Part I
Introduction
1. **Basic property principles**

1. **What is property?**

This is to start with a deceptively difficult question. Could it be said that property is the law relating to physical objects, such as land and cars? Although understandable, this proposition would be misleading. Not every transaction, or liability, relating to physical objects is regarded as relevant to the law of property. A contract with my garage to service my car is part of the law of contract rather than the law of property. Torts committed in relation to property may be ordinary torts such as negligence. Certain torts have an effect that is more specific to property, nuisance being one example. Even these, however, may be seen as more part of torts than of property.¹

A narrower proposition is that property is concerned with the ownership of objects. This is getting closer to property as understood by lawyers. Property is indeed concerned with the ownership of land and of cars. But what is special about property? Why is it different from other legal categories such as contract, restitution or tort? There are, perhaps, two principal elements.² The first concerns the attribute of property that it can be bought and sold. Whilst this is a common attribute of property, it is difficult to take it too far. Exceptionally, there are some property rights which cannot be transferred.³ The converse is also true. Many contracts can be seen as the purchase of something that is not property. I may buy a person’s silence concerning information embarrassing to myself, but no property is involved. Similarly, I may sell information to another person, even though the information is not confidential and not proprietary in nature.⁴

The second element of property concerns the right to exclude others.⁵ If I own a car, it is plain that I can stop anybody else from interfering with it.⁶ This right to exclude has two principal applications. It may operate against third parties who have no shadow of a right over the property, as in the car example. In addition, it may be applicable against those who do have claims to the property, but whose claims are inferior to that of the owner. Thus the owner of a car might sell it to A on hire purchase and then purport to sell it outright to B. Both A and B claim proprietary rights in the car, but A’s (being first in time) will be given priority in any litigation between them. It is this type of dispute which dominates much of property law.

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¹ Nuisance may be committed by a person with no proprietary interest, such as a trespasser.
² Harris, *Property and Justice*, Chapter 4.
³ For example, it is possible to ensure that a right over land terminates on any attempt to transfer it.
⁴ A sporting club could sell information regarding progress of, say, a cricket match, to a broadcaster. The information is not confidential, but it may be cheaper to buy it than to send an employee to the event.
⁶ A complication in English law is that tort actions are employed to this end; we do not have actions designed specifically as property actions. Contrast the vindicatio in Roman law.
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Not limited to ownership

The proposition that property deals with ownership of objects faces the objection of being too narrow in scope. Property has wider concerns than ownership. The layperson readily equates the physical object with the proprietary right: ‘my car’, or ‘my house’.

Two examples may be given to show that this is not always the case. First, many rights to possess land involve a lease: a right to land for a certain period. A person with a short lease (the tenant, or lessee) cannot be said to own the land. At the same time, the lessee’s rights are more than contractual. Suppose the owner of the leased land were to sell it to P. Can P evict the lessee? Contractual privity principles quite clearly point in favour of P. Yet the law does in fact protect the lessee against purchasers; the lease is a proprietary interest. Second, a car may be bought on hire purchase. Although the car does not belong to the purchaser until all the payments are made, we regard the purchaser as having an immediate proprietary right.

It is important to understand that the law recognises a finite number (numerus clausus) of proprietary rights. The parties are never free to create their own, novel, proprietary categories. Thus a contract to service my car does not create any proprietary interest. Whilst ownership is a concept that the layperson readily understands, other proprietary interests depend upon complex legal rules. Indeed, the great majority of this book will be taken up with the investigation of proprietary interests in land: what they are, what rights they confer and under what circumstances they will bind purchasers.

So far, we have concentrated upon physical objects. Yet it would be unduly restrictive to insist that property is so limited. Suppose I own shares in a company, what object do I have? A share certificate, perhaps, but the piece of paper is by itself of little importance. I can buy and sell the shares and assert my rights to them against others: propositions that seem to point towards proprietary status. Yet as soon as we move away from physical objects, our sense of property becomes a good deal less clear.

Rights of action

Let us consider rights of action held by a person. A good example is provided by a bank account. Unless I am overdrawn, my bank will owe me money. The relationship between myself and my bank is essentially contractual: it would not be regarded as proprietary because it is difficult to say what the property is in. It cannot be the cheques or cash paid into my account, because the bank can use the money for its own purposes. The original property (cheques and cash) has been converted into an obligation to pay the balance of my account on my demand (a debt). However, this debt may itself be seen as the subject matter of property. Thus I can transfer the debt to another person and I can stop anybody else from claiming to enforce it.

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7 Different rights are recognised for different forms of property.
8 Although the garage may be a bailee of the car whilst it is in their possession for servicing. Bailment is a proprietary interest based on possession.
9 See, e.g., Kevin Gray and Susan Francis Gray (Chapter 1) and Bright (21) in Land Law: Themes and Perspectives (eds Bright and Dewar).
10 See Penner, The Idea of Property in Law, Chapters 5 and 6.
11 Rights of action differ from objects in that the most obvious form of interference – taking possession – is inappropriate.
1. What is property?

This is illustrated by the following example. If I am owed a considerable sum from D, I could charge this to M as security for a debt I owe to M. The effect of this would be to allow M to recover the debt owed by D, should I fail to pay M.\(^{12}\) What happens if I then transfer the debt to a purchaser, P? The law recognises that P may be bound by M’s earlier mortgage of the same debt.\(^{13}\) A fairly recent example of this principle is that a right of pre-emption can be regarded as ‘property’ passing on bankruptcy, even though it may not be a proprietary right in the land concerned.\(^{14}\) In other words, we treat the debt or other right of action in a similar way to land or a car: the subject matter of proprietary claims.

The status of rights of action continues to cause difficulty. The House of Lords\(^ {15}\) has held (by a bare majority) that the tort of conversion does not apply to choses in action. This means that there is no proprietary remedy as exists for tangible property – the economic torts may apply, but these generally require intentional conduct.

The human body and body parts

Not every physical object can be owned. We will mention one example. It has long been clear that there can be no ownership of the human body or of corpses. Other questions are more difficult. *Yearworth v North Bristol NHS Trust*\(^ {16}\) had to consider whether semen was property so that the defendants could be liable for careless storage causing damage. It was held that semen can be owned: it was deliberately produced (by men about to undergo chemotherapy, which might affect fertility) with a view to later use. Furthermore, the men retained control over its use or destruction.

Intellectual property

A property analysis is sometimes used in order to recognise novel claims. It is commonly said that the hallmark of property lies in the exclusion of others. An owner of land can prevent others from asserting rights to it. Those with lesser rights (such as leases or rights of way over land) can stop interference with those rights. This exclusionary role of property is pounced upon by those who want to prevent interference with something that is of importance to them. In other words, an extension of property is sought in order to exclude others. As will be seen below, most developments in this area have been statutory. Thus statute prohibits the copying of written material (copyright) and the exploitation of others’ inventions (patents).

The courts are sometimes asked to develop such analyses themselves. In the well-known American case of *International News Service v Associated Press*,\(^ {17}\) the defendant had used news material printed by the claimant. In most cases, this would be stale news and of little significance, but in *INS* the time differences between the East and West coasts meant that the defendant could publish the news on the West coast at the same time as the claimant.

\(^{12}\) This is similar to a mortgage of land to secure a bank or building society loan; the security in the example being the debt owed by D rather than land.

\(^{13}\) There are detailed rules as to precisely when P is bound; generally, M must have given notice to D.

\(^{14}\) *Dear v Reeves* [2002] Ch 1; see p 99 below. A pre-emption is a right of first refusal, should the owner wish to sell.


\(^{17}\) (1918) 248 US 215.
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As there was no direct copy of the words used, there was no breach of copyright. The claimant argued that they had a novel quasi-proprietary right in their news reports. Such a proprietary right would have the exclusionary effect of preventing anybody else from using it. This analysis was accepted by the Supreme Court, but has not found favour with English or Commonwealth courts. This demonstrates the difficulty in persuading courts to recognise new forms of property.

However, even in England information receives limited protection. The courts are prepared to protect confidential information against improper use. In many cases, this is based upon the defendant’s having received the information on a confidential basis. These cases can be explained without recourse to a proprietary analysis. However, it appears that confidential information may be protected against, for example, telephone tapping. This extension of protection seems to herald a move to a more proprietary basis to justify intervention by the courts, although the area is still being debated. The rights in this section are collectively described as intellectual property.

2. Ownership

Although property is not restricted to ownership, ownership is certainly worthy of investigation. The concept rarely troubles practising lawyers, whose concern is usually as to what property is subject to ownership or else what proprietary rights are recognised. Indeed, the nature of ownership may be seen as more of a jurisprudential question than a legal one. The normal attributes of transmissibility and power to exclude others apply to ownership, but so they do to other proprietary rights.

What is special about ownership is that it is the ultimate right to use (and abuse) the object or right in question. Difficulties swiftly emerge, however. There is rarely an unlimited right to use property: witness the tort of nuisance and planning permission requirements for land development. In some cases, an owner may have put it out of his power to use land by creating a short-term right in another person, a lease for example. This shows how the law permits the incidents of ownership to be split amongst several people. Perhaps it is best to regard ownership as residing in the person with the ultimate right to the use of the property. If A has leased the land to B for 20 years, we would regard A as the owner even though B can exercise most of the rights of ownership until that period has elapsed.

In English law, the absence of remedies based upon proof of ownership is remarkable. As will be seen later, our remedies are usually based upon possession and rights to possession. It is generally sufficient simply to prove a better right than the other party and not necessary to prove absolute ownership. This has the consequence that issues relating to

18 See the instructive Australian High Court decision in Victoria Park Racing & Recreation Grounds Co Ltd v Taylor (1937) 58 CLR 479 (especially Dixon J at pp 508–510), in which the court denied a claim to prevent the broadcasting, from overlooking premises, of the claimant’s racing activities.
20 See the discussion by Honoré in Oxford Essays in Jurisprudence (First Series, ed Guest), Chapter 5; also Harris, Property and Justice.
21 There are limits as to what B can do, particularly as regards damaging the property.
22 Page 47 below.
ownership are less likely to come before the courts, which are more often concerned with possession. This provides a contrast with some other legal systems.

In particular, few cases involve the nature of ownership, although the extent of the rights of individual owners is frequently litigated. One type of case that has arisen in other jurisdictions is how far group claims to land can fit within property principles. This has caused difficulties with aboriginal land rights. As we have seen, ownership concepts may be employed where it is sought to extend notions of property to novel situations, as in the context of information. There are various statutory references to ownership, but these appear to have caused the courts few problems.

Finally, how crucial is ownership? If a legal system denies ownership, does this preclude a law of property? So long as some rights over objects (or other forms of property) are recognised and these rights are enforceable against other persons (the exclusionary aspect), it would seem appropriate to see the rules as being proprietary. If the rights were personal and not transmissible then we might have more doubts, but the point to grasp is that property analyses need not be limited to specific socio-economic structures.

3. Some basic distinctions

The law of property has developed over many centuries. One result of this is that it is encrusted with numerous distinctions, often archaic in their nature and terminology. Many legal systems recognise a distinction between land and other forms of property. There are several reasons for this. The permanence of land means that the creation of valuable long-term rights in it is feasible. Furthermore, the effective use of land often demands that permanent arrangements are made with adjoining landowners. One obvious example is that access to the land may require a right of way over a neighbour’s land. Another example is that the intended use of land may require limiting the use of adjoining land. Thus the developer of a housing estate may believe the project viable only if an adjoining owner enters into a restrictive covenant, which binds purchasers, preventing the building of a factory.

The result is that a greater variety of rights can be created in land than in other property. For other property, ease of purchase has a higher priority: purchasers of cars, for example, do not expect to undertake investigations to discover whether they are affected by a multitude of other people’s rights. There is also a feeling that land is an unusually valuable asset. This is one of the justifications for having formality requirements (writing or, in some cases, deeds) for most land transactions. Of course, some areas of land are small and of little value, whereas other forms of property can have enormous values.

Realty and personalty

In English law, a distinction is made between realty and personalty. In essence, real property is land and personalty covers all other property. The origin of the English distinction

23 The courts may, of course, be called upon to deal with ownership. One example concerns the obligation of a seller to show good title (land: Barnsley, Conveyancing Law and Practice (4th ed), pp 266–271) or to show a right to sell (goods: Sale of Goods Act 1979, s 12).


27 See Harris (1995) 111 LQR 421 (revised in Harris, Property and Justice, Chapter 7).
lies in the availability of actions to recover land in medieval property law (actions in rem, or real actions). Because leases were not protected by these actions, they counted as personality despite the eventual development of more effective leasehold remedies. Leases were given the curious categorisation of ‘chattels real’. Since the property reforms of 1925, the distinctions between realty and personality have been greatly reduced, with leases being almost completely assimilated into realty. Nevertheless, it should not be thought that there are no distinctions between realty and personality today. As will be seen in Chapter 5, the range of interests in realty remains far wider than in personality. In addition, most interests in land have to be registered before they can bind purchasers. However, many of the technical rules regulating property now apply identically to realty and personality.

One important example of this convergence, dating from 1897, concerns the devolution of property on the death of the owner. Originally, realty would pass directly to the heir or legatee. Personality would pass to the executor of the deceased’s will (or administrator in the case of intestacy), for passing on to legatees or selling for the payment of debts. This led to their being described as personal representatives. Today all property passes to personal representatives, although the now inaccurate label still survives. The routing of all property through personal representatives is important to ensure that rights to the property can be traced easily. The rights of the personal representatives are established by the grant of probate (of a will) or grant of representation (intestacy). For land, a purchaser, whether direct from the personal representatives or from a beneficiary to whom the property has been transferred, is protected against irregularities in the transfer by the personal representatives. This ensures that there is no need and, indeed, no right to inspect the will. As wills can be highly complex, this is an important element in ensuring simple and safe property transfer.

Personalty has a wide scope, as it comprises all property other than realty. It is usual to distinguish between choses in possession and choses in action. A chose in possession is a physical object, such as a car. As will be seen later, a car can be transferred by delivery to another person; rights to possession are recognised by creating a bailment of the car. Choses in action are incorporeal in nature: they are legally recognised rights. One obvious example is money in a bank account. I have a right of action against my bank to recover any sum standing to my credit in my account; conversely my bank can sue me if my account is overdrawn. Choses in action cannot attract all the same rules as choses in possession, for the simple reason that physical delivery is not feasible. Instead, we talk about assigning a chose in action: there are special rules for this, which will be considered in Chapter 8.

The line between realty and choses in possession on the one side, and choses in action on the other, is not clear-cut. It would be straightforward if the law were to say that ownership of physical property were to fall on one side of the line and all other rights on the other side. However, that would revert to the error of thinking that property is limited to ownership. Rather, the law recognises numerous rights in land and other objects that are proprietary rights in themselves. One example is the lease: a right to land for a specified

28 See now Administration of Estates Act 1925, s 1.
29 Ibid, s 1.
30 Ibid, s 36 (especially (6)–(8)).
31 Problems may arise where a representative document, such as a building society pass book, is handed over. Although there are some relaxations, the general rule is that this does not transfer the chose in action.
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period. We regard this as a property right, rather than as a mere chose in action. It does not follow, however, that every transaction relating to land constitutes realty. Suppose I contract with a window cleaning firm that I will employ them for two years to clean my windows. The firm does not have a right that is recognised as being proprietary. It is simply a contractual right, regulated as a chose in action.\textsuperscript{33}

**Intellectual property**

It has already been seen that there is a category of intellectual property; it counts as personality. It is a specialised area, the details of which fall outside the scope of this book. Several rights in intellectual property are recognised, usually as the result of legislation. Examples are copyright in written material, which prevents copying of the material without permission. This inhibits copying of the words, for example a rival publisher producing copies of a popular novel.\textsuperscript{34} It offers less protection against reproducing the ideas in the writing. The primary protection of ideas (or inventions) lies in the law relating to patents. Patents are made public, but the law provides a monopoly in respect of the invention for a period of 20 years. There are other rights, such as registered trade marks and designs. Designs cover items as varied as toys and car exhausts. Registered designs are given a monopoly for 20 years, whilst design right\textsuperscript{35} gives protection against copying of unregistered designs for ten years from their first marketing. Apart from these statutory rules, the courts have recognised rights based upon the confidentiality of information. This prevents a person from taking advantage of information received in confidence (for example, as an employee), but would not prevent simple copying of an idea or design.\textsuperscript{36}

On top of this structure, there are several torts intended to prevent unfair trading practices. These are based upon ideas of not misleading people, although their effect may be to recognise something akin to intellectual property. For example, the tort of passing off prevents the impression being given that goods have been produced by another trader. It is obviously wrong for the seller of cheap trainers to claim that they are Nike trainers. More difficult is the case where, say, a supermarket chain produces cans of a cola drink that resemble Coca-Cola cans. Here, the tort will apply if purchasers are likely to be misled. This produces a very similar result to protecting the design of the can, but it is not subject to the constraints on design protection. It is not a situation in which a property right would normally be said to exist.

**Legal and equitable rights**

This area is discussed in Chapter 4. Historically, the common law courts recognised a limited range of rights (legal rights), whereas other rights were recognised by the Court of Chancery (equitable rights). Although the courts have been fused for well over a century, the distinction between legal and equitable rights survives. For most equitable interests, the principal importance of the distinction lies in the narrower circumstances in which they may bind

\textsuperscript{32} It is also a contract. Leases share many of the characteristics of choses in action and we refer to the assignment both of choses in action and of leases.
\textsuperscript{33} Property lawyers describe such a right to enter land as a licence (see Chapter 22).
\textsuperscript{34} Protection generally ceases 70 years after death.
\textsuperscript{35} Introduced by the Copyright, Designs and Patents Act 1988.
\textsuperscript{36} Assuming that the idea or design is lawfully in that person’s possession.
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purchasers,\(^{37}\) coupled with a generally more discretionary approach in dealing with them. The most significant equitable development is the trust. This is a device whereby one person (the trustee) has legal ownership and manages the property, whilst another person (the beneficiary) has equitable ownership and enjoys all the benefits of the property. In terms of valuable rights the beneficiary is the owner, yet without control over the property. If the property is to be sold in order to be replaced with an alternative asset (as where shares in Shell are sold and replaced with shares in Marks & Spencer), it is the trustee who will sell them.

4. The new property

The language of property has been employed in the discussion of claims to advance certain rights of individuals in modern society.\(^{38}\) These claims include, for example, rights to employment and to benefits such as retirement pensions. The link with property is tenuous. The argument is that the law should recognise these rights in the same way as it recognises property, free from undue governmental control. Secure employment is, for most people, more significant than most of their possessions. The law has not, as yet, protected an individual’s right to employment to the extent to which it protects his interest in his car or house. Whether the law should do more to protect such rights is, of course, an arguable question. The property analogy is apt for the purpose of asking whether the law has got its priorities correctly ordered. However, there is little serious attempt to argue that these rights should be proprietary in the sense in which lawyers use that term. The issues arise as regards neither the transmissibility of these rights nor the power to exclude others. In terms of ownership, there is no concern with the extent of use and abuse of the right.

A rather different point is that property may be used as a way of promoting certain state policy objectives. A good example lies in ‘commodification’ in the context of environmental regulation – creating property rights in fisheries and carbon, for example.\(^{39}\) This involves the use of property (often to allow the sale of these new property rights) in order that environmental costs are taken fully into account.

Further reading

Honoré in Oxford Essays in Jurisprudence (First Series, ed Guest), Chapter 5: Ownership.
Reich (1964) 73 Yale LJ 733: The new property.

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\(^{37}\) They are more likely than legal rights to require registration.

\(^{38}\) Reich (1964) 73 Yale LJ 733; note the discussion by Harris, Property and Justice, pp 149–151.