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978-1-107-02612-4 - Time-Limited Interests in Land

Edited by Cornelius van der Merwe and Alain-Laurent Verbeke

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Time-Limited Interests in Land

A comprehensive comparative treatment of six instances of time-limited interests in land as encountered in fourteen European jurisdictions. The survey explores the commercial or social origins of each legal institution concerned and highlights their enforceability against third parties, their content and their role in land development. The commercial purpose of residential and agricultural leases is contrasted with the social aim of personal servitudes (and its common-law equivalent *liferent*) to provide sustenance for life to mostly family members, making the latter an important estate planning device. Whereas the ingrained principles of leases and personal servitudes restrain the full exploitation of land, it is indicated that public authorities and private capital could combine to turn the old-fashioned time-limited institutions of hereditary building lease (*superficies*) and hereditary land lease (*emphyteusis*) into pivotal devices in alleviating the acute shortage of social housing and in promoting the fullest exploitation of pristine agricultural land.

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The Common Core of European Private Law

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For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality *The Common Core of European Private Law Project* was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.

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CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press,
New York

www.cambridge.org

Information on this title: www.cambridge.org/9781107026124

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First published 2012

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Time limited interests in land / Edited by Cornelius Van Der Merwe and
Alain-Laurent Verbeke.

p. cm. – (The common core of European private law ; 12)

Includes bibliographical references.

ISBN 978-1-107-02612-4

1. Land use – Law and legislation – Europe. 2. Time (Law) – Europe.
3. Landlord and tenant – Europe. 4. Land titles – Registration and transfer –
Europe. 5. Servitudes – Europe. 6. Leases – Law and legislation – Europe.
7. Usufruct – Europe. I. Van der Merwe, C. G. II. Verbeke, Alain.

KJC6127.T56 2012

346.404'32–dc23

2012015502

ISBN 978-1-107-02612-4 Hardback

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accuracy of URLs for external or third-party internet websites referred to
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General editors' preface

This is the twelfth book in the *Common Core of European Private Law* series. The project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The methodology used in the Trento project is novel. By making use of case studies it goes beyond mere description to detailed inquiry into how most European Union legal systems resolve specific legal questions in practice, and provides a thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own national legal systems. The collection of materials that the *Common Core* project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for an intelligent and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified. The analytical work carried on today by the almost 200 scholars involved in the *Common Core* project is also a precious asset of knowledge and legitimisation for any such normative enterprise.

We must thank the editors and contributors to these first published results. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger. We are sad that we have not been able to present him with the results of a project in which he believed so firmly.

No scholarly project can survive without committed sponsors. The Italian Ministry of Scientific Research is funding the project, having recognised it as a 'research of national interest'. The International University College of Turin with the Compagnia di San Paolo and the

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Consiglio Nazionale del Notariato allow us to organise the general meetings. The European Commission has partially sponsored some of our past general meetings, having included them in their High Level Conferences Programme. The University of Turin, the University of Trieste, the Fromm Chair in International and Comparative Law at the University of California and the Hastings College of Law, and the Centro Studi di Diritto Comparato of Trieste have all contributed to the funding of this project. Last but not least, we must thank all those involved in our ongoing projects in contract law, property, tort and other areas, whose results will be the subject of future published volumes.

Our home page on the internet is at www.iuctorino.it There you can follow our progress in mapping the common core of European private law.

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Preface

This book has a fairly long history. Following the approval of the topic at a Trento meeting in 2002, several important issues had to be discussed in preliminary meetings which pre-dated the preparation of an official questionnaire. Initially we had to satisfy ourselves that real rights limited in time actually constitute a special category of property rights that is sufficiently important to discuss as such. We then had to decide on the title of the project. We were torn between a number of potential titles, including ‘Real Rights Limited in Time’; ‘Real Rights of Limited Duration’; or ‘Proprietary Rights Limited in Time’. Our eventual choice of the title ‘Time-Limited Interests in Land’ was closely connected to the decision to confine ourselves to the discussion of the most important time-limited rights with regard to land, and not to include a discussion of time-limited rights in movable property and incorporeal property. Furthermore, confining our analysis in this way not only allowed us to focus in more detail on the relevant legal institutions but allowed us to avoid an overlap with another simultaneous study that concentrated on time-limited interests in incorporeals.

A further preliminary issue was the question of whether we should confine ourselves to a discussion of the two most important time-limited interests in land, namely leases and personal servitudes (common law *liferent*) or whether the more obscure real interests in land of hereditary building rights (*superficies*) and hereditary land leases (*emphyteusis*) should also be considered. Additionally, we had to resolve whether to include the less important institutions of loan (*commodatum*) and precarious loan (*precarium*). The wider approach was favoured not only for the sake of comprehensiveness but also because we noted that in the past the little-known institutions of hereditary building rights (*superficies*) and hereditary land lease (*emphyteusis*) played an important

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role in land-development programmes initiated by public authorities to improve the exploitation of uncultivated land (*emphyteusis*) and the provision of housing for the homeless (*superficies*). It is our belief that even today these institutions could play a pivotal role in achieving these ends.

Owing to the fact that the project is within the sphere of property law, the editors agreed to concentrate on the proprietary rather than the obligational aspects of leases. Since commercial leases are mostly extensively regulated by special legislation, they restricted the project to the proprietary aspects of residential and agricultural leases. Finally, a decision was taken to make the first question a general one, in response to which reporters could give a fairly detailed account of the characteristics and content of the various time-limited interests in land encountered in their respective jurisdictions.

The three appointed editors, Cornelius van der Merwe, Alain Verbeke and Raffaele Caterina met in Aberdeen in December 2002 and together with Roderick Paisley of the School of Law, University of Aberdeen, prepared a provisional questionnaire to be presented at the next annual meeting of the Trento project. This questionnaire was accepted with a few minor amendments and the national reporters of fifteen jurisdictions were given the opportunity to provide answers to the various case studies dealt with in the questionnaire.

The book is arranged in three main sections, entitled 'Introduction and context', 'Case studies' and 'Concluding remarks'. The case studies themselves are also arranged in three sections dealing with: the enforceability of time-limited interests against third parties, the content of time-limited interests and the role of time-limited interests in land development. The book is distinguished by two special features. First, the comparative observations containing a summary of the various reports are placed at the beginning instead of at the end of each case study, and are followed by the various responses of the national reporters of the jurisdictions represented. Secondly, tables indicating the practical importance of each of the time-limited interests in the jurisdiction concerned are included in an Appendix.

Unfortunately, the completion of the project was delayed because of difficulty experienced in recruiting national reporters for France, Austria and eventually for Scotland. Fortunately we were able to persuade Odile Roy of the Université Paris Ouest Nanterre La Défense to write the French report in French. We are very grateful to Professor Lionel Smith, the James McGill Professor of Law, McGill University,

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Montreal, Canada who assisted us in having the French report translated into English, a task primarily undertaken by Edmund Coates of the Quebec Research Centre of Private and Comparative Law, Faculty of Law, McGill University. Judith Schacherreiter of the University of Vienna and Dr Peter Webster, presently Judicial Assistant at the Supreme Court of the United Kingdom, kindly agreed to write the national reports for Austria and Scotland respectively.

The editors wish to thank Raffaele Caterina, Paul du Plessis and the combination of Alain Verbeke, Nicholas Carette and Bart Verdict for writing the three chapters in Part I, entitled ‘Setting the scene’, ‘Historical evolution of the maxim “sale breaks hire”’ and ‘The many faces of usufruct’. Our main gratitude is, however, due to the national reporters for furnishing us with the national reports of their jurisdictions and for their patience in waiting for the project to reach its completion. We owe a particular debt of gratitude to Ilse van der Merwe of Stellenbosch and the Cambridge University Press team consisting of Helen Francis, Daniel Dunlavy, Paul Smith and Geoff Bailey for the linguistic and technical editing of the final manuscript and for compiling the various lists and the index. We gratefully acknowledge the assistance of research assistants Ryan Hartley of the University of Stellenbosch and John Townsend of the University of Aberdeen for linguistic editing of the national reports. We wish to thank Carla Boninsegna and Manuela Amsler for organising the discussion groups at the yearly meetings of the Trento Project at Trento and subsequently at Turin. We also thank Sinead Moloney for her unwavering encouragement and support, together with Professor Antonio Gambaro and the anonymous referee of this volume, whose advice helped to improve the final manuscript.

Cornelius van der Merwe acknowledges with gratitude the financial support of the National Research Foundation of South Africa and the Law School Research Committee of the School of Law of the University of Aberdeen. Without their generous assistance the volume would never have come to fruition.

The editors wish to note that most of the reports have been written between 2005 and 2009 and that a very few have been updated after 2009. Because of this, a small number of important recent developments have not been included, the most important being the re-introduction of the hereditary building right (*superficies*) by the Greek parliament in 2011 for the better development of public parcels of land.

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Abbreviations

ABGB	<i>Allgemeinen bürgerlichen Gesetzbuch</i>
AD	Appellate Division [of the Supreme Court of South Africa]
AH(S)A 03	Agricultural Holdings (Scotland) Act 2003
AH(S)A 91	Agricultural Holdings (Scotland) Act 1991
ALR	<i>Allgemeines Landrecht</i>
AP	<i>Areios Pagos</i>
App Cas	Law Reports: Appeal Cases, House of Lords
APR	<i>Algemene Practische Rechtsverzameling</i>
Arr Cass	<i>Arresten van het Hof van Cassatie</i>
B. & Ad.	<i>Barnewall & Adolphus' King's Bench Reports</i>
BauRG	<i>Baurechtsgesetz</i>
BCC	Belgian Civil Code
BGB	<i>Bürgerliches Gesetzbuch</i>
BGBI	<i>Bundesgesetzblatt</i>
BGHZ	<i>Entscheidungen des Bundesgerichtshofs in Zivilsachen</i>
Bing.	<i>Bingham's Common Pleas Reports</i>
BTVG	<i>Bauträgervertragsgesetz</i>
Bull. civ. I–IV	<i>Bulletin des arrêts de Chambres civiles de la Cour de cassation</i> [1st, 2nd, 3rd and Commercial Civil Chamber]
BW	<i>Burgerlijk Wetboek</i> (Dutch Civil Code)
C. & P.	<i>Carrington & Payne's Nisi Prius Reports</i>
Cass. civ.	Civil chamber of the <i>Cour de cassation</i>
Cass.	<i>Cour de cassation</i>
CFR	Common Frames of Reference
Ch	Law Reports: Chancery Division (1891 onwards)
ChD	Law Reports: Chancery Division 1875–90
Civ. 1	First Civil Chamber of the <i>Cour de cassation</i>

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ABBREVIATIONS xxi

Civ. 2	Second Civil Chamber of the <i>Cour de cassation</i>
Civ. 3	Third Civil Chamber of the <i>Cour de cassation</i>
Co. Rep.	Cokes King's Bench Reports
Constr. urb.	<i>Construction urbaine</i>
CPD	Common Pleas Division
CSIH	Court of Session (Scotland), Inner House
CSOH	Court of Session (Scotland), Outer House
D	<i>Recueil Dalloz</i>
Dz.U.	<i>Dziennik Ustaw</i>
EDL	Eastern Districts Local Division [of the Supreme Court of South Africa]
EEN	<i>Efimeris Ellinon Nomikon</i>
EllDni	<i>Elliniki Dikaioassyini</i>
EvBl	<i>Evidenzblatt der Rechtsmittelentscheidungen</i>
FCC	French Civil Code
GCC	Greek Civil Code
GIUNF	<i>Glaser/Unger Neue Folge, Sammlung zivilrechtlicher Entscheidungen des OGH</i>
GWD	Green's Weekly Digest
H(S)A 88	Housing (Scotland) Act 1988
HS	<i>Sammlung handelsrechtlicher Entscheidungen</i>
Int and Comp	International Comparative Law Quarterly
LQR	
JAP	<i>Juristische Ausbildung und Praxisvorbereitung</i>
JBl	<i>Juristische Blätter</i>
KBB	<i>Kommentar zum Allgemeinen bürgerlichen Gesetzbuch</i>
LAWSA	The Law of South Africa
LDT	limited duration tenancy
LoH	Law on Hypothecs
LP(MP)A	Law of Property (Miscellaneous Provisions) Act 1989
LPA	Law of Property Act
LR(S)A 79	Land Registration (Scotland) Act 1979
LRA	Land Registration Act 2002
LRL	Legislative Reference Library
LTR(S)A 74	Land Tenure Reform (Scotland) Act 1974
M. & W.	Megarry and Wade: The Law of Real Property
MietSlg	<i>Mietrechtliche Entscheidungen</i>
NJ	<i>Nederlandse Jurisprudentie</i>
NJW	<i>Neue Juristische Wochenschrift</i>

Cambridge University Press
 978-1-107-02612-4 - Time-Limited Interests in Land
 Edited by Cornelius van der Merwe and Alain-Laurent Verbeke
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xxii ABBREVIATIONS

Not Fisc M	<i>Notarieel en Fiscaal Maandblad</i>
NoV	<i>Nomiko Vima</i>
NPD	Natal Provincial Division [of the Supreme Court of South Africa]
NRAU	<i>Novo Regime do Arrendamento Urbano</i>
NZ	<i>Notariatszeitung</i>
Ob	<i>Oberster</i>
ÖJZ	<i>Österreichische Juristen-Zeitung</i>
Pas.	<i>Pasicrisie belge</i>
PPP	Public Private Partnership
Rev Dr ULB	<i>Revue de Droit de l'Université libre de Bruxelles</i>
ROW(S)A 95	Requirements of Writing (Scotland) Act 1995
RTDciv	<i>Revue trimestrielle de droit civil</i>
RW	<i>Rechtskundig weekblad</i>
SA	[High Court of] South Africa
SAFER	<i>Société d'aménagement foncier et d'établissement rural</i>
SALJ	South African Law Journal
Sh Ct Rep	Sheriff Court Report
Sh Ct	Sheriff Court
SLDT	short limited duration tenancy
SLT	<i>Scots Law Times</i>
Stb	<i>Staatsblad</i>
SZ	<i>Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen</i>
T Not	<i>Tijdschrift voor Notarissen</i>
TBBR	<i>Tijdschrift voor Belgisch Burgerlijk Recht</i>
TC(S)A	Title Conditions (Scotland) Act 2003
THRHR	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
TPD	Transvaal Provincial Division [of the Supreme Court of South Africa]
TPR	<i>Tijdschrift voor Privaatrecht</i>
TvR	<i>Tijdschrift voor Rechtsgeschiedenis</i>
U Toronto LJ	University of Toronto Law Journal
Ufr	<i>Ugeskrift for Retsvæsen</i>
WEG	<i>Wohnungseigentumsgesetz</i>
wobl	<i>Wohnrechtliche Blätter</i>
WPNR	<i>Weekblad voor privaatrecht, notariaat en registratie</i>
ZEuP	<i>Zeitschrift für Europäisches Privatrecht</i>