land law

DIRECTIONS

4th edition

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What is land?

Learning objectives

By the end of this chapter, you will be able to:

- recognize what is meant by 'land';
- understand the extent of land—in particular, how it exists in three dimensions;
- explain which objects form part of the land and which keep their separate character;
- understand what is meant by 'intangible rights' in land;
- discuss the ownership of objects found on, or within, the land, including the Crown's right to 'treasure'.

Introduction: how relevant is land law today?

Land law has always been important to people. From the beginning of civilization, people have needed to regulate land ownership and use. Although land law has its roots in ancient times, it is still of vital importance in today's world. Although they may not realize it, everyone, every day, comes into contact with the various rules relating to the ownership, occupation, and use of land. To start with, everyone has to live somewhere. Some people live in a freehold property; others live in a leasehold home. Although most people have heard the terms 'freehold' and 'leasehold', they may well not really understand what the words mean. Yet it is vitally important that each person understands exactly what he or she owns or occupies. The owners of a freehold house need to know what they can and cannot do with their land. Owners of a leasehold property need to know how their rights differ from those of a freehold owner. People renting their homes from week to week, or month to month, also need to know what they can and cannot do in relation to the property in which they live. Even students living at home with parents, or people living in a property owned by a partner, need to know what rights, if any, they have in their homes. Land law is important—as important as the roof over your head.

Despite its very practical relevance, students sometimes find land law dull. Part of the problem seems to be that it is full of its own rather obscure language and ancient-sounding concepts. It is true that land law has a specialized vocabulary, but that does not mean that it cannot be explained in modern English. Words such as 'covenant' and 'easement' have an old-fashioned sound, but they describe concepts that are as relevant today as they were when the words were first coined. Throughout this book, although we may use dusty old cases as authorities, we will also give modern examples and photographs of real pieces of land to illustrate and explain. Land law is a living, dynamic subject—and it is arguably even more relevant now than it was when England and Wales were less crowded and busy than they are today.

1.1 The definition of land

It is always helpful to begin by defining the subject matter being studied. Unfortunately for those who like simplicity, although there are many statutes that regulate land law, there is no single, authoritative, statutory definition of 'land'. There are a number of different definitions in various statutes—but they tend to repeat and expand upon one another in a less than helpful way.

As a starting point, however, we can look at the partial definition of land in Law of Property Act 1925 (LPA 1925), s. 205(1)(ix). The LPA 1925 is one among the body of statutes that makes up the 1925 property legislation: an impressive attempt to rationalize and codify the law relating to land.

statute

Law of Property Act 1925, s. 205(1)(ix)

'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, advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land; . . . and 'mines and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same . . . ; and 'manor' includes a lordship, and reputed manor or lordship; and 'hereditament' means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir.

As a definition for a new student of land law, this leaves a lot to be desired. For a start, it is only a partial definition, because it begins ' "Land" *includes*', and this means that land may also include things that are *not* mentioned in this definition. Further, it uses words and phrases that are not in common use today, so it can be difficult to grasp immediately what it means.

Despite these shortcomings, however, it is worth persevering with this definition, because it can teach us quite a lot about the basics of land law. It also introduces some of the vocabulary needed for further study, which will make it much easier for you to understand later chapters.

1.1.1 Land of any tenure

cross-reference

For more on freehold land, see Chapter 3.

Firstly, the section states that land 'includes land of any tenure'. Broadly speaking, this means that both freehold and leasehold land count as land for land law purposes. The concepts of freehold and leasehold are dealt with in later chapters.

cross-reference

For more on leasehold land, see Chapter 5.

For now, it is sufficient to understand that freehold land is owned effectively 'forever', whereas leasehold land is owned by a tenant for a definite period, which may be short or long, but is not 'forever'. A leasehold is created out of a freehold.

It might seem obvious to you that both are 'land', but, for historical reasons, this was not always the case. Originally, the distinction was not made between 'land' and other types of property, but between **real property** (or **realty**) and **personal property** (or **personalty**). Personal property can also be described as **chattels**—a word that is thought to be derived from cattle, which were a common type of personal property in early farming societies.

real property, or realty

this term refers to freehold land

personal property, or personalty

all property that does not comprise freehold land

chattel

all property that is not real property, including leasehold land, and is also often used as the opposite to 'fixture'—see 1.1.3.1. Leasehold land came to have such importance, however, that it was called a 'chattel real', because it has many of the characteristics of real property

Originally, all land was freehold, so real property meant freehold land. The word 'real' comes from the Latin *res*, which means 'the thing itself'. Real property could be protected in law by the real actions. This meant that a court action could be brought to restore the land itself to the true owner, rather than an award of money damages as compensation for its loss. It is still true today that courts will usually order specific performance of a contract to sell land. In other words, they will order the seller to transfer the land to the buyer rather than awarding damages.

By the time the idea of a lease developed, the definition of real property as freehold land was too fixed to be altered. Leasehold land was regarded as personal property, although it was clear that it was different from most types of personalty. The real actions were not available to leaseholders.

cross-reference
For more detail on 'tenure', see Chapter 2.

You will be relieved to hear that, because land now 'includes land of any tenure', leasehold land is now included squarely within the definition of land for all modern purposes.

1.1.2 The extent of land

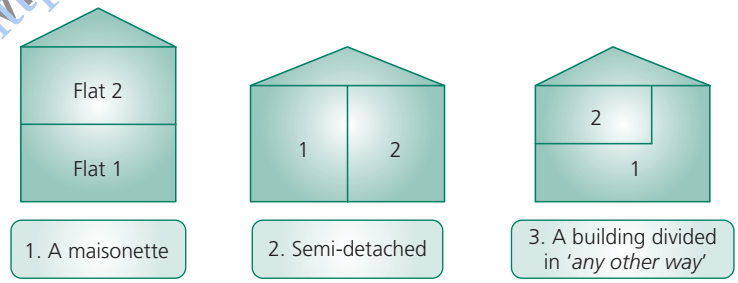
Turning back to LPA 1925, s. 205(1)(ix), you can see that land includes mines and minerals, whether they are owned by the owner of the surface of the land or owned separately from it. This illustrates a very important fact about land, which is that land is three-dimensional. There is the surface of the land, the ground beneath the surface, and the airspace above. Different people can own different strata (or levels) of land.

example

Anna owns a house that is built on land above a coalfield. She owns the surface of the land (and the house built on it), but the land beneath the surface—that with the coal in it—may be owned by the British Mining Company.

This same principle can be seen at work in the next part of the definition—that land includes 'buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way)'. Not surprisingly, buildings form part of the land, but interestingly, different people can own different parts of buildings and the building can be divided in any way (see Figure 1.1).

Figure 1.1
Ways in which a building can be divided



example

Maisonettes are buildings that are divided horizontally (1); semi-detached houses (2) are buildings that are divided vertically.

There is, however, no reason why a building should not be divided unequally, so that one person owns all of the ground floor and part of the first floor, and the other person owns the rest of the first floor. This last example (3) is of a building divided in 'any other way'.

cuius est solum eius est usque ad coelum et ad inferos
'he who owns the land owns everything reaching up to the very heavens and down to the depths of the earth'

The extended definition of land is sometimes expressed in the maxim ***cuius est solum eius est usque ad coelum et ad inferos***, or 'he who owns the land owns everything reaching up to the very heavens and down to the depths of the earth'. This maxim, approved in *Bocardo v. Star Energy* (see 1.1.2.1), is useful in reminding us that land includes not only the surface, but also the air above and the space beneath the ground. However, whilst it is true that land includes airspace and subterranean space (the space beneath the ground), it is not true that the owner's rights are unlimited, particularly with regard to airspace.

1.1.2.1 Subterranean space

The landowner owns the subterranean space below the surface of his land. He can dig down into it to form a cellar or underground room.

As s. 205(1)(ix) states, mines and minerals form part of the land—but certain minerals do not belong to the landowner and belong instead to the state. Gold and silver belong to the Crown as of right—*Case of Mines* (1568) 1 Plowd 310. The Crown is also entitled to oil, petroleum, coal, and natural gas by statutory right—see the Coal Industry Act 1994 and the Petroleum Act 1998. In addition, the Crown has the right to treasure found in the land (see 1.2.3).

case close-up

Bocardo v. Star Energy [2010] UKSC 35, [2011] 1 AC 380

This case contains an interesting point about ownership of the land 'down to the depths of the earth'. The claimants were the owners of an estate in fee. The defendants were holders of a licence under the Petroleum Act 1934 to search and drill for and pump out petroleum products from an oilfield that extended partly under the claimants' land. The defendants carried out their drilling operations from land next to the claimants' estate but, unknown to the claimants, their oil wells extended under the claimants' land.

The claimants eventually found out about the oil wells and claimed damages for trespass to their land. The defendants argued that the oil wells were so deep underground (a minimum depth of 800 ft) that they did not affect the claimants' use of the land in any way; the claimants had been unaware of them for years and therefore they did not trespass on the claimants' land.

The Supreme Court held that the oil wells were a trespass. Although they were deep below the surface, the subsoil belongs to the owner of the surface unless it has been granted to someone else. The petroleum products belonged to the state by statute (Petroleum Act 1934), but not the subsoil. It was not a trespass to remove the petroleum, but it was a trespass to drill wells under the claimants' land without permission. The defendants were therefore ordered to pay compensation to the claimants.

ad medium filum
'to the mid line'

The land beneath the surface can be extended if land borders a roadway. There is a presumption that the landowner owns the subsoil of the roadway adjoining the land up to the middle of the roadway—***ad medium filum***, as the cases often say, meaning 'to the mid line'. Landowners can construct cellars that extend into this space below the ground.

Should you happen to be visiting a pub, take a closer look: often trap doors enabling delivery of barrels to the beer cellars are set in the pavement outside the pub (see Photo 1.1).

Photo 1.1
Pub trapdoor

To see this photo in more detail scan this QR code image or visit the Online Resource Centre.

1.1.2.2 Airspace

The owner of land also owns the airspace above that land—but he or she does not own 'up to the very heavens', as the case of *Bernstein v. Skyviews* [1978] QB 479 shows.

case close-up

Bernstein v. Skyviews [1978] QB 479

Lord Bernstein, the owner of a large country estate, brought an action in trespass against a company for flying over, and taking photographs of, his land. The case turned on whether the airspace formed part of the claimant's land.

Griffiths J held that the rights of the owner of land in the airspace above it extend 'to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it'. Above that height, the landowner has no more rights than the general public. Aircraft flying at a normal height do not trespass upon land, so Lord Bernstein lost the case.

It is clear, however, that lower regions of airspace do belong to the landowner. Cases have been brought in respect of overhanging cranes, for example.

case close-up

Woolerton and Wilson Ltd v. Richard Costain Ltd [1970] 1 WLR 411

The defendants were building contractors. Their crane jib overhung the claimant's land at a height of 50 ft (15 m) above ground level. The defendant admitted trespass to the claimant's airspace, but offered compensation for this. The claimant would not accept the compensation, but asked for an interim injunction preventing the trespass.

Stamp J said: 'In principle there ought to be an injunction, but on the particular facts of this case, not until the defendants had a chance of finishing the job.'

The decision in *Woolerton and Wilson Ltd v. Richard Costain Ltd* not to grant an injunction (an order from the court to remove the crane jib), even though there was a clear trespass,

was criticized in the later case of *John Trenberth v. National Westminster Bank* (1979) 39 P & CR 104.

case close-up

John Trenberth v. National Westminster Bank (1979) 39 P & CR 104

In this case, the defendant needed to repair his building, because it was unsafe. The claimant refused to allow scaffolding to be erected on his land, but the defendant proceeded anyway. The claimant was granted an injunction to prevent this. *Woolerton and Wilson Ltd v. Richard Costain Ltd* was not followed and the correctness of that decision was doubted.

It is also clear from other cases that the landowner does not have to prove that the trespassing object has affected his use of the land.

case close-up

Laiquat v. Majid [2005] EWHC 1305 (QB)

In this fairly recent first-instance case, there was an extractor fan at about 4.5 m above ground level, which protruded 750 mm into the claimant's garden.

Silber J, relying on older cases such as *Kelsen v. Imperial Tobacco Co. Ltd* [1957] 2 QB 334, held that it was a trespass into the claimant's airspace. It was well within the height which the older authorities considered to be trespass and it did not matter that the fan had not actually interfered with the claimant's normal use of his garden.

It is clear, then, that lower regions of airspace to the height necessary for ordinary use of the land, form part of the land. Any objects intruding on that airspace from next door are a trespass and will entitle the landowner to either an injunction or damages, even if they do not, in fact, affect the ordinary use of the land.

It is interesting that there is a limit to the height above the land over which landowners have control, but apparently no limit to the depth over which they have control—see *Bocardo v. Star Energy* (see 1.1.2.1). In that case in the Court of Appeal Aikens LJ, at [2009] EWCA Civ 579 [61], said that it is not helpful to draw analogies between rights to airspace and rights to substrata, because there are many uses which can be made of airspace whilst the general public has no right to enter substrata, and because the use of airspace is regulated by statutes and regulations concerning aircraft. This view was endorsed by the Supreme Court.

In the same way that cellars can extend under the surface, the owner of land next to a highway can build out over that highway above the height required for the passage of traffic.

Photos 1.2 and 1.3 show buildings that extend out over pavements and alleyways. Room is left for the passage of pedestrians underneath. It is quite possible for the part of the building over the alleyway in Photo 1.2 to be owned separately from other parts of the building. It may have no connection with the earth itself, but it is still 'land'. (Such pieces of land are sometimes called 'flying freeholds', although, for practical reasons that we shall see later on in the book, they are often leasehold rather than freehold.)

1.1.3 Corporeal hereditaments

corporeal hereditaments
any real property having a physical form

It can be seen from the definition in LPA 1925, s. 205(1)(ix) that minerals and buildings are part of a wider category of **corporeal hereditaments**. This is a very old expression, but it is actually quite easy to understand. The word 'corporeal' means 'having a physical form', so it includes not only minerals and buildings, but also other physical things, such as plants, fences, etc.

Photo 1.2
Building over alleyway
© Sandra Clarke

To see this photo in more detail scan this QR code image or visit the Online Resource Centre.

Photo 1.3
Balconies
© Terraxplorer

To see this photo in more detail scan this QR code image or visit the Online Resource Centre.

The word 'hereditaments', meanwhile, is defined in the last sentence of LPA 1925, s. 205(1)(ix) as '*any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir*'. Again, this is a definition that is less than helpful for the new student: it is referring back to concepts that have little place in modern land law. But it was meant at the time to indicate that the old cases on what formed part of real property were to remain good law.

Many old cases were brought to establish the extent of real property for inheritance purposes. This was because the heir was entitled to all real property, but not to chattels. It was therefore

important to know which items formed part of the land (real property) and which remained separate from it (chattels). Despite their age, these cases are still authority in a more modern context for establishing the extent of land.

1.1.3.1 Fixtures

fixture
an object that is attached to the land in such a way and for such a reason that it becomes part of the land

Many of the old cases that discussed real and personal property did so in the context of **fixtures**. The law on fixtures is important for reasons other than determining who should inherit property such as pictures fixed to the wall or statues standing in a garden.

> ***thinking point***
> *In today's world, when do you think it would be important to work out which objects form part of the land?*

cross-reference
For more on mortgages and repossession, see Chapter 13.

It is important when buying and selling land to know what is included within it, particularly when it is bought and sold at auction, as there is no further chance to bargain on what will be included in the sale. Also, if a mortgagee such as a bank or building society repossesses land where the borrower has defaulted on the loan, it needs to know what is included in its security, and what is not.

It can also be relevant for tax purposes to know whether an object forms part of the land.

Before land is sold, the freehold owner of the property may, of course, fix things to the property and remove them again at will (although different rules apply to tenants—see 'Tenant's fixtures'). It is only when land is to be sold, or when you need to know who owns an object for tax purposes, that the law on fixtures is relevant. When land is sold in the 'normal' way, by contract, the parties are free to come to an agreement about fixtures and fittings. They generally do this by filling in a list, supplied by their solicitors, in which they specify exactly what is included in the sale and what is excluded. It is only if this is not done that the general law on fixtures will be relevant.

example

Sandra bought a new house from Pete. Sandra and Pete specifically agreed that the carpets of the house were included in the sale, but that the curtains were excluded. It did not matter whether fitted carpets would form part of the land under the general law, because Sandra and Pete had already reached an agreement about them. If, when he was moving out, Pete had changed his mind and taken the carpets, he would have been in breach of contract.

quicquid plantatur solo, solo cedit
'whatever is fixed to the land becomes part of it'

Yet again, there is an old Latin maxim that sums up the law on fixtures: ***quicquid plantatur solo, solo cedit***, or 'whatever is fixed to the land becomes part of it'. However, you should approach the maxim with some caution: it is useful as a general guide, but it does not state the law with complete accuracy. You must look at the case law to understand which objects are likely to become part of the land and which will remain as chattels.

The best place to start is with the test in the leading case of *Holland v. Hodgson* (1872) LR 7 CP 328.

case close-up

Holland v. Hodgson (1872) LR 7 CP 328

In this case, the question arose whether looms installed in a factory formed part of that factory—that is, were they part of the land?

Blackburn J said that whether an object is a fixture or a chattel depends on two tests:

1. the degree of annexation;
2. the purpose of the annexation.

In explaining the test, Blackburn J went on to say that articles that are attached to the land only by their weight are not usually considered to be part of the land, unless they were actually *intended* to form part of the land.

He gave the useful example of a dry-stone wall—the kind you often see when you are in the countryside. A pile of stones, randomly stacked in the middle of a field, would not be part of the land—but when they have been arranged, packed, and formed into a stone wall, then they clearly are intended to be part of the land. It is for the person claiming that an object is part of the land to prove it.

On the other hand, an object fixed to the land—however lightly—is initially considered to be part of the land, unless circumstances indicate that it was always intended to remain a chattel. In this case, it is for the person claiming that the object is a chattel to prove it.

This case tells us to look first at whether the object is attached in any way to the land. If it is, then it is to be classified as a fixture unless there is good reason to classify it as remaining a chattel. If it is not attached, the presumption is reversed: it is to be classified as a chattel unless there is good reason to classify it as a fixture. These rules have been considered in a large number of cases, of which only a selection can be considered here.

case close-up

Berkley v. Poulett (1976) 120 Sol Jnl 297

In this case, the Court of Appeal considered whether certain items formed part of land sold by auction. The dispute concerned pictures fitted into panelling on a wall, a heavy marble statue resting on a plinth in the garden, and a sundial.

The Court of Appeal considered the items in the light of the test in *Holland v. Hodgson*.

The Court concluded that the pictures, although attached to the walls, were not fixtures: they were put on the walls to be enjoyed as pictures, rather than with the intention of making them part of the land. The statue, also, was not attached to the land, but was placed on a plinth that was attached to the land. The Court of Appeal concluded that the plinth formed part of the land, but the statue did not, because there was no evidence that the statue was designed to go in just that spot in the garden as part of an 'architectural scheme'. The sundial was also held to be a chattel rather than a fixture, because it had been detached from its pedestal many years earlier.

Berkley v. Poulett shows that objects may remain chattels even though they are fixed to the building, as were the pictures in this case. Note the test proposed by this case: were the pictures brought onto the land to be enjoyed as pictures, or to enhance the land permanently? It can also be cited as authority that Blackburn J's 'purpose of annexation' test is regarded as more important than his 'degree of annexation' test in modern times.

It appears, however, from older cases, that statues—even if resting only by their own weight—can form part of the land in some cases, as can pictures.

case close-up

D'Eyncourt v. Gregory (1866) LR 3 Eq 382

In this case, it was held that articles, such as tapestry, pictures in panels, and frames filled with satin, which were attached to the walls, were fixtures and thus part of the land. In the garden, statues, figures, vases, and stone garden seats that were part of the architectural design of the grounds were fixtures, whether or not they were attached to the ground. Glasses and pictures not in panels, however, were not part of the building and so were chattels.

D'Eyncourt v. Gregory is one of these old cases about inheritance, but it is still useful in illustrating the rule that objects fixed as part of an 'architectural design' are more likely to be fixtures.

But not all cases on fixtures are as old as these: in 1997, the House of Lords had the opportunity to consider the rules expressed in *Holland v. Hodgson* in a modern context.

case close-up

Elitestone v. Morris [1997] 2 All ER 513

This case concerned a chalet or bungalow resting on concrete blocks on the ground. The chalet had been brought onto the land many years before and had been occupied by the defendants since 1971. The landowner and the occupiers seem to have proceeded on the assumption that the chalet belonged to the occupier and not the landowner, and rent was paid for the use of the land on which it stood.

When there was a change in landowner, the rent for allowing the chalet to remain on the ground was increased steeply and notice was served on the occupiers to remove the chalet.

As part of their legal fight to stay on the land, the occupiers needed to argue that the chalet formed part of the land. (This was so that they could claim that they were tenants protected by the Rent Acts—an argument that is not relevant to the point at which we are looking now.)

The Court of Appeal decided that the chalet did not form part of the land, because it merely rested on—but was not attached to—the concrete blocks that formed its foundations.

The House of Lords reversed the decision of the Court of Appeal. It found that the chalet was not designed to be removed from the land without being destroyed. It was not like a Portakabin, or a mobile home, that could not be taken down and erected elsewhere. Therefore, the House of Lords decided that, whatever the parties had originally assumed, the chalet had become part of the land.

Lord Lloyd of Berwick said that he thought the terms 'fixture' and 'chattel' were confusing ones in the context of a house or building. He preferred a different approach, using a threefold classification:

> An object which is brought onto land may be classified under one of three broad heads. It may be (a) a chattel; (b) a fixture; or (c) part and parcel of the land itself. Objects in categories (b) and (c) are treated as being part of the land.

The chalet fell into category (c)—part and parcel of the land itself—as do most buildings. It appears that, if an object cannot be removed from the land except by destruction, it has become part and parcel of the land.

Elitestone v. Morris seems to give more weight again to the 'degree of annexation' part of the test, because it is clear that, if objects are so much part of the land that they cannot be moved

without destroying them, they will be classed as fixtures (or, to use Lord Lloyd's preferred terminology, '*part and parcel of the land*'). On the other hand, the purpose test was also used, because the chalet was brought onto the land with the intention that it was to stay there permanently.

This case was applied in *Mew v. Tristmire* [2011] EWCA Civ 912.

case close-up

Mew v. Tristmire [2011] EWCA Civ 912

The claimants lived in old houseboats on wooden platforms around a harbour. Just like Mrs Morris, they wanted to claim that the houseboats formed part of the land so that they could claim rights under the Rent Acts.

The Court of Appeal held that the houseboats were chattels. They had been brought to the harbour as moveable objects which could have been easily removed without being destroyed. They could not be considered as one object with the platforms onto which they had later been lifted. It did not matter that they were now very fragile and could not be moved without damage—it was the intention at the time they were brought to the land which was relevant.

thinking point

Look at Photo 1.4 of the Cutty Sark, a tea clipper built in 1869. She has been in dry dock in Greenwich since 1954 and has recently been restored and refixed into a glass exhibition centre.

Do you think that the Cutty Sark is a chattel, a fixture, or part and parcel of the land? Why?

Photo 1.4
The Cutty Sark
© Sandra Clarke

To see this photo in more detail scan this QR code image or visit the Online Resource Centre.

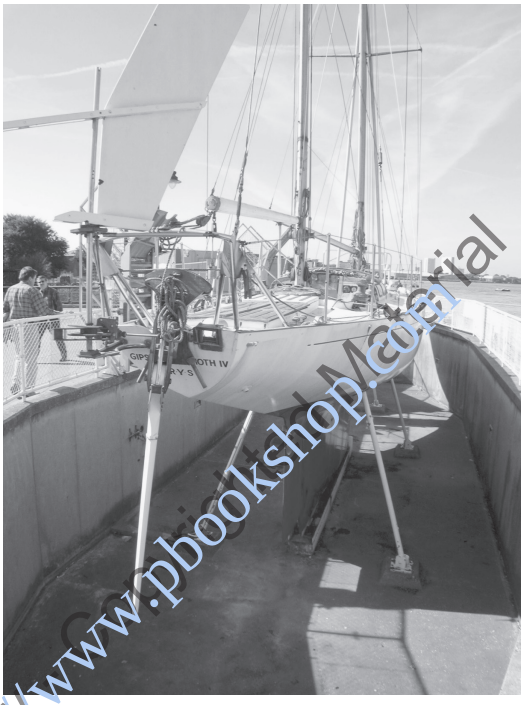
thinking point

What about the vessel pictured in Photo 1.5, the Gipsy Moth IV, in which Sir Francis Chichester sailed around the world. She was on display in Greenwich, close to the Cutty Sark.

Is she a fixture, a chattel, or part and parcel of the land? Why?

Does your answer differ from that which you gave for the Cutty Sark? Why?

Photo 1.5
How the Gipsy Moth IV was fixed to the ground
© Scott Hortop



To see this photo in more detail scan this QR code image or visit the Online Resource Centre.

thinking point

Finally, consider the boat pictured in Photo 1.6. It is a narrowboat moored on a canal and used as a houseboat.

Is she a chattel, a fixture, or part and parcel of the land? Why?

How does she differ from the Cutty Sark and Gipsy Moth IV?

It is submitted that the Cutty Sark forms part and parcel of the land, based on the fact that she has been in dry dock for many years and was brought onto the land with the intention that she stay there permanently as a visitor attraction. Gipsy Moth IV, on the other hand, is a chattel. Although she was attached to the land, it was simple to detach her from her fixings and take her elsewhere. In fact, she has been away from Greenwich for some time now and has since sailed around the world again! She was fixed to the land to display her as a chattel, not with the intention of making her part of the land.

Finally, the houseboat in Photo 1.6 is definitely a chattel, because she can be untied and moved at any time. Relevant cases are *Chelsea Yacht and Boat Club v. Pope* [2001] 2 All ER 409, in which it was held that a houseboat always remains a chattel, and of course, *Mew v. Tristmire*.

Photo 1.6
A narrowboat moored on a canal

To see this photo in more detail scan this QR image code or visit the Online Resource Centre.

Everyday items

> ***thinking point***
> *Have a look around at the room that you are in at the moment.*
> *What do you think about the everyday items that you see?*
> *What about carpets or curtains, or fitted kitchen units? Are they fixtures or chattels?*

The best guidance on everyday items is the Court of Appeal decision in *Botham v. TSB plc* (1997) 73 P & CR D 1.

case close-up

Botham v. TSB plc (1997) 73 P & CR D 1

In this case, the bank was entitled to possession of the appellant's house, because he was behind with his mortgage payments.

The appellant claimed that he had transferred the contents of the property, which was a flat, to his parents. The question therefore arose as to which of the contents were fixtures and so the property of the bank, and which were chattels and so the property of the parents. The trial judge had divided the 109 items into nine categories and considered each of the categories. He found almost all of the items to be fixtures.

The Court of Appeal differed, however, in its interpretation of the law. A summary of its decision can be seen in Table 1.1.

It is important to note that all cases will depend upon their facts. If curtains or carpets were fixed in a different way, or were part of an 'architectural scheme', for example, the decision as to whether they are fixtures or chattels could vary. This case is, however, a very useful starting point in considering everyday items.

Table 1.1

Summary of the Court of Appeal's decision in Botham v. TSB plc

Item	Decision
Fitted carpets	Held by the Court of Appeal to be chattels, because they are easily removed
Lights fixed to walls or ceilings, some of which were in recesses in the ceilings and some of which were attached to the ceiling by tracks	Only those recessed into the ceiling were held to be fixtures; the others could be easily removed
Gas flame-effect fires	Held by the Court of Appeal to be chattels, because they could be easily disconnected and removed
Curtains and blinds, including a shower curtain	Held by the Court of Appeal to be chattels, because they are easily removed
Towel rails, soap dishes, and lavatory roll holders	Held by the Court of Appeal to be fixtures, because they constituted a permanent improvement to the land
Fittings on baths and basins, such as taps, plugs, and shower heads	Held by the Court of Appeal to be fixtures, because they constituted a permanent improvement to the land
Mirrors and marble panels on the walls in the fitted bathroom	Accepted by the defendants to be fixtures
Kitchen units and work surfaces, including a fitted sink	Held by the Court of Appeal to be fixtures, because they constituted a permanent improvement to the kitchen
White goods in the kitchen, such as fridge-freezers, washing machines, and dishwashers	Held by the Court of Appeal to be chattels, because they could be easily removed

cross-reference

See Chapter 13 for more on mortgages.

Tenant's fixtures

tenant's fixtures
fixtures attached to rented property by a tenant that the tenant is entitled to remove

The law on fixtures could act harshly in relation to tenants, because they occupy the land for a limited period only and have to return the land to their landlord at the end of the tenancy. If they have attached items to the land in such a way that the items have become fixtures, they become part of the land and belong to the landlord. In order to avoid such unfairness, a separate set of rules has been established concerning **tenant's fixtures**.

If a tenant attaches a tenant's fixture, he or she may remove it at any time during the tenancy and may remove it at the end of the lease, or even after the tenancy has ended, provided that he or she is still lawfully in possession. The tenant must make good any damage done in removing the fixture.

case close-up

Mancetter Developments Ltd v. Garmanson Ltd [1986] QB 1212

In this case, the tenant had installed pipework and extractor fans in a factory. These were tenant's fixtures. When they were removed, large holes were left in the factory walls. The tenant was liable in damages for failing to make good the holes.

There are three categories of tenant's fixture: trade fixtures, ornamental fixtures, and agricultural fixtures.

- Trade fixtures
  These are objects used by the tenant in his or her trade. They have been held to include boilers, machinery, etc., and also the fittings of a public house. This is the category under discussion in *Mancetter Developments Ltd v. Garmanson Ltd*.

When looking at tenant's trade fixtures, it is important to consider the question in two steps:

1. Is it a fixture at all?
2. If it is a fixture, is it a trade fixture and therefore removable by the tenant? You can see an application of this in the recent case of *Peel Land and Property Ltd v. Sheerness Steel Ltd* [2013] EWHC 1653 (Ch), in which the judge had to decide whether the many and varied parts of a steel plant installed by the tenant were fixtures or chattels, and if fixtures, whether they were removable tenant's fixtures.

The reason for this two-step approach is that it is often necessary to decide whether an article is a fixture, even if it is a trade fixture that the tenant may ultimately have a right to remove. The ownership of the object may be important for tax purposes, or for rent-review purposes during the tenancy. If it is a fixture, it belongs to the landlord until the tenant removes it under the tenant's fixture rules. If it is not a fixture, it is a chattel, which belongs to the tenant throughout.

- Ornamental fixtures
  Older cases—such as *Martin v. Roe* (1857) 7 E & B 237—recognized the tenant's right to remove articles attached to the land for ornamental purposes, which could be removed without damage to the land. It is arguable that, in the light of the 'purpose of annexation' test, these items would probably not be regarded as fixtures at all today and so would be removable by the tenant anyway.
- Agricultural fixtures
  Farm tenants are given statutory rights under Agricultural Tenancies Act 1995, s. 8 to remove any fixture they have affixed to the land. They must make good any damage caused by removal of their fixtures. Unlike trade fixtures, agricultural fixtures belong to the tenant at all times.

1.1.3.2 Water

LPA 1925, s. 205(1)(ix) does not mention water at all, but the Land Registration Act 2002 does.

statute

Land Registration Act 2002, s. 132(1)

…

'land' includes—

(a) buildings and other structures,

(b) land covered with water, and

(c) mines and minerals, whether or not held with the surface;

…

Section 132(1) makes it clear that 'land covered with water' is still 'land' (and indeed, English law does not regard the water as being in separate ownership to the land it covers). Therefore, a lake or pond in the middle of your land is part of the land, and it would seem that the bed of a river and the seabed also form part of the land.

So far, so good—but then it gets a little more complicated. Rights over the water itself depend on whether the water is still or flowing, and, if it is flowing, whether it is tidal or not. Still water, such as a pond or lake, is regarded as forming part of the land on which it rests and landowners can do as they like with it, subject to any statutory controls under the Water Resources Act 1991. Landowners have certain natural rights over rivers flowing through their land: they can fish in the river (unless that right has been granted to someone else) and they have the right to an undiminished flow of the water. They cannot, however, take water from the river to the detriment of landowners downstream and they are entitled to prevent owners upstream from abstracting (removing) water to a noticeable extent. In any case, abstraction is now regulated by statute.

In contrast, landowners have no natural right to water simply percolating through the land—that is, to water that is not in a defined stream, but is just ground water. Subject to statutory restrictions, other landowners can pump out naturally percolating water, or even increase the amount of naturally percolating water reaching lower land, as long as they are acting reasonably—see the discussion of the law in *Palmer v. Bowman* [2000] 1 WLR 842.

If the boundary of land is a non-tidal river, the landowners on each side of the river own the bed of the river up to the centre line—*ad medium filum*. They can fish as far across the river as they can cast their lines—a good excuse for a longer fishing rod.

foreshore
the land between the high-water mark and low-water mark

Tidal water is treated somewhat differently. For a start, there is a presumption that the Crown owns the **foreshore**, although the Crown may have granted it to another body (for example, a local authority).

In addition, the public has rights of navigation and fishing over tidal waterways.

If the boundary of land is tidal water, the boundary may be fixed, or it may vary with the changing of the coastline over the years—see *Baxendale v. Instow Parish Council* [1982] Ch 14.

1.1.3.3 Animals

Wild animals and birds do not form part of the land while they are alive, and belong to landowners only when they are found dead on the land. Landowners, however, have the right to hunt them and thus bring them into possession by killing them.

1.1.3.4 Plants

Trees and other plants are attached to the land, and form part of it. It is possible to own the plants separately from the land—another example of land having different strata or levels.

example

It is possible for Farmer Brown to own the land on which trees are planted, but for Forestry Ltd to own the trees.

1.1.4 Incorporeal hereditaments

Have another look at the definition in LPA 1925, s. 205(1)(ix).

statute

Law of Property Act 1925, s. 205(1)(ix)

'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, advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land; . . . and 'mines and minerals' include any strata or seam of minerals or substances in or under any land, and powers of working and getting the same . . .; and 'manor' includes a lordship, and reputed manor or lordship; and 'hereditament' means any real property which on an intestacy occurring before the commencement of this Act might have devolved upon an heir.

incorporeal hereditaments
intangible rights in land

You will have noticed that it also includes reference to **incorporeal hereditaments**.

'Incorporeal' means things without a physical form (intangible property), such as rights to receive rent from the land, rights of way, rights of light, and the two ancient rights mentioned in the definition in LPA 1925, s. 205(1)(ix)—an 'advowson' and a 'manor'. You need not worry about an advowson (the right to present a priest to a parish), because it is largely obsolete. Manorial rights, meanwhile, are mainly ceremonial nowadays—but there have been two modern cases showing that manorial rights are not quite dead and buried:

case close-up

Bakewell Management Ltd v. Roland Brandwood and Ors [2004] UKHL 14

A businessman who bought the lordship of a manor tried to charge large sums of money for granting rights of way over the common land of the manor to the residents who owned houses around the common. They had been driving over the common to reach their houses for years, but he claimed that they had no right to do so. He was eventually unsuccessful, but the residents had to appeal all the way to the House of Lords to stop him.

cross-reference
If you want to know more about this case, see Chapter 11.

case close-up

Crown Estate Commissioners v. Roberts [2008] EWHC 1302 (Ch)

The defendant bought up a number of titles to ancient manors and tried initially to claim ownership of large areas of the foreshore of the Pembrokeshire coastline. This claim failed because of a decision in an earlier case (*Roberts v. Swangrove Estates* [2008] EWCA Civ 98), so Mr Roberts instead

claimed a number of manorial rights, including wreck de mer, a several fishery, treasure trove, sporting rights and estrays (even the court had to have these ancient terms explained to them, and there is a glossary in an appendix to the judgment). However, all he was able to prove title to was 'a moiety' (half) of a right to wreck.

Although both these cases led to very little in the final analysis, there was a good deal of expensive litigation and anxiety before the matters were settled. It might be better if such ancient rights were either abolished or their extent set out clearly by statute.

Incorporeal hereditaments form part of the land just as much as corporeal hereditaments. If you reflect for a moment, you will see why this is.

example

Ali lives in a first-floor flat. The stairs and hallways belong to his landlord, Ben. If Ali is to use his flat, he must have a right of way over the stairs and hallways. This right of way needs to form part of land and needs to be transferred with the physical land each time it is transferred to a new owner, or the flat will be valueless.

It is therefore necessary, when looking at the extent of a piece of land, to consider the incorporeal hereditaments that may form part of it. These rights form an important part of the land.

The other side of the coin is that other people may have rights over your land. These may be incorporeal hereditaments, such as rights of way—Ben, in the example just given, has a right of way over his land that will bind any future owner of his land. Such rights are described as **proprietary rights**. They are not personal to the original parties, as are ordinary contractual rights, but are binding on future owners, who were not parties to the original contract.

proprietary rights
rights that are not personal to the original parties, but which are binding on future owners

Many of these proprietary rights will be studied in later chapters, but it is worth noting now that the courts have always sought to limit the number of proprietary rights, precisely because they have such far-reaching effects. In the leading House of Lords decision, *National Provincial Bank Ltd v. Ainsworth* [1965] AC 1175, Lord Wilberforce made the following statement.

case close-up

National Provincial Bank Ltd v. Ainsworth [1965] AC 1175

Per Lord Wilberforce at 1247:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.

This definition means that a proprietary right needs to have three qualities:

1. It must be definable—that is, it must be possible to say what the right is and what it is not.
2. It must be able to be transferred to a new owner—that is, it must not be personal to the person now claiming that right.
3. It must last a reasonable amount of time—that is, it must not be a very fleeting right, or one that changes frequently.

The definition is somewhat circular, in that the *consequence* of a right being proprietary is that it can be transferred to a new owner and the *definition* is that it is a right that can be transferred to a new owner. Also, the degree of stability of the right will depend in some measure on whether

it is held to be proprietary. This definition however, does set out the most important features of proprietary rights and, in practice, the law is slow to add new rights to the category of proprietary rights, although this can still happen.

1.2 Objects lost and found in and on the land

Sometimes questions arise as to the rights of landowners to objects found lost or hidden on, or buried within, the land. The rules that apply differ depending on whether the object is found in (or attached to) the land or on the land. In both cases, however, these rules apply only if the true owner of the object (the person who lost or hid it, for example) cannot be found.

1.2.1 In the land

Objects found in, or attached to, the land belong to the occupier of the land.

case close-up

AG of the Duchy of Lancaster v. Overton (Farms) Ltd [1981] Ch 333

In this case, the court had to decide whether coins were treasure trove (see 1.2.3) or not. It was accepted that if they were not they would belong to the owner of the soil in which they were found.

1.2.2 On the land

Objects found on the surface of the land may belong either to the finder or to the occupier of the land. The lost object can be claimed by the occupier only if a manifest intention to control the land can be shown.

case close-up

Parker v. British Airways Board [1982] 1 All ER 834

A passenger found a gold bracelet on the floor of the executive lounge. He handed it to an employee of British Airways, with a request that it be returned to him if the true owner was not found. British Airways could not find the owner, so they sold the bracelet and kept the proceeds. The claimant sued for damages, on the basis that he had a better right to the bracelet than British Airways. The Court of Appeal held that the claimant did, indeed, have a better right to the bracelet.

The bracelet was not attached to the ground, so the occupier did not have automatic priority over the finder. The claimant was lawfully in the lounge and not a trespasser, and he did not have dishonest intentions. The test, therefore, was whether the defendants had shown 'a manifest intention to exercise control over the lounge and all things which might be in it'. They had not done so, because there was no evidence that they searched regularly, or at all, for lost articles.

It was accepted by the court in *Parker v. British Airways* that, in some circumstances, there was a clear 'manifest intention to exercise control' by the very nature of the premises. Donaldson LJ agreed that a bank vault would fall into such a category. At the other end of the spectrum, a public park clearly gives rise to no such implications. Most premises fall somewhere in between these two extremes.

case close-up

Waverley Borough Council v. Fletcher [1995] 4 All ER 756

In this case, the defendant, who was using a metal detector in a park owned by the claimant council, found a brooch some 9 in below the surface of the land. He dug it up and reported his find to the Coroner, who determined that it was not treasure trove (see 1.2.3). The question arose as to who had the better right to the brooch: the finder or the landowners.

The Court of Appeal held that the claimant council had the better right to the brooch. It had been found within, or attached to, the land, rather than on the surface, so that it belonged to the owner of the soil in which it had been found. The defendant's claim that he was enjoying lawful recreation in the park was rejected, because metal detecting and digging for finds were not recreations of the sort permitted in local parks.

Both of these cases show the importance of the lawfulness of the finder's presence on the land. A trespassing finder will have no right to the found object. This may occur because the finder was not invited onto the land at all, or because the limits of the permission (licence) that was granted by the landowner have been exceeded. You can see an example of trespassing by exceeding the terms of a licence in *Waverley Borough Council v. Fletcher*: the defendant had a licence to be in the park for recreation, but not to use a metal detector, nor to dig up the park.

1.2.3 Treasure

treasure trove
under common law before 1997, items of gold and silver found in a concealed place, having apparently been hidden by their owner and not reclaimed, to which the Crown had the right of possession, now replaced by Treasure Act 1996

At common law, items of gold or silver found hidden in land belonged to the Crown.

In *AG of the Duchy of Lancaster v. Overton (Farms) Ltd*, it was held that coins had to contain a substantial quantity of gold or silver to be **treasure trove**. Finders of treasure trove were paid compensation.

The common law was defective however, in not protecting archaeological finds unless they were of gold or silver and so the Treasure Act 1996 was enacted with effect from 24 September 1997. This Act abolished treasure trove and made fresh provision in relation to treasure. It removed the requirement that the objects had to have been hidden in the land to be treasure, it defined the amount of precious metal that had to be present for a find to count as treasure, and it made provision for other items of archeological importance found with treasure to be included within the definition.

statute

Treasure Act 1996, s. 1 [Meaning of 'treasure']

Treasure is—

any object at least 300 years old when found which—

(i) is not a coin but has metallic content of which at least 10 per cent by weight is precious metal;

(ii) when found, is one of at least two coins in the same find which are at least 300 years old at that time and have that percentage of precious metal; or

(iii) when found, is one of at least ten coins in the same find which are at least 300 years old at that time;

any object at least 200 years old when found which belongs to a class designated under section 2(1);

any object which would have been treasure trove if found before the commencement of section 4;

any object which, when found, is part of the same find as—

(i) an object within paragraph (a), (b) or (c) found at the same time or earlier; or

(ii) an object found earlier which would be within paragraph (a) or (b) if it had been found at the same time.

Treasure does not include objects which are—

unworked natural objects, or

minerals as extracted from a natural deposit,

or which belong to a class designated under section 2(2).

Under s. 2(1) of the Act, the Secretary of State was given power to designate further objects as treasure and, under the Treasure Designation Order 2002, SI 2002/2666, the following items were added to the definition of treasure.

statute

Treasure Designation Order 2002, art. 3 [Designation of classes of objects of outstanding historical, archaeological or cultural importance]

3. The following classes of objects are designated pursuant to section 2(1) of the Act.

(a) any object (other than a coin), any part of which is base metal, which, when found, is one of at least two base metal objects in the same find which are of prehistoric date;

(b) any object, other than a coin, which is of prehistoric date, and any part of which is gold or silver.

The Act and the Order apply to objects within these definitions that are found anywhere within England, Wales, and Northern Ireland, whether attached to or within land, or on the surface. In practice, most treasure is discovered by people using metal detectors or during archaeological digs. Very little treasure is likely to be found on the surface of land—exciting though that would be!

Finds of items that might be treasure have to be reported to the Coroner within 14 days and an inquest held to determine whether the find is treasure or not. It is a criminal offence not to report a find. A Code of Practice for offering finds to museums, and for rewarding finders and landowners has been drawn up—see the Treasure Act 1996 Code of Practice (Revised). This Code sets out the division of the reward between the finder and the landowner. It starts with the presumption that the reward is to be split 50/50, but an agreement between the finder and landowner as to the split may be observed. If the finder is a trespasser or has committed an offence related to finding, or dealing with, the treasure (such as not declaring it in a timely way to the Coroner), his or her reward may be reduced or refused altogether.

1.2.4 Summary

The law on objects lost and found in and on the land is summarized in Figure 1.2.

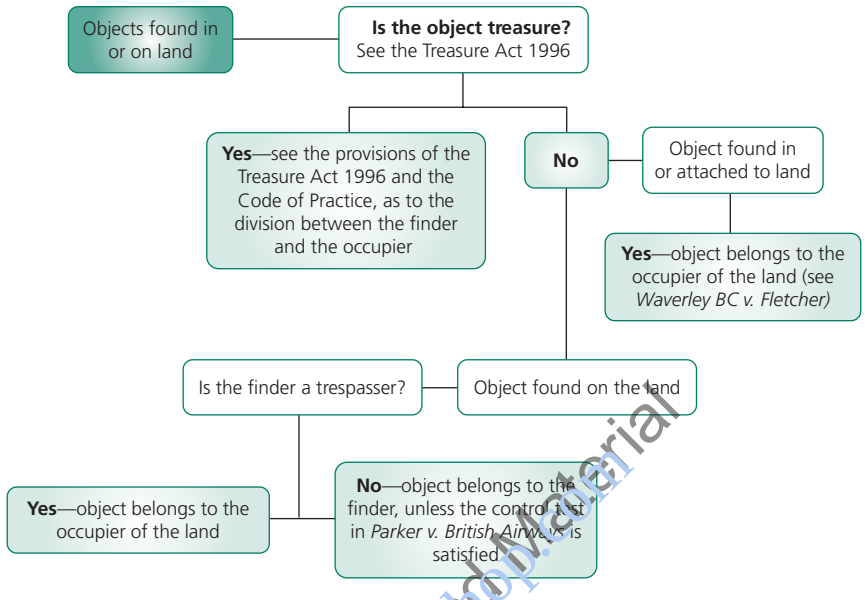


Figure 1.2
A summary of the law on objects lost and found in and on the land

Summary

1. Land extends both below and above the ground.
2. Both corporeal and incorporeal hereditaments form part of the land.
3. The law distinguishes between fixtures and chattels, and the test used by the courts to identify them relates to the degree and purpose of annexation.
4. Items lost or hidden on land belong to their true owner if they can be found, or, if they cannot, to the occupier of the land within which the items are buried or to which they are attached.
5. If the item is merely on the surface of the land, however, the finder may well have better rights than the landowner, depending on the 'manifest intention to control' test. An exception to these rules is found within the law of treasure.

The bigger picture

- If you want to see how this area of land law fits into the rest of your studies, you can look at Chapter 14, especially 14.2.1 and 14.2.2. Before you can answer any question on land law, you need to be able to identify the land!

- For some guidance on what sort of exam questions come up in this area, see Chapter 15, 15.3.
- If you need to find extra cases for research on coursework in this area, the following may be helpful.

Extent of land

Anchor Brewhouse Developments Ltd v. Berkley House (Docklands Developments) Ltd [1987] 2 EGLR 173

London & Manchester Assurance Co Ltd v. O & H Construction Ltd [1989] 2 EGLR 185

Mitchell v. Mosley [1914] 1 Ch 438 (this case was approved by the Supreme Court in *Bocardo v. Star Energy*)

Fixtures

Hamp v. Bygrave [1983] 1 EGLR 174

Melluish v. BMI (No. 3) Ltd [1996] AC 454

Smith v. City Petroleum Co Ltd [1940] 1 All ER 260

Stokes v. Costain Property Investments Ltd. [1984] 1 WLR 763

Young v. Dalgety plc [1987] 1 EGLR 116

Webb v. Frank Bevis Ltd [1940] 1 All ER 247

Objects found on or in land

Armory v. Delamirie (1722) 1 Stra 505, 93 ER 664

Bridges v. Hawksworth (1851) 21 LJ Jur 1079

Elwes v. Brigg Gas Co (1886) 33 Ch D 562

Hannah v. Peel [1945] KB 509

Questions

1. Daisy's neighbour has started to build an extension to his house. The extension adjoins Daisy's back garden. The foundations for the extension and the new drainage pipes run under Daisy's garden. Has Daisy any grounds for complaint?
2. Mai Ling's neighbour has just installed a new boiler. The flue extends some 10 cm into Mai Ling's garden, at a height of about 4 m. Has Mai Ling any grounds for complaint?
3. Olu has just bought a house. When he saw the house before buying it, the garden contained a large shed and a number of beautiful plants. The shed and some of the plants were removed before he moved in. Does Olu have any grounds for complaint?
4. Haminder is walking across Farmer Jones' field when he sees a golden bracelet half-buried in the soil. He loosens it with his fingers and takes it home to clean it up. Haminder hands the bracelet to the police, but they have handed it back, saying that they cannot trace the owner. Can Haminder keep the bracelet?

For suggested approaches to answering these questions scan here or visit the Online Resource Centre.

Further reading

Conway, H., 'Case comment on *Elitestone v. Morris*' [1998] Conv 418
This case comment examines the leading case of *Elitestone v. Morris*.

Gray, K. J. and Gray, S. F. (2008) *Elements of Land Law*, 5th edn, Oxford: Oxford University Press, ch. 1.2
Chapter 1.2 contains a very detailed account of the matters covered in this chapter.

Hinks, F., 'To the Manor Bought' Legal Week, 4 September 2008, 26
This article contains an interesting discussion of *Crown Estate Commissioners v. Roberts* [2008] EWHC 1302 (Ch).

Thompson, M. P., 'Must a House be Land?' [2001] Conv 417
This article looks at the case of *Chelsea Yacht and Boat Club v. Pope*, and considers the nature of land and of dwelling houses.

Fetherstonhaugh, G., 'You can take it with you' Estates Gazette 2013, 1328, 77
This case comment examines the case of *Peel Land and Property Ltd v. Sheerness Steel Ltd* [2013] EWHC 1658 (Ch).

online resource centre
www.oxfordtextbooks.co.uk/orc/clarke_connections4e

For more advice relating to this chapter, including revision podcasts, self-test questions and an interactive glossary, visit the Online Resource Centre.