

# Contents

<i>Preface</i> .....	v
<i>Table of Cases</i> .....	xvii
<i>Table of Legislation and International Conventions</i> .....	xxxiii

## Part 1—The Basic Ideas

1. Rights in Rem .....	3
1.1 The Idea of a Right in Rem .....	3
1.1.1 ‘Rights in Personam’ and ‘Rights in Rem’ .....	3
1.1.2 ‘The Potential to Affect John’ .....	4
1.1.3 Two Difficulties with the Terminology .....	7
1.1.4 Rights in Rem as Effective against ‘Disponees’ .....	8
1.2 The Kinds of Rights in Rem .....	9
1.2.1 The <i>Numerus Clausus</i> .....	10
1.2.2 Why the <i>Numerus Clausus</i> ? .....	11
1.2.3 The Rights .....	14
1.3 ‘Persistent Rights’ .....	15
1.3.1 Common Law and Equity .....	16
1.3.2 Equitable Rights as ‘Persistent’ .....	18
1.4 Why Focus on Rights in Rem in Land? .....	22
2. Human Rights .....	24
2.1 Human Rights in Land .....	24
2.1.1 The Focus .....	24
2.1.2 A ‘Reservoir of Entitlement’ .....	25
2.2 Justiciability .....	25
2.2.1 In the European Court of Human Rights .....	26
2.2.2 In the Courts of England and Wales .....	28
2.3 Article 1 of the First Protocol .....	31
2.3.1 The Article .....	32
2.3.2 Possessions .....	32
2.3.3 Interference .....	33
2.3.4 The Three Types of Interference .....	35
2.3.5 Justification .....	39
2.3.6 Impact .....	43
2.4 Article 8 .....	44
2.4.1 The Article .....	44
2.4.2 Respect for One’s Home .....	44

2.4.3	Interference.....	45
2.4.4	Justification .....	45
2.4.5	Impact .....	50
2.5	An Overview .....	50
2.5.1	The Law's Practical Operation.....	50
2.5.2	An Appraisal .....	52
2.6	Why Focus on Human Rights in Land?.....	53
3.	When do Rights in Rem Bind? .....	55
3.1	The Registered Land Regime .....	56
3.1.1	The Principles.....	56
3.1.2	'Actual Occupation'.....	59
3.2	The Appropriateness of the Regime.....	61
3.2.1	An Argument for Complete Registration.....	62
3.2.2	An Argument for Retaining Overriding Interests .....	64
3.2.3	A Compromise between the Two Arguments.....	66
3.2.4	The Future of Overriding Interests.....	69
3.2.5	Human Rights .....	71
4.	Consenting Out of a Right .....	73
4.1	The Rule in <i>Bristol and West Building Society v Henning</i> .....	73
4.1.1	The Rule .....	73
4.1.2	The Underlying Analysis .....	74
4.2	What Counts as the Necessary Representation?.....	75
4.2.1	Finding the Necessary Representation.....	75
4.2.2	Vitiation.....	76
4.2.3	Do Flaws in your Consent Affect the Disponee? .....	78
4.2.4	'Notice' .....	78
4.3	Consent to a Replacement Mortgage .....	80
	Part 2—Acquisition of Rights in Rem	
5.	Conferment.....	85
5.1	Acquisition by 'Conferment' .....	85
5.1.1	Conferment as a Vindication of Choice .....	85
5.1.2	Choice and the ECHR.....	86
5.2	Expression and Formalities .....	90
5.3	Conferment on Death .....	93
5.4	Conferment <i>Inter Vivos</i> .....	94
5.4.1	The Rules.....	94
5.4.2	The Distinction Between the Legal and Equitable Rules.....	95
5.4.3	Deed or Writing? .....	97
5.4.4	Completion by Registration? .....	97
5.4.5	Electronic Conveyancing .....	99
5.4.6	Conclusiveness.....	101
5.4.7	Amendment of the Register.....	102

5.5	The Special Case of Leases .....	109
5.5.1	The Formality Rules .....	109
5.5.2	An Appraisal .....	110
5.5.3	Implied Periodic Tenancies .....	111
6.	Contracts to Confer .....	113
6.1	Pre-conferment Contracts .....	113
6.2	Conversion .....	115
6.2.1	The Doctrine of Conversion.....	115
6.2.2	The Nature of Estate Contracts .....	118
6.2.3	The Two Factors.....	120
6.2.4	'Discovered' Contracts.....	122
6.2.5	Estate Contracts as Undercutting Legal Formality Requirements .....	123
7.	Adverse Possession and Prescription .....	126
7.1	Disorganised Acquisition .....	126
7.1.1	'Factors of Other Kinds' .....	126
7.1.2	Disorganised Acquisition and Formality.....	128
7.2	Adverse Possession.....	130
7.2.1	The First Element: 'Taking Adverse Possession' .....	130
7.2.2	The Second Element .....	133
7.2.3	The Pre-2002 Doctrine's Basis and Acceptability .....	134
7.2.4	The Post-2002 Doctrine's Basis and Acceptability.....	136
7.3	Prescription.....	138
7.3.1	The Doctrine of Prescription.....	138
7.3.2	An Appraisal .....	140
8.	Proprietary Estoppel .....	143
8.1	An Outline .....	143
8.2	The Requirements for an Estoppel .....	144
8.2.1	The Requirements.....	144
8.2.2	Your Belief .....	144
8.2.3	Your Detriment .....	146
8.2.4	My Responsibility.....	147
8.2.5	A Summary; Unconscionability.....	150
8.3	Estoppel Relief.....	151
8.3.1	Estoppel Relief is Discretionary .....	151
8.3.2	<i>Jennings v Rice</i> .....	152
8.3.3	More about the Discretion .....	153
8.4	What is Estoppel About?.....	155
8.4.1	The Problem .....	155
8.4.2	The Projects.....	156
8.4.3	Effectuation of Otherwise Ineffective Conferrals Etc .....	156
8.4.4	Correction of Reliance Loss .....	159

8.4.5	Distributive Justice .....	160
8.4.6	A Summary .....	163
8.5	The Estoppel ‘Equity’ .....	164
8.5.1	When do Estoppel Rights Arise? .....	164
8.5.2	Estoppel Equities as Rights in Rem.....	168
9.	Constructive Trusts.....	170
9.1	Two Constructive Trust Doctrines .....	170
9.1.1	The Doctrines’ Limitation to Trusts .....	170
9.2	Transfer Subject to an Undertaking.....	171
9.2.1	The Principle .....	172
9.2.2	Must the Outcome be a Trust? .....	173
9.2.3	Proving the Promise.....	174
9.2.4	An Alternative to a Promise?.....	177
9.3	Family Property .....	179
9.3.1	An Outline.....	179
9.3.2	Two Questions .....	180
9.3.3	Departure from the Prima Facie Position.....	181
9.3.4	Quantum .....	182
9.3.5	‘Fairness’ .....	182
9.3.6	Materially Communal Relationships .....	185
9.3.7	Non-materially Communal Relationships .....	187
9.3.8	Genuine and Invented Common Intentions.....	189
9.3.9	The Nature of Family Property Rights .....	194
9.3.10	Human Rights .....	196
	Part 3—The Individual Rights in Rem	
10.	Freehold Ownership .....	201
10.1	Ownership in English Land Law.....	201
10.1.1	Ownership and the Fee Simple Absolute in Possession.....	201
10.1.2	Defining the Fee Simple Absolute in Possession.....	202
10.2	The Idea of Ownership .....	203
10.2.1	The Paradigm of Ownership: <i>Dominium</i> .....	203
10.2.2	The Qualification of <i>Dominium</i> .....	204
10.2.3	Fragmentation .....	205
10.2.4	‘Anti-Property’ .....	209
10.2.5	Two Kinds of Qualification? .....	211
10.3	Fixing the Scope of Ownership.....	212
10.3.1	Paradigm Property’s Power.....	213
10.3.2	The Sources of Paradigm Property’s Power.....	214
10.3.3	Balancing.....	216
10.3.4	The Theory of Balancing .....	218

10.4	The Meaning of Ownership.....	225
10.4.1	‘Ownership is Meaningless’ .....	226
10.4.2	Finding Ownership’s ‘Essence’.....	228
11.	Leases.....	231
11.1	The Idea of a Lease .....	231
11.1.1	Leases and Ownership.....	231
11.1.2	Enfranchisement and ‘Right to Buy’ .....	233
11.2	The Legal Definition of a Lease .....	234
11.2.1	‘Exclusive Possession, Payment, Term’ .....	234
11.2.2	Leases and the Rent Acts .....	235
11.3	Exclusive Possession.....	237
11.3.1	The Idea of Exclusive Possession .....	237
11.3.2	‘Conferring’ Exclusive Possession .....	238
11.3.3	Two Complications.....	239
11.3.4	Exceptions .....	242
11.3.5	Shams and Pretences .....	242
11.4	Other Aspects of the Legal Definition .....	247
11.4.1	Payment.....	247
11.4.2	Term.....	248
11.4.3	Labels.....	251
11.4.4	An Interpretation .....	252
11.5	The Operation of Leases.....	254
11.5.1	Kinds of Obligation.....	254
11.5.2	Enforcement .....	256
11.5.3	Termination.....	256
11.6	Acquisition of Leases.....	260
11.7	Alienating Reversions and Leases .....	261
11.7.1	Assignment.....	262
11.7.2	Sub-leasing .....	263
11.7.3	Two Qualifications.....	264
12.	Mortgages .....	267
12.1	The Essential Idea of a Land Mortgage .....	267
12.1.1	Mortgages as Security Rights .....	267
12.1.2	Mortgages as Rights in Rem .....	268
12.1.3	Mortgages of Land .....	269
12.1.4	The Current Legal Form of a Land Mortgage.....	271
12.2	The Development of Land Mortgages.....	272
12.2.1	The Legal Form.....	272
12.2.2	Equity’s Insistence that a Mortgage Give Only Security Rights .....	274
12.3	The Content of a Land Mortgage.....	275
12.4	Sale and Foreclosure .....	276
12.4.1	The Source of the Right to Sell.....	276

xii CONTENTS

12.4.2	The Availability of the Right to Sell.....	277
12.4.3	The Lender's Duties Regarding Sale.....	278
12.4.4	Foreclosure.....	282
12.5	Possession.....	284
12.5.1	The Basic Rule.....	284
12.5.2	The Two Riders.....	286
12.5.3	<i>Quennell v Maltby</i> .....	288
12.5.4	Connecting Possession and Sale.....	289
12.6	Collateral Advantages.....	291
12.6.1	Collateral Advantages and their Evolving Treatment.....	291
12.6.2	The First Approach.....	292
12.6.3	The Second Approach.....	293
12.6.4	The Key.....	294
12.7	The Creation of Mortgages.....	296
12.7.1	Vitiation.....	297
12.7.2	Vitiation and Third Parties.....	300
12.8	Mortgages' Effectiveness against Disponees.....	301
13.	Easements.....	303
13.1	What is an Easement?.....	303
13.1.1	The Rule in <i>Re Ellenborough Park</i> .....	304
13.1.2	Elements (1) and (3): Two Pieces of Land, Two Owners.....	304
13.1.3	Element (2): 'Accommodating' the Dominant Land.....	305
13.1.4	Element (4): A Right 'Capable of Forming the Subject-matter of a Grant'.....	309
13.1.5	Intention to Create a Right in Rem.....	313
13.1.6	Why Should Easements Take this Form?.....	313
13.2	The Creation of Easements.....	317
13.2.1	Express and Implied Conferral.....	317
13.2.2	Necessity and Common Intention.....	319
13.2.3	Implication on the Basis of Prior Usage.....	320
13.2.4	<i>Wheeldon v Burrows</i> .....	321
13.2.5	Law of Property Act 1925 Section 62.....	324
13.2.6	Implied Reservation.....	328
13.2.7	Prescription.....	330
13.2.8	Formalities.....	330
13.3	Easements' Effectiveness Against Disponees.....	332
14.	Restrictive Covenants.....	335
14.1	The Idea of a Restrictive Covenant.....	335
14.2	What Counts as a Restrictive Covenant?.....	336
14.2.1	The First Requirement: 'Touching and Concerning' the Servient Land.....	337

14.2.2	The Second Requirement: ‘Touching and Concerning’ the Dominant Land.....	337
14.2.3	The Role of the First and Second Requirements.....	339
14.2.4	The Third Requirement: The Obligation Must be Negative .....	341
14.2.5	The Role of the Third Requirement .....	342
14.3	The Creation of Restrictive Covenants .....	344
14.3.1	General.....	344
14.3.2	Conferral on a Third Party.....	345
14.3.3	Formalities .....	346
14.4	Restrictive Covenants’ Effectiveness Against Disponees .....	347
14.5	The Passing of the Benefit .....	347
14.5.1	The Standard Account .....	348
14.5.2	A Critique .....	350
14.6	A Comparison with Easements.....	352
15.	Trust Rights 1.....	355
15.1	The Basic Concepts.....	355
15.2	Where a Trust has More than One Beneficiary .....	356
15.2.1	Concurrent and Consecutive Interests.....	356
15.2.2	Joint Tenancies and Tenancies in Common.....	357
15.2.3	Should Joint Tenancy be Abolished?.....	358
15.2.4	The Four Unities .....	359
15.2.5	Separation at the Outset .....	360
15.2.6	Subsequent Severance.....	361
15.3	The Creation of Trust Rights in Land .....	365
15.3.1	Express and Constructive Trusts .....	365
15.3.2	A Complication Regarding Tenancies in Common .....	366
15.3.3	Formalities for Express and Constructive Trusts .....	367
15.3.4	Trustees .....	367
15.3.5	Multiple Trustees as ‘Legal Joint Tenants’.....	368
15.4	Statutory Trusts .....	370
15.4.1	The Nature of Statutory Trusts .....	370
15.4.2	The Rights in a Statutory Trust.....	370
15.4.3	The Point of Statutory Trusts.....	371
15.4.4	Statutory Trusts and Formalities.....	372
15.5	A Worked Example.....	372
16.	Trust Rights 2.....	374
16.1	The Possible Variety of Beneficial Rights .....	374
16.2	Access to Particular Benefits 1: General Principles.....	375
16.2.1	The Ordinary Law of Trusts.....	375
16.2.2	The Trusts of Land and Appointment of Trustees Act 1996 Section 14.....	377
16.2.3	The Justification for Section 14 .....	378

16.2.4	The Operation of Section 14: The Statutory Considerations.....	379
16.2.5	The Operation of Section 14: The Aim of the Jurisdiction .....	381
16.2.6	The Special Case of Insolvency .....	384
16.3	Access to Particular Benefits 2: The Right to Occupy Trust Land .....	385
16.3.1	The Rules.....	385
16.3.2	An Objection .....	386
16.3.3	Intervention by the Court.....	389
16.4	Trust Rights' Effectiveness Against Disponees.....	391
16.5	Overreaching 1: The Key Ideas .....	392
16.5.1	The Idea of Overreaching.....	392
16.5.2	The Value of Overreaching.....	393
16.5.3	The Settlor's and Beneficiaries' Perspective .....	394
16.5.4	Why does Overreaching Apply Only to Trust Interests? .....	396
16.6	Overreaching 2: The Effect of Impropriety .....	396
16.6.1	'Impropriety' .....	396
16.6.2	Restrictions.....	397
16.6.3	The First Scenario: Where there is a Restriction .....	398
16.6.4	The Second Scenario: Where there is No Restriction .....	398
16.6.5	Does, and Should, Section 26 Apply Where there is a Breach of the Two-trustee Rule? .....	400
16.7	Binding Disponees .....	402
16.7.1	Unoverreached Beneficial Rights as Overriding Interests.....	403
16.7.2	The Consent Principle .....	404
16.8	A Worked Example, and an Appraisal.....	404
16.8.1	A Worked Example .....	404
16.8.2	An Appraisal .....	408
17.	Licences.....	410
17.1	What is a Licence?.....	410
17.1.1	Licences as Residual Consensual Rights in Personam to Be on Another's Land .....	410
17.1.2	Kinds of Licence .....	411
17.2	Bare Licences .....	412
17.2.1	The Nature of a Bare Licence .....	412
17.2.2	Duration.....	412
17.2.3	Effect on Disponees.....	413
17.3	Contractual Licences.....	414



17.3.1	The Nature of a Contractual Licence.....	414
17.3.2	Duration.....	414
17.3.3	Are Contractual Licences Rights in Personam or in Rem?.....	418
17.4	Licences Coupled with an Interest .....	422
17.4.1	Characteristics.....	422
17.4.2	What Counts as a Licence Coupled with an Interest?.....	423
17.4.3	Does this Concept Exist?.....	424
17.5	Creation of Licences, and their Operation Against Disponees .....	426
	<i>Index</i> .....	428

<http://www.pbookshop.com>