PART I

Introduction and context

1 Setting the scene

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1. The scene

Every modern legal system recognises, besides perpetual ownership rights, time-limited interests in land. There are many reasons why people may wish to deal in rights that are limited in time as opposed to dealing in perpetual rights. The acquirer might simply not be interested in a perpetual right, for instance, because he/she knows that he/she is going to leave for another country in a few years or because financially he/she may not be able to afford to buy a perpetual right.

Looking at things from the perspective of the grantor, he/she may be interested in realising financially some of the value of the land without giving up his/her right to live there until his/her death. Alternatively, the grantor may be inspired by his/her concern for his/her family. For instance, the grantor may wish for his/her younger sister to live comfortably in his/her house until her death, but the grantor may also want to ensure that at her death all of his/her property will go to the grantor's son.

Simplifying all of this, one may see two fundamental rationales for creating time-limited interests in land: first, ensuring a more efficient exploitation of land and second, providing for the personal needs of the creator or for someone he/she cares for. The first rationale usually requires that the limited interest's duration is fixed in time. The latter is more compatible with lifelong limited interests. Lease, *superficies* and *emphyteusis* can be seen as examples of how to achieve more efficient exploitation of the land, whereas usufruct and life estate (liferent) are good examples of how to facilitate the personal needs or wishes of the creator.

Recognition of the fact that most of these needs can be met to some extent by the law of contract is important. However, the contractual

solution is not entirely satisfactory, since contracts create only personal rights. This introduces an element of risk: if the land is alienated, the personal time-limited interest will not be enforceable against the new owner.

On the other hand, creating real time-limited interests in land can be problematic. It makes the circulation of land more difficult. This is especially true for lifelong time-limited interests. The time-limited interest holder cannot transfer any better title than he/she has himself/herself. Thus alienation of his interest is very difficult because the acquirer will have an interest measured by the life of the original holder. This is certainly a precarious (and somewhat illogical) position. It is evident that an interest measured by someone else's life is not very appealing to anyone. Consequently, the time-limited interest's holder will encounter great difficulties in trying to sell it or use it as a security to borrow money. Furthermore, any agreement with the future holder is particularly difficult because there is an element of uncertainty about the duration and thus the value of their respective rights, and negotiation tends to be easier when the rights involved are clear.

These needs and problems more or less define the outlook of time-limited interests in land in all contemporary legal systems. What is very much different is the theoretical conceptualisation of the different rights. Some legal systems see absolute ownership as something radically and qualitatively different from time-limited interests, which are, together with praedial servitudes, considered as *iura in re aliena*. This is generally considered to be the Roman law solution, and is the prevailing view in modern civil law jurisdictions. Other legal systems put perpetual and time-limited rights in the same class.

A different conceptualisation was adopted by English law, which has divorced ownership from land itself and attached it to an imaginary thing called an estate, which entitles the owner to use the land for a longer or shorter period of time. The time-limited interest is thus seen as an estate in land, which differs from the perpetual fee simple only in quantity.

It should be noted that a partially similar solution was adopted by the continental legal systems in the age of the *ius commune*, when *emphyteusis*, *superficies* and *locatio ad longum tempus* were considered *dominia utilia*. The *summa divisio* between absolute ownership and limited real rights is largely the product of the rebirth of the Roman law doctrine of ownership. However, the reality that the scholars of the *ius commune* tried to put into the Roman schemes was substantially common to all European

countries. It has been said that 'la Common law a résisté à l'influence romaine; son droit de la propriété foncière, construit sur la base des structures féodales et des institutions normandes, rappelle l'organisation complexe du droit médiéval français'.[1]

A second, more specific point of theoretical difference concerns lease. While universally it has experienced a sort of 'realification' process through the abandonment of the principle *emptio tollit locatum*, lease of land in England began life as a mere personal right, but by the close of the Middle Ages the leaseholder had a fully protected interest in the land, being able to recover the land against all persons who evicted him. In Scotland, the Leases Act 1449 conferred security of tenure on lessees by permitting them to remain on the land until the end of their leases, even if the landlord sold the property. In continental Europe, the principle 'sale does not break hire' triumphed with the great codifications at the turn of the nineteenth century, but it was already widely accepted in Roman-Dutch law. However, not all legal systems came to the logical conclusion of recognising lease as a real right in land. In many legal systems the right of the lessee is still commonly classified as a mere personal right, or at least is considered as a sort of 'hybrid'.

In any case, legal systems invariably seem to recognise the need for real rights (enforceable against third parties) that have a fixed duration. Sometimes the same tool answers all needs: in England, a lease of land may be from year to year or for ninety-nine or even for 300 years. In other countries, leases are used for creating short-time interests (in Italy, for instance, a contract of lease cannot be stipulated for a period exceeding thirty years (Civil Code, art. 1573)) and thus the functional equivalents of the English lease include lease and *superficies* as well as *emphyteusis*.

The real point of difference concerns lifelong time-limited interests. In England, the common law (in the narrow sense in which it is contrasted with equity) has since 1925 recognised only two estates, namely the perpetual fee simple and the lease.

The problem with settlement of land was that the splitting up of the fee simple estate over time meant that there was no one person for the time being who was independently capable of giving an absolute title and thus being able to effectively manage that land. In a well-drawn settlement, these difficulties were often overcome by the grantor using a trust, under which he would convey the fee simple to trustees with a direction or power to sell, lease, mortgage and

[1] Patault, *Introduction historique*, p. 33.

so on and to allow the family members to take an equivalent benefit from the proceeds of sale, a process known as 'overreaching'. It was this device that the draftsman of the 1925 legislation adopted. Indeed, all that the statute did was to make good conveyancing practice compulsory. Thus from 1925 onwards the splitting up of the enjoyment of land over time was still a possibility. The only difference was that it now had to be done behind a trust containing powers for the beneficial interests to be overreached.[2]

The functional equivalent of the civilian usufruct, life estate, can now exist only behind the curtain of a trust. The English story is an instructive lesson for civil law countries. Usufruct may be a problem for effective management of the land. This may be an explanation for the relative decline in the use of usufruct in many civil law systems. The idea of giving the usufructuary the right to sell, thus transferring the nude owner's interest on the proceeds of sale, is seen as problematic in some civil law countries. This is because the classical notion of usufruct includes the duty to preserve the substance of the property. This kind of resistance may condemn usufruct to be abandoned as too rigid a tool.

2. Balancing the interests: a handful of common problems

Whenever a time-limited interest in land is created, the law has an important role to play in reconciling the competing interests of the parties involved. Different legal systems face substantially the same problems.

A 'stylistic' divergence between civil law and common law systems has been rightly emphasised. Many civil law systems 'define what is owned by the usufructuary by explicitly relying on the idea of a right to do certain acts': 'the usufructuary has the right to use and to draw the fruits of the thing subject to the usufruct'.

Turning now to the English law of property, it is fair to say that the problem of how to split ownership among successive holders of an asset has seldom been addressed in England by asking the question of what *rights* the holder *pro tempore* gets while in possession. English courts have more often dealt with the converse question, i.e., under what circumstances does a limited owner face liability in torts for acts he should have refrained from doing? The difference in the two starting points may reflect a general English preference for framing legal issues without recourse to the ubiquitous and amorphous notion of a legal right.[3]

[2] Swadling, 'Property: General Principles', p. 231. [3] Graziadei, 'Tuttifrutti', pp. 130–1.

While civilian systems often use the language of rights and duties, the relevant English rules were shaped through the tort of waste. The practical divergences must not be overemphasised. This is even more evident when one considers that some key cases on the liability of limited interest holders for waste make free use of various civilian resources. In a case concerning the cutting of timber by a life tenant, Bowen LJ went so far as to say that in a case which has no direct precedent, 'it is desirable to refer to the law of usufruct, on which the English law of waste is, to a great extent, based'.[4] Whether or not this is true, it highlights the fact that English judges and scholars did not see a radical, qualitative discontinuity between Roman law and English law with regard to the law concerning time-limited rights.

The time-limited interest holder is entitled to exploit the land. He/she can use it directly and take its produce, as was said by Lord Blackburn in a Scottish case:

> the law of England, and, I believe, of every country, the feudal law, and the civil law, too, would say that in that case the person who has the limited interest takes, beyond all doubt, the annual produce, the grass, the apples, and things of that sort, and applies them to his own use as he pleases, as long as his interest lasts.[5]

In any legal system, however, the time-limited interest holder's rights of exploitation meet some limitations, which can easily be explained. A time-limited interest holder 'will have an incentive to maximize not the value of the property, that is, the present value of the earnings stream obtainable from it, but only the present value of the earnings stream obtainable' during his interest's expected lifetime. He/she may, for instance, 'want to cut the timber before it has attained its mature growth – even though the present value of the timber would be greater if the cutting of some or all of it were postponed', if the added value will enure to the future interest holder.[6] A time-limited interest holder may want to exploit the land intensively even if, in the long run, this is detrimental to the land itself. There is a clear potential for conflicts of interest here.

Every legal system has developed a body of rules in order to regulate the possible conflicts of interest. In the common law this role is played by the law of waste. In the civil law tradition, with regard to usufruct, the relevant rules were developed starting from the *salva rei substantia*

[4] *Dashwood* v. *Magniac* [1891] 3 Ch 306, 362.
[5] *Campbell* v. *Wardlaw* (1883) 8 App Cas 641, 645. [6] Posner, *Economic Analysis*, p. 73.

limit and the *cautio fructuaria* already present in Roman law and are expressed through different formulas. In general terms, the usufructuary has the duty to preserve the substance of the property and has to use the diligence of a good *paterfamilias* with regard to the enjoyment of the property. These rules are designed to prevent the property being depleted as a source of income.

Many legal systems go further and forbid radical modifications of the property even if their effect is not directly detrimental. With regard to usufruct, the general idea is well expressed by the German Civil Code: the usufructuary is not entitled to transform the property or substantially change it (§ 1037) and in exercising his/her right of use, the usufructuary cannot alter the economic destination of the property (§ 1036). This idea is not unknown to English law: alterations in the physical characteristics of the premises by an unauthorised act of the tenant that increased the value of the property were considered ameliorating waste, and were prohibited. It is uncertain whether this is still the law today.[7] There may be a legitimate interest in the land being returned substantially unchanged: even if a change of destination is not detrimental *per se*, it may be incompatible with the personal plans of the future interest holder. This must nevertheless be balanced against the need to avoid the land being locked into an inefficient use.

Some legal systems have developed lesser time-limited rights, which limit the power of the holder to use the property and appropriate its fruits and usually do not entitle the holder to lease the property. These more-limited rights (which include the Roman *usus* and *habitatio*) are not always clearly distinguished from irregular servitudes, which confer a limited right of use (for example, a right of way) upon a particular person.

A time-limited interest holder will not necessarily have an incentive to keep the property in a good state of repair. It is highly unlikely that he will be bothered about the long-term effects of disrepair. In many civil law systems the usufructuary and the lessee are obliged to carry out repairs and maintenance. The extent of this duty has not always been entirely clear. In the common law tradition, this kind of problem has been tackled through the law of permissive waste. In Coke's times, it seemed clear that 'to doe or make waste . . . includes as well permissive

[7] An injunction against ameliorating waste may still be awarded at least where the whole character of the property will be changed. See e.g. Megarry and Wade, *Real Property*, p. 81.

waste, which is waste by reason of omission, or not doing, as for want of reparation'.[8] In English law, the liability of the life tenant for permissive waste is now excluded while the position of the lessee is more uncertain.

A more general problem concerns the extent to which the statutory regime can be modified when a time-limited interest is created and whether these modifications simply give rise to a bundle of personal rights and obligations between the parties or to rights which are fully enforceable against third parties.

While these problems can be met with different solutions, it must be noted that this variation does not respect the *summa divisio* between common law and civil law, nor does it seem strictly related to the different theoretical conceptions of time-limited interests in land. Only time will tell how particular legal systems choose to deal with these problems. It is submitted that whatever varying methods are adopted by different systems, they will simply be balancing the same goals in a different manner.

3. Time-limited interests arising by operation of law

The need to provide for one's widow or widower without putting at risk the children's right to inherit is an obvious explanation for the creation of lifelong time-limited interests in land. This may be traced to the origins of the Roman usufruct: the normal method of creating a usufruct was by legacy, and the most common case was the legacy of usufruct by the testator to his widow.

In the civil law tradition, usufruct has remained one of the common tools for providing for the widow's needs. In many cases, the surviving spouse is granted a usufruct (or another similar right) by operation of law over the deceased spouse's property, either as an intestate successor or as a forced heir.

In various versions, usufruct is still a common solution in the civil law countries. In France, the rules have changed several times. Since 2001, if a deceased dies intestate, leaving a spouse and children or descendants, the surviving spouse will take, at his/her option, either the usufruct of the whole of the existing property or the ownership of one quarter of the existing property (Civil Code, art. 757). In the absence of an intention to the contrary expressed by the deceased, a spouse, entitled

[8] Coke, *Laws of England 1590–1640*, p. 145.

to inherit and who occupied as his/her main habitation at the time of the deceased's death a lodging belonging to the deceased, has until his/her death a right of habitation in the lodging and a right of use of its furnishings (Civil Code, art. 764). In Spain, the surviving spouse receives a usufruct over one-third of the estate if there are descendants (Civil Code, art. 834).

In Italy, the Civil Code originally reserved to the surviving spouse a usufruct over a variable share of the deceased spouse's property. Since 1975, the surviving spouse takes a share (between one-quarter and one-half) of the deceased spouse's patrimony (in full ownership and not in usufruct). He/she is, however, also granted the right of habitation of the house used as a family home and the right of use of its furnishings (Civil Code, art. 540). This has resulted in the diminishing importance of the usufruct with a counterpart increase in importance of the right of habitation.

A new system has been introduced in the Netherlands with the new Book 4 of the Civil Code. If no will has been made, the spouse acquires the assets of the deceased's estate by operation of law. The children, however, have pecuniary claims against the surviving spouse. If the latter declares an intention to remarry, he/she is obliged, on request, to make over to the child assets to the value of the pecuniary claim, subject to a reserved right of usufruct (art. 19). Where, as a result of any testamentary disposition, the deceased's spouse is not entitled to the dwelling and household effects which form part of the deceased's estate and in which the surviving spouse was living at the time of the deceased's death, the heirs have to co-operate to establish a usufruct on behalf of the surviving spouse to that dwelling and those household effects to whatever extent the latter requires them to do so (art. 29). Thus, in the rather complex system introduced by the new Dutch law of succession, the creation of a usufruct in favour of the surviving spouse over some portion of the deceased's property is still a probable result.

The idea of a life estate of the widow or widower on the deceased's land is not foreign to the common law tradition. The common law recognised the marital life estate of dower to protect a widow from disinheritance by her husband. In most instances, the life estate of curtesy protected the widower from disinheritance by his wife. The lifetime protection afforded a widow extended to an interest in only one-third of the estate which her husband acquired during their marriage. The lifetime protection afforded the widower covered all of his wife's inheritable freehold estates. On the other hand, the husband was