

Chapter 2: The Meaning of “Land”

Outline	2.1	Introduction	2.5	The doctrine of waste
	2.2	Realty and personality	2.6	Party walls
	2.3	What is “land”?	2.7	Land and human rights
	2.4	Fixtures and fittings	2.8	Summary



Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 1 Understand the legal concepts of real property and personal property

2.1 Introduction

We shall start the journey into this fascinating subject by exploring the meaning of land and property rights. Legally, property does not have the same meaning that lay persons give it. Lay persons often say that they own a particular property, for example, Yewtree Cottage. Legally, what that means is that a person has property rights over the cottage. Property is a right which a subject has over an object. Strictly speaking, to call something a property right or a proprietary right is unnecessary; the property itself is the right. The expressions “property” and “proprietary rights” (see **2.2.4**) are, however, a part of common legal language and will be used throughout this course.

One key point to remember is that in land law there are often competing and different rights over the same piece of property. The role of land law is to regulate these competing rights so that they receive the appropriate level of protection. In the case of land, it is very common for the landowner to have a mortgage – in such a case the landowner and the mortgagee (the lender) both have rights over the land, and the role of land law is to deal with how those rights are recognised and enforced. Other examples of rights over land include a neighbour who may have a right of way (a possible easement) over the land, or another neighbour may be entitled to the benefit of a restrictive covenant – restricting the owner of land from using it in a particular way – again, this is a property right. These various rights will be discussed in detail during the course.

2.2 Realty and personality

Property may be sub-divided into **real property** (realty) or **personal property** (personalty or chattels).

2.2.1 Real property

Historically, if an owner was dispossessed of real property, he was entitled to a real action (an action *in rem*, against the thing itself). This entitled the owner to recover the dispossessed property. The idea that property rights are capable of being enforced against everyone will be met time and time again

throughout the manual. Moreover, real property passed to one's heir on death. Such property is consequently also known as a **hereditament**. This is a term which is still in use today and you should become familiar with it.

Nowadays, real property is basically property which is immovable, that is, land. The exception to this is with regards to certain rights – most importantly leases – which are known as **chattels real**. Historically, a lease was seen as being personal property. By 1499, however, leases were subject to a real action – if an owner of leasehold land was dispossessed, he could recover his land. Hence, leases became something of an anomaly, in some ways having the nature of realty and in some ways of personalty – hence their characterisation as a chattel real. Leases will be covered and are, indeed, a most important part of any land law course.

2.2.2 Personal property

In contrast to real property, personal property was subject only to a personal action, that is, against the person who had dispossessed the claimant rather than against the thing itself. Such an action allowed the property owner to sue for damages for loss suffered or the return of the goods at the choice of the defendant. There was therefore no automatic right to the return of the goods. Such property became known as **chattels**, deriving from the word cattle – the most important type of personal property in medieval times. Instead of passing to one's heirs on death, personal property would be divided between certain relatives in the event of intestacy.

Personal property can be sub-divided as follows.

(1) Choses in possession

These are tangible objects, goods which have a physical existence and which are movable, for example, cars, furniture, books and clothes. Land is not a chose in possession.

(2) Choses in action

These are intangible rights (but not relating to land), which do not have a physical existence and which can ultimately be realised only by a court action. Examples include debts, stocks and shares, patents, copyright and trademarks.



- (2) Which one of the following is not personalty?
- (a) Choses in possession.
 - (b) Choses in action.
 - (c) Freehold.
 - (d) Leasehold.

2.2.3 The relevance of the distinction today

Although the distinction between realty and personalty has been historical, it is still of importance today.

The fact that leases remain personal property to this day (even though they are capable of being a legal estate) is also of importance.

Why is the distinction important? Say T leaves all his property by will by the following disposition: "All my real property to W, my wife, and all the personal property to S, my son." The effect of this will be to leave all T's freehold land to his wife and all his personal property – including any leasehold property he may hold – to his son. Therefore, if T has no freehold land, his wife will receive nothing, even though he probably intended her to take any leasehold property.

For most purposes the property legislation of 1925 assimilated real and personal property to such an extent that the distinction is only of importance today in specific circumstances, such as in the law of probate.

2.2.4 The distinction between personal rights and proprietary rights

Proprietary rights have the capacity to bind a purchaser of the land. For example, easements and leases are proprietary rights in land and so can bind a purchaser of the land that they are over. An invitation to supper is a personal right only and, as such, an invitation would not bind a third party purchaser. Personal rights can only bind the person who gave the right. With the exception of some licences, all the rights described in this manual are proprietary rights.



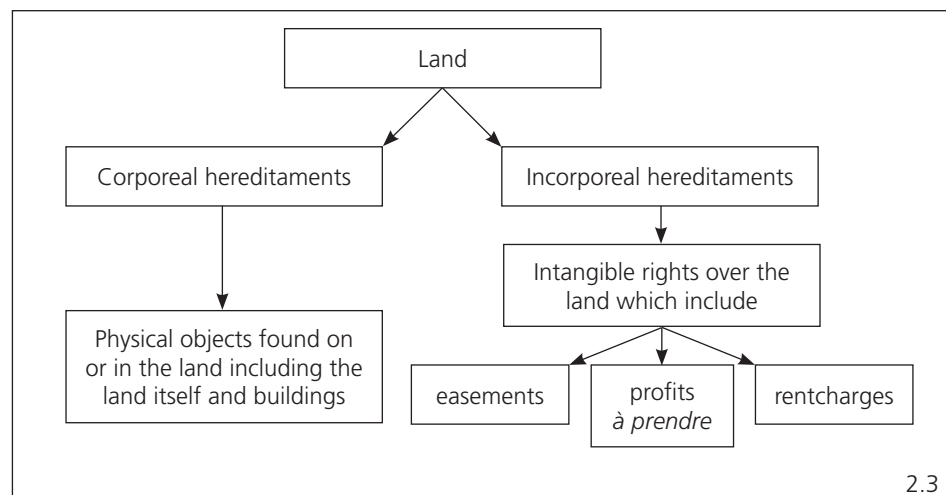
(3) Why is the difference between a personal and a proprietary right important?

2.3 What is "land"?

By **s205(1)(ix) LPA 1925** land includes:

land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments.

So, land includes the intangible rights – incorporeal hereditaments – which a person may have over someone else's land. You need not worry about a "manor" or an "advowson" but a typical incorporeal hereditament is an easement (e.g. a right of way or a right to light).



2.3

Two Latin maxims are frequently employed in the definition of “land” – *cuius est solum eius est usque ad coelum et ad inferos* and *quicquid plantatur solo, solo cedit*. The former means that “he who owns the land owns everything extending to the heavens and to the depths of the earth”; the latter means that “whatever is attached to the ground becomes a part of it”. Neither maxim can be taken at face value, and we need to consider the accuracy of each today.

2.3.1 *Cuius est solum eius est usque ad coelum et ad inferos*

There are several limitations to this maxim. As long ago as 1669 it was decided in ***Duppa v Mayo [1669]*** that “*fructus industriales*” (annual crops which require periodical labour for their production, such as potatoes) are not included in “land”, though “*fructus naturales*” (natural products of the soil, such as grass, which requires no labour for its production) are sometimes included.

Airspace: “to the heavens” or the right to airspace has been curtailed so that an owner’s rights now extend only to such a height as is necessary for the ordinary use of the land and the structures on it – ***Bernstein v Skyviews Ltd [1978]***. In the case, Baron Bernstein could not prevent aerial photographs being taken of his house by helicopter from a reasonable height above the ground.

There is also statutory authority limiting an owner’s right to sue in trespass or nuisance with respect to the infringement of airspace. **s76 Civil Aviation Act 1982** provides that no action shall lie in respect of trespass or nuisance by a flight of an aircraft over property at a reasonable height.

Where there is an incursion into the airspace of the landowner within the reasonable height then this *prima facie* gives rise to a claim in trespass: ***Kelsen v Imperial Tobacco Ltd [1957]***. McNair J held that an advertising sign which projected into the airspace of the adjoining property amounted to trespass.

Mines and minerals: “to the depths of the earth” or the question as to the depth of the landowner’s ownership of the land was looked at in ***Star Energy v Bocardo SA [2010]***. In order to obtain oil, Star Energy had drilled from its own land deep under Bocardo’s land without permission. The Supreme Court held that the owner of land also owns the strata beneath it. Whilst there was a point at which the pressure and temperature would make any discussion of ownership futile, it had not been reached here. The fact that Bocardo had drilled wells so deep pointed to the opposite conclusion. This was an actionable trespass and damages were awarded. A landowner is not entitled to all minerals under his land. The ownership of coal, oil and natural gas is

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