Rights in Rem

As already stated, this book focuses on two kinds of rights in land: ‘rights in rem’ as recognised by traditional English (‘domestic’) law, and those additional rights that are declared in the European Convention on Human Rights. This chapter introduces the former, Chapter 2 the latter.

1.1 The Idea of a Right in Rem

1.1.1 ‘Rights in Personam’ and ‘Rights in Rem’

Say I own a house, but then something occurs which, according to the rules of English domestic law, means that you now have a right to live in it. The ‘something’ might be that I make a contract with you to this effect; or that I give you a share in the ownership; or that I marry you; or various other significant happenings. Say then that I sell the house to John. In terms once again of English domestic law, there are two possibilities.

One is that your right cannot affect John. That is, it is effective only against me, and if you want to enforce it you will have to look to me, not to John. It follows, now I have passed the house to John, that you will not be able to insist on living there: as it is said, to maintain your right ‘in specie’. Only a right effective against John could allow that. Because your remedy can only be against me, it will have to take the form of a money payment, from me, compensating you for not now being able to live in the house. Rights which behave in this way are called ‘rights in personam’. Prominent among the rules dealing in rights of this kind are those comprising the ordinary law of contract. Contract has a feature called ‘privity’, whereby a contract between
A and B cannot bind C. That is another way of describing the fact that rights arising under the law of contract alone are in personam.

The other possibility is that your right can affect—bind—John. If your right is of this kind, and the conditions for John being affected are indeed satisfied, your remedy is no longer against me alone: you can enforce the right against John. Just because your right is effective against John does not necessarily mean that you will be able to maintain it in specie, ie insist on living in the house: your remedy might still take the form of money compensation for not being able to live in it, though this time against John rather than me. However, effectiveness against John is certainly a precondition for your being able to claim in specie protection, and commonly this will indeed be forthcoming. If the law treats your right as having the potential to affect John in this way, your right is called a ‘right in rem’.

Your right to live in the house might be of either kind. To know which, we need further information. For example, if you simply rent the house from me, your right will be a ‘lease’, and in rem; but if your right is to live in it with me, as my lodger, it will be a ‘licence’, and in personam. There are various other possibilities, some of each type. We shall review many, though not all, of them in the course of this book.

1.1.2 ‘The Potential to Affect John’

The previous section spoke of a right in rem as one ‘having the potential to affect John’, and noted that John will in fact be affected by it only if certain conditions are satisfied.

In principle, the law could say that rights in rem will affect John, full stop. In practice, contemporary English land law takes a more complex position, whereby John will commonly be affected only if certain circumstances are present. The rules on this point have varied over the years, but currently are for the most part stated in the Land Registration Act 2002. We shall look at these in detail in Chapter 3, but, for example, the position may be that John will be affected by your right in rem only if, before he bought my land, your right had been registered at the Government’s Land Registry. (A right in

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3 Distinguish this meaning of privity from another, whereby a contract between A and B cannot confer a right on C. This too was a feature of the law of contract, but the relevant rules have been substantially amended by the Contracts (Rights of Third Parties) Act 1999. On privity generally, see eg M Chen-Wishart, Contract Law (4th edn, Oxford, 2012) ch 4.

4 An argument has been made that, of the rights which this book treats as in rem, some lack certain of the features of a true right in rem, and so should be segregated out and considered instead as ‘persistent’ rights. This argument is explored in § 1.3.2. Even if there are two categories of non-in personam rights in this way, however, they certainly share the characteristic of ‘having the potential to affect John’, so can be bracketed together so far as this matter—our present focus—is concerned.
personam cannot be registered at the Registry, and even if somehow it were, it
would still not bind John. Registration, and certain equivalent phenomena,\(^5\)
constitute the circumstances under which rights capable of binding John will
actually do so. So they apply only to rights in rem. A right in personam is by
definition not capable of binding John, so will not do so, no matter what.)

The idea of a right in rem is sometimes conveyed in the Latin expression
\textit{nemo dat quod non habet}, i.e. no one can give what he\(^6\) does not have. Say
I purport to sell John a house, but in fact it belongs not to me but to you. John
does not become owner of the house, because I did not own it previously, so
did not have it to give. Equally if I do own the house but have leased it to
you for five years, thereby giving you a right in rem over it for that period. If
I purport to sell the house to John, what I have to give is the ownership minus
your leased interest, so the picture is painted of him acquiring the ownership
minus your interest. Which, in both cases, explains why John must respect
your interest: he never acquired (because I never gave him, because I never
had) the ability to do otherwise.\(^7\) Whereas if your right is only in personam—
as where you are my lodger—your claim is against me personally, so all the
rights in the house remain mine to give, and I can successfully transfer them
to John. If John chooses to evict you, all you can do is sue me for breaking
my contract with you.

But this picture does not fit with the fact that English land law’s rights in
rem affect someone like John only if certain conditions, such as registration, are
met. I may own a house subject to a lease in your favour, but if that lease is not
registered, John may not be affected by it: I will thus have given him the house
unencumbered, despite not owning such an unencumbered house myself. So
the actual law regarding the behaviour of rights in rem is not in fact fully
described by the \textit{nemo dat} image. How should we think about this discrepancy?

A quick answer might be that \textit{nemo dat} is only a metaphor, and its impre-
cision therefore unimportant. That is not good enough, however. The idea
underlying \textit{nemo dat} is that when something ‘belongs’ to a person, as the
house in the above examples belongs wholly or in part (to the extent of the
lease) to you, that person’s entitlement to it is absolute, impregnable. This
idea has a powerful appeal.\(^8\) The fact that the actual law departs from it, in
the manner under discussion, therefore requires explanation and justification.

\(^5\) That is, the cases in which the law regards a right in rem as an ‘overriding interest’: § 3.1.1.
\(^6\) Here, and (unless the context indicates otherwise) throughout this book, masculine
pronouns are used to refer to both sexes.
\(^7\) Likewise if, rather than selling the house to John, I go bankrupt and the house is to be taken
and sold to help pay my creditors. If the house is not mine but yours, this cannot happen. If it is
mine but you have a lease over it, it can and will happen, but when the house is offered for sale,
the offer must be subject to your lease.
\(^8\) It is an aspect of the paradigm conception of property, or ownership. For further discussion
of the latter (the reasons why it has a powerful appeal, and the reasons why we may nonetheless
not espouse it), see Ch 10.
The key is that, for all its appeal seen from your perspective, the pure *nemo dat* idea creates dangers for others such as John. Dealing with me, he may believe that I have the house to sell, and that there are no derogations from this, for example a lease in your favour; and he may proceed on the basis of this belief, most especially by paying me for the house’s whole value. If this belief turns out to be ill founded, John will suffer. He may well have a claim against me for his money, or the relevant fraction of it, but this is distinctly second best to not encountering the problem at all.

Of course, John’s mistake may be entirely his own fault, with the result that we may have little sympathy for him. But equally, he may have taken all the care in the world, so that there is a sense in which the emergence of your right against him genuinely upsets the understanding he could reasonably have of his position. To put it more pointedly, the pure *nemo dat* idea, allowing you to insist on your (in this situation) undiscoverable right against John, permits you in that way to exert ‘arbitrary domination’ over him. And the precepts of republicanism—a very important political tradition treating liberty as the absence of such domination, or of any scope for it—invite us to organise the law so as not to permit such a thing. That is, they invite us to stop the law short of the pure *nemo dat* idea.

And consider finally the possibility that John took, not all the care in the world in failing to discover your rights, but all the care that we should wish him to. For the market in an asset to operate most effectively, so that the asset can move to the person able to extract the greatest profit from it, we need to minimise the ‘transaction costs’, ie the costs involved in procuring this movement. The more care we expect of John, or that is in effect demanded by our rules about when a right in rem will bind him, the higher will be his transaction costs, frustrating these boons.

From these points of view, then, it makes sense for the law to make John bound by a right in rem only when it ought to be easily discoverable. Hence the rule whereby John will in many cases be bound by your right only if the latter has been registered: registration makes for easy discoverability. The literal idea of *nemo dat quod non habet* is sacrificed to the extent required by such countervailing considerations. But that idea’s essential appeal remains, so the rules embodying the departures from it require the most careful design. Those currently in force will be examined and evaluated in Chapter 3.

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10 An older rule provided that certain rights bound John only if he was not a ‘bona fide purchaser for value without notice’ of them. The key element in this, the idea of ‘notice’, in theory referred to the possibility of discovery by a ‘reasonable purchaser’. As such, it was apparently sympathetic to the value under discussion. But the concept of a ‘reasonable purchaser’ was itself interpreted in various ways, including some quite demanding on John: leaving the concept not so sympathetic after all.
When do Rights in Rem Bind?

We now revert to rights in rem, to go into more detail about their behaviour as such.

In § 1.1.2 we saw that rights in rem are rights which are in principle capable of binding disponees … but that they will actually bind a particular disponee only if certain conditions are present. This chapter looks at the rules telling us what those conditions are, when the rights are ones that concern land.

There are two sets of such rules: one for ‘registered land’ (or ‘land of registered title’) and one for ‘unregistered land’. The question whether a disponee of a piece of registered land is affected by a right in rem relating to it is decided solely by the rules contained in the Land Registration Act 2002. No other rules are relevant.1 In the case of unregistered land the same question is decided partly by rules in the Land Charges Act 1972, and partly by some non-statutory rules. Much the greater part of the land in England and Wales is now registered land.2 This book will therefore go on to look in detail only at the provisions of the Land Registration Act 2002, relating to registered land.

1 Sometimes a disponee will incur an obligation by reason of a rule not supplied by the Act, but this is an essentially different matter from becoming the subject of a pre-existing right in rem, which is our present focus. A rule of the former kind is that generating a ‘constructive trust’ against a disponee who, as part of the disposition transaction, promises to do something he would not otherwise have to: see § 9.2.

2 When the registration regime was originally introduced, in 1925, it was made applicable only to certain areas. The number of areas was increased over time, until eventually the whole of the two countries was covered. Even when a piece of land is located in an area to which registration applies, however, the registration regime becomes applicable to it only when its title has been entered on the register: and that need occur only when it is involved in a prescribed kind of transaction (though it can also occur without such a transaction, being registered voluntarily). The list of prescribed transactions has lengthened over time, bringing increasing areas of land within the scope of the regime. For the current law relating to initial registration, see the Land Registration Act 2002 Pt 2 and Sch 1.
3.1 The Registered Land Regime

3.1.1 The Principles

The key principle of the Land Registration Act 2002 is that a right in rem will affect a disponee of the land in question in two, and only two, sets of circumstances: if it appears on the register, and if it operates as an ‘overriding interest’.

The Act makes detailed provision for the registration of rights in rem. Some types of right in rem must be registered; others can be registered; only a few are not registrable. The most important of the non-registrable types is an ordinary lease for three years or less (including therefore a weekly, monthly or yearly tenancy), which can therefore affect a disponee only via the alternative route, as an overriding interest.

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3 Land Registration Act 2002 ss 29–30. As these sections indicate, however, this key principle does not apply if the disponee (i) does not give valuable consideration for the disposition, as where he receives it as a gift; or (ii) takes an interest in the land other than (approximately speaking) ownership, a lease, an easement or a mortgage, ie (again approximately speaking) those interests which must be conferred by a ‘registrable disposition’ (see § 5.4.1). Where the key principle does not apply, the rule is instead that the disponee is affected by any extant right in rem pre-dating his own, whether or not it is registered or overriding: s 28. So if I own land, and for example I sell you an option to buy it (this being a right in rem), but then I transfer it as a gift to John, John will be affected by your option over it even if your option is not registered, nor counts as overriding. The ambit of this latter rule will, however, diminish if, especially with the possible eventual advent of electronic conveyancing (§ 5.4.5), registration comes to be required in respect of more interests than at present; such as, let us imagine, your option in the example. But it is questionable whether registration would ever be required of all interests, in which case the rule will continue to have at least some application.

4 The expression ‘overriding interest’ was used in the Land Registration Act 1925; the 2002 Act avoids it, coming closest with the phrase ‘unregistered interests which override’, but the shorter form remains in common usage and will be adopted here.

5 Land Registration Act 2002 Pt 4.

6 s 27, dealing with rights whose conferral is a ‘registrable disposition’, ie which have to be recorded on the register in order to exist at all (see § 5.4.1).

7 s 32, and also s 40. Technically, only those rights whose conferral is a registrable disposition are said to be ‘registered’ when so recorded. The remainder are said to be ‘protected by’, or ‘the subject of’, ‘entry on the register’, or similar. But this linguistic differentiation is commonly ignored, the word ‘registered’ being used in all cases.

8 s 33.

9 See § 11.4.2.

10 The rules about registering rights under trusts (ss 33(a), 40) are also special, reflecting a preference that such rights, though in some sense rights in rem and so capable of binding a disponee, should not actually do so, but should instead be ‘overreached’: ie detached from the land at the moment of the disposition, and thenceforth attached instead to the purchase money. This phenomenon is explored more fully in §§ 16.5–16.6.
A right in rem that has not been registered (despite the fact that, usually, it could have been) will nonetheless bind a disponee if it operates as an overriding interest. And it will do so if it fits the description in Schedule 3 to the Act. In its present form, this lists 10 kinds of circumstances in which a right can be overriding. In nine of them, the right qualifies as overriding simply by being a particular kind of right, as named in the Schedule. The most generally significant of such rights are ordinary leases of up to seven years’ duration, and some kinds of easement (an easement is a right such as a right of way). The 10th, enormously important, case is that described in Schedule 3 paragraph 2. By this, almost any right in rem concerning a piece of land operates as an overriding interest if the person to whom it belongs is in actual and apparent occupation of that land at the time of the disposition (though not if the disponee asks that person about the right, and he does not reveal it). The idea of ‘actual occupation’ is explored in more detail in § 3.1.2.

So in theory, almost all rights in rem can be registered, which is one route by which they can bind a disponee; but, if not registered, they can almost all (so long as they are either one of the nine named rights in Schedule 3, or accompanied by actual and apparent occupation) bind a disponee nonetheless, as overriding interests. In practice, however, the range of overriding interests that are actually registered may be much narrower.

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11 Sch 3 explains when rights will count as overriding against a disposition of land, title to which is already registered. When the disposition is one as a result of which the land’s title will become registered for the first time, rights against it will count as overriding under the slightly wider rules in Sch 1.

12 Originally there were 14. Five of these have since (as of 13 October 2013) been removed, while one has been added. One more is contributed by s 90, giving overriding interest status to PPP leases over the London Underground: a very specialised category. And Sch 12 paras 7–13 address certain rights that existed before the advent of the 2002 Act, and at that time counted as overriding, but would have lost this status under the 2002 Act. The listed rights are allowed to retain the status after all—in some cases only for a temporary period that has now expired, but in other cases permanently.

13 Sch 3 para 1: see § 11.7.1. Leases that cannot be registered, as being for three years or less, are therefore covered, together with some that can be registered. Registration of the latter can thus be regarded as optional.

14 Sch 3 para 3: see § 13.3.

15 Two kinds of right are excluded (Sch 3 para 2(a) and (d)), namely beneficial rights under the Settled Land Act 1925 and leases with a start date three months or more after their grant, where the start date has not yet arrived; but the former type is not truly a right in rem anyway, and a tenant under the latter type would be unlikely to be in occupation.

16 The word ‘apparent’ is used here and throughout this book as shorthand for the statutory words ‘obvious on a reasonably careful inspection of the land at the time of the disposition’. The occupation does not need to be ‘apparent’, however—though it still needs to be ‘actual’—if the disponee actually knows about the right at the time of the disposition: Sch 3 para 2(c)(ii).

17 If ‘inquiry was made [of him] before the disposition and [he] failed to disclose the right when he could reasonably have been expected to do so’.

18 At one time, some people seem to have thought that, under the Land Registration regime, any given type of right in rem could be capable either of registration, or of operation as an overriding interest, but not both. But there was never a basis for this view in the relevant statutory wording, and it was authoritatively denied in Williams & Glyn’s Bank Ltd v Boland [1981] AC 487 (HL).
interests is not quite so wide. Some kinds of rights in rem do not themselves entitle their owner to occupy the land to which they relate, and will thus rarely, and coincidentally, satisfy paragraph 2. So unless they are among the nine, they will not normally qualify as overriding interests. But many important rights can still be seen as realistically able to bind disponees either via registration, or by being overriding.

There is, however, no third alternative. This rule represents a choice: before 2002, there was a third alternative, but the 2002 Act has eradicated it. It can be seen in the pre-2002 case of Peffer v Rigg, holding that a right which was neither registered nor overriding nevertheless bound a disponee who actually knew of it. This conclusion was reached on the basis of the wording of the then prevailing Land Registration Act 1925, which certainly could be read to this effect. But it arguably also embodied a view that such a disponee ought to be bound, as a matter of general principle. That view was considered by the Law Commission during the design phase of the 2002 Act, and rejected, principally on grounds of its incompatibility with the idea that a right in rem will not bind a disponee unless it is registered. The provisions for overriding interests are thus the only route by which rights in rem can bind despite not being registered. As part of our appraisal of those provisions in § 3.2.3, however, we shall consider whether the law is right to draw the line there, or whether another such route—the alternative here under discussion—ought to be added.

19 For example, a restrictive covenant: a right that you may have, as my neighbour, forbidding me from, say, erecting additional buildings on my land (see Ch 14). When I sell my land to John, and the question arises whether he is bound by your right, it is unlikely that you will be able to rely on its operating against him as an overriding interest, because a restrictive covenant is not among the nine named rights, and by the nature of it you are unlikely to have been in occupation of my land at the time, so as to bring it under Sch 3 para 2.


21 ss 20(1) and 59(6). The two sections described the circumstances in which a disponee was bound and not bound in differing terms. The judge's ruling was one of a number of possible readings of their combined effect. Under s 59(6), read with s 3(xxi), a disponee took free of unregistered and non-overriding rights only if he was in good faith. The judge held that a disponee was not in good faith if he knew of the right but went on to buy the land ostensibly free from it.

22 This was the decision's second ratio decidendi. It had two others. The first pointed out that the rules (ss 20(1) and 59(6)) required the right to be registered or overriding only if the disposition was for valuable consideration, and held that, on the facts, the disposition in the particular case was not for valuable consideration. This is a narrow issue, on which the result would be the same under the Land Registration Act 2002: ss 29(1), 132. The third ratio was that the disponee was bound (not by the right itself, operating in rem, but) by a 'constructive trust' generated by the circumstances of the transaction. This involves an idea of wider significance, discussed in § 9.2.4.

3.1.2 ‘Actual Occupation’

As we have seen, Schedule 3 paragraph 2 gives overriding status to almost any right in rem whose owner is, at the time of the disposition of the land to which it relates, in actual and apparent occupation of that land. Say you have a right in rem over a house which I own, and that I transfer the house to John. If you are, and are discoverable as being, in actual occupation of the house at the time of that transfer, you can claim that your right binds John as an overriding interest in this way. This section looks at the idea of ‘actual occupation’.

In many cases, applying the concept of ‘actual occupation’ poses no problem. (As a consequence, authority regarding these cases is sparse, but there appears no reason to doubt one’s commonsense instincts.) If you live in a house, you will normally be in actual occupation of it. This remains so notwithstanding that you may be physically absent from it at the precise moment of the disposition. You may be out for a few hours (at work, on a walk, shopping, etc), or away for a longer spell (on business, on holiday, in hospital, etc). It probably need not be your main home (so you could be in actual occupation of your weekend cottage as well as your flat in town), or even your ‘real’ home at all (as where you are living with me for the time being, but have no expectation that this will be a permanent arrangement). On the other hand, ‘mere fleeting presence’ is not enough; ‘some degree of permanence and continuity’ is required: so the fact that you happen to pay me a quick visit at the moment of the disposition will not avail you. There are, however, bound to be marginal situations, in which it will be impossible to give a confident answer either way. As, perhaps, where you have a number of homes, and move between them at the time of the disposition of one of them, you happen to be there this is your first visit to it for six months, and you plan to stay for a fortnight.

Some of the pre-2002 interpretations of ‘actual occupation’ slanted it to cover only situations in which the disponee could readily discover the putative occupant, or perhaps the occupant’s right. This tendency has now been

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24 As in Chhokar v Chhokar [1984] FLR 313 (CA). In Link Lending Ltd v Bustard [2010] EWCA Civ 424 (CA), a person was found to be in actual occupation of her house despite having been detained in a psychiatric care institution for over a year, returning to the house only once a week for a brief visit under supervision—on the basis that she still regarded it as her home, and hoped to live there once more some day. See B Bogusz, ‘The Relevance of “Intentions and Wishes” to Determine Actual Occupation: A Sea Change in Judicial Thinking?’ [2014] Conv 27.


26 In Stockholm Finance Ltd v Garden Holdings Inc [1995] NPC 162 (Ch D) the visit to the residence in question was the first for over a year, and was held not to represent actual occupation.

institutionalised in the requirement of Schedule 3 paragraph 2 that the occupation be not only actual, but also apparent: ‘obvious on a reasonably careful inspection of the land at the time of the disposition’. Under this formulation, it is not necessary (or sufficient) for the right itself to be obvious, or discoverable from the occupation alone. Rather, insisting that the occupation—and so the occupant—be discoverable, the formulation ensures that the disponee is in a position to make enquiries of the occupant, which in turn should lead to discovery of the right. Paragraph 2 rules that if the disponee makes such enquiries (they have to be addressed to the owner of the right, not merely say to the disponor), and the right is not disclosed when disclosure could reasonably be expected, the disponee is not bound by the right, unless he knows about it anyway.

Some decisions treat you as in actual occupation of a house on the strength of facts other than your own personal presence there. So you might qualify as in actual occupation, despite not being there yourself, on the basis that John is there … and John is your employee, there to do his job for you,28 or perhaps if he is your spouse 29 … but apparently not if he is your tenant,30 or your guest.31 You might also qualify as in actual occupation on the basis that your belongings are there32 … but apparently not if they have been there for only a short time when the disposition occurs.33 It is hard to understand why you should thus count as in actual occupation in circumstances where, in ordinary terms, you are not. Perhaps the thinking is that in these circumstances the disponee should be able to discover your right. This is problematic (as we saw in the previous paragraph, the legislation focuses not on discoverability of the right itself, but on the occupation of the right-owner, from whom information about the right may then be elicited), but even if it is correct, it does not fully account for the various distinctions. These seem not consistently to reflect the discoverability of the right, or even of the ‘occupation’. The contrasting treatments of belongings may perhaps be understood in that way, but not those regarding the presence of other people.

Sometimes you do not count as in actual occupation of a house even if, without complication, you are present there at the relevant time, living in it as your home. In some old decisions, where a husband owned a house, and lived in it with his wife, she was nonetheless regarded as not in actual

29 Strand Securities Ltd v Caswell [1965] Ch 958, 984–5 (CA). Would any other relationship suffice? Perhaps the presence of a child would amount to actual occupation by a parent … but in that decision, the presence of a step-daughter was not regarded as actual occupation by her step-father.
30 The Land Registration Act 1925 did treat a landlord as in actual occupation via his tenant (s 70(1)(g)), but this has not been carried forward into the Land Registration Act 2002 Sch 3 para 2.
32 Chhokar v Chhokar [1984] FLR 313 (CA).
33 Abbey National Building Society v Cann [1991] 1 AC 56 (HL), where the time between the arrival of the belongings and the disposition was 35 minutes.
occupation of it.\(^{34}\) In *Williams & Glyn’s Bank Ltd v Boland*\(^ {35} \) this approach was abandoned, in favour of one whereby ‘actual occupation’ means what (or at any rate not less than) it appears to. But the earlier view has been revived, in a ruling that children under 18 living in their parents’ house do not count as in actual occupation of it.\(^ {36}\) Perhaps this ruling too was intended to ensure discoverability (one certainly hopes that it rests on more than a mere sense that children do not count). If so, it ought not to prevail in the law as configured by Schedule 3 paragraph 2. As we have seen, the latter demands only discoverable occupation. A child’s occupation is probably no less discoverable than an adult’s, and certainly cannot be said to be always undiscoverable. After that, it is for the disponee to make appropriate enquiries. In the case of a young child, the disponee may not be protected by the rule whereby a right that is *not* disclosed on enquiry to its owner does not bind, because the rule demands that it be reasonable to expect such disclosure, and in the case of a young child it would often not be reasonable. But the disponee will normally be able to ensure that the right is disclosed, by enquiring of the child’s parents.

The foregoing paragraphs focus on actual occupation of a house. Land put to other uses can of course be the subject of occupation too. What counts as ‘occupation’ will vary with the use. For example, to show that you are in actual occupation of my warehouse, you would point out that you keep your goods there: no one would expect you to live there. Actual occupation of a garage will usually consist in keeping a car in it,\(^ {37}\) and actual occupation of a farm will presumably consist normally in farming it.

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**Chapter 3 continues**

### 3.2 The Appropriateness of the Regime

So the registered land regime, as currently configured, allows rights in rem to bind disponees if they are registered, or if they count as overriding interests (but not otherwise)—as just described. In this group of sections, we consider whether this is an appropriate regime for the law to maintain.

\(^{34}\) See especially *Bird v Syme-Thomson* [1979] 1 WLR 440 (Ch D).


\(^{36}\) *Hypo-Mortgage Services Ltd v Robinson* [1997] 2 FLR 71 (CA).

\(^{37}\) As in *Kling v Keston Properties Ltd* (1983) 49 P & CR 212 (Ch D). Apparently inconsistently, *Epps v Esso Petroleum Co Ltd* [1973] 1 WLR 1071 (Ch D) held that parking a car on an open but nonetheless defined piece of land did not amount to actual occupation of it. For a broadly similar case, see further *Chaudhary v Yavuz* [2013] Ch 249, [28]–[32] (CA).
10 Freehold Ownership

10.1 Ownership in English Land Law

10.1.1 Ownership and the Fee Simple Absolute in Possession

Freehold ownership is the most extensive type of right in rem maintained by English land law. It is more technically known as the ‘fee simple absolute in possession’. This is the term used to denote it in section 1 of the Law of Property Act 1925. In practice, however, it is much more usual to speak of it as ‘ownership’. The word ‘freehold’, which is often omitted, distinguishes this right from a lease, which, as we shall see in Chapter 11, is also a kind of ownership, though a less extensive one.

Referring to the fee simple absolute in possession as ownership already gives a fair intuitive idea of what it involves. Certainly, there is little or nothing about its details that one might make one hesitate to apply that term. And this is no accident. In very broad terms, ownership is something like the ability to use the asset in question—here, the piece of land—as one likes, and to exclude other people from it, and to transfer it as one might wish. Some concentration of these abilities is valuable (even if there are things to be said against it too) as, above all, strongly supporting—really, embodying—a collection of desiderata associated with liberalism. These are explained more fully in § 10.3.2. For present purposes, the key point is that English law, like many other of the world’s legal systems, having more or less a liberal alignment in general, will naturally aspire to maintain one of liberalism’s principal vehicles. The match between the fee simple absolute in possession and ownership should be seen as calculated, aimed at delivering this aspiration.¹

¹ On the relationship between the fee simple absolute in possession and ownership, see further J Harris, ‘Ownership of Land in English Law’ in N MacCormick and P Birks (eds), The Legal Mind—Essays for Tony Honoré (Oxford, 1986) ch 9.
10.1.2 Defining the Fee Simple Absolute in Possession

What has been said so far has been rather unspecific, pointing only to an intuitive sense of the idea of ownership. One would wish to be more precise about the exact configuration of the right English law maintains as the fee simple absolute in possession. But the attempt is in fact rarely made.

It is easy, and fairly accurate, to say that if someone has the fee simple absolute in possession in a piece of land, he has the ability to use the land as he likes, and to exclude other people from it, and to transfer it as he might wish; or at least, some reasonably impressive degree of ability.

On examination, we soon discover that the correct formulation is very much ‘some reasonably impressive degree of ability’, as opposed to an untrammelled ability. An English freehold owner cannot use his land in any way he might wish (eg we cannot nowadays set man-traps for trespassers; and we may build only as permitted by the planning laws), nor exclude everyone from it (eg our children, whom we are bound to house; or the police, entering with a search warrant), nor transfer it to anyone he chooses (eg in such a way as to defraud his own creditors; or to an enemy in wartime). So in each respect, having the fee simple absolute in possession means having the ability to do these kinds of things to the extent permitted or supported by the law.

In principle, this should not stop us from defining the right. We should be able to compile a catalogue of all the ways in which the law provides such permission and support; or perhaps in which it does not, leaving the converse to be inferred. Some examples of the kind of rules requiring mention in this respect have just been suggested, and it will not be difficult to think of others. But compiling an exhaustive catalogue would, obviously, be a very daunting enterprise indeed, and certainly beyond the scope of a book such as this. In practice, too, there are points at which the position cannot be confidently stated, but this should occasion no more surprise here than in other contexts—except in that certainty in the law is especially highly prized by liberalism, which as we have noted is a, if not the, principal sponsor of ownership.

However, simply (or not) to define the fee simple absolute in possession in this way would, in the end, be an incomplete way of capturing it. As already said, the fee simple absolute in possession is English land law’s instantiation of the idea of

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2 See eg S Douglas, ‘The Context of a Freehold: A “Right to Use” Land?’ in N Hopkins (ed), Modern Studies in Property Law, Volume 7 (Oxford, 2013) ch 16, discussing (at 371–7) the unclear extent to which I may complain if my use of my land is detrimentally affected by your activities, where these do not involve any kind of perceptible encroachment over my boundary: eg where you erect, on your land, a building so tall that it blocks my land’s TV reception; or where you manage your land in such a way that the whole area, including my land, needs to be quarantined. The article also offers a most useful treatment of how such issues may be abstractly analysed.

ownership; and ownership is one of nature’s footballs. That is to say, its destiny is to be kicked back and forth—envisioned in a range of different ways, reflecting the state of play between the competing sets of (especially political) considerations at issue in one dialectic or another. No account of ownership, and therefore of the fee simple absolute in possession, can be sufficient without including an understanding of this characteristic of it. The remainder of this chapter addresses this aspect of the matter, moving as appropriate between reflection on ownership in general and attention to English law’s construction of it in particular—the latter being introduced both for its own sake, and as an illustration of the kinds of way in which ownership in the abstract can be shaped in practice.

10.2 The Idea of Ownership

10.2.1 The Paradigm of Ownership: Dominium

There is a paradigm idea of ownership; an idea that pops instinctively into our minds, before we stop to think about it. It supposes that an owner has rights to do anything he likes with the ‘owned’ asset, and can lose these rights by, but only by, his consent. That is to say, an owner has an unqualified legal power to use the asset, to exclude others from it, and to transfer it—or, in each case, not, if he so chooses.

This paradigm idea of ownership can be referred to by the Latin—Roman law—word ‘dominium’. It is unlikely, however, that any legal system, including the ancient Roman one, ever did or would operate the idea in an unqualified way. Certainly, as already noted, contemporary English law does not.\(^4\)


\(^5\) Civil law jurisdictions operate a concept which is commonly referred to as ‘dominium’, and represented as being of this kind. But of course it is not: such jurisdictions recognise the sorts of qualifications about to be discussed in the text. Differences between the civil law and English law approaches are thus in practical terms ones of degree (though they may rest on rather widely divergent conceptual foundations). (See further G Samuel, ‘The Many Dimensions of Property’ in J McLean (ed), Property and the Constitution (Oxford, 1999) ch 3.) The differences are perhaps most marked as regards the substantial fragmentation of ownership, a matter discussed in § 10.2.3. English law’s experiments with this have certainly been more adventurous than the civil law’s … but as we shall see, English law, having experimented, has now become more cautious, giving unitary ownership (ie dominium) greater emphasis after all.

\(^6\) Likewise American law, to which much of the literature is directed. For references to many of the outstanding writings, leading us away from dominium in a number of interesting directions, see L Underkuffler, The Idea of Property: Its Meaning and Power (Oxford, 2003) 31 fn 77.
The concept of *dominium* is still useful to us, however, as an idea. Section 10.3 explores the way in which real-world ownership is the result of some sort of balancing exercise between *dominium* and other ideas, whose claims conflict with it.

### 10.2.2 The Qualification of *Dominium*

Take even an uncomplicated asset like a pencil. There are few ways in which the law does not allow me to use my pencil, but there are some: my ownership does not entitle me to commit a crime with it, say by using it to poke someone in the eye. I can give, sell or bequeath the pencil to someone else largely as I wish, but there are general restrictions on my power to alienate property when approaching bankruptcy, so as to protect my creditors, and on my power to neglect my family and dependants on my death. And while I will usually have the law on my side in objecting to others’ behaviour tending to deprive me of the pencil, like all my assets it can be seized to pay my debts (in the organised manner known as bankruptcy), and for certain law enforcement and security reasons, and potentially by government expropriation (generally subject to the payment of compensation); and if someone does take the pencil from me, or damages or destroys it, there are certain restrictions, especially time limits, on my legal power to complain.

So while the law’s construction of the ownership of a pencil does not diverge hugely from the paradigm idea, even in this simple case it certainly does not follow that idea entirely. When the asset is land, the picture is essentially similar, but with different emphases. My right to recover my land from those who seek to steal it is in general better protected, for example, but there is a significantly higher chance of its being expropriated, under the standing arrangements for compulsory purchase. More restrictions arise upon what I can do with it, arising for instance from the environmental and planning regimes. It is also much more likely that other people will have individual rights demanding that the land shall, or shall not, be used in particular ways, such as a right entitling them—rather than me—to occupy it for a time, subject to paying me rent (a lease); or entitling them to cross it (an easement). It is wholly usual for my rights to the land to be qualified in such ways; yet we continue to think of me as ‘owning’ it.

So I may remain ‘owner’ while my rights actually fall short of the paradigm. Of course, the more my rights are limited in the ways described, the more difficult it becomes to view me as owner. (Section 10.4 considers...

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whether there is an irreducible idea of ownership; a point beyond which we would stop using that term.) This difficulty is important not only linguistically, but also substantively. The limitations in question, for example, might make it impossible for me to extract full value from the land, or to sell it on terms enabling a buyer to do so. We might well see this as problematic, as diminishing liberty and damaging the market: see § 10.3.2. If we decide to accept it nonetheless, it should be because we believe that the negative effects of the relevant limitation are outweighed by countervailing advantages.

10.2.3 Fragmentation

The first way in which dominium may be eroded is by the division of the rights that comprise it between a number of different people. This phenomenon may be referred to as ‘fragmentation’.

A degree of fragmentation in fact occurs whenever a right in rem arises. Say for example I own a field. As things stand, you have no right to come on to it; my ownership allows me to exclude you. But if you now acquire a right of way over it, I can no longer do so. One can say that the right in question has been split off from my hitherto entitlement and passed to you; that my ownership has to that extent been fragmented. Notice that only rights in rem fragment ownership in this way. If I am obliged in personam to allow you to pass over my land, as where I contract personally with you to that effect, I have not fragmented my ownership; the entitlement I would pass to a transferee would remain unfragmented. In other words, fragmentation is controlled by the numerus clausus principle, so as to ensure that fragmentation is not on the whole injurious: see § 1.2.2.

So fragmentation can involve quite small fragments, such as rights of way. The details of rights such as this, and the arguments for allowing them to exist as ownership-fragments, will be reviewed in subsequent chapters. It is worth spending some time here, however, on fragmentation by way of estates, trusts and leases. These forms of fragmentation are special because, the fragments being so large, we may hesitate, or even refuse, to say that there remains an ‘owner’ at all.

The first of them involves—or involved: as explained below, it has now been discontinued—dividing (not the physical land itself, but) the land’s ownership, the fee simple absolute in possession, into a number of differently sized pieces, which can then be held by different people. Both the fee simple absolute in possession and each of these pieces is known as an ‘estate’. The fee simple absolute in possession is, as it were, the block from which the smaller, fragmentary estates can be carved. An example of a smaller estate is a ‘life estate’. If you have a life estate in a piece of land, it means that you have rights in it only for the duration of your life. But if smaller estates are created and held by different people in this way, these smaller estates must always