Chapter 1
Foundational Concepts

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[1–01] As an initial matter, the study of any distinct area of law requires familiarisation with some basic foundational concepts, without which understanding the specific and complex elements of that area of law can be difficult. The purpose of this chapter is to familiarise the reader with some of the foundational concepts of property law that, if understood at this point, ought to ease the path through the remainder of this book and, indeed, through your property or land law course itself. In that respect we deal with questions of what property actually is, the meaning of ownership and possession, and the concept of "land" (the commodity whose ownership we are primarily concerned with in this book).

I. Property

[1–02] It is imperative at the outset to replace one's vernacular understanding of property (i.e. a piece of land or a thing) with a more precise legal concept. In legal terms, property is a bundle of rights relating to something, and the extent and nature of these rights dictate the extent and nature of one's property. Thus "owning" a house is, in essence, having certain kinds of rights and privileges in relation to that house: rights that can be exercised in relation to all other people within the boundaries of the general law over a particular period of time. Property, or bundles of rights, can be shared out among numerous people. As we will see in some detail in later chapters, it is possible for there to be both legal and equitable rights over the same piece of land, and for those rights to be held by different people. This may add an additional level of complexity to any transaction in relation to land as the purchaser's solicitor will have to familiarise herself with *all* of the rights relating to the land that her client may want to purchase. The solicitor will, therefore, have to find out whether the vendor (i.e. the seller) has title to the property that permits him to offer it for sale, whether there are any other parties with rights over the land whose rights might have to be discharged prior to the sale (e.g. a mortgage) or indeed whose rights might have to be respected by the purchaser even after the conveyance has been completed (e.g. a neighbour who has a right of way over the land to be sold). Thus, property is a complex notion and one of the primary roles of property law is to help us to identify, categorise and manage those various rights that can exist over the same parcel of

land so that anyone who intends to transact in relation to it knows exactly what kind of property can be acquired and what burdens might exist over it.

[1–03] Our concern in this book is with what we call "real property". This requires us at the outset to explore the term "real property" and come to a clear understanding of its meaning. Real property is the term used to describe the rights held in freehold[1] in relation to land, or things attached to land. This kind of property developed through the historical treatment of rights relating to land. It used to be the case that freeholders could take an action to the king's court in order to vindicate their property rights. If successful, these claimants would be awarded what was known as a real remedy, or a remedy directed at the restoration of the claimant's rights in relation to the property. All property in relation to which these "real actions" could be taken, and which could result in "real remedies", became known as real property.

[1–04] On the other hand, all those who had rights in relation to things or to leases could take a personal action only and were therefore said to have personal property. In the case of personal actions, a court could award a personal remedy such as compensation, but would not generally award remedies directed at the restoration of one's property. Until the late 1400s rights in relation to leases were said to be contractual, purely personal and therefore subject only to personal actions. Over time the courts changed their view on this matter and began to allow leaseholders to take real actions and to be awarded real remedies. Leasehold rights were never re-classified as real property, however, and therefore became known as "chattels real", i.e. personal property in relation to which a real remedy is possible. For this reason, although this book deals primarily with real property, leasehold rights are included for consideration.[2]

[1–05] In summary, the distinction between real property (with which this book is concerned) and personal property (with which this book is not generally concerned) is as follows:

- Real property
    - Freehold rights in relation to land and things attached to land (defined by application of the maxim *superficies solo credit*, or, "that which is attached to the land becomes part of the land", which is considered below).
- Personal property
    - Rights in relation to things *and* leasehold rights (known as "chattels real") in relation to land and things attached to land (defined by application of *superficies solo credit*).

Property can be further divided into tangible and intangible rights. In general terms, tangible rights will be described as corporeal, or rights with physical substance (such as ownership rights over a house, for example), whereas intangible rights will be described as incorporeal, or rights without physical substance even though they can allow for a physical exercise over the land of another (such as a right of way over someone else's land, for example).

[1] Freehold is considered in full in Chapter 4, but for now might be described as ownership rights that are neither leasehold nor merely permissive (like licences).
[2] See further Chapter 15.

II. Property as a Right

[1–06] Not only is property to be defined as a bundle of rights, but the holding of private property is generally conceived of as a human right that is worthy of respect and protection in the law. It is important to note that this generally exists as a negative right (i.e. a right not to have one's property interfered with by the State) and not as a positive right (i.e. a right to hold property and, as a corollary, to have it provided by the State, or for the State to ensure that property retails at a reasonable price). Positive rights relating to property and other social and economic needs are generally resisted heavily at both domestic and international levels because they are seen as creating too onerous a burden on the State.[3] That said, states frequently impose statutory obligations on themselves and on local authorities to provide housing on the basis of need.[4]

[1–07] The right to private property is afforded double protection in the Irish Constitution. Article 43 provides:

> 1. 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2. 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

In addition, Art 40.3 protects private property by means of a State guarantee:

> . . . by its laws [to] protect as best it may from unjust attack and, in the case of injustice done, [to] vindicate the . . . property rights of every citizen.

[1–08] The duplication in the Constitution of the guarantees relating to private property has been the subject of much debate, and the Constitution Review Group has recommended that the guarantee be expressed in a singular provision[5]; however, it seems that, after much uncertainty, the courts have come to a conclusion on the appropriate relationship between these two provisions. This jurisprudence suggests that the reference to social justice and the common good in Art 43 is an important consideration in the courts' analyses of whether the substantive right to private

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[3] It should be noted that this a very outmoded and disconnected view of socio-economic rights, which sees them as unusually "expensive" as if civil and political rights (such as the right to vote) were somehow free or inexpensive.

[4] For an excellent treatment of housing law in Ireland, see Kenna, *Housing Law and Policy in Ireland* (2nd ed., 2011, Dublin, Clarus Press).

[5] *Report of the Constitution Review Group* (1996, Dublin, The Stationery Office), p.361.

property has been interfered with in a manner inconsistent with Art 40.3.[6] The constitutional guarantee of private property is well established as covering land and things affixed to land, but its remit is broader than real property.[7] Where measures are challenged on the basis of constitutional property rights, the Irish courts will assess whether they (a) interfere with private property rights, (b) are directed at the achievement of a legitimate aim, and (c) are a proportionate exercise of State powers in pursuance of that legitimate aim.[8]

[1–09] The European Convention on Human Rights (ECHR),[9] which was transposed into Irish law by means of the European Convention on Human Rights Act 2003,[10] protects the right to possessions in Art 1 of Protocol One (to which Ireland is a party). The right to possessions is contained in an Optional Protocol to the Convention—rather than in the main body of the Convention itself—because of the political disagreement within the continent of Europe about possessions and, particularly, about private property. This disagreement was mostly a matter of capitalism verses communism. The inclusion of the right within an Optional Protocol made the main text more inclusive and conciliatory, while at the same time allowing states that wished to do so to bind themselves to an obligation relating to possessions, including private property. Article 1, Protocol One provides:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[1–10] Article 1, Protocol One protects possessions, including private property, from unjustified or arbitrary State interference, but—as the second paragraph shows—it does not absolutely prohibit State interference with property. Rather, it requires that any such interference would be lawful (by reference to both domestic and international law) and would pursue a legitimate aim in a proportionate manner. As should be clear immediately, the standards relating to property applied at constitutional and ECHR level are not hugely disparate. Indeed, the adoption by the Irish courts of a

[6] See generally Hogan & Whyte, *Kelly's Irish Constitution* (4th ed., 2003, Dublin, LexisNexis Butterworths), Chapter 7.7.

[7] For more on this see, for example, *Attorney General v Southern Industrial Trust Ltd* (1960) 94 ILTR 161; *Buckley v Attorney General* [1950] IR 67; *Phonographic Performance (Ireland) Ltd v Cody* [1998] 4 IR 504.

[8] See, for example, *In re Art 26 and Part V of the Planning and Development Bill 1999* [2000] 2 IR 321.

[9] The right to property is also protected in Art 17 of the Universal Declaration of Human Rights.

[10] On the Act see de Londras & Kelly, *The European Convention on Human Rights Act: Operation, Impact and Analysis* (2010, Dublin, Round Hall).

proportionality approach to interferences with property law can arguably be linked back to ECHR jurisprudence.

[1–11] It should be noted that "possessions", as defined in this Article, are a relatively broad concept and can be taken to include any sufficiently established economic interest, such as movable or immovable property, shares,[11] patents,[12] leases[13] and judgment mortgages.[14] The European Court of Human Rights originally conceived of this provision as laying down three distinct rules:

> [T]he first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the Contracting States are entitled... to control the use of property in accordance with the general interest. However, the three rules are not 'distinct' in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule.[15]

In later jurisprudence, however, the court has tended to conceive of the Article, in general, as laying out a right to the enjoyment of possessions in fair balance to the needs of society by means of the proportionality test considered above. Compliance with the provision requires that any interference with possessions ought to be lawful, i.e. it must be done on the basis of clear, precise and property promulgated domestic law.[16] Secondly, Art 1, Protocol One requires that any interference with possessions be done in a manner consistent with the requirements of procedural justice.[17]

[1–12] It should be noted that, to date, Art 1, Protocol One has not shown any great degree of transformative character within the ECHR scheme. This is particularly because the European Court of Human Rights has tended to afford a very wide margin of appreciation (i.e. discretion) to states in decision-making regarding the needs of social justice and the mechanisms for the achievement of legitimate objectives. In one of the areas where it was thought that the Convention might have a significant impact on Irish property law, namely in relation to adverse possession, the Court has now firmly established that Art 1 of Protocol One is not violated.[18] In this light, the Irish constitutional jurisprudence tends to be more proactive. While the Irish courts have generally tended to accept legislative and executive decisions as to the dictates of social

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[11] *Bramelid and Malmström v Sweden* (1986) 8 EHRR 45.
[12] *SmithKline and French Laboratories v the Netherlands* (1990) 66 DR 20.
[13] *Mellacher and Others v Austria* (1989) 12 EHRR 391—see further Chapter 15.
[14] *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 EHRR 931—see further Chapter 13.
[15] *AGOSI v United Kingdom* (1986) 9 EHRR 1 § 48.
[16] *Hentrich v France* (1994) 18 EHRR 440.
[17] *ibid.*
[18] *JA Pye (Oxford) Ltd v United Kingdom* (2007) 46 EHRR 1083 *reversing* (2006) 43 EHRR 43.

justice and the common good, they have been quite proactive in requiring different mechanisms of implementation.[19] In addition, the European Court of Human Rights has not been at all proactive in the formation of any positive duties on the part of states in relation to Art 1, Protocol One. Thus, while there is a negative obligation not to interfere disproportionately with people's possessions, there is no positive obligation to take appropriate action to regulate interpersonal economic activity to ensure that people can acquire possessions even with very limited resources. Not only is this characteristic common to the ECHR and the Constitution, it is also related to the lack of willingness to accept positive obligations relating to social and economic rights generally mentioned above.

III. Ownership and Possession

[1–13] The concepts of ownership and possession are absolutely central to the law of property and are used with some exactitude in the context of this subject. For this reason everyday conceptions of ownership and possession should be put aside and the reader ought to commit to the precise technical meanings of the terms in law.

[1–14] In simple (and somewhat simplified) terms, ownership is control: the owner of something is the person who acquires the right to control the thing that is owned. This control is manifested through two relationships—the first is the owner's relationship with the thing owned; the second is the owner's relationship with the rest of the world in relation to the thing that is owned. This can be well illustrated by means of an example. Imagine that Patrick "owns" a pen and therefore enjoys two relationships of control in relation to it. The first is his control of the pen itself: he can take the pen with him, leave it at home, write with it, chew it, stand on it, throw it away, etc. He can, in essence, do whatever he wants with the pen.[20] The second relationship of control is between Patrick and the rest of the world in relation to this pen: Patrick can decide to allow another person to use the pen, to sell it to someone, to give it away to someone for free, etc.[21] The control Patrick holds over this pen is limited to a certain extent, however, as is the control all owners hold over the thing(s) they own. The general law interacts with property law to restrict one's exercise of control in fairly logical ways and in order to ensure that this control is not exercised in a reckless manner. For example, the criminal law recognises Patrick's control over the pen, but nevertheless does not allow him to hide cocaine inside it and transport the cocaine over national borders; nor does the law allow Patrick to use this pen to vandalise the property of another.

[1–15] We can go beyond the simplified concept of "ownership as control" and break the idea of ownership down further. The classical iteration of what have become known as the "incidents" of ownership is that offered by Honoré.[22] According to Honoré, the "liberal concept of full individual ownership" can be broken down into the following

[19] See generally Hogan & White, *Kelly's Irish Constitution* (4th ed., 2003, Dublin, LexisNexis Butterworths), p.1970.
[20] This sentiment is subject to some common-sense limitations that are considered shortly.
[21] *ibid.*
[22] Honoré, "Ownership" in Guest (ed.), *Oxford Essays in Jurisprudence* (1961, Oxford, Oxford University Press) and reprinted in Honoré, *Making Law Bind: Essays Legal and Philosophical* (1987, Oxford, Clarendon Press).

eleven incidents, not all of which need necessarily be present at the same time but all of which, in conjunction, make up this classical liberal ownership idea. The eleven incidents are: (i) the right to possess; (ii) the right to use; (iii) the right to manage; (iv) the right to the income; (v) the right to the capital; (vi) the right to the security; (vii) the incident of transmissibility; (viii) the incident of absence of term; (ix) the duty to prevent harm; (x) liability to execution; and (xi) residuary character. For Honoré the right to possess is the basic and foundational right upon which the concept of ownership rests. This does not mean that ownership and possession cannot be separated; they can, but ownership implies the capacity to transfer possessory rights and capacities and, by corollary, anyone who does not have that capacity cannot be said to have ownership in the full, classical and liberal sense. The remaining incidents are powers, privileges, liabilities and protections that arise from ownership. Honoré's fragmentation of property into these different incidents has had an immense impact on the theory of property law and, indeed, for some who argue that all eleven must be present and, where they are, that this constitutes "full ownership", they offer a powerful argument against necessary evils such as taxation which, it is sometimes claimed, are at odds with ownership.[23] However, even if one prefers to think of ownership in the "unified" sense of control rather than the "fragmented" sense of incidents—as I do in this book—that control conception does not preclude (and, in fact, largely incorporates) all of those incidents classically outlined by Honoré.[24]

[1–16] As noted above, property law does not exist within a vacuum; all owners are restricted, to some extent, by planning law, criminal law, the law of torts and so on in the extent to which their control may be exercised. In addition, of course, we put some limits on *what* can be owned or can be the subject of property law recognising that there are some things (such as living human beings, for example) that ought not to be made the subject of an area of law concerned with recognising, regulating, delineating and vindicating proprietary rights. In addition to the limitations on ownership flowing from the general law, certain categories of owners are subjected to additional limitations for either protective or punitive reasons. Children are an excellent example of such specific limitations.[25] Children can own and deal with land in law; however any land owned by a child is said to exist in trust.[26] Children are not the only category of landowner subjected to limitations—certain convicts,[27] persons of unsound mind,[28] people who have acquired property through criminal activities[29] and limited companies[30] are also subjected to particular limitations on ownership.

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[23] For an excellent overview of these arguments, and refutation thereof, see Attas, "Fragmenting Property" (2006) 25 *Law and Philosophy* 119.
[24] For an excellent and extremely thorough exposition of this see Harris, *Property and Justice* (1996, Oxford, Clarendon Press).
[25] In this context, a child can be taken as someone under the age of 18 *per* Age of Majority Act 1985, s 2(1).
[26] Land and Conveyancing Law Reform Act 2009, s 18(1)(c). This was previously governed by the Settled Land Acts 1882–1890. See further Chapter 6.
[27] See Forfeiture Act 1870.
[28] See Lunacy Regulation (Ireland) Act 1871.
[29] See Criminal Assets Bureau Act 1996.
[30] The company's internal documents, such as the memorandum of association, will dictate the extent of the company's capacity to transact freely in relation to property that it holds.

[1–17] Possession—which is at the heart of ownership, although separable from it—is the right to use and enjoy the thing being possessed. Ownership and possession very often go together so that, for example, the person who "owns" a house is the same as the person who "possesses" that house. It is important to realise, however, that this need not be the case; rather, ownership and possession can easily be separated. Take, for example, a typical situation where a person purchases a house for the purposes of renting it out. In that case the person who purchases the house "owns" it but, by entering into a landlord and tenant relationship over it, no longer has the right to possess it as that possessory right has gone to the tenant.[31] Possession can have important legal consequences in property law. In the case of adverse possession, for example, possessing land for the appropriate amount of time and with the appropriate intention can have the effect of extinguishing the land owner's title.[32] In other situations the *lack* of possession can be important. Where, for example, a third party acquires rights over land that is held by a tenant, those rights may not be enforceable against the landlord once the lease has come to an end simply because the landlord had no possessory rights over the land during the period of acquisition.[33]

IV. Land

[1–18] The law of real property deals with property rights relating to land. The concept of land is, therefore, important. While "land" appears to be a relatively straightforward concept, the legal extent of land is rather more complex than one might imagine at first. For that reason it is worthy of some consideration. There are two particular questions that must be considered in order to grasp fully the meaning of "land" for the purposes of property law. The first is the extent to which things that are attached to the land can be said to be part of the land. This is important because, if an attachment is deemed "land" it is subject to the law of real property and, in the case of a leasehold arrangement, for example, the tenant may not be empowered to remove such "attachments" at the end of the lease. The second question to be considered is the extent to which one has rights over and above the surface of the land itself.

Attachments

[1–19] Whether or not things attached to land become part of the land can be a particularly important consideration when property is being sold or when a lease comes to an end. The purchaser of a house will want to know whether, for example, the beautiful mural in the living room or the centrepiece statue in the landscaped gardens are part of the property and therefore come with it when it is sold. This is also an important consideration for tenants upon termination of a lease because, with relatively few

[31] The tenant also has a kind of ownership of the house: a leasehold ownership. Leasehold is considered in full in Chapter 15. It is a fundamental feature of a lease that the tenant has the right to *exclusive possession* of the property, thereby reinforcing the separation of the landlord's freehold ownership from the possession.

[32] The law of adverse possession is considered in full in Chapter 14.

[33] This is the case where a third party adversely possesses against a tenant or where an easement is acquired by prescription over land that is held by a tenant, both of which are considered in Chapter 14.

exceptions, anything attached to the land by the tenant will become the property of the landlord at the end of the lease provided it is what one might call *sufficiently attached*.[34]

[1–20] Whether or not something is sufficiently attached to the land for it to be considered part of the land (and therefore treated as real property) is assessed by reference to the maxim *superficies solo credit*, meaning "that which is attached to the land becomes part of the land". The difficulty is that the concept of "attachment" is somewhat ambiguous from a stand-alone perspective and needs to be substantiated by reference to a test of some kind. This test is now well established and can be said to consist of the application of two questions:

(a) To what extent is the relevant thing attached to the land? *and*
(b) What was the intention of the person who attached this thing to the land?

The application of this two-pronged test will then dictate whether the thing attached has become part of the land, or whether it is still a mere chattel to which the law of real property does not apply. The relative weight to be given to each of these questions is more or less circumstantial, as demonstrated by a pair of cases—*Leigh v Taylor*[35] and *d'Eyncourt v Gregory*.[36]

[1–21] *Leigh v Taylor* concerned a house in which a number of valuable tapestries were attached to the walls. The tapestries belonged to a tenant for life (i.e. someone with rights for as long as he was alive), and when he died a dispute arose as to the ownership of the tapestries. The remainderman (i.e. the person entitled to the property when the previous owner died) claimed that these tapestries were attached to the property and, as a result, that he was now entitled to them as part of the land. On the other hand, the heirs of the deceased claimed that the tapestries were merely ornamental and, therefore, were not attached to the property. The court considered the competing claims by reference to the two prongs of the test outlined above.

[1–22] First of all, the tapestries were not affixed to the property with any great permanence. In the law report the means of attachment is described as follows:

> Strips of wood were placed over the paper which covered the walls, and were fastened by nails to the walls. Canvas was stretched over the strips of wood and nailed to them, and the tapestries were stretched over the canvas and fastened by tacks to it and the pieces of wood. Mouldings, resting on the surface of the wall and fastened to it, were placed round each piece of tapestry.[37]

Reflecting on this, the Earl of Halsbury L.C. held: "I can hardly imagine how a piece of tapestry of that extent, fourteen feet long, stretched against a wall, could be more slightly attached than this was."[38] The means of attachment was, therefore,

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[34] The exceptions to this general rule—known as the law of tenants' fixtures—are considered in Chapter 15.
[35] [1902] AC 157.
[36] [1896] 2 Ch. 497.
[37] [1902] AC 157 at 157.
[38] *ibid.* at 160.

particularly slight and from this the Court could infer that the tapestries were never intended to become part of the land, but rather were attached in this manner in order to better display them. This conclusion was bolstered by the fact that they could be removed without doing any damage whatsoever to the property.

[1–23] This case is easily distinguished from *d'Eyncourt v Gregory*, which concerned a tenant for life over property on which he had erected and furnished a mansion house. The tenant for life—who had rights over the property for his lifetime only—left all of the tapestry, marbles, statues, pictures and frames and glasses to persons in his will. A dispute arose as to whether he was entitled to leave these matters in his will, or whether they were part of the land and, therefore, beyond his power of disposition as soon as he died. In this case, the items at issue were not attached to the land in any substantial way—they were placed on shelves, hung on wall-hooks or, in the case of garden statues, attached merely by the force of gravity of their own weight.

[1–24] The first prong of the test did not, therefore, seem to suggest that these items ought to be considered as part of the land. However, when the court went on to consider the intention of the person who had attached these items, it became evident that a great many of them were intended to essentially become part of the house and grounds and were essential to the architectural design of the property. Lord Romilly in this case expressed the principle upon which it was decided that at least some of the items were in fact "attachments" thus:

> I think it does not depend on whether any cement is used for fixing these articles, or whether they rest by their own weight, but upon this—whether they are strictly and properly part of the architectural design... and put in there as such, as distinguished from mere ornaments to be afterwards added.[39]

This intention that the items would form part of the architectural structure of the house overrode the slightness of the means by which they had been affixed or attached and they were therefore "attachments" to be governed by the law of real property.

Ownership Rights Above and Below the Surface of the Land

[1–25] Those with rights over land will not merely have rights to the surface of the land but also—to some extent at least—to the materials below and the airspace above the surface area. It was traditionally assumed that the maxim *cujus est solum, ejus est usque ad coelum et usque ad inferos* (i.e. "ownership is up to the heavens and down to hell") was an accurate statement of the extent of one's property rights over land, but it ought not be assumed that this is the case. As one can easily imagine, such a position introduces serious difficulties in practice, particularly in built-up areas where metros or other underground transportation links may be constructed and in the contemporary world of air travel, satellite technology and so on.

[1–26] In general terms, it is right to say that one has rights to the property underneath the surface of the land and the airspace above it, but it would be inaccurate to assume

[39] [1896] 2 Ch. 497, 500.

that this is an absolute principle, or that these rights really do extend in physical terms to the "ends of the earth".[40] It certainly appears to be relatively accurate to say that a property owner is entitled to the property underneath the surface, at least inasmuch as that property does not include minerals or what might be called "treasure trove", both of which properly belong to the State. In relation to airspace, it is clear that one is entitled to enjoyment of a *reasonable* amount of airspace above the surface of one's land,[41] but that this right does not extend to the point at which it interferes with the operation of satellites or obstructs air travel.[42]

[1–27] One of the most important implications of the fact that one has rights in relation to the airspace above the surface of the land is that it is possible to have property rights in a strip of airspace.[43] A horizontal line of airspace property is known as a "flying freehold" and can be bought, sold, mortgaged, etc. in precisely the same way as any other piece of real property, although for practical reasons such conveyances will require particular care to be taken in both the process of mapping and the formulation of covenants[44] relating to support, maintenance and so on.

Statutory Definition of "Land"

[1–28] Reflecting these principles, the Land and Conveyancing Law Reform Act 2009 includes the following, non-exhaustive, definition of "land" for the purposes of the Act in s 3:

> "land" includes—
> (a) any estate or interest in or over land, whether corporeal or incorporeal,
> (b) mines, minerals and other substances in the substratum below the surface, whether or not owned in horizontal, vertical or other layers apart from the surface of the land,
> (c) land covered by water,
> (d) buildings or structures of any kind on land and any part of them, whether the division is made horizontally, vertically or in any other way,
> (e) the airspace above the surface of land or above any building or structure on land which is capable of being or was previously occupied by a building or structure and any part of such airspace, whether the division is made horizontally, vertically or in any other way,
> (f) any part of land

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[40] *Commissioners for Railways v Valuer-General* [1974] AC 328.

[41] *Lord Bernstein of Leigh v Skyviews and General Ltd* [1978] QB 479.

[42] See, for example, Air Navigation and Transport Act 1936, s 55; the rights do extend to the point of disallowing advertising hoardings to protrude over someone else's property (*Kelsen v Imperial Tobacco Co* [1957] 2 QB 334) and to requiring that cranes operate at a high enough level to not interfere with others' property rights (*Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* [1988] NLJ 385).

[43] *O'Gorman & Co. Ltd. v Jes Holdings Ltd* [2005] IEHC 168; *Irredale v Loudon* (1908) 40 SCR 313.

[44] Covenants are, simply put, promises made under seal (or in a deed) such as a promise to support the land of another with the structures on one's own land. Covenants can be either leasehold (in leases) or freehold. Leasehold covenants are discussed in Chapter 15 and freehold covenants are considered in Chapter 11.

Furthermore, s 71 of the Act provides that a conveyance of land includes within it all buildings, drains, fences, fixtures, hedges, water, watercourses and other features forming part of the land.[45] If the land has houses or other buildings on it, the conveyance will also convey all cellars, drains, fixtures, gardens, lights, outhouses, passages, sewers, watercourses and other features that form part of the land, houses, or other buildings.[46]

V. Title

[1–29] While ownership can be defined as control over the thing owned, title is an important legal concept by which one assesses the strength of one's right to exercise this control. In essence, title refers to one's legal "entitlement" to property. Title is generally proved by a documentary process, which has now been greatly simplified by the introduction and sophistication in Irish law of systems of land registration.[47] In this way title can be taken to mean the collection of documents used within a conveyancing process to make out the vendor's entitlement to transact in the proposed manner and to show the extent to which any third parties might have rights in relation to the land. In the case of unregistered land, title consists of a number of documents showing the range of interests and entitlements extant over the property. One of the most important aspects of the conveyancing process whereby rights over land are transferred (usually by sale or lease) is the establishment of "good marketable title".[48] What constitutes good marketable title is, in essence, a question determined by whatever the prevailing conveyancing standards are.[49] In general terms, however, we can say that good marketable title is established where a purchaser can be satisfied that, should he want to sell that property again in the future, it could be sold without special conditions designed to deal with defects in title. So the purchaser will want to be satisfied that the vendor has the right to sell the property as proposed and that there are no outstanding questions as to that title (for example, that there are no third parties who might be able to enforce a right against the purchaser or someone intended to enter into a subsequent transaction over the land).

[1–30] The law recognises that there are different strengths of title that exist over property. In other words, a person—Patrick—may have title over a piece of land, but his title might not be the strongest title out there. This may be because, for example, Patrick is an adverse possessor and his title is merely possessory. This does not mean that Patrick can not transact in relation to the land; there may well be a purchaser in the marketplace who would be happy to accept the merely possessory title and acquire it from Patrick. That purchaser would not, however, be acquiring the strongest possible title to the land and must therefore accept that the element of risk of future claims against the property are higher than they would be if a stronger title (such as a good marketable title) had been acquired. The stronger the title of a vendor, then, the lower the level of risk a purchaser is taking on and, in all likelihood, the higher the market value of the property.

[45] s 71(1)(a), Land and Conveyancing Law Reform Act 2009.
[46] s 71(2)(a), Land and Conveyancing Law Reform Act 2009.
[47] These systems of land registration are considered in full in Chapter 7.
[48] *Clarke v Taylor* [1899] 1 IR 449.
[49] See also Land and Conveyancing Law Reform Act 2009, Part 9, Chapter 2 (ss 56–61).

VI. Moral Limits to "Property"

[1–31] It is important to consider whether there are any moral limitations to the concept of property—in other words, whether there are contexts in which one would say that property in the form of ownership rights is impossible. The concept of moral limits to property is probably best demonstrated through a consideration of the evolution of the rule that there is no property in the human body. It was originally the case that the law recognised that "a portion of our fellow creatures may become the subject of property".[50] This viewpoint essentially survived in the law until the abolition of slavery in both international and domestic legal systems, although it should be noted that the courts had begun to show a reluctance to enforce contracts over human property as early as the 1500s.[51] While the origin of the rule that there can be no property in the human body is somewhat contested,[52] by now the veracity of the rule is beyond doubt. This is so not only as a matter of property law, but also as a matter of international law which forbids slavery and servitude (both of which are fundamentally founded on the concept of "ownership" or "control" of a person[53]) in the strongest terms known to international law.[54]

[1–32] That said, there are a limited number of scenarios in which human bodies—usually dead—or parts thereof can be protected by the law against interference from others. In the case of corpses, for example, next-of-kin may be recognised as having enforceable rights to ensure that prior to the burial there is no interference with the corpse by medical or other practitioners. This was defined in *Smith v Tamworth*[55] as a "sort of quasi-property" in the corpse, i.e. a right to control what happens to the corpse. This *quasi*-property right has been interpreted in the United States as allowing for the same enforcement rights as any other property rights. This was confirmed by the 6th Circuit Court of Appeal in *Brotherton v Cleveland*,[56] in which corneas were removed from the deceased without the consent of the next-of-kin. The Court held that

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[50] *Gregson v Gilbert* (1783) 99 ER 629.

[51] See *Cartwright's Case* (1569) 2 Rushworth 468 and *Somerset v Stewart* (1772) Lofft 1.

[52] See Atherton, "Claims on the Deceased: The Corpse as Property" (2000) 7 *Journal of Law and Medicine* 361; Magnusson, "The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions" (1992) 18 *Melbourne University Law Review* 601; Matthews, "Whose Body? People as Property" (1983) *Current Legal Problems* 193.

[53] For an exhaustive examination of the foundations of slavery in classical thought see Garnsey, *Ideas of Slavery from Aristotle to Augustine* (1996, New York, Cambridge University Press). For a review of the "ownership" foundation to slavery, including international law on slavery, see generally Allain, *The Slavery Conventions: The Travaux Preparatores of the 1927 League of Nations Convention and the 1956 United Nations Convention* (2008, Leiden, Martinus Nijhoff).

[54] The prohibition of slavery is found not only in the slavery conventions (see Allain, *ibid.*) but also in all general human rights instruments, including Art 4 of the European Convention on Human Rights. It has the status of *jus cogens* in international law, which means that it is a peremptory norm that can never be violated or derogated from in any circumstances and that any treaties that violated this norm can be invalidated. On *jus cogens* see Art 53, Vienna Convention on the Law of Treaties (1969) and, generally, Orakhelashvili, *Peremptory Norms in International Law* (2009, Oxford, Oxford University Press).

[55] Unreported, No. 4196 of 1996, 14 May 1997; cited by Taylor, "Human Property: Threat or Saviour" (2002) 9(4) *Murdoch University Electronic Journal of Law.*

[56] 10 Cent L J 325 (1880), as cited by JFH, "The Nature of Rights in a Dead Body" (1926) *University of Pennsylvania Law Review* 404 at 404.

the plaintiffs were entitled to the protections of their property guaranteed by the due process clause in the same way as those rights would be guaranteed to them in relation to any other piece of property. However, in general it is the case that there are no property rights *per se* in a corpse—although it appears that, in the 1800s, a corpse could be arrested by a creditor of the deceased for failure to pay a debt.

[1–33] Perhaps the most contentious—and the most grizzly—exception to the rule that there is no property in human beings is what is sometimes termed "the work and skill" exception. This flows from the decision of the Australian High Court in the case of *Doodleward v Spence*.[57] This case concerned the corpse of a two-headed baby, which had been preserved and had become the subject of a dispute as to who was properly entitled to it. While the Court accepted that, in general, human bodies were not capable of being property, it did not accept that this was an absolute rule. Griffith C.J. held that the possession of a corpse for purposes other than burial was not, *per se*, unlawful and proceeded to carve out "the work and skill" exception in the following terms:

> [A] human body, or a portion of a human body, is capable by law of becoming the subject of property. It is not necessary to give an exhaustive enumeration of the circumstances under which such a right may be acquired, but I entertain no doubt that, when a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it, at least as against any person not entitled to have it delivered to him for the purpose of burial, but subject, of course, to any positive law which forbids its retention under the particular circumstances.[58]

[1–34] This principle was endorsed recently by the Court of Appeal in *R v Kelly*.[59] This case concerned an artist who had limited access to cadavers at the Royal College of Surgeons, London, but who was charged with the theft of "three heads, three torsos, part of a brain, six arms and ten legs and feet", which were removed without authorisation, used by him for the creation of bronze sculptures and never returned to the College. The Court of Appeal upheld his conviction, holding that there is a distinction between corpses and body parts and, furthermore, that body parts could be transformed into property by "virtue of the application of skill".

[1–35] The question of whether there is property in the human body has become all the more urgent with the advancements in medical research and technology that frequently require the harvesting of and experimentation with cells, or other body tissue, and can result in the production of "body parts", such as embryos. In the United States of America there has been some recognition that people can sell blood, or that there can be property in hair, urine, bone marrow, etc.[60] that casts considerably

[57] [1908] 6 CLR 406.
[58] *ibid.* at 414.
[59] [1999] QB 621.
[60] For more on these developments, see Griggs, "The Ownership of Excised Body Parts: Does an Individual Have the Right to Sell?" (1994) 1 *Journal of Law and Medicine* 223.

difficult questions on the matter of whether there is property in the human body. At the same time, there is case law that suggests the absolute rule against property in the human body may continue to be applied notwithstanding developments in scientific and medical research. This is suggested by the case of *Moore v Regents of UCLA*.[61]

[1–36] John Moore was being treated for hairy cell leukaemia in UCLA, where blood, bone marrow and other body substantives were removed for the confirmation of his diagnosis. Approximately one year after he began treatment in UCLA, Moore was advised to have his spleen removed, which he was told was vital to slow down the progress of his disease and to delay or prevent death. Moore consented to the splenectomy on the basis of these advices and his spleen was removed. Moore continued to attend at UCLA for check-ups that, he was told, were necessary to his health and well-being. As part of every visit, blood, blood serum, skin, bone marrow and sperm were sampled.

[1–37] It transpired that, throughout his treatment, doctors at UCLA Medical Centre had been engaged in research on hairy cell leukaemia involving the use of his cells and other bodily substances without his knowledge. These substances were available to them only because of the continued doctor–patient relationship with Moore. In 1979 a cell line was developed from Moore's cells, which his doctors patented successfully. This discovery led to large amounts of revenue for the UCLA Medical Centre and, upon discovering what had transpired, Moore sued on the basis that he had property rights in these cells. The Court held that Moore had no property in his cells or the profits made from them, although it did find that his medical staff had an obligation to reveal their research and financial interests in the bodily substances harvested from Moore's body.

[1–38] These cases and trends raise profound questions about the nature of the rule that there is no property in the human body. Is it the case that there is no property in the entire human body when it is living or in cells, but that there are *quasi*-proprietary rights in a corpse, property rights in corpses and body parts that have been subjected to work and skill, and property rights in parts of the living body, such as blood and hair, but only if the person decides to sell them? The answers to these questions are not entirely clear, but the continuing evolution of the matter of property in human beings not only alerts us to the complexity of property but also to the difficult moral questions that can arise in our decisions as to the limits of property.

VII. A Short Note on Property Law and Social Change

[1–39] In recent years the Irish law of property has undertaken massive reform, most of which was not a result of the economic crisis in which the country is currently engaged. The greatest example of this will arise repeatedly throughout this book: the Land and Conveyancing Law Reform Act 2009. Social changes in Ireland were part of that process of reform. Take, for example, the provision in s 9(2) that abolishes any remnants of feudal tenure from Irish property law.[62] We will see in the next chapter that in fact many of our building blocks in property law have a feudal provenance, and we

[61] 793 P 2d 479 (Cal 1990).
[62] This is considered in more detail in paras [2–58] and [2–59].

did not abolish all of those concepts and doctrines in the 2009 Act. Rather we reconstituted them, often in a tidier and more manageable way but always on a new footing. A statutory footing; a *democratic* footing. We did this because, in common with many other states, we do not consider that a feudally based property law system is appropriate in a modern democratic state. Reflecting on this in the context of the United States, Joseph Singer has written that at the birth of the United States of America, feudalism was rejected as an essential element of that country's commitment to democracy:

> Democracies are premised on the idea that we must show equal concern and respect for every person. For that reason, we reject distinctions of status . . . The feudal system was premised on distinctions among persons . . . [it] placed people in ranks and it was a fundamental principle that you were defined by your status. It was also a fundamental principle that some men were not free.
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> . . .
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> American property law was born at a time when great changes were happening in the world. Prime among them was the American rejection of feudalism as a way of life. Movie stars and sports players aside, we want no lords here.[63]

[1–40] As well changes that reflect socio-political change, such as a shift to democracy or emergence from colonialism, property laws often reflect socio-economic change. Many of the changes that were introduced in the 2009 Act were done with a view to ensuring that our organisation of the law of property does not unduly hamper property-based transactions, the foundation upon which so much of our economic prosperity was built.[64] We have also, rather late in the day, introduced the Multi-Unit Developments Act 2011 to deal with particular questions that arise in multi-unit developments, such as apartment blocks. In the main this reform focuses on the creation of Owners' Management Companies to manage the development, including the common areas and the enforcement of covenants. Again, the growth of multi-unit developments and of the problems associated with them—especially problems of essentially exploitative service charges paid to maintenance companies frequently entirely neglectful of the property—was one that came to prominence because of the "Celtic Tiger" and changes that this brought to how we use land in development terms and to what kinds of properties people bought (or could afford to buy).[65]

[1–41] If our rise to economic superstardom can help to explain some legal changes that have come about in the last few years, then our descent into economic purgatory

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[63] Singer, "Property Law as the Infrastructure of Democracy", The 4th Wolf Family Lecture on the American Law of Real Property, 4 April 2011. Available at SSRN: http://ssrn.com/abstract = 1832829

[64] See, for example, the discussion of the reform of estates in land by the Land and Conveyancing Law Reform Act 2009 in Chapter 4.

[65] For a full outline of the difficulties that MUDs presented see the Law Reform Commission's work on this matter: *Consultation Paper on Multi-Unit Developments* (LRC CP 42-2006) (2006, Dublin, Law Reform Commission) and *Report on Multi-Unit Developments* (LRC 90-2008) (2008, Dublin, Law Reform Commission).

can also help to explain some other changes that we will consider at various points in the book. Two areas of particular concern are notable at this point. The first relates to mortgages and, in particular, to the process by which mortgagees (usually banks and other financial institutions) can repossess and sell mortgaged property if the repayments are not made in full and on time. As we will see in Chapter 13, the Land and Conveyancing Law Reform Act 2009 reformed the operation of mortgages but it did not insert what we might call substantial "stalling mechanisms" to delay repossessions. That has, however, been seen as an important public policy concern because of (a) the huge number of people who we know are either in arrears or about to go into arrears on their mortgages, and (b) the significant support given by the state to banks operating in Ireland. In fact, these stalling mechanisms were not introduced by legislation in the end; rather they were introduced by the Financial Regulator through a Code of Conduct. In other words, the Code of Conduct—which, at the time of writing, is the Code of Conduct on Mortgage Arrears as last revised on 6 December 2010—is a regulatory instrument that tries to ameliorate the difficulties people are facing by forcing banks to delay on their use of statutory mechanisms for repossession and sale (or "enforcement") of mortgages that exist over residential properties. We will consider how the Code works in Chapter 13.

[1–42] Of course, it is not only home owners who are having property-related difficulties in the current climate. Commercial tenants also face particular difficulties, especially where they possess their commercial premises on the basis of leases that pre-date the "crash". It had become common course for these leases to include what are known as "upwards only rent review clauses"; conditions that provided that rent would either go up on review or stay the same, but could never go down. These clauses raised relatively few eyebrows during "the boom", but of course are problematic now when market activity is low, property values are declining, but rents can still be increased. Section 132 of the Land and Conveyancing Law Reform Act 2009 resolves this difficulty when it comes to leases executed after it came into effect, but it does not retrospectively abolish such clauses. There are continuing calls for a retrospective abolition of upwards only rent review clauses, which we will consider in Chapter 15, and commercial organisations continue to claim that rent levels are a significant factor in failing businesses.

[1–43] Perhaps one of the most significant property-related developments since the beginning of the economic crisis is the establishment of the National Asset Management Agency, reputed to be one of the largest property holding companies in the world.[66] NAMA, as this agency is known, is established by statute and has the capacity to acquire lands from those who fall within its remit. It has also been suggested that NAMA will establish its own mortgage scheme in the future with the hope of stimulating activity in the property market. Although the establishment of NAMA is significant, it is primarily dealt with in law schools in financial regulation and banking law courses, and is not addressed in this book.[67]

[66] National Asset Management Agency Act 2009.

[67] The operation and composition of NAMA is extensively considered in Dodd & Carroll, *NAMA: The Law Relating to the National Asset Management Agency* (2011, Dublin, Round Hall).

[1–44] We should not, however, fall into the trap of thinking that economic collapse is the only "social change" that has an impact on property law. Social change, and its effect on the formulation of public policy, has long has an impact on how property law is designed and implemented. The relationship between the two has usually been one of legal reaction to social change. In other words, property law tends to react to changes in social patterns rather than to induce those changes itself. This is not, of course, always the case: in the United Kingdom, for example, Margaret Thatcher famously brought about massive social change when she created a scheme for people to buy their corporation houses and, by so doing, ushered in what has been termed an "ownership society" there. However, in general the relationship works in the other direction. So, for example, it was increased social pressure for women's liberation and equality that brought about the introduction of the Married Women's Property Act 1882 (allowing married women to own and manage their own land), rather than the other way around. Similarly, it was a social demand for a system of family recognition that aligned more closely to people's lived experiences that brought about the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 and its associated property law changes, rather than a spontaneous legal move designed to bring about greater family diversity in Irish society.

[1–45] This is not to suggest that changes in property law cannot do more than merely reflect a broader social change; they can help us to adapt to that social change as a democracy (for example, by abolishing feudalism), as an economy (for example, by restricting rents), as families (for example, by protecting the homes of married couples and people in civil partnerships), and as individuals (for example, by ensuring that a woman with property can choose to marry without running the risk of losing her capacity to own and manage that property).