 from *Colchester BC v Smith* [1992] Ch 421; Extract 4.2.20 from *Asher v Whitlock* (1865) LR 1 QB 1; Extract 4.2.21 from *St Marylebone Property Co Ltd v Fairweather* [1963] AC 510; Extract 4.3.1 from *Elitestone Ltd v Morris* [1997] 1 WLR 687; Extract 4.3.2 from *Holland v Hodgson* (1872) LR 7 CP 328; Extract 4.3.4 from *D'Eyncourt v Gregory* (1866) LR 3 EQ 382; Extract 4.3.5 from *Re De Falbe* [1901] 1 Ch 523; Extract 4.3.7 from *TSB Bank plc v Botham* [1996] EGCS 149, *Estates Gazette Case Summaries*, Reed Business Information; Extracts 4.3.8, 4.3.12 from *Hobson v Gorringe* [1897] 1 Ch 182; Extract 4.3.9 from *Melluish v BMI (No 3) Ltd* [1996] AC 454; Extract 4.3.11 from *Gough v Wood & Co* [1894] 1 QB 713; Extract 4.3.13 from *Re Samuel Allen & Sons Ltd* [1907] 1 Ch 575; Extract 5.1.2 from *HSBC Trust Company (UK) Limited v Quinn* [2007] EWHC (Ch) 1543; Extract 5.1.3 from *Alan Estates Ltd v WG Stores Ltd* [1982] Ch 511; Extract 5.2.1 from *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146; Extract 5.2.2 from *Pitt v PHH Asset Management Ltd* [1994] 1 WLR 327; Extract 5.2.4 from *Firstpost Homes Ltd v Johnson* [1995] 1 WLR 1567; Extract 5.2.5 from *Spiro v Glencrown Properties Ltd* [1991] Ch 537; Extract 5.2.8 from *North Eastern Properties Ltd v Coleman* [2010] 1 WLR 2715; Extract 5.2.9 from *Commission for the New Towns v Cooper (Great Britain) Ltd* [1995] Ch 259; Extract 5.2.12 from *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38; Extract 5.2.13 from *Yaxley v Gotts* [2000] Ch 162; Extract 5.2.14 from *Kinane v Mackie-Conteh* [2005] WTLR 345, *Wills and Trusts Law Report*, [22-4], [26-9], [32], [39-41], [44-9], [51], Headnotes reprinted with permission from Legalease Limited; Extract 5.2.15 from *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752; Extract 5.3.4 from *Long v Tower Hamlets LBC* [1998] Ch 197; Extract 5.4.2 from *Standing v Bowring* (1885) 31 Ch D 282; Extract 5.4.3 from *Dewar v Dewar* [1975] 1 WLR 1532; Extract 5.4.4 from *Cochrane v Moore* (1890) 25 QBD 57; Extract 5.4.6 from *Re Wasserberg* [1915] 1 Ch 195; Extract 5.4.8 from *Re Cole* [1964] Ch 175; Extract 5.4.9 from *Re Stoneham* [1919] 1 Ch 149; Extract 5.4.10 from *Thomas v Times Book Co Ltd* [1966] 1 WLR 911; Extract 5.5.1 from *Trendtex Trading Corporation v Crédit Suisse* [1982] AC 679; Extract 5.5.4 from *Government of Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199; Extract 5.5.5 from *Stoddart v Union Trust Ltd* [1912] 1 KB 181; Extract on page 155 from *Gorringe v Irwell India Rubber & Gutta Percha Works* (1886) 34 Ch D 128; Extract 5.5.6 from *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1; Extract 5.5.7 from *Ward v Duncombe* [1893] AC 369; Extract 5.6.1 from *Re Cozens* [1913] 2 Ch 478; Extract 5.6.2 from *Jones v Lock* (1865) LR 1 Ch App 25; Extract 5.6.3 from *Richards v Delbridge* (1874) LR 18 Eq 11; Extract 5.6.4 from *Paul v Constance* [1977] 1 WLR 527; Extract 5.6.5 from *Re Bowden* [1936] Ch 71; Extract 5.6.8 from *Grey v IRC* [1960] AC 1; Extract 5.6.10 from *Vandervell v IRC* [1967] 2 AC 291; Extract 5.6.11 from *Neville v Wilson* [1997] Ch 144; Extract 6.2.1 from *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669; Extract 6.2.2 from *Air Jamaica v Charlton* [1999] 1 WLR 1399; Extract 6.2.3 from *Pettitt v Pettitt* [1970] AC 777; Extract 6.2.4 from *Sekhon v Alissa* [1989] 2 FLR 94, © Jordan Publishing Ltd; Extract 6.2.5 from *Jones v Maynard* [1951] Ch 572; Extract 6.2.7 from *Tinsley v Milligan* [1994] 1 AC 340; Extract 6.2.8 from *Bannister v Bannister* [1948] 2 All ER 133, reproduced by permission of Reed Elsevier (UK) Limited, trading as Lexis Nexis; Extract 6.2.9 from *Hodgson v Marks* [1971] Ch 892; Extract 6.2.10 from *Binions v Evans* [1972] Ch 359; Extract 6.2.11 from *Ashburn Anstalt v Arnold* [1989] Ch 1; Extract 7.1.1 from *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133; Extracts 7.1.2, 7.2.2 from *Crabb v Arun DC* [1976] Ch 179; Extract 7.1.3 from *Gillett v Holt* [2001] Ch 210; Extract 7.1.4 from *Cobbe v Yeoman's Row Management Ltd* [2008]

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Part I

Introductory matters

1

Basic property principles

In this chapter, we will consider some of the basic principles and distinctions to be observed in property law. Most of them will be further developed in later chapters and, as in many subjects, the basic principles may be more readily comprehended once some of the more detailed material has been considered.

1. General principles

We will investigate ideas of property through two contributions to the literature. These relate specifically to land, though many of the principles apply to all forms of property.

Extract 1.1.1

**Peter Birks, 'Before We Begin: Five Keys to Land Law', in *Land Law: Themes and Perspectives* (eds Bright and Dewar) pp 457–463, 467–468, 470–473, 476–486
(footnotes omitted)**

Land Law is a complex subject. It is not in the end a very difficult one. It is less unstable than other areas of the law. Yet it is hard to get into. The purpose of this chapter is to make access easier. It is impossible to improve access to a completely unknown quantity. The first section, therefore, asks what kind of category we are trying to understand.

WHAT KIND OF CATEGORY?

The name 'land law' suggests a simple contextual category: all the law about land. The law does use many such categories, ordered only by the alphabet: all the law about aviation, banks, commerce, dogs, education, and so on. They take as their subject some aspect of life, just as a non-lawyer would identify it. But in this case things are not quite so straightforward. By the end of this section we will have formulated a more complex proposition: land law, as generally understood, is a contextual subset of a legal-conceptual category.

...

The core of land law

A target has a centre. Taking land law as a simple contextual category, we can identify at least five topics . . . Four of these must on reflection be located in the second or third circles, just outside the bull's-eye at which we are aiming. They matter, but they do not relieve us of the intellectual necessity of mastering the core. Two belong largely in public law. One of these comprises the social control essential if the environment is to be protected. The other is the housing law which applies to local government tenancies. Within private law, a third unit lies in the law of civil wrongs and deals with the duties imposed by the law for regulating the behaviour of neighbours towards each other, especially through the torts of nuisance and trespass to land. Fourthly, there is the structuring of mega-wealth, the mission of the old Lincoln's Inn

conveyancers. That is breaking away, not specifically land law any longer but wealth management. Its principal vehicle is the trust, often enough offshore, in which land becomes just one kind of asset in a rolling fund. Fifthly and last of all, there is the unit at the very centre of the target. When lawyers speak of land law, it is usually to this core that they refer.

Every business needs premises, every factory needs a site. For most of us as private individuals our home is the centre of our lives. Functionally, this core of land law has the task of providing the structure within which people and businesses can safely acquire and exploit land for daily use, to live and to work. To discharge that function, it has to have its own conceptual apparatus. The proper content of this fifth unit thus becomes the nature, creation, and protection of interests in land. Those interests and their implications are the conceptual apparatus of our land law.

The word 'interests' is slightly evasive. The law recognizes different kinds of rights, among them property rights. By 'interest' we mean 'property right'. The category of all property rights (or, in other words and more simply, "the law of property") is a legal-conceptual category. It differs from, say, the law of dogs in that its subject is a legal concept, the concept of a proprietary right. The core of land law is the subset formed when the conceptual category of 'property right' is confined to one context: the law relating to property rights in land. To focus on that core is neither to downgrade the importance of the units in the next circles nor to forget that in real life all the units which we have identified, and others, cohere together.

Land law in this core sense is, therefore, a contextual subset of a legal-conceptual category. There is a recurrent problem. Property rights in land have roots a millennium deep in a pre-commercial society in which land and wealth were virtually synonymous. The structuring of landed wealth, and the power that went with it, was then land law's principal mission. The subject of land law – the law, that is, of the recognized proprietary interests in land – is therefore intellectually entangled in a history not always obviously relevant to its contemporary function.

THE FIVE KEYS

The five keys have one-word tags: Time, Space, Reality, Duality, and Formality. There is a pervasive theme which has its own label: Facilitation. This might be said to be the string on which the five keys hang. There is also a complication. All five keys have to be turned together. Exposition is easiest when each point has a natural priority. Here there is no natural priority, and no expository device to achieve what King Arthur intended when he seated his knights at a round table.

Facilitation

Some areas of law are primarily concerned to inhibit undesirable conduct. This is most obviously true of the law relating to wrongs, whether criminal or civil. Even there, behind the inhibition, lies a facilitative goal – namely, to allow civilized life to be conducted free from the fear of harm. The wrong of nuisance facilitates the enjoyment of land, but primarily by inhibiting unreasonable interference. By contrast, other areas are primarily facilitative. The law of contract, for example, helps people do something which by and large they want to be able to do – namely, to make reliable agreements.

Like contract, land law is primarily facilitative. Each of the five keys, though some more obviously than others, can be seen as facilitating the achievement of goals which people routinely want to achieve. . . .

A landowner may be willing to pay a large sum for a permanent proprietary right to prevent building on the neighbouring land. The first instinct is to facilitate, but there are arguments the other way. Should he be able to sterilize the economic use of that land? In fact the law does allow such a right to be created. Restrictive covenants, as property rights, are a relatively new invention. . . .

TIME

Although bits do occasionally wash away or slip into the sea, land is in general permanent. For most human purposes we have to regard it as lasting for ever. There is a powerful urge to deal in slices of time. It is not confined to land. The institution of the trust makes it relatively easy to turn all kinds of wealth into an enduring fund, and that facility in turn excites and to a degree gratifies the urge to deal in slices of time. However, it is the natural permanence of land which makes slices of time a dominant feature of land law.

Two motivations

Why do people want to deal in slices of time? It is an urge which has been fed from at least two sources. One is essentially commercial, the other not.

The commercial motivation

Commercial motivation means, in plain words, the desire to get money out of land. There are all sorts of ways of getting money out of land. For instance, one can farm the land and sell the produce. The most extreme method of all is to sell one's whole interest in the land. That means selling the whole slice of time over which one has control. The largest interest in land – the greatest slice of time – is 'for ever'. In everyday conversation I tend to say 'my house' or 'the house I own'. In all probability, what I actually have in my house is 'for ever', a slice of time measured by the length of time the land will last. There is no harm in calling that ownership. That is what in effect it is. But in the technical language of the law that huge slice of time measured by the life of the land itself is called a fee simple. The fee simple in the land on which my house stands is worth about £200,000. I could mortgage it or sell it. But there is another possibility. I could keep 'for ever' and deal instead in a shorter slice of time.

The commercial motivation for dealing in lesser slices of time is to realize in money some of the value of the land without giving up one's whole interest. The lease is the proprietary interest which most obviously facilitates this. I might let my land for a fixed number of years, say for ten years. . . .

The family motivation

The primary non-commercial motivation for dealing in slices of time is concern for one's family. In obsolescent aristocratic terms this might be restated as a dynastic motivation. The idea of benefiting the different generations of one's family is perfectly natural. . . .

The evolution of the doctrine of estates

In ordinary language the sentence 'Mr Smith has an estate in Suffolk' suggests a goodish patch of Constable landscape of which Mr Smith is the owner. But in land law an estate is a slice of time. The doctrine of estates is the learning which tells you what slices of time the law allows or has allowed a landowner to deal in. A 'life estate' was a recognized estate at common law.

. . .

SPACE

Mention of a piece of land by name – as, for example, Lord's Cricket Ground or Wembley Stadium – brings to mind an image of the surface of the land. But the surface is merely a cross-section of a space which, in a flat-earthish sort of way, we still think of as stretching infinitely up and down. Modern cosmology requires modification of the image of that space, but some of the mind's worst problems in comprehending its true shape have been overtaken by much humbler science. First balloons and then aeroplanes necessitated a rethink. The tube in which estates subsist has had to be cut off in order to deprive the surface-owner of exclusive control of the upper air. . . .