
Contents

	<i>Preface</i>	<i>page</i>	xvii
	<i>Acknowledgments</i>		xix
	<i>Table of cases</i>		xxii
	<i>Table of statutes</i>		xxxv
	<i>Table of statutory instruments</i>		xliv
	<i>Table of treaties</i>		xlvi
	<i>Table of EC legislation</i>		xlvi
	Part 1 The concept of property		1
1	Property law: the issues		3
	1.1 Basic definition		3
	1.2 Illustrative example		3
	1.2.1 John		4
	1.2.2 Dr A and Dr B and the acquisition and transmission of property interests		13
	1.2.3 The drugs company: constraints on the exercise of property rights		14
2	What we mean by 'property'		17
	2.1 Introduction		17
	2.1.1 Property as a relationship and as a thing		17
	2.1.2 Conceptualising 'things'		18
	2.1.3 Distinguishing property rights from other rights relating to things		18
	2.1.4 Rights and other entitlements: Hohfeld's rights analysis		19
	2.1.5 Hohfeldian analysis of dynamic property relationships		24
	2.1.6 Property rights, property interests and ownership		26
	2.2 Private property, communal property, state property and no property		35
	2.2.1 Introduction		35
	2.2.2 Distinguishing no-property, communal property, state property and private property		36

2.3 Economic analysis of property rights	42
2.3.1 What economic analysis seeks to achieve	42
2.3.2 Key concepts in the economic analysis of property rights	45
2.4 Things as thing and things as wealth	50
2.4.1 Functions of things	50
2.4.2 The idea of a fund	51
2.4.3 Thing versus wealth	51
2.4.4 Related conceptions	52
3 Justifications for property rights	59
3.1 Introduction: general and specific justifications	59
3.2 Economic justification of property rights	59
3.2.1 Property and scarcity	59
3.2.2 Viability of single property systems	78
3.2.3 Criteria for measuring the success of a particular form of ownership	80
3.3 John Locke's justification for private property	81
3.3.1 What Locke was attempting to establish	81
3.3.2 The political context	82
3.3.3 The problem of consent	83
3.3.4 Locke's justification for original acquisition	83
3.3.5 The nature of Locke's commons	84
3.3.6 Why mixing labour with a thing should give rise to entitlement	84
3.3.7 The sufficiency proviso	87
3.3.8 The spoilation proviso	89
3.3.9 The theological dimension to Locke's theory	90
3.3.10 Present relevance of Locke's theory	90
4 Allocating property rights	107
4.1 Introduction	107
4.2 The first occupancy rule	108
4.2.1 Intuitive ordering	108
4.2.2 Preservation of public order	109
4.2.3 Simplicity	110
4.2.4 Signalling	110
4.2.5 The bond between person and possessions	111
4.2.6 The libertarian justification	111
4.2.7 The communitarian objection	112
4.2.8 Economic efficiency	112
4.3 New things	122
4.4 Capture	128

	Contents	ix
<hr/>		
4.5	Colonisation and property rights	138
4.5.1	Introduction	138
4.5.2	The <i>Milirrpum</i> decision and the doctrine of <i>terra nullius</i>	140
4.5.3	Mabo (No. 2)	143
4.5.4	Developments since <i>Mabo (No. 2)</i>	150
	Part 2 The nature of proprietary interests	153
5	Personal and proprietary interests	155
5.1	Characteristics of proprietary interests	155
5.1.1	General enforceability	155
5.1.2	Identifiability of subject-matter	156
5.1.3	Significance of alienability	157
5.1.4	Requirement for certainty	159
5.1.5	The <i>numerus clausus</i> of property interests	159
5.1.6	Vindication of property rights	160
5.1.7	Termination	161
5.1.8	Property rights and insolvency	163
5.2	Special features of communal property rights	167
5.2.1	Present scope of communal property	167
5.3	Aboriginal land rights	173
5.3.1	Nature of native title	173
5.3.2	Alienability	173
5.3.3	Abandonment	174
5.3.4	Variation	174
5.3.5	Extent of native title	175
5.3.6	Is native title proprietary?	175
6	Ownership	180
6.1	The nature of ownership	180
6.1.1	The basis of ownership	180
6.1.2	An outline of the difficulties encountered in any consideration of ownership	182
6.2	The contents of ownership	192
6.2.1	An introduction to Honoré's analysis	192
6.3	The roles played by ownership	212
6.3.1	As a legal term of art	212
6.3.2	As an amorphous notion	216
6.4	The limitations of ownership	217
6.4.1	Nuisance	217
6.5	Restrictive covenants	250
7	Possession	259
7.1	The nature of possession	259
7.1.1	Introduction	259

x Contents

	7.1.2 Possession, ownership and proprietary interests	259
	7.1.3 What is possession?	261
7.2	Possession of land	271
	7.2.1 Leases and licences	271
	7.2.2 Possession and particular use rights	278
7.3	Possession of goods: bailment	280
	7.3.1 Nature of bailment	280
	7.3.2 Rights, duties and obligations of bailor and bailee	281
7.4	Protection of possession	282
	7.4.1 Protection of property rights by protection of possession	282
	7.4.2 Tort and the protection of property rights	282
	7.4.3 Self-help remedies	286
	7.4.4 Unlawful eviction and harassment	291
	7.4.5 Trespassing and the criminal law	292
8	Fragmentation of ownership	297
	8.1 Introduction	297
	8.2 Present and future interests	297
	8.2.1 Interests in possession, in reversion and in remainder	298
	8.2.2 Absolute entitlements, contingent entitlements and mere expectancies	299
	8.2.3 When interests vest	302
	8.2.4 Alienation, management and control	303
	8.2.5 Interests of contingent duration	304
	8.2.6 Requirement of certainty	306
	8.2.7 Successive interests in land and the doctrine of tenures and estates	307
	8.2.8 Restrictions on the power to create future interests	311
	8.3 Legal and equitable interests	311
	8.3.1 Origin of the legal/equitable distinction	311
	8.3.2 Legal and equitable interests now	312
	8.3.3 The significance of the legal/equitable distinction	313
	8.3.4 Three common fallacies	313
	8.4 Fragmentation of management, control and benefit	320
	8.4.1 Corporate property holding	320
	8.4.2 Managerial property holding	332
	8.5 Group ownership	339
	8.6 General and particular use rights	342
9	Recognition of new property interests	345
	9.1 Why are certain interests regarded as property?	345
	9.1.1 The function of property	345
	9.1.2 The danger of property	346
	9.1.3 The requirements of property	347

	9.2 The dynamic nature of property	348
	9.2.1 The recognition and limits of the covenant as a proprietary interest	349
	9.2.2 The recognition of a proprietary right to occupy the matrimonial home	353
	9.3 The general reluctance to recognise new property rights	356
	9.3.1 The facts of <i>Victoria Park Racing v. Taylor</i>	356
	9.3.2 The views of the majority	357
	9.3.3 The views of the minority	357
	9.3.4 The significance of the case	358
	9.4 A comparative confirmation and an economic critique	368
	9.5 The future of property	371
	9.5.1 The new property thesis	373
	9.5.2 The emergence of quasi-property	376
	Part 3 The acquisition and disposition of property interests	381
10	Title	383
	10.1 What we mean by 'title'	383
	10.2 Acquiring title: derivative and original acquisition of title	384
	10.2.1 Derivative acquisition: disposition or grant	384
	10.2.2 Original acquisition	384
	10.3 Relativity of title	386
	10.4 Proving title	387
	10.4.1 Role of registration	388
	10.4.2 Possession as a root of title	389
	10.4.3 Provenance	390
	10.4.4 Extinguishing title by limitation of action rules	391
	10.4.5 Relativity of title and the <i>ius tertii</i>	393
	10.5 The nemo dat rule	393
	10.5.1 Scope of the <i>nemo dat</i> rule	394
	10.5.2 General principles applicable to all property	396
	10.5.3 The application of the <i>nemo dat</i> rule to goods	397
	10.5.4 The application of the <i>nemo dat</i> rule to money	398
	10.5.5 The application of the <i>nemo dat</i> rule to land	402
	10.6 Legal and equitable title	403
11	Acquiring title by possession	406
	11.1 Introduction	406
	11.2 The operation of adverse possession rules	406
	11.2.1 Unregistered land	407
	11.2.2 Registered land	407
	11.2.3 What counts as 'adverse' possession	407
	11.2.4 Effect on third party interests	409

11.3	Why established possession should defeat the paper owner	410
11.4	Adverse possession and registration	412
11.5	Good faith and the adverse possessor	413
11.6	Goods	443
	11.6.1 Taking and theft	444
	11.6.2 Protection of title by tort	444
	11.6.3 The limitation act 1980 and title to goods	444
	11.6.4 Finders	445
12	Transfer and grant	448
	12.1 Derivative acquisition	448
	12.2 Formalities	448
	12.2.1 Nature and content of formalities rules	448
	12.2.2 Registration and electronic transactions	451
	12.2.3 Validity and enforceability against third parties	452
	12.2.4 Effect of compliance on passing of title	453
	12.2.5 Transactions excepted from formalities rules	453
	12.2.6 Deeds and prescribed forms	454
	12.2.7 Why have formalities rules	455
	12.2.8 Disadvantages	460
	12.3 Contractual rights to property interests	471
	12.3.1 Estate contracts and the rule in <i>Walsh v. Lonsdale</i>	471
	12.3.2 Application to property other than land	472
	12.3.3 The failed formalities rule	473
	12.3.4 Options to purchase, rights of pre-emption and rights of first refusal	479
	12.4 Unascertained property	484
	12.4.1 The problem of identification	484
	12.4.2 Unascertained goods	484
	12.4.3 Other unascertained property	485
13	Acquiring interests by other methods	489
	13.1 Introduction	489
	13.2 The difference between adverse possession and prescription	489
	13.3 Why long use should give rise to entitlement	490
	13.4 Rationale	492
	13.4.1 Ascendancy of the presumed grant rationale	492
	13.4.2 Effect of the 'revolting fiction'	493
	13.5 When long use gives rise to a prescriptive right	494
	13.5.1 The problem of negative uses	494
	13.5.2 Rights that can be granted but not acquired by prescription	496
	13.6 User as of right and the problem of acquiescence	497
	13.7 The future of prescription	498

14	Enforceability and priority of interests	512
	14.1 Rationale of enforceability and priority rules	512
	14.2 Enforceability and priority rules	513
	14.2.1 The basic rules	513
	14.2.2 Impact of registration	514
	14.3 The doctrine of notice	515
	14.3.1 Notice	516
	14.3.2 Good faith	518
	14.3.3 Effectiveness of the doctrine of notice as an enforceability rule	519
	14.4 Overreaching	523
	14.4.1 Nature and scope of overreaching	523
	14.4.2 Operation of overreaching	524
	14.4.3 Overreaching the interests of occupying beneficiaries	525
	14.4.4 Transactions capable of overreaching beneficiaries' interests	527
	14.4.5 The two-trustees rule	529
15	Registration	537
	15.1 What are registration systems for?	537
	15.2 Characteristics of the English land registration system	539
	15.2.1 Privacy	539
	15.2.2 Comprehensiveness	539
	15.2.3 Boundaries	541
	15.2.4 Restricted class of registrable interests	541
	15.2.5 The mirror, curtain and guarantee principles	544
	15.2.6 Consequences of non-registration	545
	15.3 Enforceability and priority of interests under the Land Registration Act 2002	553
	15.3.1 Registrable interests	553
	15.3.2 All other interests	554
	15.4 Overriding interests	554
	15.4.1 Justifications for overriding interests	554
	15.4.2 Principles to be applied	555
	15.4.3 Overriding interests under the 2002 Act	556
	15.4.4 Easements and profits	557
	15.4.5 Interests of persons in actual occupation: the 1925 Act	558
	15.4.6 Interests of persons in actual occupation: the 2002 Act	562
	15.4.7 Complexity	565
	15.5 Indemnity	566
	15.5.1 Function of indemnity	566
	15.5.2 Shortfall in the provision of indemnity	566
	15.5.3 Cost	567

	Part 4 Proprietary relationships	569
16	Co-ownership	571
	16.1 Introduction	571
	16.2 The classical approach to co-ownership: joint tenancies and tenancies in common	572
	16.2.1 Basic concepts	572
	16.2.2 A comparison of joint tenancies and tenancies in common	576
	16.2.3 Use of co-owned property	591
	16.2.4 Sale and other dispositions of co-owned property	596
	16.3 Other forms of co-ownership	599
	16.3.1 Commonhold	599
	16.3.2 Unincorporated associations	599
	16.3.3 Extending the limits of co-ownership: public trusts	605
17	Leases and bailment	609
	17.1 Introduction	609
	17.2 Leases and bailments compared	609
	17.2.1 Consensuality	609
	17.2.2 Contract	610
	17.2.3 Enforcement	610
	17.2.4 Duration and purpose	611
	17.2.5 Beneficial use	611
	17.2.6 Proprietary status	612
	17.2.7 Inherent obligations of the possessor	612
	17.3 Leases	613
	17.3.1 Nature of the lease	613
	17.3.2 Alienability	640
	17.3.3 Effect of alienation on enforceability	645
	17.4 Bailment	648
	17.4.1 Essential features of bailment	648
	17.4.2 Categories of bailment	649
	17.4.3 Characteristics of bailment	650
	17.4.4 Liabilities of the bailee	651
	17.4.5 Is bailment proprietary?	653
18	Security interests	657
	18.1 The nature and function of security	657
	18.1.1 Nature of security	657
	18.1.2 Function	658
	18.1.3 Efficiency	661
	18.1.4 Use of security	662

18.2	Forms of security	663
18.2.1	Property transfer securities: the mortgage	663
18.2.2	Possessory securities: pledge or pawn	664
18.2.3	Hypothecations: the charge	664
18.2.4	Liens	665
18.2.5	Property retention securities	665
18.2.6	Charge by way of legal mortgage	665
18.3	Control over the terms of the relationship	669
18.3.1	Equitable supervisory jurisdiction	669
18.3.2	The <i>Kreglinger</i> principles	670
18.3.3	Statutory intervention	672
18.4	Enforcement of security	684
18.4.1	Remedies	684
18.4.2	Possession	685
18.4.3	Sale	686
18.4.4	Duties on enforcement	687
	<i>Bibliography</i>	698
	<i>Index</i>	709