Principles of Property Law

FOURTH EDITION

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mology reveals little. Philosophers such as Aristotle, Cicero, Seneca, Grotius, Pufendorf and Locke each, in turn, have debated the meaning of this term, as later did legal luminaries such as Blackstone, Madison and Holmes, and even economists such as Coase.[5]

From an intuitive perspective the idea of property is perfectly straightforward: the term refers to those things one can own. Although it is both sensible and common to use such language, the law offers a different slant, one that tends to dwell more on the 'owning' element. Property is sometimes referred to as a bundle of rights.[6] That characterization means that property is not in fact a thing, but rather a right, or better, a collection of rights (over things) enforceable against others.[7] Explained another way, the term property signifies a set of relationships among people that concern claims to tangible and intangible items.

The reference to 'rights' reveals that property, to a legal positivist, means entitlements created by law. In Jeremy Bentham's words, "[p]roperty and law are born and die together. Before laws were made there was no property; take away laws and property ceases".[8] Under that conception, property is a legal construct, born and bred under law. However, there is no complete catalogue of the objects that are regarded as property. Likewise, the *subjects* of property, that is, those who may acquire ownership, are also part of a fluctuating class. We look to the juridical definition of property to tell us not only what may be owned, but who among the citizenry can qualify to be an owner.

Take a closer look at these ideas: first, at the notion of a bundle. This imagery suggests that property is a collection of incidents. Professor A.M. Honoré, in a classic treatment of the nature of ownership, identified eleven elements that he claimed provided the most ample conception of property to be found within a mature legal system. He said this:

> Ownership comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuarity.[9]

I see this list as describing rights to: (i) possession, management and control; (ii) income and capital; (iii) transfer *inter vivos*[10] and on death; and (iv) protection

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Property: Nomos XXII (New York: N.Y.U. Pr., 1980) 69; J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Pr., 1997); A. Bell & G. Parchomovsky, "A Theory of Property", 90 Cornell L.Rev. 531 (2005); A. Mossoff, "What is Property? Putting the Pieces Back Together", 45 Ariz.L.Rev. 371 (2003); D. Lametti, "The Concept of Property: Relations Through Objects of Social Wealth" (2003) 53 U.T.L.J. 325; L.S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: O.U.P., 2003).

5 *Klamath Irrigation Dist. v. U.S.*, 2005 W.L. 2100579 (Fed.Cl.) at 1 (*per* Allegra J.).

6 *Cf.* Penner, *supra*, note 4. It has been argued that the bundle of rights description is a phallic metaphor: see J.L. Schroeder, "Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property", 93 Mich.L.Rev. 239 (1994).

7 See C.B. Macpherson, "The Meaning of Property" in C.B. Macpherson, ed., *Property: Mainstream and Critical Positions* (Toronto: U.T.P., 1978) at 2.

8 J. Bentham, *The Theory of Legislation* (Bristol: Thoemmes Pr., 2004 ed., 1802) vol. 1, at 113.

9 A.M. Honoré, "Ownership" in *Making Law Bind* (Oxford: Clarendon Pr., 1987) at 165.

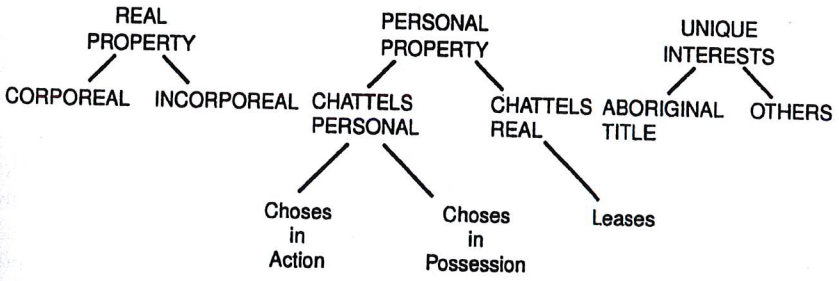
10 An *inter vivos* transfer is one made between living persons.

those interests capable of being held in possession: essentially freehold estates. Incorporeal hereditaments include a variety of interests which, among other things, are non-possessory in nature. The main types are easements, *profits à prendre*, rentcharges, and (arguably) restrictive covenants.[71]

Chattels personal can be either 'choses in possession' (tangibles) or 'choses in action' (intangibles). A chose in action, by definition, cannot be reduced into possession. It is an abstract entity, enforceable solely by court action – hence the name. Initially, the term applied only to a right to enforce a debt, including rights under promissory notes or other negotiable instruments. Eventually the scope of the category was extended to include a wide range of other intangibles, including copyrights, trademarks, patents, bonds, and corporate shares. It would seem now that any assignable right counts as a chose in action in modern legal parlance.[72] Some choses in action are represented by physical symbols: the abstract right to be repaid money might be embodied in an I.O.U. The paper record can sometimes obscure the distinction between things in possession and those in action, for there is a tendency to regard the paper as the right itself. But the intangible debt is the critical entitlement here; loss of the paper only impairs proof of the debt's existence.[73] Such choses are sometimes referred to as documentary intangibles.[74]

The following diagram provides a reprise of the discussion of categories presented so far:

A CLASSIFICATION OF PROPERTY INTERESTS



There are other ways to slice the property law pie. Under the functional analysis employed by Andrew Bell,[75] property interests can be described in one of four ways. Some are *beneficial* rights, the holder of which has the embracing

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71 These concepts are defined in Chapter 10.

72 But see *Clarke v. Clarke*, [1990] 2 S.C.R. 795, 1990 CarswellNS 49.

73 Is the wall between tangible and intangible personal property rights governing information crumbling? See M.J. Radin, "Infornmation Tangibility", online:<http://papers.ssrn/abstract_id=357060>.

74 See, *e.g.*, F.H. Lawson & B. Rudden, *The Law of Property*, 3rd ed. (Oxford: O.U.P., 2002) at 31-2.

75 A.P. Bell, *The Modern Law of Personal Property in England and Ireland* (London: Butterworths, 1989) at 4*ff*. See also the taxonomy in R. Chambers, *An Introduction to Property Law in Australia* (Sydney: L.B.C. Information Services, 2001) ch. 5.

same lines, where there is a radical change in the use of the dominant lands, and if that change produces a substantial increase or alteration in the burden on the servient lands, the easement right may be suspended or lost.[115]

5. OTHER SERVITUDES AND SERVITUDE-LIKE RIGHTS

There are a number of interests or rights that resemble easements in one way or another. Think of a simple agreement between landowners to allow B's car to be parked on A's driveway. That arrangement could take the form of a lease of a parking space, an easement,[116] a licence,[117] or perhaps even a bailment.

There are other rights that overlap with easements, in purpose or design. Some property rights closely resemble negative easements. Here are some examples. In Chapter 3 it was shown that ownership of land carries with it natural or inherent rights of lateral and vertical support.[118] A comparable easement of support can be obtained for buildings on land (arguably a negative easement), and this gives the easement-holder the right to repair neighbouring buildings when the support they provide is in jeopardy of being lost or reduced.[119] Under the doctrine of non-derogation from grant, discussed in relation to leases, we saw that a tenant may have a right to limit activity taking place on nearby lands owned by the landlord.[120] As will become apparent later on in this chapter, negative easements are similar to restrictive covenants. Rights which have not been accepted into the legion of negative easements, such as a right to protection from weather,[121] may be made to run – via covenants – with the servient and dominant lands.

The incorporeal hereditament known as a *profit à prendre* is somewhat akin to a positive easement. A profit entitles the holder to take some part of the produce, such as timber, crops, turf, soil, grass, or animals from land belonging to another.[122] It may entitle the holder to extract oil and natural gas: that is the type of grant is often used in modern mining operations.[123] A profit can be either held with others (in common), or exclusively (in severalty). Title to the objects covered by the grant of a *profit à prendre* is acquired through capture, not before: it is a right to

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115 *McAdams Homes Ltd. v. Robinson*, [2004] E.W.C.A.Civ. 214.

116 See, *e.g.*, *Depew v. Wilkes* (2002) 60 O.R. (3d) 499, 2002 CarswellOnt 2516 (C.A.) But see *Saeed v. Plustrade Ltd.*, [2002] P. & C.R. 266 (C.A.) reflecting the unresolved status of such an easement in England.

117 See, *e.g.*, *Imperial Oil Ltd. v. Young* (1998) 21 R.P.R. (3d) 65, 1998 CarswellNfld 224 (C.A.). As to the distinction between easements and licences, see *Gypsum Carrier Inc. v. The Queen*, [1978] 1 F.C. 147, 1977 CarswellNat 87 (T.D.).

118 See Part 4(b), Chapter 3.

119 Some riparian rights also resemble negative (and positive) easements. See Part 3(c), Chapter 3.

120 See Part 4(b), Chapter 8.

121 Such a right was rejected as an easement in *Phipps v. Pears*, [1965] 1 Q.B. 76, [1964] 2 All E.R. 35 (C.A.).

122 It is not, therefore, confined to fugacious substances: *Amoco Canada Resources Ltd. v. Potash Corp. of Saskatchewan*, [1992] 2 W.W.R. 313, 1991 CarswellSask 231 (C.A.).

123 See, *e.g.*, *Berkheiser v. Berkheiser*, [1957] S.C.R. 387, 1957 CarswellSask 60.

win or extract (thus the term '*prendre*').[124] Unlike an easement, a profit may exist in gross; or it may be tied (or 'appurtenant') to a dominant tenement.

In Chapter 9 we saw that English common law recognizes ancient customary rights.[125] These create a "local common law"[126] and may run with land even though the necessary features of an easement are absent. In order to be recognized, the customary use must be certain, reasonable, continuous, and it must have existed since time immemorial (1189 or earlier).[127] The last requirement rules out the possibility of claims succeeding in Canada, at least those made by non-indigenous settlers.[128]

Aboriginal rights, some of which are analogous to *profits à prendre*,[129] can also be recognized under the common law or by way of treaty.[130] As we saw in Chapter 5, ancient rights, say, to hunt or fish, may be established when it is shown that the practice, custom or tradition was a central and significant part of the claimant Aboriginal group's culture at the time of European contact. To find such a right, therefore, the courts do not have to resort to the English law governing customary rights based on usage from time immemorial. And although such a claim does not amount to Aboriginal *title*, it is normally connected to the land in some way. As with a profit, the right relates to some ascertainable territory; it is site-specific.[131]

Some public usufructuary rights resemble incorporeal hereditaments. We all enjoy general rights to use public roadways[132] and watercourses. Our rights over these public lands are subject, of course, to various restrictions (such as those imposed by traffic rules). Moreover, private roads can become public roads or highways under the doctrine of dedication. In general, there must be an intention to dedicate on the part of the owner, the property must be made available for

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124 See generally *British Columbia v. Tener*, [1985] 1 S.C.R. 533, 1985 CarswellBC 7; H.H. Hahner, "An Analysis of Profits à Prendre", 25 Ore.L.Rev. 217 (1946).

125 See Part 9, Chapter 9.

126 *Hammerton v. Honey* (1876) 24 W.R. 603 (Ch.D.) at 603 (*per* Jessel M.R.).

127 This reference point was deemed by statute to be 1189, the year of the ascension of Richard I to the throne of England: *Statute of Westminster, 1275*, 3 Edw. 1, c. 39. See further *Bryant v. Foot* (1867) L.R. 2 Q.B. 161, affirmed (1868) L.R. 3 Q.B. 493 (Ex.Ch.).

128 See *Grand Hotel Co. v. Cross* (1879) 44 U.C.Q.B. 153, 1879 CarswellOnt 186. See also *Gibbs v. Grand Bend (Village)* (1989) 71 O.R. (2d) 70, 1989 CarswellOnt 601 (H.C.) reversed (1995) 26 O.R. (3d) 644, 1995 CarswellOnt 1056 (C.A.). At trial, Chilcott J. suggested at 109 O.R. that "perhaps the law of custom in Ontario could be looked at afresh" with regard to the requirement of usage since time immemorial. See also S.W. Bender, "Castles in the Sand: Balancing Public Custom and Private Ownership Interests in Oregon's Beaches", 77 Ore.L.Rev. 913 (1998).

129 See *Bolton v. Forest Pest Management Institute*, [1985] 6 W.W.R. 562, 1985 CarswellBC 260 (C.A.) where a trap line registered under provincial law was treated as a *profit à prendre*.

130 See, *e.g.*, *R. v. Marshall*, [1999] 3 S.C.R. 456, 1999 CarswellNS 262, reconsideration refused [1999] 3 S.C.R. 533, 1999 CarswellNS 349.

131 See further Part 7(b)(iii), Chapter 5, and the authorities cited there.

132 But see *R. v. Trabulsey* (1995) 22 O.R. (3d) 314, 1995 CarswellOnt 439 (C.A.) leave to appeal to S.C.C. refused (1996) 27 O.R. (3d) xv.