§ Law in Context

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Property Law

Commentary and Materials

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Ownership

6.1. The nature of ownership

6.1.1. The basis of ownership

As a working definition we may regard ownership as the ultimate property interest and the means by which we signify the person or persons with primary (but not necessarily exclusive) control of a thing. Such a definition requires us to separate the notions of ownership and property while acknowledging that the terms are often used, somewhat loosely, as synonyms. Property is a broad term which encompasses any interest in a thing whereby the interest holder acquires rights enforceable beyond the original parties to the transaction (or other means) by which the interest was acquired. Thus the term property extends to a range of diverse interests such as easements (such as a right of way over land) and choses in action (such as the benefit of a contract which is normally assignable and may thus be enforced by someone other than a party to the original contract). In contrast, ownership is a particular type of property interest in which the person designated as owner is deemed, in some sense at least, to have the greatest possible interest in the thing. As a subset of property it is consequently concerned with two quite separate sets of relations. The first is the owner's relationship with other people (whether they be non-interest holders or subsidiary interest holders in the thing owned) and the second is the owner's relationship to the thing itself.

6.1.1.1. Ownership and people

The concept of ownership is built upon the right to possess which, as we saw in Chapter 2, in both the private and communal property setting, can be seen as two individual rights which together enable the owner to protect and maintain his possession and hence his ownership. Against non-owners the owner has a primary right to exclude them from the thing owned and, as against fellow owners a primary right not to be so excluded. In private ownership the right to exclude is the most important of these two rights of possession because there will be many more non-owners than owners of the thing (although the right not to be excluded is still important where the thing is jointly owned – see Chapter 16). In contrast, in

communal ownership the right not to be excluded is, for comparable reasons, of more significance (although likewise the right to exclude is still important where someone outside the community becomes involved; but cf. Blackburn J's view in *Milirrpum* in section 5.3.6.1 above).

As you will see, neither of these rights are absolute, nor of much significance absent any other entitlements in the thing. They are, however, the rights that underscore ownership, for without them no other rights can be exercised. What, for example, is the point in owning this book if you have no means of excluding non-owners intent on excluding you. Similarly, what benefit arises from a resource being communally owned unless this gives individual members the right not to be excluded from its use.

6.1.1.2. Ownership and things

Ownership provides a bond between the individual and the inanimate. As Hegel argued, private ownership is an assertion of personality whereby the person 'has as his substantive end the right of putting his will into any and every thing and thereby making it his' (Hegel, *Philosophy of Right*, section 44). As Stillman has noted:

> [P]roperty for Hegel is essential for men if they are to lead a full life of reason. In owning property, men act in the external world. They dominate Nature. They create social institutions. In shaping the natural and the social orders according to their intentions and goals, men develop and express their own capabilities; in reflecting on the results of their actions, they educate themselves about the world of actuality and about themselves and thereby prepare themselves for further action in the natural and social worlds. At the same time, men claim themselves, their minds and their bodies, as their own properties; from the right to property derive the rights to life and liberty, so that they are permanent subjects and actors, continuously shaping the natural and social worlds and themselves.
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> Property for Hegel is to be seen not merely as an economic category or the result of utilitarian calculus; not only as a result of labor or convention; not solely as a requisite for social stability or diversity. It is more. For Hegel property is a political and philosophical necessity, essential for the development.
>
> (Stillman, 'Property, Freedom and Individuality', pp. 132–3)

A similar point is made, somewhat more caustically, by Kevin Gray:

> Not so long ago I was talking with a couple of Martians at one of those seminars in Oxford organised by Professor Peter Birks. The visitors explained that they were engaged in a piece of joint research on the terrestrial concept of property – a mode of thinking which apparently finds no parallel within their own jurisdiction. The present paper is prompted in some measure by the conversations which I had with the Martian lawyers, for I was stimulated to look afresh, from perhaps a wider perspective, at the strange way in which we humans make claims of 'property' or 'ownership' in respect of the resources of the world ...

> My Martian interlocutors reminded me of the highly anomalous nature, unparalleled within our own galaxy, of the terrestrial impulse to view external resources as belonging properly or exclusively to particular members of the human race. Social psychologists like Earnest Beaglehole used to speak of the 'hidden nerve of irrational animism that binds the individual to the object he appropriates as his own'. [Beaglehole, *Property: A Study in Social Psychology*, p. 23] My Martian colleagues were especially intrigued by the fact that, in one of the earliest phrases articulated by almost every human child, there lies the strongest affirmation of this internalised concern to appropriate. The phrase, 'It's mine!', is, of course, literally untranslatable into any of the Martian languages. Yet, as my friends pointed out, even our judges and legislators seem obsessed with the need to formulate human perceptions of the external world in the intangible terms of individualised ownership and 'private property'. Our lives are in every respect dominated by an intuitive sense of property and belonging. (Gray, 'Equitable Property', pp. 157–8)

Gray's cynicism is aimed at the relatively modern tendency, demonstrated for example in Hegel's analysis, of regarding ownership solely in terms of private property. However, as Grunebaum demonstrates in Extract 3.3, it is quite possible to argue that communal ownership engenders a comparable bond between the community and the thing which provides a similar means by which the individual might develop.

6.1.2. An outline of the difficulties encountered in any consideration of ownership

'What', you might ask, 'is so difficult about *ownership*?' It is, after all, a word in common usage which, unlike many terms in property law, is readily understood by most people from an early age. As Kevin Gray noted above, and any parent will confirm, the cry 'It's mine' (or its equivalent) is one of the first phrases learnt by the emerging infant as they begin to assert rights of (or at least claims to) ownership of various things in their new found world. Thereby displaying, in all its vulgar assertiveness, a certainty about ownership which enables us, in later life, to make decisions and enter into bargains confident in the knowledge as to the rights we are acquiring or forsaking when ownership changes hands. 'Indeed', notes the American jurist Bruce Ackerman (in *Private Property and the Constitution*, p. 116), 'most of the time Layman negotiates his way through the complex web of property relationships that structures his social universe without even perceiving the need for expert guidance.' Yet, despite such seeming certainty, the concept of ownership is more problematic than it would first appear for a number of quite distinct reasons.

6.1.2.1. The different meanings of ownership

Ownership is a difficult term because its meaning varies according to its context. As you will see repeatedly in this chapter (particularly in section 6.3), the use of ownership in one setting is often not relevant to how it is to be understood in a different setting.

It is consequently important to bear in mind the limitations of the working definition we provided in section 6.1.1, for the reality is somewhat more complex.

6.1.2.2. Disagreements about ownership

Given this complexity, it is perhaps not surprising that the concept is a source of debate and disagreement. In his writings on property, William Blackstone defined ownership as 'that sole and despotic *dominium* which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe' (Blackstone, *Commentaries*, Book II, Chapter 1, p. 2). This appears at variance with the modern habit (see Honoré below) of conceiving of ownership in terms of a bundle of separate (but related) rights including the rights to use, possess and destroy. But this latter-day trend has in turn led Thomas Grey, among others, to argue (see Extract 6.1 below), that the 'bundle of rights' approach 'tends ... to dissolve the notion of ownership' so that we 'no longer need [such] a notion' (Grey, 'The Disintegration of Property', p. 69). While others would argue that, for technical reasons, at least in the context of land law, we never have done (see the quote from Hargreaves at section 6.3.1.1 below). Waldron, on the other hand, suggests that ownership 'expresses the abstract idea of an object being correlated with the name of an individual' (Waldron, *The Right to Private Property*, p. 47) and in formulating his argument (see Extract 6.2 below) rejects the approaches of both Blackstone and Grey by noting that the liberties conferred by ownership are not unlimited (as Blackstone would *appear* to suggest) and by explicitly rejecting Grey's submission (that the concept has no useful role to play).

Despite their seeming incompatibility, the divide between such views is less extreme than it at first appears. The quotation from Blackstone is an oft-cited favourite, much beloved of commentators. However, as Whelan has noted, '[s]ince this seems to be Blackstone's clearest single statement on property, it is often quoted out of context' (Whelan, 'Property as Artifice', p. 118) – with predictable consequences – for an entirely different picture emerges when one reads the paragraph from which the passage was extracted:

> There is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few, but will give themselves the trouble to consider the original and foundation of this right ... We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father had done so before him; or why the occupier of a particular field or of a jewel, when lying on his deathbed, and no longer able to

> maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. (Blackstone, *Commentaries*, Book II, Chapter 1, p. 2)

From this perspective, it is clear that Blackstone did not regard ownership as a single all-embracing right but, as Whelan again notes, rather 'a complex of different rights not accounted for by the simple notion of "sole and despotic dominion"' (Whelan, 'Property as Artifice', p. 119).

If we turn to the views of Grey, we will see a surprising degree of affinity with this position. Central to Grey's thesis is the notion that the modern conception of property 'fragments the unitary conception of ownership into a mere shadowy "bundle of rights"' (Grey, 'The Disintegration of Property', p. 69). Waldron likewise bases his analysis (but not his conclusion) explicitly on such a bundle. Thus, despite their obvious disagreements, all three appear to agree on the basics, conceiving of ownership in terms of a number of separate rights. As you will see in section 6.2 below, the 'bundle of rights' analysis (coupled with associated limitations) is the one constant to which most commentators subscribe (but cf. Penner, 'The "Bundle of Rights"').

Before leaving this point, we should note that much of this chapter is devoted to materials drawn from the liberal tradition of ownership which regards the term as solely a private property concept. However, the ambit of ownership extends further and is equally applicable to common, communal and state property as Honoré acknowledges when he admits the possibility of other formulations of the concept, be they 'either primitive or sophisticated', which do not correspond with his analysis of the 'liberal notion of ownership'.

6.1.2.3. Contradictions within ownership

While property lawyers are, as we saw in Chapter 2, all too ready to disabuse novices concerning their lay notions as to the meaning of property, the same rigour is rarely applied to ownership. However, strictures regarding the fallacy of talking about 'property as things' are equally applicable to our habit of referring to the 'thing's owner'. Bentham's observation that 'in common speech in the phrase *the object of a man's property*, the words *the object of* are commonly left out' again provides an explanation as to how this arises. By conflating the 'object' with the 'property that exists in the object' ownership of property has come to be seen as simply 'ownership of the object' rather than 'ownership of property in the object'. But as the essence of property is rights in respect of things, so ownership of property must be concerned with ownership of rights in respect of things. Thus, when we speak of the owner of a thing, the phrase is meaningless unless we mean by that the owner of rights in the thing. From this perspective, therefore, when we speak of ownership we are simply identifying in whom the property rights reside. This, after all, is what we are doing when we speak about the thing's 'owner'. We are using the term 'owner' to link the property rights that exist in the thing to the person (or persons) in whom those rights currently vest. It is, in other words, a useful shorthand by which we signify the

location of certain rights but, as the following extract underlines, all talk of 'owning things' is liable to lead to confusion:

> In everyday conversation we usually speak of 'property' rather than 'property rights' but the contraction is misleading if it tends to make us think of property as things rather than as rights, or of ownership as outright rather than as circumscribed. The concepts of property and ownership are created by, defined by, and therefore limited by, a society's system of law. When you own a car, you own a set of legally defined rights to use the vehicle in certain ways and not in others ... [for] the only things that are owned are property rights. (Dales, *Pollution Property and Prices*, p. 58)

To multiply ownership in this way breaks the single bond that links ownership to things and, while this might appeal to the logician, fails to accord with human nature and sentiment. As we noted in section 6.1.2.2, the identification of ownership with things, rather than rights, is deeply imbedded within our common psyche.

In the face of such difficulties, English law adopts a pragmatic stance:

> Since it seems a pity to have to jettison excellent words like ownership, owner, and own, the last of which, as a verb, has no real equivalent in many other languages, and since English law is not at all committed to any particular usage, there are two alternatives open to us. We can say that the owner of a thing, whether land or a chattel, is the person who can convey the full interest in it to another person ... or on the contrary that what a person owns is an ... interest ... In the former case we attach ownership to the physical object at the cost of reducing the number of owners; in the latter we enlarge the number of owners but attach ownership in every case to an abstract entity. At present the usage [under English law] ... is ambiguous.
>
> (Lawson and Rudden, *The Law of Property* (2nd edn), p. 116; see also (3rd edn), pp. 81–2)

6.1.2.4. The division of ownership

Finally, we should note ownership's ability to hive off its various attributes both between different types of owner and between owners and non-owners.

Between different types of owner

Even if one rejects the full rigour of the multiplication of ownerships argument, suggested by Dales and Grey, there is no doubt English law recognises that, to a limited extent at least, different types of ownership interest might exist in the same thing. The classic manifestation of this is the trust, a fundamentally important mechanism under English property law which we will consider in detail in Chapter 8. For present purposes, all you need to know is that, under it, ownership of a thing is split between the trustee and the beneficiary with the various attributes of ownership divided up between them. In broad terms, the trustee is given the right to manage the property on behalf of the beneficiary who has the right to enjoy it. As you will see later, the determination of ownership then becomes dependent upon perspective. More controversially, again as we see in Chapter 8, the ownership of companies has

in recent years also been described in terms of split ownership with the classical view of the shareholder as sole owner coming under sustained pressure from new models of corporate governance which seek to reflect the ownership-type interests of a variety of other stakeholders including employees, directors, local communities and the general public (e.g. Ireland, *Company Law and the Myth of Shareholder Ownership*).

Between owners and non-owners

The attributes of ownership might also be divided among a host of non-owners (some of whom, at least, would thereby acquire a property interest in the thing but not its ownership). Take this book for example, which the owner has the right to read, decorate his bookshelf with or sell on to some unsuspecting first year. This list of specific activities might be distilled into three separate entitlements: namely, the right to use the book (by reading it or using it as a door stop etc.); the right to possess the book (by placing it on one's bookshelf or putting it in one's briefcase etc.); and the right to the capital (by selling it to someone else or shredding it etc.). This is by no means a complete list of the attributes of ownership but will suffice for present purposes (see further section 6.2 below).

Now, while such rights clearly come within our lay notion of ownership, it is obvious that, in any particular instance, they are not necessarily a reliable indicator as to where ownership resides. For example, you might have the right to possess the book because you have borrowed it from the library. More controversially, you might possess the book because you have stolen it from the library: see Chapter 7. The library borrower will similarly, of course, enjoy the right to use the book for the period of the loan. More surprisingly perhaps, even the right to the capital might be enjoyed by someone other than the owner as when a pornographic book is destroyed in accordance with a court order which achieves its purpose without requiring ownership of the book to pass to the party entrusted with its disposal.

The aim of the forgoing discussion was to begin to illustrate why the concept of ownership is so difficult to define. No sooner had we grasped hold of the term, by singling out three of its most fundamental incidents, than it slipped from our fingers, as we acknowledged that each of those rights could be exercised by someone other than the owner. As you will see later in this chapter, the same is true of any aspect of ownership that we care to single out. For, in any specific instance, any particular incident of ownership may be held by someone other than the person we would normally identify as the owner of the thing in question.

Extract 6.1 Thomas C. Grey, 'The Disintegration of Property', in *Nomos XII: Property* (New York: New York University Press, 1980), Chapter 3, pp. 69–71 and 72–3

In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments,

conceive of property as *things* that are owned by *persons*. To own property is to have exclusive control of something – to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership.

By contrast, the theory of property rights held by the modern specialist tends both to dissolve the notion of ownership and to eliminate any necessary connection between property rights and things. Consider ownership first. The specialist fragments the robust unitary conception of ownership into a mere shadowy 'bundle of rights'. Thus, a thing can be owned by more than one person, in which case it becomes necessary to focus on the particular limited rights each of the co-owners has with respect to the thing. Further, the notion that full ownership includes rights to do as you wish with what you own suggests that you might sell off *particular aspects* of your control – rights to certain uses, to profits from the thing, and so on. Finally, rights of use, profit, and the like can be parceled out along a temporal dimension as well – you might sell your control over your property for tomorrow to one person, for the next day to another, and so on.

Not only can ownership rights be subdivided, they can even be made to disappear as if by magic, if we postulate full freedom of disposition in the owner. Consider the convenient legal institution of the trust. Yesterday A owned Blackacre; among his rights of ownership was the legal power to leave the land idle, even though developing it would bring a good income. Today A puts Blackacre in trust, conveying it to B (the trustee) for the benefit of C (the beneficiary). Now no one any longer has the legal power to use the land uneconomically or to leave it idle – that part of the rights of ownership is neither in A nor B nor C, but has disappeared. As between B and C, who owns Blackacre? Lawyers say B has the legal and C the equitable ownership, but upon reflection the question seems meaningless: what is important is that we be able to specify what B and C can legally do with respect to the land.

The same point can be made with respect to fragmentation of ownership generally. When a full owner of a thing begins to sell off various of his rights over it – the right to use it for this purpose tomorrow, for that purpose next year, and so on – at what point does he cease to be the owner, and who then owns the thing? You can say that each one of many right holders owns it to the extent of the right, or you can say that no one owns it. Or you can say, as we still tend to do, in vestigial deference to the lay conception of property, that some conventionally designated rights constitute 'ownership'. The issue is seen as one of terminology; nothing significant turns on it.

What, then, of the idea that property rights must be rights in things? Perhaps we no longer need a notion of ownership, but surely property rights are a distinct category from other legal rights, in that they pertain to things. But this suggestion cannot withstand analysis either; most property in a modern capitalist economy is intangible. Consider the common forms of wealth: shares of stock in corporations, bonds, various kinds of commercial paper, bank accounts, insurance policies – not to mention more arcane intangibles such as trademarks, patents, copyrights, franchises, and business goodwill.

In our everyday language, we tend to speak of these rights as if they attached to things. Thus we 'deposit our money in the bank', as if we were putting a thing in a place; but really we are creating a complex set of abstract claims against an abstract legal institution. We are told that, as insurance policy holders we 'own a piece of the rock'; but we really have other abstract claims against another abstract institution. We think of our share of stock in Megabucks Corporation as part ownership in the Megabucks factory outside town; but really the Megabucks board of directors could sell the factory and go into another line of business and we would still have the same claims on the same abstract corporation.

Property rights cannot any longer be characterized as 'rights of ownership' or as 'rights in things' by specialists in property. What, then, *is* their special characteristic? How do property rights differ from rights generally from human rights or personal rights or rights to life or liberty, say? Our specialists and theoreticians have no answer; or rather, they have a multiplicity of widely differing answers, related only in that they bear some association or analogy, more or less remote, to the common notion of property as ownership of things ... The conclusion of all this is that discourse about property has fragmented into a set of discontinuous usages. The more fruitful and useful of these usages are those stipulated by theorists; but these depart drastically from each other and from common speech. Conversely, meanings of 'property' in law that cling to their origin in the thing-ownership conception are integrated least successfully into the general doctrinal framework of law, legal theory, and economics. It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term 'property' at all.

Notes and Questions 6.1

1 Do you agree that the bundle of rights thesis (which we examine in detail in section 6.3 below) necessarily 'dissolve[s] the notion of ownership'?

2 If you dissect a frog for the purposes of scientific analysis, does that dissolve the notion of frogs or simply help explain how frogs function? Admittedly, ownership is an intangible construct but that surely makes it, if anything, easier to subject to analytical scrutiny (and a lot less messy!).

3 Should it matter whether the thing you own is tangible or intangible especially when the rights you own in the thing are always, by definition, intangible? While property law's unexpected pre-occupation with abstractions confounds our initial expectations, it does not follow from this that ownership is thereby undermined.

4 Does Grey's analysis prove anything except that ownership is more complex than one might initially imagine?

5 How would Grey distinguish 'ownership' from 'property'? Do you agree with his distinction?

Extract 6.2 Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988), Chapter 2

1. SCEPTICISM ABOUT PRIVATE PROPERTY

Although private property has found its way again to the forefront of attention in jurisprudence and political philosophy, serious discussion is hampered by the lack of a generally accepted account of what private property is and how it is to be contrasted with alternative systems of property rules. As Tawney pointed out:

> It is idle ... to present a case for or against private property without specifying the particular forms of property to which reference is made, and the journalist who says that 'private property is the foundation of civilisation' agrees with Proudhon, who said it was theft, in this respect at least that, without further definition, the words of both are meaningless. (Tawney, 'Property and Creative Work', p. 136)

Many writers have argued that it is, in fact, impossible to define private property – that the concept itself defies definition. If those arguments can be sustained, then a work like this is misconceived. If private property is indefinable, it cannot serve as a useful concept in political and economic thought: nor can it be a point of interesting debate in political philosophy. Instead of talking about property systems, we should focus perhaps on the detailed rights that particular people have to do certain things with certain objects, rights which vary considerably from case to case, from object to object, and from legal system to legal system. But, if these sceptical arguments hold, we should abandon the enterprise of arguing about private property as such – of saying that it is, or is not, conducive to liberty, prosperity, or rights – because the term does not pick out any determinate institution for consideration.

Why has private property been thought indefinable? Consider the relation between a person (call her Susan) and an object (say, a motor car) generally taken to be her private property. The layman thinks of this as a two-place relation of ownership between a person and a thing: Susan owns that Porsche. But the lawyer tells us that legal relations cannot exist between people and Porsches, because Porsches cannot have rights or duties or be bound by or recognise the rule. The legal relation involved must be a relation between persons – between Susan and her neighbours, say, or Susan and the police, or Susan and everyone else. But when we ask what this relation is, we find that the answer is not at all simple. With regard to Susan's Porsche, there are all sorts of legal relations between Susan and other people. Susan has a legal liberty to use it in certain ways; for example, she owes no duty to anyone to refrain from putting her houseplants in it. But that is true only of some of the ways that the car could (physically) be used. She is not at liberty to drive it on the footpath or to drive it anywhere at a speed faster than 70 mph. Indeed, she is not at liberty to drive it at all without a licence from the authorities. As well as her liberties, Susan also has certain rights. She has what Hohfeld called a 'claim-right' against everyone else (her neighbours, her friends, the local car thief, everyone in the community) that they should not use her Porsche without her permission. But Susan also owes certain duties to other people in relation to the vehicle. She must keep it in good order and see that it does not

become a nuisance to her neighbours. She is liable to pay damages if it rolls into her neighbour's fence. These rights, liberties, and duties are the basic stuff of ownership. But legal relations can be changed, and, if Susan owns the Porsche, then *she* is in a position to change them. She has the power to sell it or give it to somebody else, in which case all the legal relations change: Susan takes on the duties (and limited rights) of a non-owner of the Porsche and someone else takes on the rights, liberties, duties, and powers of ownership. Or perhaps Susan lends or hires the car; that involves a temporary and less extensive change in legal relations. She can bequeath the car in her will so that someone else will take over her property rights when she dies. These are her powers to change her legal situation and that of others. She may also, in certain circumstances, have her own legal position altered in relation to the Porsche: for instance, she is liable to have the car seized in execution of a judgment summons for debt. All these legal relations are involved in what we might think of as a clear case, indeed a paradigm, of ownership. Private property, then, is not only a simple relation between a person and a thing, it is not a simple relationship at all. It involves a complex bundle of relations, which differ considerably in their character and effect.

If that were all, there would be no problem of definition: private property would be a bundle of rights, but if it remained constant for all or most of the cases that we want to describe as private property, the bundle as a whole could be defined in terms of its contents. But, of course, it does not remain constant, and that is where the difficulties begin.

Each of the legal relations involved in Susan's ownership of the Porsche is not only distinct, but in principle separable, from each of the others. It is possible, for example, that someone has a liberty to use an automobile without having any of the other rights or powers which Susan has. Because they are distinct and separable, the component relations may be taken apart and reconstituted in different combinations, so that we may get smaller bundles of the rights that were involved originally in this large bundle we called ownership. But when an original bundle is taken apart like this and the component rights redistributed among other bundles, we are still inclined, in our ordinary use of these concepts, to say that one particular person – the holder of one of the newly constituted bundles – is the *owner* of the resource. If Susan leases the car to her friend Blair so that he has exclusive use of the Porsche in return for a cash payment, we may still say that Susan is really the car's owner even though she does not have many of the rights, liberties, and powers outlined in the previous paragraph. We say the same about landlords, mortgagors, and people who have conceded various encumbrances, like rights of way, over their real estate: they are still the owners of the pieces of land in question. But the legal position of a landlord is different from that of a mortgagor, different again from that of someone who has yielded a right of way, and different too from that of a person who has not redistributed any of the rights in his original bundle: depending on the particular transactions that have taken place, each has a different bundle of rights. If lay usage still dignifies them all with the title 'owner' of the land in question, we are likely to doubt whether the concept of ownership, and the concept of private property that goes with it, are doing very much work at all. The lawyer, certainly, who is concerned with the day-to-day affairs of all these people, will not be interested in finding out which of them really counts as an owner. His only concern is with

the detailed contents of the various different bundles of legal relations (for a particularly strong statement of this view, see Grey, 'Disintegration of Property' [Extract 6.1 above]).

As if that were not enough, there are other indeterminacies in the concept of ownership. In America, an owner can leave his goods in his will to more or less anyone he pleases. But an owner's liberty in this respect is not so great in England; it is even more heavily curtailed by statute law in, say, New Zealand: and in France the operation of the doctrine of *legitima portio* casts a different complexion on wills, bequest, and inheritance altogether. What does this show? Does it show that the French have a different concept of ownership from the Americans and the English, so that it is a linguistic error to translate '*propriété*' as 'ownership'? Or does it show that the power of transmissibility by will is not part of the definition of ownership, but only contingently connected with it? If we take the former alternative, we are left with the analytically untidy situation in which we have as many ambiguities in the term 'ownership' as there are distinct legal systems (and indeed distinct momentary legal systems – for each may change in this respect over time). But if we take the latter option, we run the risk of leaving the concept of ownership without any essential content at all. It will become rather like *substance* in Locke's epistemology: a mere substratum, a hook on which to hang various combinations of legal relations.

In fact, I think many legal scholars now do take this latter option. In their view, the term 'ownership' serves only as an indication that some legal relations, some rights, liberties, powers, etc., are in question. On their view, the term does not convey any determinate idea of what these legal relations are. In every case, we have to push the words 'ownership' and 'private property' aside and look to the detail of the real legal relations involved in the given situation (cf. Grey, 'Disintegration of Property' [Extract 6.1 above]; also Ackerman, *Private Property and the Constitution*, pp. 26 *et seq.*).

For completeness, I should mention a third source of indeterminacy. The objects of property – the things which in lay usage are capable of being owned – differ so radically in legal theory, that it seems unlikely that the same concept of ownership could be applied to them all, even within a single legal system. In England, the ownership of a Porsche is quite a different thing from the ownership of a piece of agricultural land. There are different liberties, duties, and liabilities in the two cases. Private property in these comparatively concrete objects is a different matter again from the ownership of intangible things like ideas, copyrights, corporate stock, reputations, and so on. Once again, the common word 'ownership' – 'X owns the car', 'Y owns the land', 'Z owns the copyright' – may be unhelpful and misleading, for it cannot convey any common content for these quite different bundles of legal relations. There is also a similar, though perhaps less spectacular, variation in ownership with different types of *owner*: the ownership of a given resource by a natural person may be a different matter from its ownership by a corporation and different again from its being the property of the Crown. Variations in 'subject' as well as variations in 'object' can make a difference to the nature of the relation.

2. CONCEPTUAL DEFINITION

We owe to H. L. A. Hart the point that, in jurisprudence, as in all philosophy, it is a mistake to think that particulars can be classified under general terms only on the basis

of their possession of specified common features. But when jurists express doubts about the usefulness of general terms such as 'private property' or 'ownership', it is usually this sort of definition that they have in mind. They imply that, if we are unable to specify necessary and jointly sufficient conditions which an institution must satisfy in order to be regarded as a system of private property, or which a legal relation must satisfy in order to be regarded as a relation of ownership, then those terms are to be regarded as ambiguous or confused and certainly as analytically unhelpful.

If Hart's point is accepted, however, this scepticism begins to seem a little premature. Conceptual definition is a complicated business and the idea that it always involves the precise specification of necessary and sufficient conditions must be regarded as naive and outdated. A term which cannot be given a watertight definition in analytic jurisprudence may nevertheless be useful and important for social and political theory; we must not assume in advance that the imprecision or indeterminacy which frustrates the legal technician is fatal to the concept in every context in which it is deployed ... Briefly, what I want to say ... is that private property is a *concept* of which many different *conceptions* are possible, and that in each society the detailed incidents of ownership amount to a particular concrete conception of this abstract concept.

Notes and Questions 6.2

1 Why is the bundle of rights which constitutes ownership not constant?

2 What, respectively, do Waldron and Grey each think of the view of 'many legal scholars ... [that] the term *ownership* serves only as an indication that some legal relations, some rights, liberties, powers, etc., are in question'?

3 Why should the concept vary according to both the object and the subject of the relationship?

4 What is the difference between a concept and a conception?

6.2. The contents of ownership

In this section, we will examine the substantive rights and limitations that, together, constitute ownership. In so doing, we will concentrate on Honoré's article, 'Ownership', which, as has often been noted, is 'a constant point of reference for those seeking to grapple with this highly elusive concept' (Harris, 'Ownership of Land in English Law', p. 143).

6.2.1. An introduction to Honoré's analysis

It was not until comparatively recently, when Honoré published his essay on the topic in 1961, that the concept of ownership was subjected to rigorous analytical scrutiny. The process had been set in motion by Hohfeld some forty years earlier with the analysis of rights which we considered in Chapter 2. Yet, while that provided the

skeleton of an analytical framework, it was Honoré who gave it form by offering a substantive analysis of the interests which, in his view, constitute ownership.

As you will see in Extract 6.3 at the end of this section, Honoré identified eleven, what he termed, 'standard incidents of ownership'. Before considering these, it is important to understand exactly what Honoré was attempting to achieve in this essay. At the outset he makes the following comment:

> [T]he standard incidents of ownership ... may be regarded as necessary elements in the notion of ownership, in the following sense. If a system did not admit them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might have a modified version of ownership, either primitive or sophisticated. But the listed incidents, though they may be together sufficient, are not individually necessary conditions for the person of inherence to be designated owner of a particular thing ... [for] ... the use of 'owner' will extend to cases in which not all the listed incidents are present.

Now what is meant by stating that the standard incidents are 'necessary elements' although not 'individually necessary'? Honoré is explicitly *not* attempting to provide a litmus test of ownership whereby any particular link between a person and a thing can be analyzed to see if such-and-such a person is the owner. For his interest lies not with particular person–thing relationships but in the system where such relationships exist. Honoré is, in effect, providing a template in which he lists those incidents with which any system claiming to embrace a liberal notion of ownership must correspond. For example, if one acknowledges that possession is one of the fundamental incidents of ownership, the fact that you are allowed to take possession of a book (by borrowing it from the library) does not imply that you have become the book's owner. However, a society that did not allow anyone to possess anything could not be said to recognise the liberal notion of ownership.

In addition to clarifying Honoré's aims, the quotation also identifies the ambit of the essay with the explicit acknowledgment that it is only concerned with the 'liberal notion of ownership' (i.e. private ownership). As Honoré expressly states, he does not preclude the possibility of other forms of ownership, be they 'either primitive or sophisticated', which do not correspond to the template. Taken on its own terms, therefore, the essay is not attempting to offer a universal jurisprudence of property as applicable to this society as it is, for example, to Chinese communist or pre–colonial aboriginal society. On the contrary, Honoré in his stated aims, is only concerned with what is loosely termed Western society where private property is the norm although (as we saw in Chapter 2) by no means the only form of recognised property interest.

Extract 6.3 A. M. Honoré, 'Ownership', in *Making Laws Bind* (Oxford: Clarendon Press, 1987), pp. 165–79

> I now list the standard incidents of ownership. They may be regarded as necessary elements in the notion of ownership, in the following sense. If a system did not admit

them, and did not provide for them to be united in a single person, we would conclude that it did not know the liberal concept of ownership, though it might have a modified version of ownership, either primitive or sophisticated. But the listed incidents, though they may be together sufficient, are not individually necessary conditions for the person of inherence to be designated owner of a particular thing. As we have seen, the use of 'owner' will extend to cases in which not all the listed incidents are present.

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. This makes eleven leading incidents. Obviously, there are alternative ways of classifying the incidents. Moreover, if we adopted the fashion of speaking of ownership as if it were just a bundle of rights, at least two items in the list would have to be omitted ...

... The present analysis, by emphasising that the owner is subject to characteristic duties and limitations, and that ownership comprises at least one important incident independent of the owner's choice, redresses the balance.

1. THE RIGHT TO POSSESS

The right to possess, namely, to have exclusive physical control of a thing, or to have such control as the nature of the thing admits, is the foundation on which the whole superstructure of ownership rests. It may be divided into two aspects, the right (claim) to be put in exclusive control of a thing and the right to remain in control, namely, the claim that others should not without permission interfere. Unless a legal system provides some rules and procedures for attaining these ends it cannot be said to protect ownership.

It is of the essence of the right to possess that it is *in rem* in the sense of availing against persons generally. This does not, of course, mean that an owner is necessarily entitled to exclude everyone from his property. We happily speak of the ownership of land, yet a largish number of officials have the right of entering on private land without the owner's consent for some limited period and purpose. On the other hand, a general licence so to enter on the property of others would put an end to the institution of landowning.

The protection of the right to possess (still using 'possess' in the convenient though over-simple sense of 'have exclusive physical control') should be sharply marked off from the protection of mere present possession. To exclude others from what one presently holds is an instinct found in babies and even, as Holmes points out (*The Common Law*, p. 213), in animals, of which the seal gives a striking example. To sustain this instinct by legal rules is to protect possession but not, as such, to protect the right to possess, and so not to protect ownership. If dispossession without the possessor's consent is, in general, forbidden, the possessor is given a right *in rem*, valid against persons generally, to remain undisturbed. But he has no right to possess *in rem* unless he is entitled to recover from persons generally what he has lost or had taken from him, and to obtain from them what is due to him but not yet handed over. Admittedly,

there may be borderline cases in which the right to possess is partially recognised, as when a thief is entitled to recover from those who oust him and all claiming under them, but not from others.

The protection of the right to possess, and so of one element in ownership, is achieved only when there are rules allotting exclusive physical control to one person rather than another, and that not merely on the basis that the person who has such control at the moment is entitled to continue in control. When children understand that Christmas presents go not to the finder but to the child whose name is written on the parcel, when villagers have a rule that a dead man's things go not to the first taker but to his son or his sister's son, we know that they have at least an embryonic idea of ownership.

To have worked out the notion of 'having a right to' as opposed to mere having or, if that is too subjective a way of putting it, of rules allocating things to people as opposed to rules which forbid forcible taking, was an intellectual achievement. Without it a stable society would have been impossible. Yet the distinction is apt to be overlooked by English lawyers, accustomed as they are to the rule that against a defendant having no title to the land the occupier's possession is itself a title (Pollock and Wright, *Possession in the Common Law* (1888), pp. 91, 95; R. Megarry and H. W. R. Wade, *The Law of Real Property* (5th edn, 1984), p. 104) ...

... The owner, then, has characteristically a battery of remedies in order to obtain, keep, and if necessary get back the thing owned. Remedies such as the action for ejectment, the claim for specific restitution of goods, and the *vindicato* are designed to enable the plaintiff either to obtain or get back a thing, or at least to put pressure on the defendant to hand it over. Others, such as the actions for trespass to land and goods, the Roman possessory interdicts and their modern counterparts, are primarily directed towards enabling a present possessor to keep possession. Few of the remedies mentioned are confined to the owner. Most of them are available also to persons with a right to possess falling short of ownership, and some to mere possessors. Conversely, there will be cases in which they are not available to the owner, for instance because he has voluntarily parted with possession for a temporary purpose, as by hiring the thing out. The availability of such remedies is clearly not a necessary and sufficient condition of owning a thing. What is necessary, in order that there may be ownership of things at all, is that such remedies shall be available to the owner in the usual case in which no other person has a right to exclude him from the thing.

2. THE RIGHT TO USE

The present incident and the next two overlap. On a wide interpretation of 'use', management and entitlement to income fall within use. On a narrow interpretation, 'use' refers to the owner's personal use and enjoyment of the thing owned, and so excludes management and entitlement to income.

The right (liberty) to use the thing at one's discretion has rightly been recognised as a cardinal feature of ownership, and the fact that, as we shall see, certain limitations on use also fall within the standard incidents of ownership does not detract from its importance. The standard limitations on use are, in general, rather precisely defined, while the permissible types of use constitute an open list.

3. THE RIGHT TO MANAGE

The right to manage is the right to decide how and by whom the thing owned shall be used. This right depends, legally, on a cluster of powers, chiefly powers to license acts which would otherwise be unlawful and powers to make contracts: the power to admit others to one's land, to permit others to use one's things, to define the limit of such permission, to contract effectively in regard to the use and exploitation of the thing owned. An owner may not merely sit in his own deck-chair but may validly license others to sit in it, lend it, impose conditions on the borrower, direct how it is to be painted or cleaned, contract for it to be mended in a particular way. This is the sphere of management in relation to a simple object like a deck-chair. When we consider more complex cases, like the ownership of a business, the complex of powers which make up the right to manage is still more prominent. The power to direct how resources are to be used and exploited is one of the cardinal types of economic and political power. The owner's legal powers of management are one, but only one, possible basis for it. Many observers have drawn attention to the growth of managerial power divorced from legal ownership. In such cases, it may be that we should speak of split ownership or redefine our notion of the thing owned. This does not affect the fact that the right to manage is an important element in the notion of ownership. Indeed, the fact that in these cases we feel doubts whether the legal owner really owns is a testimony to its importance ...

4. THE RIGHT TO THE INCOME

To use or occupy a thing may be regarded as the simplest way of deriving an income from it, of enjoying it. It was, for instance, expressly contemplated by the English income tax legislation at the time this was written that the rent-free use or occupation of a house is a form of income. Though it would be even more inconvenient and unpopular to assess and collect such a tax, the same principle must extend to moveables.

Income in the more ordinary sense (fruits, rents, profits) may be thought of as a surrogate of use, a benefit derived from forgoing the personal use of a thing and allowing others to use it for reward; as a reward for work done in exploiting the thing; or as the brute product of a thing, made by nature or by others. Obviously, the line between the earned and unearned income from a thing cannot be firmly drawn.

The owner's right to the income, which has always, under one name or another, bulked large in an analysis of his rights, bulks still larger with the increased importance of income relative to capital. Legally, it takes the form of a claim to the income, sometimes *in rem*, sometimes *in personam*. When the latter is in the form of money, the claim before receipt of the money is *in personam*; and since the income from many sorts of property, such as share and trust funds, is in this form, here is another opportunity for introducing the apophthegm that *obligatio* has swallowed up *res*.

5. THE RIGHT TO THE CAPITAL

The right to the capital consists in the power to alienate the thing and the liberty to consume, waste, or destroy the whole or part of it. Clearly, it has an important

economic aspect. The liberty to destroy need not be unrestricted. But a general provision requiring things so far as they are not consumed by use to be conserved in the public interest would be inconsistent with the liberal idea of ownership.

Most people do not, in any case, wilfully destroy permanent assets. Hence, the power of alienation is the more important aspect of the owner's right to the capital of the thing owned. This comprises the power to alienate during life or on death, by way of sale, mortgage, gift, or other mode, to alienate a part of the thing, and partially to alienate it. The power to alienate may be subdivided into the power to make a valid disposition of the thing and the power to transfer the holder's title (or occasionally a better title) to it. 'Title' is an important notion in the analysis of ownership. It denotes the power of the owner (or someone with a lesser interest) to alienate the thing and thereby to transfer the power to alienate and exercise the other rights of an owner or person with a lesser interest. An owner who exercises this power is said to give a good title to the thing in question.

The power to make a valid disposition and the power to transfer title usually concur but are sometimes separate, as when A has a power of appointment over property held in trust by B. Here A has the power to make a valid disposition of the thing, and B the power to transfer the legal title to it. (This example turns on the English distinction between the legal title, which is in B, *and* the equitable ownership, which A has the power to dispose of. But there are also examples in systems which do not admit this distinction.) Again, in some systems a sale or mortgage may be regarded as valid though the seller or mortgagor cannot give a good title at the time of the agreement to sell or mortgage.

An owner normally has both the power of disposition and the power of transferring title. In many early societies disposition on death is permitted but it seems to form an essential element in the mature notion of ownership. The tenacity of the right of testation once it has been recognised is shown by the Soviet experience. The earliest Soviet writers were hostile to inheritance, but gradually Soviet law has come to admit that citizens may dispose freely of their 'personal property' on death, subject to limits not unlike those known elsewhere.

6. THE RIGHT TO SECURITY

An important aspect of the owner's position is that he should be able to look forward to remaining owner indefinitely if he so chooses and if he remains solvent. His right to do so may be called the right to security. Legally, this is in effect an immunity from expropriation, based on rules which provide that, apart from bankruptcy and execution for debt, the transmission of ownership is consensual.

However, a general right to security, availing against others, is consistent with the existence of a power in the state to expropriate or divest. From the point of view of security of property, it is important that when expropriation takes place adequate compensation should be paid. But a general power to expropriate, subject to paying compensation, would be fatal to the institution of ownership as we know it. Holmes' paradox, that where specific restitution of goods is not a normal remedy ... expropriation and wrongful conversion are equivalent, obscures the vital distinction

between acts which a legal system permits as rightful and those which it reprobates as wrongful. If wrongful conversion were general and went unchecked, though damages were regularly paid, ownership as we know it would disappear.

In some systems such as English law, a private individual may destroy another's property without compensation when this is necessary in order to protect his own person or property from a greater danger (*Cope* v. *Sharpe* [1912] 1 KB 496; *Cresswell* v. *Sirl* [1948] 1 KB 241). Such a rule is consistent with security of property only because of its exceptional character. Again, the state's or local authority's power of expropriation is usually limited to certain classes of thing and certain limited purposes. A general power to expropriate any property for any purpose would be inconsistent with the institution of ownership. If, under such a system, compensation were regularly paid, we might say either that ownership was not recognised in that system, or that money alone could be owned, 'money' here meaning a strictly fungible claim on the resources of the community. As we shall see, 'ownership' of such claims is not identical with the ownership of material objects and simple claims.

7. THE INCIDENT OF TRANSMISSIBILITY

It is often said that one of the main characteristics of the owner's interest is its duration ...

... What is called unlimited duration comprises at least two elements: (i) that the interest can be transmitted to the holder's successors, and so on *ad infinitum*, and (ii) that it is not certain to determine at a future date. Thus, the fact that in English medieval land law all interests were considered temporary (Hargreaves, *Introduction to the Principles of Land Law* (1952), p. 47) is one reason why the terminology of ownership failed to take root, with consequences which have endured long after the cause has disappeared. These two elements may be called transmissibility and absence of term respectively. We are here concerned with the former.

No one, as Austin points out (Austin, *Jurisprudence* (4th edn, 1873), p. 817), can enjoy a thing after he is dead, except vicariously, so that, in a sense no interest can outlast death. But an interest which is transmissible to the holder's successors (persons designated by or closely related to the holder, who obtain the property after him) is more valuable than one which stops when he dies. This is so because on alienation the alienee or, if transmissibility is generally recognised, the alienee's successors, are thereby enabled to enjoy the thing after the alienor's death so that a better price can be obtained for the thing. In addition, even if alienation were not recognised, the present holder would by the very fact of transmissibility be dispensed *pro tanto* from making provision for his intestate heirs. Hence, for example, the moment when the tenant in fee acquired a heritable, though not yet fully alienable, right was a crucial moment in the evolution of the fee simple. Heritability by the state would not, of course, amount to transmissibility in the present sense. It is assumed that the transmission is in some sense advantageous to the transmitter.

Transmissibility can, of course, be admitted in principle, yet stop short at the first, second, or third generation of transmittees. The owner's interest is, however, characterised by indefinite transmissibility, no limit being placed on the possible

number of transmissions, though the nature of the thing may well limit the actual number.

In deference to the view that the exercise of a right must depend on the choice of the holder ... I have refrained from calling transmissibility a right. It is, however, clearly something in which the holder has an economic interest. To revise the notion of right in order to take account of incidents not depending on the holder's choice which are nevertheless of value to him would, however, be a radical step. Thus, if transmissibility were a right, it would be one which neither the holder nor anyone on his behalf could exercise.

8. THE INCIDENT OF ABSENCE OF TERM

This is the second part of what is called 'duration'. The rules of a legal system usually provide for determinate, indeterminate, and determinable interests. The first are certain to determine at a future date or on the occurrence of a future event which is itself certain to occur. In this class come leases for however long a term, copyrights, etc. Indeterminate interests are those, such as ownership and easements, to which no term is set. Should the holder live for ever, he would, barring insolvency, etc., be able to continue in the enjoyment of them for ever. Since human beings are mortal, he will in practice only enjoy them for a limited period, after which the fate of his interest depends on its transmissibility. Again, given human mortality, interests for life, whether of the holder or another, are indeterminate. The notion of an indeterminate interest in the full sense, therefore, requires the notion of transmissibility, but if the latter were not recognised, there would still be value to the holder in the fact that his interest was not due to determine on a fixed date or on the occurrence of some contingency, like a general election, which is certain to occur sooner or later.

On reflection, it will be found that what I have called indeterminate interests are really determinable. The rules of legal systems always provide for some contingencies such as bankruptcy, sale in execution, or state expropriation on which the holder of an interest may lose it. It is true that in most of these cases the interest is technically said to be transmitted to a successor (e.g. a trustee in bankruptcy), whereas in the case of determinable interests the interest is not so transmitted. Yet the substance of the matter is that the present holder may lose his interest in certain events. It is therefore never certain that, if the present holder and his successors so choose, the interest will not determine so long as the thing remains in existence. The notion of indeterminate interests can only be saved by regarding the purchaser in insolvency or execution, or the state, as continuing the interest of the previous owner. This is an implausible way of looking at the matter, because the expropriability and executability of a thing is not an incident of value to the owner, but a restriction on the owner's rights imposed in the social interest. It seems better, therefore, to deny the existence of indeterminate interests, and to classify those which are not determinate according to the number and character of the contingencies on which they will determine. This justifies our speaking of a determinable fee, of fiduciary ownership, etc. These do not differ essentially from full ownership, determinable on bankruptcy or expropriation.

9. THE DUTY TO PREVENT HARM

An owner's liberty to use and manage the thing owned as he chooses is subject to the condition that not only may he not use it to harm others, but he must prevent others using the thing to harm other members of society. There may, indeed, be much dispute over what is to count as harm, and to what extent give and take demands that minor inconvenience between neighbours shall be tolerated. Nevertheless, at least for material objects, one can always point to abuses which a legal system will not allow.

I may use my car freely, but not in order to run my neighbour down, or to demolish his gate, or even to go on his land if he protests; nor may I drive uninsured. These restrictions are of course not confined to owners. Anyone who drives a car has similar duties. The owner's position is special in that he must not allow others to use his car in these harmful or potentially harmful ways. I may build on my land as I choose, but not in such a way that my building collapses on my neighbour's land; nor must I allow anyone else for example, a contractor, to build on my land in such a way. These and similar limitations on the use of things and on permission to use them are so familiar and so clearly essential to the existence of an orderly community that they are often not thought of as incidents of ownership. Some of them are imposed on all who use a thing, whether owners or non-owners. Others are confined to owners, or to those, such as the occupiers of land, who are in most cases also owners. No one may use things in a way which harms others, but owners have a special responsibility to see to it that their property is not used in a harmful way by others.

10. LIABILITY TO EXECUTION

Of a somewhat similar character is the liability of the owner's interest to be taken away from him for debt, either by execution for a judgment debt or on insolvency. Without such a general liability the growth of credit would be impeded and ownership would be an instrument by which the owner could freely defraud his creditors. This incident, therefore, which may be called *executability*, constitutes one of the standard ingredients of the liberal idea of ownership.

It is a question whether any other limitations on ownership imposed in the social interest should be regarded as among its standard incidents. A good case can certainly be made for listing *liability to tax* and *expropriability* by the state. Although it is often convenient to contrast taxes on property with taxes on persons, all tax must ultimately be taken from something owned, whether a material object, a fund, or a chose in action. A general rule exempting the owners of things from paying tax from those things would therefore make taxation impracticable. But it may be thought that, to state the matter in this way is to obliterate the useful contrast between taxes on what is owned and on what is earned. Although, therefore, a society could not continue to exist without taxation, and although the amount of tax is commonly dependent on what the taxpayer owns or earns, and must be paid from his assets, I should not wish to press the case for the inclusion of liability to tax as a standard incident of ownership.

Much the same holds good of expropriability. Although some state or public expropriation takes place in every mature society, and though it is not easy to see how administration could continue without it, expropriation tends to be restricted to

special classes of property. We are left with the thought that it is, perhaps, a characteristic of ownership that the owner's claims are ultimately postponed to those of the public authority, even if indirectly, in that the thing owned may within defined limits be taken from the owners to pay the expenses of running the state or to provide it with essential facilities.

11. OWNERSHIP AND LESSER INTERESTS: RESIDUARY CHARACTER

I described the interest of which the standard incidents have been depicted as the greatest interest in a thing recognised by the law, and contrasted it with lesser interests (easements, short leases, licences, special property, mere detention). It is worth looking more closely at this distinction, for it depends partly on a point that the foregoing analysis has not brought out.

I must emphasise that we are not now concerned with the topic of split ownership cases where the standard incidents are so divided as to raise a doubt which of two or more persons interested should be called owner. We are dealing with those simpler cases in which the existence of B's interest in a thing, though it restricts A's rights, does not call in question A's ownership of the thing.

The first point to be noted is that each of the standard incidents of ownership can apply to the holder of a lesser interest in property. The bailee has possession of, and often the right to possess, the goods bailed. The managing director of a company has the right to manage it. The life tenant or usufructuary of a house is entitled to the income from it. The donee of a power of appointment is entitled to dispose of the capital subject to the power. The holder of an easement has a transmissible and non-determinable interest in the land subject to the easement. Yet, without more, we feel no temptation to say that the bailee owns the thing, the managing director the company, the life tenant the house, the donee the capital, or the easement holder the land. What criteria do we use in designating these as lesser interests?

One suggested view is that the rights of the holder of a lesser interest can be enumerated while the owner's cannot (J. von Gierke, *Sachenrecht* (3rd edn, 1948), p. 67; cf. W. Markby, *Elements of Law* (6th edn, 1905), pp. 157–8). This rests on a fallacy about enumeration. The rights, for instance, exercisable over a thing by way of liberty (what may be done with or to the thing) do not together constitute a finite number of permissible actions. The owner and the lessee alike may do an indefinite number and variety of actions, namely, any action not forbidden by a rule of the legal system.

A second view is that the criterion used is the fact that, at least as regards some incidents, the holder of the lesser interest has more restricted rights than the owner. The lessee's interest is determinate, the owner's merely determinable. But, conversely, the lessee has the right to possess and manage the property and take its income. In these respects the owner's interest is, for the time being, more restricted than his own. Nor will it help to say that the owner's rights are more extensive than those of the holder of a lesser interest as regards most of the incidents listed. In the case of a lease, for example, this would lead to the conclusion that the lessee has as much claim to be called owner as the reversioner.

A third suggestion is that some one incident is to be taken as decisive. In the case of all the listed rights, however, it is possible to put examples which would lead to the opposite result from that sanctioned by usage. If A lets B a car on hire, B possesses it but A owns it. The holder of a life interest or usufruct manages and takes the income of the thing, but the *dominus* or reversioner owns it. When trust property is subject to a power of appointment, the donee of the power can dispose of it, but the trustee owns it ...

... Besides these examples, where any of the suggested criteria would give a result at variance with positive law and legal usage, there are many others where the rights in question apply to both or neither of the persons holding an interest in the thing. For instance, some writers appear to treat duration (J. C. W. Turner, 'Some Reflections on Ownership in English Law', (1941) 19 *Canadian Bar Review* 342) as the criterion for distinguishing between ownership and lesser interests. Yet the holder of an easement, like the owner of land, has a transmissible and indeterminate right over it, while, conversely, neither the owner nor the licensee of a copyright has an indeterminate right.

It would be tedious to list examples for the other rights. Clearly, if a criterion is to be found, it must be sought elsewhere. At first sight, a hopeful avenue of inquiry is to ask what happens on the determination of the various interests in the thing under consideration. This brings us to a further standard incident of ownership, namely, its residuary character.

A legal system might recognise interests in things less than ownership and might have a rule that, on the determination of such interests, the rights in question lapsed and could be exercised by no one. Or it could allot them to the first person to exercise them after their lapse. There might be leases and easements: yet, on their expiry, no one would be entitled to exercise rights similar to those of the former lessee or holder of the easement. This would be unlike any system known to us, and I think we should be driven to say that in such a system the institution of ownership did not extend to any thing in which limited interests existed. There would, paradoxically, be interests less than ownership in such things but no ownership of them.

This fantasy is meant to bring out the point that it is characteristic of ownership that an owner has a residuary right in the thing owned. In practice, legal systems have rules which provide that, on the lapse of an interest, rights, including liberties, analogous to the rights formerly vested in the holder of the interest, vest in or are exercisable by someone else. That person may be said to acquire the corresponding rights. Of course, the corresponding rights are not identical with, but correspond to, the former.

It is true that corresponding rights do not always arise when an interest is determined. Sometimes, when ownership is abandoned, no corresponding right vests in another. The thing is simply an ownerless *res derelicta*. It seems, however, a safe generalisation that, when an interest less than ownership terminates, legal systems provide for corresponding rights to vest in another. When easements terminate, the owner can exercise the corresponding rights. When bailments terminate, the same is true. At first sight, it looks as if we have found a simple explanation of the use of the term 'owner', but this turns out to be but another deceptive shortcut. For it is not a

sufficient condition of A's being the owner of a thing that, on the determination of B's interest in it, corresponding rights vest in or are exercisable by A. On the determination of a sublease, the rights in question become exercisable by the lessee, not by the owner of the property.

Can we then say that the owner is the ultimate residuary? When the sublessee's interest determines, the lessee acquires the corresponding rights; but when the lessee's right determines, the owner acquires these rights. Hence the owner appears to be identified as the ultimate residuary. The difficulty is that the series may be continued, for on the determination of the owner's interest, the state may acquire the corresponding rights. Is the state's interest ownership or a mere expectancy?

A warning is here necessary. We are approaching the troubled waters of split ownership. Puzzles about the location of ownership are often generated by the fact that an ultimate residuary right is not coupled with present alienability or with the other standard incidents we have listed ...

... We are, of course, here concerned not with the puzzles of split ownership but with simple cases in which the existence of B's lesser interest in a thing is clearly consistent with A owning it. To explain the usage in such cases it is helpful to point out that it is a necessary but not sufficient condition of A's being owner that, either immediately or ultimately, the extinction of other interests would inure to his benefit. In the end, it turns out that residuarity is merely one of the standard incidents of ownership, important no doubt, but not entitled to any pre-eminent status.

Notes and Questions 6.3

1 It is important to note that Honoré adopted the phrase *incidents of ownership* because his analysis is more than simply a list of rights which together constitute the 'ownership' bundle. While the first seven incidents might be accurately described as rights of some kind, the final four are less concerned with rights than with the limitations (or lack of limitation) under which the previously listed rights operate.

2 Do you agree that the *right to use* can be distinguished from both the *right to manage* and the *right to the income*?

3 When considering the *incidence of absence of term* Honoré suggests that 'indeterminate interests are really determinable' because the rules of a legal system always allow for some contingencies (such as bankruptcy) by which the holder of an indeterminate interest might lose it. Consequently, such interests are, 'in ... substance', the equivalent of determinable interests as they have the potential to end if an event which is not certain to happen, such as bankruptcy, does actually occur. Do you agree with this argument? As Honoré explicitly concedes, there is, after all, a difference. When an indeterminate interest is lost in this way, 'the interest is technically said to be transmitted to a successor (e.g. a trustee in bankruptcy), whereas in the case of determinable interests the interest is not so transmitted'. But is this not crucial? As we see in section 8.2, with

determinable interests the interest ends (automatically) on the occurrence of the determining event, while an indeterminate interest is, at least potentially, of infinite duration. The fact that the latter might be taken from its current holder against his will does not equate it with the former. If you, as owner of this book, are adjudged bankrupt, it will vest in the trustee in bankruptcy. The title would, by this mechanism, have changed hands but this is no more than would occur if you sold the book to another or (somewhat curiously) gave it to him for Christmas. In none of these situations has the interest determined and to equate indeterminate interests with determinable ones on the basis of such an argument appears problematic.

4 Would it be more plausible to draw a parallel between indeterminate and determinable interests when the thing, and as a consequence the indeterminate interest held in it, are capable of being destroyed?

5 The duty to prevent harm makes the significant point that ownership of a thing does not give you the freedom to do what you want with the thing owned. As owner of this book, you may read it but you cannot throw it with intent to harm another nor (more subtly) copy it in a way which infringes our copyright (see Chapter 9). The duty to prevent harm consequently extends beyond the physical to the economic and extends to all those limitations on use which apply to things in the interest of others. This is, without doubt, an important point to make, challenging as it does the caricature of ownership as, in the (quoted out of context) words of Blackstone, 'sole and despotic *dominium*' which we introduced earlier. It is, of course, inconceivable to regard ownership in such absolute terms, as Blackstone was at pains to point out when he noted earlier in the *Commentaries* that the Englishman's 'absolute right' to property 'consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, *save only by the law of the land*' (Blackstone, *Commentaries*, Book I, p. 138, emphasis added). However, a number of commentators (such as Waldron) have suggested that, because the duty to prevent harm is not limited to owners, it is misguided to regard this as an incident of ownership. For example, everyone is under a duty not to throw this book at another with intent to harm irrespective of who actually owns the book. Does it follow from this, however, that the duty to prevent harm is not an incident of ownership? As you will see in section 6.5 below, the duty to prevent harm is a fundamentally important limitation on the right to use and (to a lesser degree) the right to possess. To argue that it is not an incident of ownership because non-owners are under a similar duty simply misunderstands Honoré's thesis. He is not concerned with identifying rights that are unique to ownership but rather with describing those rights which any system embracing private ownership must recognise. On occasion, those rights will be exercised by non-owners as, likewise, will any limitation on those rights. However, just because a non-owner might have the right to use this book (if, for example, he borrowed it from you), does not mean

that the right to use is not an incident of ownership and the same argument applies to any limitation on that right (such as the duty to prevent harm).

6 Why do you imagine Honoré changed the title of this ninth incidence of ownership from the *prohibition of harmful use* in the first edition of his article to the *duty to prevent harm* in later editions? Is it legitimate to raise this particular incident to the level of a duty?

7 Why is the essentially negative *liability to execution* essential to the workings of a modern economy?

8 In his final category, Honoré contrasts ownership with lesser interests, by which he means rights vested in others which restrict the owner's rights in the thing without bringing his actual ownership into question. Thus, if you lend this book to a friend, he will, under the informal terms of the loan, acquire the right to possess and use this book for a limited period of time without, at any point, becoming the book's owner. As Honoré illustrates, any of the previously listed rights of ownership can be split off in this way, and this prompts the question how do we still identify one party as the owner and the rest as simply holders of lesser interests in the thing. Do you agree with Honoré that none of the solutions he considers provides a complete answer? What bearing does this have on the issues raised above (sections 6.1.3.3 and 6.1.3.4)?

9 In 'The "Bundle of Rights" Picture of Property', p. 737, is Penner correct when he describes Honoré's purpose to be the provision of 'criteria for the correct application of the term *owner* in English Law'? Why might it more plausibly be argued that that is explicitly what Honoré was not attempting to do?

10 Although this was not his intention, which of Honoré's rights of ownership could be applied to communal ownership? Do some rights need to be modified and are others simply inappropriate outside the field of private ownership?

11 Honoré's purpose in detailing his eleven incidents of ownership was to describe the liberal concept of ownership and, in so doing, he specifically excluded from his endeavours any attempt to provide a universal definition of ownership. It has, however, become commonplace to apply his template to other legal systems quite alien to the liberal tradition, which prompts an inquiry into how far the analysis surpasses its stated aim. In the opinion of some, such as Lawrence Becker, it goes much further:

> Honoré has given an analysis of the concept of full ownership that ... provides a clear overview of the varieties of property rights. I have found his analysis ... to be an adequate tool for describing every description of ownership I have come across, from tribal life through feudal society to modern industrial states. The definition of the elements of ownership that he identifies will vary from society to society, as will the varieties of ownership that are recognized. But ownership is always, as far as I

> can tell, analyzable in the terms he proposes ... [from] *primitive* and archaic societies ... to modern ones. (Becker, 'The Moral Basis of Property Rights', p. 190)

Rather than a description of the liberal concept of ownership, Becker views Honoré's analysis (which according to his calculations provides 4,080 possible varieties of ownership model (p. 192)) as a means to describe any system of ownership both within and beyond the liberal tradition. As we saw in Chapter 2, every society includes a mixture of private, communal and state ownership although the particular proportions will differ markedly. Yet, as Munzer indicates in Extract 6.4 at the end of this section, they may all be analysed by reference to Honoré's template. For example, in Australian aboriginal society, which we considered in Chapter 4, equivalents to many of Honoré's incidents can be found vested not in an individual but in the various groupings within aboriginal society. In the system described in *Milirrpum* v. *Nabalco Pty Ltd* (1971) 17 FLR 141, the clans had the right to possess (in the sense necessary to perform their duties in respect of the sacred sites) while the bands had the right to use (in an economic sense as hunter-gatherers foraging across the various sites). In contrast, the society described in *Mabo* v. *Queensland (No. 2)* (1992) 175 CLR 1 invested both such rights not in clans or bands but in families. Space permitting, one could go on to analyse in detail each of these systems of ownership by applying Honoré's list of incidents even though neither system, in any respect, purports to embrace a liberal conception of ownership. Some would take issue with the basic idea that every society needs to grapple with the notion of ownership (see Extract 6.5 at the end of this section from Flathman). We would suggest, however, that any society which did, could profitably be analyzed from the perspectives offered us by Honoré. In other words, while we do not possess a universal concept of ownership, Honoré's incidents do provide us with a tool with which to assess differing approaches to the ownership issues that arise in differing societies.

Extract 6.4 S. Munzer, 'Understanding Property', in S. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), Chapter 2, pp. 23–7

The idea of *property* – or, if you prefer, the sophisticated or legal conception of property – involves a constellation of Hohfeldian elements, correlatives, and opposites; a specification of standard incidents of ownership and other related but less powerful interests; and a catalogue of 'things' (tangible and intangible) that are the subjects of these incidents. Hohfeld's conceptions are normative modalities. In the more specific form of Honoré's incidents, these are the relations that constitute property. Metaphorically, they are the 'sticks' in the bundle called property. Notice, however, that property also includes less powerful collections of incidents that do not rise to the level of ownership. For example, an easement involves primarily a claim-right and a privilege to use the land of another and secondarily a power to compel enforcement of that claim-right and privilege. It would be usual to classify an easement as property or a property interest, even though it does not amount to ownership. Easements, bailments, franchises, and

some licences are examples of *limited property*. Notice, too, that the idea of property will remain open-ended until one lists the kinds of 'things' open to ownership. In a legal system, it will be mainly a descriptive task to compile the list. In political theory, it will be a normative problem to show what things should be open to ownership. The reference to ownable things is a link between the sophisticated and popular conceptions of property. Notice, finally, that, even with a list of ownable things, the idea of property is indeterminate at the margin. No litmus test can separate rights of Property from, say, those of contract in all cases. Nor do lawyers' language and reasoning manifest, or require, such a line. It suffices to be able to describe a person's legal position.

The idea of *property rights* is narrower than that of property. Property rights involve only advantageous incidents. Property involves disadvantageous incidents as well. Meant here is advantage or disadvantage to the right holder or owner. Although property obviously involves disadvantages to persons other than the right holder, it is important to see that there can be disadvantages to the right holder as well. Suppose that someone owns a single-family home in a suburban area. Then she has a duty not to use it in ways prohibited by the law of nuisance or by zoning regulations. She may be disabled from transferring it to others with burdensome restrictions – for example, that no one may use it save for unduly limited purposes. If someone wins a court judgment for damages against her, then, subject perhaps to homestead laws, she has a liability that the home be sold to pay the judgment. The duty, disability, and liability are disadvantageous to her. It would be odd to say that they are part of her property rights in the home. But they are part of what is involved in saying that the home is her property. Similarly, easements, bailments, franchises, and some licences involve limited *property rights* ...

... The identification of the owners or right holders facilitates additional terminology. If the owners are identifiable entities distinguishable from some larger group, there is *private property*. The most common example is individual private property, where an individual person is the owner – in severalty, as lawyers say. Other sorts of private property exist when the owners or right holders are persons considered together, such as partnerships and cotenancies, or are artificial entities that represent the financial interests of persons, such as corporations. Contrasted with private property are various sorts of *public property*. Here the owners are the state, city, community, or tribe. Some forms of ownership involve a mixture of private and public property rights.

Understanding property along the lines suggested by Hohfeld and Honoré has the salient advantage of cross-cultural application – that is, the idea of property, though perhaps not a moral and political theory of property, applies to all or almost all societies. If instead, the idea of property were cast in terms of particular economic or cultural data, it would not illuminate very well property in societies different from those which gave rise to the original data and idea. Granted, if property is conceived along the lines advocated here, variation can still occur in who may own property, which incidents comprise ownership or other property interests, and which things can be owned. But the Hohfeld–Honoré analysis starts from the central truth that property involves relations among persons and with respect to things. It enables one to clarify these relations in widely different social settings. Though the analysis is especially well suited to complicated legal systems in developed societies, it also assists social scientists in analysing much simpler situations.

A well-known article by the anthropologist Hoebel brings out the point (E. Adamson Hoebel, 'Fundamental Legal Concepts as Applied in the Study of Primitive Law' (1942) 51 *Yale Law Journal* 951–66). Hoebel argues, first, that Hohfeld's vocabulary sharpens perception of the undeveloped legal and social systems. Hoebel's illustration is Yurok Indian society in northern California prior to the impact of Western civilisation. The Yurok had no formal government but did have an informal arrangement for enforcing legal standards by damages. Yurok law permitted something resembling ownership of fishing sites but with qualifications that Hohfeld's conceptions illuminate. The title holder of a fishing site has an exclusive liberty to fish there. He also has a power to grant a temporary liberty to another person to fish in that spot. Should he exercise the power, however, he comes under a duty to prevent his guest from being injured. Thus, if his guest were to slip and hurt herself while fishing, she would have a claim-right against her host for damages.

Second, Hoebel suggests that Hohfeld's vocabulary can avoid some unnecessary wrangles among anthropologists stemming from the use of overly broad or inapplicable labels. An example is the controversy over the type of ownership of canoes in Melanesia. Some anthropologists held that canoes were 'private property'. Others maintained that they involved 'communal ownership'. Hohfeld's conceptions, Hoebel points out, enable observers to describe accurately what is going on without getting embroiled in a larger dispute over private property and communism. The observers might find that the 'owner' of a canoe has a claim-right that others not damage it, a liberty superior to that of others to use it, a power to sell or give it away, and an immunity from being forced to sell. They might also find that the 'owner' is under a duty to ferry certain travellers, and that failure to discharge the duty would give a traveller a claim-right for damages. Such findings involve a mixture of 'private' and 'communal' elements. They would not be accurately described by prefixing either label, without qualification, to canoe ownership in that society.

Extract 6.5 Richard E. Flathman, 'Impossibility of an Unqualified Disjustificatory Theory' in *Nomos XII: Property* (New York: New York University Press, 1980), Chapter 3, pp. 69–71 and 72–3

PROPERTY RIGHTS AS A UNIVERSAL AND NECESSARY FEATURE OF HUMAN SOCIETIES

'Property right', 'ownership' and related concepts, Becker argues, following A. M. Honoré are family resemblance terms under the rubric of which a considerable variety of elements ... have been brought together in what is indeed a 'prodigious diversity' of combinations (no less than 4,080 by Becker's computations). Realizing this allows us to dispose of the discredited view that some 'primitive' societies were without the concept and the practice of property rights. If we operate with a suitably capacious conception of ownership, Becker argues, 'it is easy to show that private property rights of some sort exist everywhere'. In short, Wittgensteinian premises about language, mediated by A. M. Honoré's application thereof to 'ownership', plus a conceptually sophisticated anthropology, yields the conclusion that rights to private property are a universal phenomenon.

This by no means modest finding is much less than the entire yield of Becker's potent combination of authorities. The finding of universality would support the 'Burkean'

argument noted above. But it could not exclude the possibility of a morrow that witnessed the abolition of all 4,080 members of this (truly extended) family. More to the present point, it could not exclude the possibility of a conclusive argument that all 4,080 variants are moral abominations that ought to be abolished. The possibility of such an argument is excluded, however, by Becker's further contention. '[I]t is possible to argue', he goes on to say, 'that they [property rights] are a necessary feature of social organization.' Now, as Hobbes somewhere says, that which is necessary arises not for deliberation. If property rights are not only universal but necessary, any philosopher attempting a general justification or disjustification of them would be pretending to a kind of intellectual purchase that is simply not available.

Becker hastens to caution against a familiar type of misinterpretation of the evidence to which he is responding. Early economic and legal anthropologists, operating with an overly restricted concept of ownership, mistakenly concluded that numerous societies were devoid of property rights. The analogous error in respect to the improved (perfected?) anthropological accounts would be the contention that some specific system of property rights is necessary for social organization. The evidence does not support such a thesis. What the data indicate is that, while property rights exist everywhere, 'what is necessary about them *is just that some exist*'. This leaves abundant room for philosophizing about the 'specific' questions of just which type, form, or variant of property rights would be best suited to this or that social organization and about the 'particular' question of how those rights ought to be distributed. The metatheoretical point that matters here, of course, is just that these are the only questions left open to question. Despite the remarks quoted earlier, it is the clear implication of Becker's necessity thesis that what have passed for general theories of property is one of three things: confused or disguised theories of specific and/or particular justification; metatheoretical remarks that are either demonstrably mistaken or that demonstrate the incoherence of putative general justifications; absurdities. And the practical upshot (one could hardly say the moral upshot) of the argument, one may suppose, is that we might as well resign ourselves to life with some form or other of property rights.

Let us take up the argument by considering the three elements of which it consists, namely: (a) Honoré's Wittgensteinian explication of 'property' and 'ownership'; (b) the claim that property rights are 'found everywhere'; and (c) the inference that they are necessary to social organization.

The present commentator has no quarrel with the 'Wittgensteinian' approach to the definition of ownership. Nor is he competent to question the substance of Honoré's analysis of the standard 'incidents' of ownership. But does this analysis support the conclusion that property rights exist 'everywhere' (whatever, exactly, is meant by that conveniently vague term)? Honoré says that his analysis is of 'mature legal systems', and he leaves open the question whether it holds for societies, organizations, or whatever that do not fall into that category. On the basis of extensive reading in legal and economic anthropology, Becker finds that Honoré's analysis, in only slightly modified form, does work for all of the societies discussed in those materials. Hence his claim that property rights are universal.

Our first objection to this argument concerns the conceptual verisimilitude and perspicuity of the accounts on which it is based. As noted, Becker himself stresses the distortions introduced by the inappropriate conceptualizations employed by nineteenth- and early twentieth-century anthropologists. Those conceptualizations were inadequate, according to Becker, because they were based on an overly narrow understanding of ownership in *their own* (i.e. the anthropologists' own) societies. But what reason does Becker have for thinking that the latterly improved understandings of ownership in mature legal systems (simply granting that the anthropologists in question did employ something like Honoré's conceptualization) itself better prepares scholars to analyze societies that manifestly differ from their own in important ways? Does he have independent evidence against the possibility that one conceptual distortion has been succeeded by another?

The skepticism we are expressing is grounded in that very Wittgensteinian understanding of language from which Becker seems to be proceeding. For Wittgenstein, most concepts take their meaning from the uses to which speakers put them in the course of the activities, practices, and forms of life in which those speakers are engaged. We are not in a position to prove that concepts such as 'possession', 'management', 'alienation', and 'transmission' (which in varying forms and combinations, are among the incidents of ownership in mature legal systems) have no equivalents or close analogues among the Azande, the Zulus, the Hopi, and so forth. But a minimum of knowledge about other differences between those societies and those from which Honoré's analysis is built up is enough to generate our skepticism.

Let us nevertheless assume that analogues to these concepts are indeed to be found, albeit in a great diversity of forms and combinations, 'everywhere'. It is not yet clear that it follows from this assumption, especially if one is working from recognizably Wittgensteinian premises, that it is helpful or enlightening to insist that property rights are a universal phenomenon. Can we imagine Wittgenstein concluding his analysis of such concepts as 'game' and 'understanding' by trumpeting the generalization that games and understanding are universal phenomena? The answer is pretty clearly negative. And the reason it is negative is just that such generalizations, even if in some sense true, deflect us from the point that Wittgenstein is most anxious to establish. '[I]t is our *acting*, which lies at the bottom of the language-game [italics mine].' Where the acting differs, generalizations based on linguistic or grammatical similarities are seriously misleading. Is there a universal pattern of *acting* in respect to ownership? Perhaps. But the least that must be said is that this remains to be shown.

These doubts about the universality thesis, of course, are anything but irrelevant to the necessity thesis. If property rights are not universal, then neither are they necessary. Equally, if the sense in which property rights are universal is insignificant or unenlightening, then the same will be true of the sense in which they are necessary. Because we have only suggested, not established, our objections to the universality thesis, we cannot claim that those objections prove Becker's necessity thesis false or insignificant. But then neither has Becker proved the universality thesis. Until he does so, he too is debarred from simple reliance upon it in arguing for the necessity thesis.

There is, however, at least one objection to the necessity thesis that is independent of the discussion thus far. Unless Becker has some heretofore unappreciated solution to the Humean principle of induction, he can hardly claim that 'the data' themselves are sufficient to 'indicate' that property rights are necessary to all social organizations. Even if we grant universality, necessity remains to be established.

The most extended argument Becker presents for the necessity thesis is made via a passage he quotes from the sociologist Irving Hallowell. 'Since [*sic*] valuable objects in all human societies must include, at the minimum, some objects of material culture that are employed to transform ... raw materials ... into consumable goods, there must be socially recognized provisions for handling the control of such elementary capital goods as well as the distribution and consumption of the goods that are produced.' Thus far, we have an assertion of a kind familiar to readers of structural-functional sociological theory. Certain functions, it is alleged, must be performed if a society is to maintain itself; therefore certain structures or arrangements, which perform those functions, are necessary. Even if we waive the well-rehearsed objections to this mode of reasoning, Becker's endorsement of the inference Hallowell draws from it is a truly arresting example of begging the question at issue. 'Consequently', Hallowell continues, 'property rights are ... an integral part of the economic organization of any society.'

No doubt property rights are one familiar device for 'handling the control of elementary capital goods' and for regulating the distribution of consumables. Equally, in societies for which the hypotheticals Hallowell had earlier enunciated are true, property rights are 'extremely fundamental'. But what in this argument demonstrates that property rights are the only possible device for doing these things?

Strictly speaking, of course, the answer to this question is 'nothing whatsoever'. Judging from the passage Becker quotes, Hallowell had found that property rights performed this function in numerous societies and, drawing on a deeply controversial general theory, illicitly transformed an empirical generalization into a necessary truth. Whatever Hallowell may have been doing, the most likely explanation for Becker's use of the passage seems to be along the following lines. Becker is operating with a highly latitudinarian concept of ownership, one that gives plausibility – although perhaps an illicit plausibility – to the claim that property rights are universal. This concept of ownership was derived from an analysis of societies in which property rights arguably do 'perform the functions' that Hallowell discusses. Thus when Becker has satisfied himself that the same concept is at work in all societies, he implies that the property rights denoted by the concept do the same job in all societies.

Notes and Questions 6.4

1 Are Flathman's criticism's based upon a private property notion of ownership?

2 Can you, or for that matter Flathman, offer a picture of a society (either existing, past or as a theoretical construct) in which property rights do not exist?

3 How are the terms *ownership* and *property rights* used in the above passage? Do Flathman and Becker treat them as synonyms?

6.3. The roles played by ownership

6.3.1. As a legal term of art

Traditionally, English law has been more concerned with establishing possession rather than determining ownership. This is, at least in part, a product of the adversarial system in which our courts are required to choose the better of two competing claims rather than undertake an investigation to discover who, among all the possible claimants in the world, has the best claim to the thing. As a result, the court is freed from the onerous obligation of determining ownership and can concentrate on the simpler task of establishing which of the two parties before it has the better right to possess the thing in question (which can normally be accomplished without deciding who is its owner – see chapter 10). When viewed from this perspective, one can perhaps appreciate why it is often said that English law has little use for the term ownership, in contrast to Roman law where it is traditionally viewed as being of fundamental importance. As Rudden has noted, all the civil-law systems have modelled their treatment of ownership on the Roman law concept of *dominium* which, at least theoretically, gives the owner an almost absolute interest.

> Now one of the most striking institutions of Roman Law was *dominium* ... which ... was ... as near to being absolute as any private law institution can be. The owner had an absolute title, he had an absolute right to dispose of the thing he owned, and his right to use it was limited by so few restrictions of a public law character that it, too, could almost be called absolute. The kinds of incumbrances with which it could be burdened were kept down to the lowest possible number, and where they existed they were carefully distinguished from the *dominium* over the thing, which was regarded as retaining its character of a general undifferentiated right over the thing capable of resuming its original plenitude by the mere disappearance of the incumbrance.
>
> Now, the concurrence of these various absolutes in a single institution was really a very remarkable peculiarity of Roman law. Doubtless it was and still is very convenient for a person to be able to say: 'This thing is mine; my title to it is absolute; I can do what I like with it subject to certain very obvious restrictions that have to be put on the use of everything of the kind; and, if I wish, I can vest all these rights in another person, by transferring the thing to him.'
>
> (Lawson and Rudden, *The Law of Property* (2nd edn), p. 115; this passage does not appear to have been repeated in the third edition)

Whether this was of any practical consequence is perhaps harder to assess. Rudden continues by noting that '[i]n actual practice the Roman position cannot have been very different' from the approach under the common law. 'If', for example, 'a plaintiff was protecting his possession or seeking to recover it from a defendant who had dispossessed him directly, he merely proved his possession' in a similar fashion to the means adopted under English law. As Rudden concedes,

'[t]here is little that looks absolute' in all of this but what cannot be denied is the prominence given to the notion of ownership as a near-absolute interest under the civil law (through the vehicle of *dominium*) even though at a practical level this is of less significance than it might at first appear.

While the common law failed to accord ownership a similar degree of prominence, it would be a mistake to conclude that the term has no role to play under English law. On the contrary, the lack of a central all-embracing notion of ownership enables the concept to play a number of different roles, and we consequently need to distinguish the various situations in which it is employed.

6.3.1.1. Ownership's role in land

It is often suggested that, in the particular context of land, the term ownership is simply redundant due to what is known as the doctrine of estates. As we see in section 8.2 below, the doctrine is simply a land-holding mechanism. The estate is an artificial construct, an abstraction, which combines the three dimensions of spatial existence (length x breadth x height) with the fourth dimension (time). The two most important estates are the *fee simple absolute in possession* and the *term of years absolute*. The fee simple is the greatest estate that exists under English law and vests the holder with an interest in the land of potentially infinite duration (cf. the other freehold estates, namely, the life estate which is limited to the lifetime of the original grantee, and the fee tail which normally endures until the death of the last male descendant of the original grantee). In contrast, the term of years is a leasehold estate which has been carved out of the freehold estate of another (normally referred to as the landlord). It is of strictly finite duration, and vests certain rights in the leaseholder for the duration of the lease.

We must now consider what relevance all of this has for the notion that, under English land law, there is no concept of ownership. As noted by Hargreaves, in the following quote, the argument is, in essence, a simple one in which land ownership is contrasted with estate holding:

> By distinguishing the land from the estate, English land law has shown conclusively that, even within a society as individualistic and as legalistic as England in the nineteenth century, ownership is not a necessary legal concept. The problem of ownership remains, but it is not a legal problem: it is the concern of the politician, the economist, the sociologist, the moralist, the psychologist – of any and every specialist who can contribute his grain to the common heap. Ultimately, the philosopher will try to unify this shifting mass into a coherent whole. That he has failed in the past to achieve an acceptable synthesis is not to be wondered at, for the mass is constantly changing from age to age, perhaps even from year to year. The lawyer naturally has his contribution to make, but as the problem is not even fundamentally a legal problem, the final solution does not lie with him. He is concerned with ownership only insofar as it produces consequences within the sphere of his own special technique, roughly indicated by the ideas of legal rights and legal duties. The sum total of those legal rights and duties which inhere at any one time in any one possessor – or tenant – of land is his estate, but whether the possessor is also the

> owner, in the wider field of philosophy, cannot be determined by the lawyer or by the art which he practises, for the estate, even the fee simple, does not give the complete data necessary for the formulation, let alone the solution, of the ultimate problem.
>
> (Hargreaves, 'Review of Modern Real Property', p. 17)

There are clear parallels here with the ideas already considered when we briefly discussed the views of Grey and Dales (Extract 6.1 and section 6.1.2.3 above). Hargreaves' point is simply a reiteration of the idea that, as lawyers, we are, in any given situation, only interested in the specific rights which may or may not exist in relation to a thing. In deciding whether A or B can rightfully possess Blackacre, we do not ask 'Who owns the land?' but rather 'Who has the right to possess the land?'. A might have the fee simple which would normally carry with it the right to possess but not if B had an unexpired term of years absolute which would give her the right.

So what implications does this have for the notion of ownership? In essence, there are three possible responses. Grey took the view that focusing on specific rights tended towards the very disintegration of the concept of ownership. In contrast, Dales implicitly argued, not that ownership disintegrated, but that it multiplied with each particular rights holder in the thing being viewed as an owner of the thing in respect of the right (or rights) held. Hargreaves' position is more subtle than either of these approaches. As the above quotation makes clear, he does not suggest that the concept of ownership has disintegrated, for he clearly regards the notion of ownership as an important (although non-legal) concept. Later in the same article, he similarly rejects the multiplication of ownerships approach, calling it a 'venial misuse of words ... to speak of "ownership" of an estate, of an "estate owner" and the like ... [for] ... [o]ne can no more "own" an estate than one can "own" a right'. Compelling as this argument is, it is perhaps worth noting, if only in passing, that it is a misuse of words to which the Law of Property Act 1925 itself subscribes, repeatedly using the phrase 'estate owner' which it defines, not surprisingly, as 'the owner of a legal estate' (section 205(1)(v)).

Such caveats aside, Hargreaves' thesis clearly disentangles the concept of ownership from the property rights that exist in a parcel of land. Ownership of land is, in his view, a non-legal relationship conceptually distinct from the property rights that might exist in respect of it, many of which *may* be vested in the person described as 'owner' but all of which *must* arise in respect of some estate held in the land the most extensive of which is the fee simple estate. Such a view is contentious and not without its critics, including Lawson, who took a quite contrary view:

> The estate which has the longest duration is the fee simple, which is now in almost every case perpetual and is equivalent to full ownership.
>
> (Lawson, *The Rational Strength of English Law*, p. 88)

A similar view was taken by Rudden (Lawson and Rudden, *The Law of Property* (2nd edn), p. 115) and is based on the idea that the rights that vest in the holder of the fee simple estate are so great that it is akin to owning the land itself free from all

but the most minor of limitations. A rather more subtle approach is adopted by Harris (*Ownership of Land in English Law*, pp. 148–58), who suggests that the term plays an essential role in English land law even though it is not utilised as a term of art, because, as he demonstrates, the concept is used variously to underpin the institutions of land law, within the doctrinal reasoning of the courts and, on occasion, as a legal term in its own right.

6.3.1.2. Ownership's role in chattels

There is no direct equivalent to the doctrine of estates under the law of personal property. As a consequence, the term 'ownership' is more freely employed in this context in a form which, in many respects, accords with lay perceptions as to its meaning. Technically, the term is used to signify the ultimate property interest in the thing.

6.3.1.3. Ownership's role in legislation

While the concept of ownership lacks the pivotal role accorded to the term *dominium* under the civil law, terms such as 'ownership' and 'owner' are still encountered in statutes where they play a technical role limited to the context in which they appear. We have already considered one example of this in the Law of Property Act 1925 and it is by no means unique. It will probably not come as a surprise that, given the lack of an all-embracing definition of ownership, the term when it is encountered is defined with regard to the legal consequences that arise. Thus, despite being viewed by some as a 'venial misuse of words', the use of the term 'estate owner' in the Law of Property Act 1925 is unproblematic and uncontentious. Likewise, in *Lloyds Bank* v. *Bank of America* [1938] 2 KB 147, it was said that the term 'owner' which appears in section 2 of the Factors Act 1889 included all those with specific property rights in a thing (including a person whose rights were limited to having taken the thing as security for a loan under a pledge – see Chapter 18).

Such approaches accord with the notion of ownership of rights rather than ownership of things. Under both the Law of Property Act 1925 and the Factors Act 1889, there is likely to be more than one owner of the same thing each with differing rights in it. Thus, under the former, both the holder of the fee simple and the holder of the term of years in the same parcel of land are, under the Act, rightly described as 'estate owners', while, under the latter, both the pledgor and the pledgee are 'owners' for the purposes, at least, of section 2.

It would be a mistake, however, to cite such disparate examples as evidence that, under English law, ownership is always to be equated with rights rather than things. *Hanlon* v. *Law Society* [1980] 2 All ER 763, CA; [1980] 2 All ER 199, HL, for example, involved a trust which we would normally conceive as involving two owners of the trust property (the trustee who owns the legal title and the beneficiary who owns the equitable title – see Chapter 8). However, in this case, both Arnold P in the Court of Appeal and Lord Lowry in the House of Lords stated that, for the purposes of the Legal Aid Act 1974, the ownership of the trustee could be

discounted and the beneficiary would be regarded as the sole owner of the property in question. In contrast, in *R.* v. *Tower Hamlets London Borough Council, ex parte Von Goetz* [1999] 2 WLR 582, the Court of Appeal held that, for the purposes of section 104 of the Local Government and Housing Act 1989, the term 'owner's interest' could include the interest of both trustees and beneficiaries. It is, perhaps, worth emphasising at this point that it is not our purpose to consider the merits of these various decisions. Each is a product of its own particular context, decided under a system in which no all-embracing definition of ownership exists and in which there is, consequently, a degree of flexibility that simply does not exist under the civil law. Such a contextual approach means that great care needs to be taken when considering the term from a technical standpoint. This can be seen in the Sale of Goods Act 1893, for instance, where the term 'owner' is frequently used absent any statutory definition because, even within the limited confines of this particular enactment, it has a meaning which 'assumes significance only in relation to a particular issue with a particular person' (see Battersby and Preston, 'The Concepts of "Property", "Title" and "Owner"', p. 269).

6.3.2. As an amorphous notion

6.3.2.1. Ownership as an organising idea

The problem with our discussion so far is that, in concentrating on a number of separate roles played by the concept of ownership, we have over-rationalised the notion and in so doing produced a distorted image which obscures its primary role. For in reality the term is often used with no such specificity as simply an idea which, while by no means vague, is essentially amorphous. In essence, the term is often used simply to signify the bond that exists between 'you' (or 'us') and 'it' with no attempt to define its nature or extent. In this conception of ownership, the owner is the one (or many) whose decision as to what should or should not be done with a thing is regarded as, in the words of Waldron, 'socially conclusive'.

It is in this sense that the term fulfils its primary role by providing a simple, readily understood notion of what it means to be the owner of a thing which, as we noted in section 6.1 above, the non-specialist can employ each time he is confronted by what would otherwise be an unfathomable conundrum. On occasion, this will produce the wrong result, as when the owner of a house expresses surprise that he is required to obtain planning permission and cannot do as he pleases with 'his land'. Normally, however, the amorphous concept of ownership provides a simple test that invariably provides non-lawyers with a means of establishing what they can and cannot do with a particular thing, no matter how complex the actual property relationships involved. As you will see in later chapters, the property relationships that arise when, for example, a house is bought with the aid of a mortgage or a car purchased via a lease-back arrangement, are indeed complex but that does not prevent the 'owner', his friends (who might be visiting the house or borrowing the car for the afternoon) and, for that matter, total strangers normally

knowing exactly what they can and cannot lawfully do in respect of the property in question.

6.3.2.2. Ownership as a contested concept

While providing an appreciation of its complexity, dividing ownership, as we have done, into a number of separate roles is also liable to distort the concept by presenting an overly compartmentalised view which underplays its dynamism. As you will have begun to appreciate when we considered the difficulties of ownership in section 6.1 above, there is no general agreement on this issue, and this final role focuses on the contest that ensues. For, as Waldron suggests, quoting the political philosopher W. B. Gallie, it is possible to view ownership as one of those 'concepts whose proper use inevitably involves endless disputes about their proper uses on the part of their users' (Gallie, 'Essentially Contested Concepts'). Such debate is inextricably linked to the concept of ownership. Whenever we speak of it, we are to an extent engaging in a contest as to its true meaning, and this discourse is as crucial to the concept as each of the previous roles we have identified.

6.4. The limitations of ownership

Ownership in practice never invests the owner with complete control over the thing owned. All ownership of things is subject to limitations which differ in accordance with the practical, social and historical circumstances surrounding the particular object of property in question. Thus the limitations which arise in respect of the ownership of a piece of land are different from the limitations which apply to the ownership of this book or, for that matter, its copyright. However, no matter how diverse the types of property or the limitations that arise in respect of them, it remains true that ownership of anything is subject to some kind of limitation. These essentially negative restrictions are, as Honoré argued, as much an aspect of ownership as the positive rights normally associated with the term, and it is for this reason we have entitled this section the 'limitations *of* ownership', rather than the more usual 'limitations *on* ownership'.

Limitations as to the use of property exist both in the public law and the private law fields, and are normally imposed as a matter of public policy but can on occasion arise by agreement. To examine how these various types of limitation dovetail and interact, we will consider land use restrictions (with the exception of planning law) which provide a particularly graphic illustration of the reasons why limitations on property are an essential aspect of ownership.

6.4.1. Nuisance

Historically, the use of land has been regulated by means of the law of nuisance. Today, while still the principal common law mechanism in this field, its significance has been much diminished by developments in both the private and public law spheres, such as restrictive covenants and planning and environmental

controls. Whilst the law of planning is beyond the remit of this volume, we will concentrate first on the law of nuisance, which provides us with a vivid picture of the symbiotic relationships which characterise all forms of ownership, before going on to consider the relatively recent innovation of the restrictive covenant.

6.4.1.1. A brief introduction to nuisance

Nuisance is divided into two distinct branches, namely, public and private nuisance, although it is quite possible for the same conduct to amount to an actionable wrong under both categories.

Public nuisance

Public nuisance is defined by Jolowicz as something 'which materially affects the life of a class of Her Majesty's subjects who come within the sphere or neighbourhood of its operation'. Historically, it was, in effect, the common law's response to problems arising out of land use where the effects were too diverse and indiscriminate to expect any individual to take action on his own. In consequence, the law of public nuisance is something of a rag-bag of public wrongs which, in the words of Lord Denning, 'covers a multitude of sins, great and small' (*Southport Corp*. v. *Esso Petroleum Co*. [1954] 2 QB 182 at 196) including, for example, keeping a disorderly house, selling food unfit for human consumption, throwing fireworks in the street and even (in other jurisdictions at least) running a badly organised pop festival (see *Attorney-General for Ontario* v. *Orange Productions Ltd* (1971) 21 DLR (3d) 257).

The law of public nuisance developed against the backdrop of a legislature far less interventionist than we are accustomed to today, and its significance correspondingly declined as Parliament became more accustomed to dealing with specific public hazards by individual legislative action. It does not follow from this that public nuisance is now irrelevant (nor that this area of the law is incapable of further development) but simply that both existing and new public hazards are, these days, more likely to be dealt with specifically by parliamentary enactment rather than by the ingenuity of the common law.

In accordance with its underlying rationale in protecting the interests of the community, public nuisance is a crime for which the perpetrator may be prosecuted. If the criminal sanction proves inadequate, a civil action (to obtain an injunction requiring that the unlawful activity be terminated) may be brought by the Attorney-General or the local authority. However, in the absence of particular damage, individuals are not permitted to bring a civil claim in respect of such a nuisance, as that would open the door to a multiplicity of actions where, by definition, the harm caused has been suffered by the public in general.

Private nuisance

In contrast, private nuisance is a civil wrong (a tort) invariably enforced by individuals bringing a private action in the civil courts. Unlike its public law

counterpart, private nuisance is not primarily concerned with promoting the wider interests of the community (cf. *Miller* v. *Jackson*, discussed below) but in balancing the rights of adjoining occupiers of land (although it might plausibly be argued that, in any society which recognises private rights in land, these two aims are not as dissimilar as they might at first appear). As Lord Wright noted in *Sedleigh-Denfield* v. *O'Callahan* [1940] AC 880 at 903: 'A balance has to be maintained between the right of the occupier to do what he likes with his own and the right of the neighbour not to be interfered with', for otherwise modern life would be impossible. If we simply banned all interference with neighbouring land, there would be little one could do with your own lest some extraneous noise or smell happened to waft from it. Similarly, to allow unlimited interference with neighbouring land would give you the right to make surrounding land effectively unusable because of the unlimited amount of disruption you would be at liberty to inflict. Balancing the rights of adjoining occupiers of land is capable of promoting the interests of the wider community by allowing all land within that society to be used effectively. It is then a matter of debate as to how this is to be achieved and as to which criteria are to be used in judging what is an effective use of the land, as we see below.

6.4.1.2. The requirements of private nuisance

Private nuisance has been described as 'unlawful interference with a person's use or enjoyment of land, or some right over or in connection with it' (Scott LJ in *Read* v. *Lyons & Co. Ltd* [1945] KB 216 at 236). The interference normally comprises a continuous or recurrent activity or condition which may take one of three forms (cf. Gearty, 'The Place of Private Nuisance in a Modern Law of Torts'). You may interfere with your neighbour's land by causing or permitting something to encroach onto his land from your own, such as overhanging branches, tree roots or children repeatedly trespassing. Direct physical injury to the neighbouring land may also amount to a nuisance where it is continuous or repeated, for example when building works on your land cause subsidence to neighbouring properties or where the windows and tiles of a house are repeatedly broken by cricket balls emanating from the village cricket green. Finally, nuisance will also arise as a result of interference with the use or enjoyment of land (often referred to as the amenity of land), for example when noise or smoke emanating from a factory continuously or repeatedly wafts over a neighbouring property. This final variety of nuisance has been described recently by Lord Goff in *Hunter* v. *Canary Wharf* [1997] AC 655 at 692, as the 'typical' form and will be the one on which we concentrate below.

The point to note at the outset is that, while interference with land might constitute a nuisance, it does not in fact follow from this that an actionable nuisance exists in law. As we stated in the previous section, private nuisance is concerned with balancing the rights of adjoining occupiers of land, and, in attempting to achieve such equilibrium, the common law's primary guide is a test of reasonableness. The question to be determined is whether or not the

interference in fact is one which it is unreasonable for either the perpetrator to create or the sufferer to bear. If it is unreasonable from *either* (or of course both) these perspectives, the interference will amount to an actionable nuisance and, conversely, only if the interference is reasonable when considered from *both* standpoints will no actionable nuisance arise, as demonstrated in *Christie* v. *Davey* (extracted at www.cambridge.org/propertylaw/).

6.4.1.3. Private nuisance and private property

The function of private nuisance is to prevent unreasonable interference with private property rights in land. This is unproblematic when the nuisance complained of involves the conceptually clear categories of encroachment on or damage to the land. However, the position is potentially more complicated in respect of interference with use or enjoyment of land. This is because there is a wider class of persons who might legitimately claim to use and enjoy land; and, secondly, because 'use and enjoyment' is necessarily more amorphous than the physical aspects of land which underpin any claim involving encroachment or damage. We will deal with each complication in turn.

Who can sue?

Prior to the decision of the House of Lords in *Hunter* v. *Canary Wharf* [1997] AC 655, there was a groundswell of academic opinion suggesting that the right to sue in private nuisance should be extended beyond those with a proprietary interest in the land. A number of commentators had suggested that gratuitous and contractual licensees such as family members and lodgers (who might legitimately claim to use or enjoy the land although they have no proprietary interest in it) should have *locus standi* to sue in respect of interference to the land they occupy. (See, for example, J. Fleming, *The Law of Torts* (6th edn, 1983), who condemns the 'senseless discrimination' whereby non-interest holders in land are prevented from suing; and *Winfield and Jolowicz on Tort* (14th edn, 1994), pp. 419–20, and Markesinis and Deakin, *Tort Law* (3rd edn, 1994), pp. 434–5, both of whom suggested the right to sue should be extended to long-term lodgers.)

Such proposals have a fine pedigree with Jeremy Bentham, among others, having made similar pleas in the nineteenth century. Notwithstanding the eminence of many of its proponents, the argument is, in all its forms, fundamentally misconceived from both a theoretical and a practical perspective. A property right is, at its most fundamental, a right against the world in respect of some resource (in this case, land) and the tort of nuisance is one of the means by which interest holders in land are able to protect their interest. By definition, someone without an interest in the land does not have rights against the world in respect of that land (but cf. *Manchester Airport plc* v. *Dutton* [2001] 1 QB 133 considered in Notes and Questions 17.3 below). Giving them the right to sue in nuisance would, in effect, grant them such an interest for they would now have rights against the world (i.e. their right to sue anyone who committed an actionable nuisance in respect of the

land) in respect of land in which they supposedly had no interest. This is plainly illogical. One either has an interest in the land or one does not. If you belong to the former category, the law provides a number of mechanisms by which you can protect your interest, while, if you are in the latter, you have, as far as the land is concerned, nothing to protect.

Those who have suggested otherwise have, in effect, been implicitly arguing that there are special classes of occupiers (such as spouses, children and long-term lodgers) who should be granted some form of property interest in the land they occupy. However, as the history of reform in this area will confirm (see section 9.2.2 below) the only sensible way of achieving such a goal is by specific legislative enactment creating new property interests in land focused on specific classes of occupier. To do otherwise risks creating an uncertain interest vested in an uncertain class of interest holders which, as we will see in Chapter 9, is the very antithesis of a property right.

Such criticisms are of more than purely theoretical significance. As we saw in Chapter 5, property rights are dangerous things because of their potential to bind the world. If I have a property right in a thing this has significance for everyone else. It is consequently crucial that the number of different interests in a thing be limited and that the existence of potential interest holders should be easily ascertainable. Widening the class of persons capable of suing in private nuisance would have had the effect of increasing the number of interest holders in land many of whom would have been difficult to locate in practice. The point is made graphically in the following extract from the judgment of Lord Goff in *Hunter* v. *Canary Wharf* [1997] AC 655, when, by a four-to-one majority, the House of Lords rejected the Court of Appeal's attempt to widen the class of persons capable of suing in private nuisance to include individuals who resided in a locality yet who had no proprietary interest in the land they occupied:

> For private nuisances of this kind, the primary remedy is in most cases an injunction, which is sought to bring the nuisance to an end, and in most cases should swiftly achieve that objective. The right to bring such proceedings is, as the law stands, ordinarily vested in the person who has exclusive possession of the land [i.e. some form of property interest in it]. He or she is the person who will sue, if it is necessary to do so. Moreover, he or she can, if thought appropriate, reach an agreement with the person creating the nuisance, either that it may continue for a certain period of time, possibly on the payment of a sum of money, or that it shall cease, again perhaps on certain terms ... If anybody who lived in the relevant property as a home had a right to sue, sensible arrangements such as these might in some cases no longer be practicable. Moreover, any such departure from the established law on this subject, such as that adopted by the Court of Appeal in the present case, faces the problem of defining the category of persons who would have the right to sue. The Court of Appeal adopted the not easily identifiable category of those who have a 'substantial link' with the land, regarding a person who occupied the premises 'as a home' as having a sufficient link for this purpose. But who is to be included in this category? It was plainly intended to

> include husbands and wives, or partners, and their children, and even other relatives living with them. But is the category also to include the lodger upstairs, or the *au pair* girl or the resident nurse caring for an invalid who makes her home in the house while she works there? If the latter, it seems strange that the category should not extend to include places where people work as well as places where they live, where nuisances such as noise can be just as unpleasant or distracting ... This is, in my opinion, not an acceptable way in which to develop the law.

Given the weight of academic opinion ranged against such an approach, the decision in *Hunter* v. *Canary Wharf* has not met with universal acclaim (see, for example, Extract 6.6 below, from a later edition of Markesinis and Deakin, *Tort Law*). The environmental lobby in particular has criticised the decision as a conservative and regressive one which, in the words of Whiteman, 'Nuisance – The Environmental Tort?', p. 885, fails to 'reflect ... the changing nature of interests in relation to land ... [and] still reflects a world of proprietors whose pursuit of self-interest is regulated by public bodies (e.g. planning authorities) acting in the public interest'. Such criticism is misplaced. The anomalies and uncertainty that would be caused by expanding private nuisance in this way make such a development untenable. If the concerns of the environmental lobby are accepted, the best way forward lies either in reform of the law of public nuisance or in specific legislative enactments rather than in providing an indeterminate group of non-interest holders with an indeterminate interest.

What is protected?

In addition to settling the question as to who was entitled to sue in private nuisance, the House of Lords, in *Hunter* v. *Canary Wharf*, also considered the nature of 'use and enjoyment'. The case concerned the building of the Canary Wharf Tower in London's Docklands the unintended effect of which was to interfere with the television reception of a large number of residential homes in the vicinity of the newly constructed building. The residents consequently sought an injunction claiming that this constituted an interference with the 'use and enjoyment' of their land. Although capable of changing over time and determined to an extent by location, 'use and enjoyment' is primarily a question of law established by precedent. As we will consider in greater detail in Chapter 9, there is no general right to a view under English law. This might seem somewhat surprising, given how often people are influenced in their choice of home by its prospect. However, land use would be severely curtailed if neighbours had the right to complain about loss of view in respect of a planned building (or for that matter an existing one as it is no defence to a claim in nuisance that the interference was there first) and emphasises the point made earlier that establishing an actionable nuisance is a question of law and not fact.

In *Hunter* v. *Canary Wharf*, the House of Lords drew on this line of authority and, in reaffirming that the right to use and enjoy land does not include the right to

an unobstructed view, applied it by analogy to interference to television reception. Put simply, the complainants had no property in the reflected light travelling towards their land (which is after all what is constituted by a view) and, by analogy, no property in similarly directed television signals. As a consequence, the court was not required to establish whether the interference was reasonable as it occurred in respect of something to which the residents had no right. However, towards the end of his judgment, Lord Cooke confused the issue by adding the following aside.

> In the light of the versatility of human malevolence and ingenuity, it is well to add [that] ... [t]he malicious erection of a structure for the purpose of interfering with television reception should be actionable in nuisance on the principle of such well known cases as *Christie* v. *Davey* and *Hollywood Silver Fox Farm* v. *Emmett*.

Christie v. *Davey* involved a dispute between two neighbours over noise in which both parties held an estate in the land with a corresponding right of use and enjoyment. The alleged nuisance thus occurred in respect of existing rights vested in both parties. The court's task was to establish whether or not the noise each neighbour generated was a reasonable or unreasonable interference with the use and enjoyment of the other's land and the motive of each side was consequently relevant. A similar point arose in *Hollywood Silver Fox Farm* v. *Emmet*, where there was a dispute between two landowners, one of whom bred silver foxes on his land. During the breeding season, the vixen is very sensitive to noise which can cause it to refuse to breed, miscarry or even eat its young. In the course of their dispute, the adjoining landowner caused a gun to be discharged on his farmland close to where the silver foxes were breeding for the sole purpose of causing such disruption. Again, both parties held estates in the land with a consequent right to use and enjoyment. As this was farmland, this would normally include the right to use the land for purposes associated with farming, including the breeding of animals and the use of shotguns. So, as in *Christie* v. *Davey*, the alleged nuisance occurred in respect of existing rights vested in the parties to the dispute and motive was again clearly relevant to the court's decision that the malicious discharge of the shotgun was an actionable nuisance.

While the neighbours in *Christie* v. *Davey*, *Hollywood Silver Fox Farm* v. *Emmett* and *Hunter* v. *Canary Wharf* all had the right to use and enjoy the land they possessed, use and enjoyment of land does not, in the opinion of the House of Lords at least, include the right to the unobstructed reception of television signals. Thus, *Hunter* v. *Canary Wharf* is substantively different from the two former cases, as the alleged nuisance was in respect of something to which the residents had no right and to which the motives of the person causing the interference would consequently be irrelevant. Contrary to the views of Lord Cooke, the case therefore has little in common with *Christie* v. *Davey* and *Hollywood Silver Fox Farm* v. *Emmett*, both of which involved interference with something in which the residents did have a right and to which the motives of the parties were clearly relevant in establishing whether or not the interference was reasonable.

As these were *obiter* comments, much removed from the facts of the case, it is perhaps not surprising that counsel in the case did not think it appropriate to cite the more apposite *Bradford Corp*. v. *Pickles* [1895] AC 587 either to their Lordships or in the lower courts. Such deficiencies are, of course, a product of the adversarial system where the judge is only expected to utilise the materials placed before him and where counsel are under pressure (both from their clients and, increasingly, from the courts) not to waste time (and therefore money) with arguments that do not directly address the issues in the case. *Obiter* comments consequently need to be viewed with caution as they may well have been made in ignorance of the relevant authorities. As you will see in Notes and Questions 6.8 below, *Bradford Corp*. v. *Pickles*, like *Hunter* v. *Canary Wharf*, involved a nuisance action in respect of something to which the claimant had no rights and, in consequence, the House of Lords unanimously rejected the claim.

6.4.1.4. The allocation of entitlements

The conventional definition of private nuisance regards the tort as a passive mechanism used to protect private property rights in land. Such an approach, while superficially accurate, ignores the creative role played by nuisance in mapping out the extent of any particular interest in land. In *Christie* v. *Davey*, for example, before an injunction could be issued, the court was required to determine the extent of each party's right to make noise in the privacy of their own home. Similarly, the decision of the House of Lords in *Hunter* v. *Canary Wharf* is based upon a particular conception of the right to use and enjoy residential land which did not extend to granting landowners an interest in television signals yet to be received. The role of nuisance is consequently extremely important in fashioning particular interests in land and in articulating the extent of the particular rights that arise in any given situation. So how does the law allocate such entitlements?

The traditional criteria

As *Christie* v. *Davey* illustrates, the traditional way in which the law deals with nuisances concerning the use and enjoyment of land takes into account various criteria. Factors such as the motives of the parties, the purpose of the activity, its utility, its necessity, the locality in which it takes place, the extent of the disturbance (both in duration and in intensity) and its timing would all be generally relevant but not individually crucial to assessing whether an actionable nuisance of this kind exists (the position is different in respect of the other forms of nuisance: see *St Helen's Smelting Co*. v. *Tipping* (1865) 11 HL Cas 642). The law's primary guide in all of this is a test of reasonableness in which the courts seek to balance the rights of competing landowners. This involves an examination of the (supposed) cause of the interference and its degree and extent, coupled with an assessment of the fairness of the proposed solutions. Over time, this approach has built into a doctrine of precedent which develops incrementally, often by analogy as we saw in *Hunter* v. *Canary Wharf*.

The role of the market

Yet, as Ronald Coase asked some forty years ago (and Posner considers in Extract 6.7 below), is the traditional approach really necessary? Consider two neighbouring landowners, a farmer who grows crops and a rancher who rears cattle on two unfenced plots of land. As cattle are no respecters of legal boundaries, let us assume that, in the course of a year, they trample down £1,500 worth of crops in their frequent forays onto the neighbouring land. Let us further assume that the cost to the farmer of fencing his plot would be £500, while the cost to the rancher of doing so to his larger acreage would be £1,000. On whom should the law place the burden? If one approaches the problem from the traditional lawyer's position, it would seem to be the rancher. His cattle are the cause of the nuisance, and it would seem just that he should bear the cost of alleviating the nuisance by either compensating his neighbour for the £1,500 worth of trampled crops or for building a £1,000 fence. Faced with such a choice, one would expect the rancher to build the fence as it is the cheaper option. But there is another possibility, for the problem of the wandering cattle can equally be solved (as far as these two neighbours are concerned) by the farmer fencing his land. Yet this will cost him £500, and as long as the rancher is liable for the damage caused by the cattle the farmer has no incentive to do so. In contrast, the rancher has every incentive to persuade the farmer because he can alleviate the problem more cheaply than the rancher. The rancher will consequently offer the farmer an amount between £500 and £1,000 (say £750) to build a fence which will both save him money (£250) and reward the farmer (£250) for his efforts. Thus, despite the law placing the burden on the rancher, it is the farmer who, in this example, builds the fence.

What would have happened if the law had placed the burden on the farmer (rather than on the rancher) at the outset by not making the rancher liable for the damage caused by his cattle? In this case, faced with £1,500 worth of potential damage, the farmer would have built the fence for £500, so saving himself £1,000. There would be no opportunity to persuade the rancher to build the fence because it is cheaper for the farmer to do so. Thus, as Coase demonstrated, the farmer builds the fence irrespective of where the law places the initial burden. In the first instance, this is because the rancher pays him to do so, and, in the second, because it is cheaper than bearing the cost of damage to his crops.

Despite its simplicity, the analysis has profound implications for the law, as it appears to suggest that the initial allocation of rights is an irrelevance because the party who values the right the most will, as efficiency dictates, get it in the end; either because he had it from the outset or because he bought it from the person who did. If this is indeed the case, it prompts the question why do we as lawyers go to such trouble balancing out the rights of competing users of land when, no matter what we decide, the market will sort it out in the end. However, as Coase would be the first to point out, the reality is somewhat more complex due (at least in part) to what he described as 'transaction costs'. This is a term which Coase uses

to describe all the possible impediments to bargaining (such as communication costs, absence of perfect knowledge, holdout, free-riders etc.) which combine to hinder the efficient allocation of the right (see further Chapter 2 above).

Transaction costs are an inevitable component of any bargaining process, and this has implications for how we initially allocate the right. In their absence, the market will, by definition (because we have defined transaction costs as all impediments to bargaining), assert itself and it would not matter in whom the right was initially vested. But in their presence the market is distorted, making the efficient allocation of the right more difficult and often impossible. From the standpoint of efficiency therefore, rather than toying with notions such as cause, degree and fairness, the court should allocate the right to the party who values it most, for in a perfect market (absent all transaction costs) he is the one who would eventually acquire it.

The role of public policy

The problem with the Coase analysis is that it only concerns itself with economic efficiency (by which the right is given to the person who values it most). However, as we noted in Chapter 2, and as Calabresi and Melamed argue in Extract 6.8 below, this is not the only criterion by which entitlements are set (would Coase agree?). There are also, what they term, *distributional preferences* and *other justice considerations* which need to be considered. By *distributional preferences*, they mean the decisions taken by a society in which resources are reallocated to achieve certain goals. These are infinite and varied but might, for example, include a progressive tax system to redistribute wealth, the provision of subsidised sporting facilities to promote a healthy lifestyle and planning controls to protect the environment. In each case, a perceived good is achieved by manipulating the rewards available. Under a progressive tax system, wealth is passed from richer to poorer, while subsidising sporting facilities transfers resources to those who engage in sport, and environmentally focused planning controls impose costs on those who engage in environmentally hazardous activities. Finally, by *other justice considerations*, Calabresi and Melamed are referring to criteria that have neither an economic or distributional rational but are based on notions of fairness and morality such as making those who cause the nuisance liable even where this achieves no distributional preference and is not economically efficient. To consider how these various criteria are reconciled requires an examination of the means by which entitlements are protected, and this is what we shall turn to next.

6.4.1.5. The protection of entitlements

Our discussion has thus far concentrated on the substantive rights which might be allocated without considering how those rights, once assigned, should be protected. Yet, while this is an essentially second-order question, it is extremely important as the range of mechanisms by which an entitlement might be protected provides the law with the flexibility to reconcile a number of (often contradictory)

aims. In their article, Calabresi and Melamed identified three basic means by which a right might be protected: property rules, liability rules and rules of inalienability.

Property rules

Under this analysis, an entitlement is protected by a *property rule* whenever A (the person with the right) has a free choice as to whether or not he will surrender his entitlement, as when I decide to sell you my car.

Liability rules

An entitlement is protected by a *liability rule* when A stands to lose it for an objectively determined amount, as when the court awards me damages for your negligence in damaging my car.

Rules of inalienability

Finally, an entitlement is protected by a *rule of inalienability* whenever A has a right which he cannot surrender, as when the law intervenes to strike down a purported sale of my car while I am incapacitated through drink or mental illness.

As Munzer has noted, while these rules are, in effect, an alternative to the Hohfeld–Honoré analysis considered in section 6.2 above, they can still be described by adopting Hohfeldian terminology:

> Statements in Calabresi and Melamed's terminology can be paraphrased in Hohfeld's language. If A's entitlement is protected by a property rule, then others have a disability (a no-power) in regard to obtaining the entitlement except at a price agreed to by A. If A's entitlement is protected by a liability rule, then others have a disability in regard to obtaining or reducing the value of the entitlement unless they discharge a duty to compensate A *ex post* by a collectively determined amount. If A's entitlement is protected by a rule of inalienability, A has a disability in regard to transferring the entitlement to others. (Munzer, 'Understanding Property', p. 27)

For philosophical discussion of the work of Calabresi and Melamed, see Coleman and Kraus, 'Rethinking the Theory of Legal Rights', pp. 1340–7.

The combination of rules

From the previous examples involving the car, it will be obvious that entitlements to most things are normally protected by a mixture of all three rules and this is equally true in the context of land use. Let us return to the example of the farmer and the rancher we discussed in section 6.4.1.4 above and the traditional lawyer's approach which fixed the rancher with liability for the damage done to the farmer's crops by the wandering cattle. The farmer's right not to have his crops trampled in the future is protected by a property rule. He can, if he wishes, give up the right, usually on payment of a suitable fee (as when the rancher paid him £750 to fence off his land). In the absence of such an agreement, the farmer can assert his right by suing the rancher and obtaining an injunction requiring the rancher to restrain his

cattle from trespassing onto the farmer's land and doing further damage. As for the already trampled crops, the farmer's entitlement is protected by a liability rule in which the court must objectively determine the price to be paid for damage already done to the crops by fixing the level of damages payable to the farmer.

The law of nuisance consequently protects entitlements by a combination of property rules and liability rules. It achieves the former in the guise of injunctions designed to prevent future infringements and the latter by means of awarding damages usually in respect of past transgressions. If we develop the example further, we can also appreciate how a rule of inalienability may be used to protect entitlements in the land use context. Let us assume that, in the wake of concerns involving genetically modified crops, the local planning authority imposes restrictions under which the farmer is prevented from growing such crops within one mile of any neighbouring land. In such a set of circumstances, the rancher would have an entitlement not to have genetically modified crops grown within one mile of his land which he could neither sell (at a subjectively determined price) nor lose (at an objectively determined level) and which would therefore be protected by a rule of inalienability.

The reason we employ these three means of protection is because the setting of entitlements represents a compromise and trade-off between economic efficiency, distributional preferences and other justice considerations. As you will recall, despite it being the less efficient solution, a property rule was adopted which gave the farmer an entitlement not to have crops trampled in the interests of justice because it seemed fair that the rancher should pay for damage caused by his cattle. However, in respect of past damage, a liability rule was adopted as the most efficient means of allowing the rancher to carry on his trade. Otherwise, it would be virtually impossible to engage in any form of human activity because, in a system in which everyone's entitlement not to suffer tortious damage was protected by a property rule, anyone engaged in a potentially tortious act would first have to negotiate to buy the entitlement from every potential victim. Finally, the distributional preference of protecting the environment is achieved by our fictional rule of inalienability which restrains the growing of genetically modified crops within one mile of neighbouring land and imposes the additional costs that arise from such a rule on the party engaged in what is deemed to be the environmentally hazardous activity.

A vivid example of how a variety of preferences might be achieved by using the various rules identified by Calabresi and Melamed is provided by *Miller* v. *Jackson* [1977] QB 966 (extracted at www.cambridge.org/propertylaw/). The case involved a dispute between the users of a village cricket green, and the Millers, who owned a neighbouring house and who, in response to the regular intrusion of cricket balls into their garden, issued a writ alleging nuisance. In the Court of Appeal, three judgments were delivered, each of which reveal very different approaches to the problem. Lane LJ, while regretting his decision, held that the regular intrusion of cricket balls did constitute a nuisance against which an injunction preventing future occurrence should be ordered. In contrast, Lord Denning, placing great emphasis on

the importance of cricket to the English way of life and the fact that the cricket green was established before the house was built, stated that no actionable nuisance arose. Finally, Cumming-Bruce LJ, in a pivotal judgment, agreed with Lane LJ that an actionable nuisance arose but held that, rather than an injunction, damages to the order of £400 for past and future nuisances should be payable. Faced with a majority who held that a nuisance had arisen, Lord Denning reluctantly (audaciously?) joined forces with Cumming-Bruce LJ in ordering an award of damages for past and future occurrences as the best means of allowing the cricket to continue.

It might, at this stage, be helpful to consider the three judgments in *Miller* v. *Jackson* by reference to the Calabresi and Melamed analysis. In holding that an injunction should be granted, Lane LJ was protecting the Miller's right not to be disturbed by cricket balls with a property rule. According to his judgment, they had an entitlement which it was up to them to enforce and which they were at liberty to surrender at a price determined only by them. In contrast, Lord Denning, in holding that no actionable nuisance arose, was seeking to protect the cricketers' entitlement to play cricket by means of a property rule which only they could surrender at a price determined by them. The judgment of Cumming-Bruce LJ, in accordance with that of Lane LJ, held that an actionable nuisance arose. However, in deciding that an injunction was not appropriate and that damages should be paid in respect of past and future nuisance, he sought to protect the Miller's entitlement by means of a liability rule in which the right was lost for an objectively determined sum. Finally, in his *obiter* comments expressing surprise that the planning authorities allowed the house to be built so close to the cricket ground, Lord Denning was suggesting that the cricketers' entitlement to play cricket should have been protected by a rule of inalienability. This would have given them the right not to have residential accommodation (which would interfere with their cricket) built within a certain distance of the cricket green which they had no power to surrender (as they play no direct role in the granting of planning permission which might still be refused if they stopped playing cricket). This analysis can be reduced to the tabular representation shown in Table 6.1.

You will notice that there are two empty categories in the table, labelled 'X' and 'Rule 4'. X is unproblematic and would have arisen if legislation had, for example, been passed banning the playing of cricket within a certain distance of land designated as suitable for residential accommodation. In such circumstances, the Millers' would have had an entitlement to be free from cricket balls which they would have had no power to surrender. In contrast, Rule 4, as it is labelled in the article by Calabresi and Melamed, is a remedy not provided for under English law which they submit has the potential to play a useful role in the allocation of entitlements (cf. the American case of *Spur Industries* v. *Webb*, 404 P 2d 700 (1972)).

Under Rule 4, the party causing the disturbance has an entitlement to do so protected by a liability rule whereby the right might be lost for an objectively determined amount. In their article, Calabresi and Melamed argue that, in certain circumstances, this might be the most appropriate remedy and that the law of

Table 6.1

	Millers' entitled to be free from cricket balls	Cricketers' entitled to play cricket
Property rule	Rule 1 Lane LJ's judgment	Rule 3 Lord Denning's judgment
Liability rule	Rule 2 Cuming-Bruce LJ's judgment	Rule 4
Rule of inalienability	X	Lord Denning's *obiter* comments in respect of planning permission

nuisance suffers because there is no cause of action by which this can be achieved. For example, let us assume that in distributing entitlements we are seeking to reconcile economic efficiency in the allocation of land with the distributional goal of promoting cricket within the community. Let us consider how successful each of the four nuisance rules identified by Calabresi and Melamed are in the peculiar circumstances of *Miller* v. *Jackson* on the assumption that:

1 land used for housing is more valuable than land used for cricket greens;
2 property developers are richer than village cricketers;
3 village cricketers would charge far more to give up a right to play cricket than they could afford to pay to acquire such an entitlement in the first place (see note 6 of Notes and Questions 6.5); and
4 residential accommodation and cricket on adjoining land is incompatible because of the level of disturbance caused by the cricket.

The results are set out in Table 6.2. It is perhaps helpful to offer a number of explanations and caveats at this point. You will have noticed that damages are payable under Rules 2 and 4; however, the difference is that, under Rule 2, damages are to be paid by the cricketers rather than the property developer and consequently no transfer of resources occurs, as in Rule 4, which might encourage the cricketers to relocate. Under Rule 3, where the entitlement to disturb is protected by a property rule, the property developers might pay a sufficiently high sum to persuade the cricketers to do this but, because of factors such as tradition and the assumption we made at point 3 above, the cricketers might set an unrealistically high price to surrender their entitlement or refuse to do so at any cost. Only under Rule 4 is there the potential to use the land efficiently by forcing the cricketers to accept a sum from the property developers adequate to allow them to relocate which consequently achieves the twin aims of promoting the efficient use of land while encouraging the playing of cricket.

Finally, it is important to note the limits of the above example. It is not, in any sense seeking to prove that Rule 4 is always the best solution, nor even that it usually

Table 6.2

	Economic efficiency (housing more valuable than cricket)	Distributional preference (promoting cricket)
Rule 1 Property rule used to protect right of residential occupiers not to be disturbed by cricket	Land can be used for residential purposes	Adjoining land cannot be used for cricket
Rule 2 Liability rule used to protect right of residential occupiers not to be disturbed by cricket such that damages payable are:		
a. low	a. Land cannot be used for residential purposes	a. Adjoining land can be used for cricket
b. high	b. Land can be used for residential purposes	b. Adjoining land cannot be used for cricket
Rule 3 Property rule used to protect right of cricketers to cause disturbance	Land cannot be used for residential purposes	Adjoining land can be used for cricket
Rule 4 Liability rule used to protect right of cricketers to cause disturbance	Provided damages are set at the appropriate level, land can be used for residential purposes	Cricketers paid a suitable amount to relocate and continue playing cricket somewhere else

is, but simply that there might be a set of circumstances where it offers the most appropriate means of allocating entitlements. In the absence of Rule 4 therefore, the law of nuisance arguably provides an incomplete means of allocating entitlements.

Notes and Questions 6.5

Consider the following notes and questions both before and after reading *Christie* v. *Davey* [1893] 1 Ch 316 at 326–9 and the materials highlighted below (either in full or as extracted at www.cambridge.org/propertylaw/).

1 Would an injunction have been issued against Davey if, rather than being motivated by malice, he was simply a performance artist rehearsing his act?

2 What would have been the court's attitude if Davey had been a somewhat more timorous person whose only malicious act consisted of him occasionally drumming his fingers on the wall?

3 Is it relevant that the case took place in the nineteenth century when, in the absence of radio and television, musical evenings at home were an established part of suburban life? Would a court today be more or less tolerant of the degree of noise created by the Christies?

4 Were both sides in the case entitled to play instruments continuously from 9.00 am to 11.00 pm every day?

5 How would the court have decided the case if the Christies had chosen to practise by repeatedly playing a score which they knew Davey disliked?

6 Can you think of an example of a nuisance which it would not be unreasonable for the victim to bear made actionable by the unreasonableness of the perpetrator? (See *Hollywood Silver Fox Farm* v. *Emmett* [1936] 2 KB 468.)

7 What issues did the court consider in assessing whether either party had acted unreasonably? Was any single issue critical?

Extract 6.6 Markesinis and Deakin, *Tort Law* (5th edn, Oxford: Clarendon Press, 2003), pp. 472–3

By reconfirming the validity of the ... restrictive interpretation of the list of possible claimants, the majority decision of the House of Lords in *Hunter* v. *Canary Wharf Ltd* has gone against a number of Commonwealth judgments as well as a bold attempt by a majority of our own Court of Appeal to liberate our law from its past. None the less, the majority decisions embody a rigorous analysis of the existing case law (as well as the history of the tort) and in this sense provide interesting (for students if not for practitioner) insights into how differing judicial philosophies and techniques can affect a dispute.

The examination – necessarily brief – of this aspect of this case must start by quoting an interesting observation by Lord Cooke. The learned Lord thus stressed, it is submitted correctly, that:

> [I]n logic more than one answer can be given [to this problem]. Logically, it is possible to say that the right to sue for interference with the amenities of a home should be confined to those with proprietary interests ... No less logically the right can be accorded to all who live in the home. *Which test should be adopted ... is a question of the policy of the law. It is a question not capable of being answered by analysis alone. All that analysis can do is to explore the alternatives* ... The reasons why I prefer the alternative [to the position adopted by the majority] ... is that it

> gives better effect to widespread conceptions concerning the house and family. ([1997] 2 WLR 684 at 719 (emphasis added))

Lord Cooke would thus have been willing to respond to the appeal of textbook writers to attempt 'a degree of modernisation' in the law 'while freeing it from undue reliance upon the technicalities of land law'. One suspects that such an approach to case law development would have appealed to judges such as Lord Denning or pioneering jurists such as Professor John Fleming of the Berkeley Law School. But it was doomed to failure in the current climate that prevails in our highest court where, for instance, Lord Hoffmann boldly stated that 'the development of the common law should be rational and coherent. It should not distort its principles and create anomalies merely as an expedient to fill a gap.' Once this is accepted as the cornerstone of the philosophy of the majority, the resolution of the dispute acquires a certain legalistic tone. Thus the question implicitly becomes what technical arguments can be found in favour of the *status quo*. Between them, the majority had little difficulty finding three; and one cannot deny their force (once one accepts the basic premise that one is not free to break free from the existing technicalities of land law). Thus, Lord Goff argued that the current state of the law could claim 'certainty' and 'efficiency' on its side. To these two points one must add Lord Hoffmann's analysis of Lord Westbury's views ... [f]or once one accepts the view that in his *St Helen's* judgment Lord Westbury did not intend to create two separate torts (one dealing with material interference and one with interference with enjoyment), it follows logically and inexorably that only those with an interest in land can sue. The decision in *Hunter* thus does more than tackle, for the time being at least, a particular problem area of the law in nuisance: it gives us some revealing insights into the views our judges have about the interplay of interpretation and development of the law.

Notes and Questions 6.6

1 Is it correct to describe arguments based on 'efficiency' or 'certainty' as technical?

2 Reread the quote from Lord Goff (section 6.4.1.3 above). Does it have 'a certain legalistic tone' or is it based on a practical assessment of the issues?

3 Should the 'development of the common law ... be rational and coherent' or is it right to 'create anomalies ... to fill a gap'?

4 Was the decision of the majority based upon 'the existing technicalities of land law' or an appreciation of the practical difficulties that would otherwise ensue?

5 Would the approach of Lord Cooke have turned nuisance into a tort against persons rather than land? Would such a reclassification confront the problems identified by Lord Goff?

6 Does the reaction to the decision also 'give us some revealing insights into the views' of academics about the importance of both principle and practicalities?

Notes and Questions 6.7

Consider the following notes and questions both before and after reading *Hunter* v. *Canary Wharf* [1997] AC 655 (either in full or as extracted at www.cambridge.org/propertylaw/).

1 What difference, if any, would it have made if the interference to television reception was made by something emanating from Canary Wharf?

2 Why might the residents have had rights in respect of television signals which had reached their land if they did not have rights in respect of signals on the way to their land?

3 Should the courts have paid any regard to the motive for building Canary Wharf?

4 Do you agree with Lord Lloyd's view that *Bank of New Zealand* v. *Greenwood* [1984] 1 NZLR 525 is 'not ... easy to reconcile with' the requirement that there can be 'no legal redress in nuisance' where 'there is nothing emanating from the defendant's land'?

5 In the context of a modern city, what interests should the law of nuisance seek to reconcile?

6 Are the interests of the community of any relevance in determining whether an actionable nuisance has arisen?

Notes and Questions 6.8

Consider the following notes and questions both before and after reading *Bradford Corp*. v. *Pickles* [1895] AC 587 (either in full or as extracted at www.cambridge.org/propertylaw/).

1 Why do you think water running in defined channels was treated differently from percolating water?

2 Why did the status of percolating water change once it was appropriated?

3 Would Bradford Corporation have succeeded if Pickles' extraction of the percolating water had caused physical damage to their land such as subsidence? (See *Stephens* v. *Anglian Water Authority* [1987] 1 WLR 1381.)

4 Why, do you think, are all water supplies, whether percolating or channelled, now generally subject to a statutory-based licensing system (see question 1 in Notes and Questions 3.1 above)?

5 Can you think of any other forms of unowned property which might enter onto your land (see section 2.2.2.1 above)? What rules should or do apply to it before and after appropriation (see the discussion of wild animals in section 4.4 above)?

6 Does your neighbour have any claim against you if you appropriate such property when it is on (i) your land (ii) his land (iii) someone else's land and (iv) common land?

7 How might Locke have justified the decision in the case, and would such an analysis confirm the answers you reached in the above question?

Extract 6.7 Richard A. Posner, *Economic Analysis of Law* (6th edn, New York, Aspen Publishers, 2002), pp. 42–8

[P]roperty rights aren't really exclusive, in the sense of giving the owner of a resource the absolute right to do with it what he will and exclude the whole world from any participation or say in the use of the resource. Absolute rights would conflict. If a railroad is to enjoy the exclusive use of its right of way, it must be permitted to emit engine sparks without legal limitation. The value of its property will be impaired otherwise. But if it is permitted to do that, the value of adjacent farmland will be reduced because of the fire hazard from the sparks. Is the emission of sparks an incident of the railroad's property right (i.e. part of his bundle of rights) or an invasion of the farmer's property right (or bundle)?

Before answering this question, we must ask whether anything turns on the answer, which in turn will require us to consider ... the Coase Theorem ... Suppose that the right to emit sparks, by enabling the railroad to dispense with costly spark-arresting equipment, would increase the value of the railroad's right of way by $100 but reduce the value of the farm by $50, by preventing the farmer from growing crops close to the tracks. If the farmer has a legal right to be free from engine sparks, the railroad will offer to pay, and the farmer will accept, compensation for the surrender of his right; since the right to prevent spark emissions is worth only $50 to the farmer but imposes costs of $100 on the railroad, a sale of the farmer's right at any price between $50 and $100 will make both parties better off. If instead of the farmer's having a right to be free from sparks the railroad has a right to emit sparks, no transaction will occur. The farmer will not pay more than $50 for the railroad's right and the railroad will not accept less than $100. Thus, whichever way the legal right is assigned initially, the result is the same: the railroad emits sparks and the farmer moves his crops.

The principle is not affected by reversing the numbers. Assume that the right to emit sparks would increase the value of the railroad's property by only $50 but would reduce the value of the farmer's property by $100. If the railroad has a right to emit sparks, the farmer will offer to pay and the railroad will accept some price between $50 and $100 for the surrender of the railroad's right. If instead the farmer has a right to be free from emissions, there will be no transaction, since the farmer will insist on a minimum payment of $100 while the railroad will pay no more than $50. So, as Coase showed, whatever the relative values of the competing uses, the initial assignment of legal rights will not determine which use ultimately prevails ...

... It does not follow, however, that the initial assignment of rights is completely immaterial from an efficiency standpoint. Since transactions are not costless, efficiency

is promoted by assigning the legal right to the party who would buy it – the railroad in our first hypothetical situation and the farmer in the second – if it were assigned initially to the other party. Moreover, as we shall see, the cost of transacting is sometimes so high relative to the value of the transaction as to make transacting uneconomical. In such a case, the initial assignment of rights is final.

Unfortunately, assigning the property right to the party to whom it is more valuable is incomplete as an economic solution. It ignores the costs of administering the property rights system, which might be lower under a simpler criterion for assigning rights; and it is difficult to apply in practice. The engine spark example was grossly oversimplified in that it permitted only two property right assignments, a right to emit sparks and a right to be free from sparks. If administrative (mainly information) costs are disregarded, the combined value of the farmer's and the railroad's property might be maximized by a more complex definition of property rights, such as one that permitted the farmer to grow one kind of crop but not another, to plant nothing within 200 feet of the tracks, and to have no wooden buildings within 250 feet of the tracks, while permitting the railroad to emit sparks only up to a specified level. The possible combinations are endless, and it is unrealistic to expect courts to discover the optimum one – and uneconomical to make them search too hard for it! But in most cases, and without excessive cost, they may be able to approximate the optimum definition of property rights, and these approximations may guide resource use more efficiently than would an economically random assignment of property rights.

Some examples may help to clarify this fundamental point. Under English common law, a landowner who built in such a way as to so block his neighbor's window that the neighbor would need artificial light to be able to read in the half of the room nearest the window was considered to have infringed the neighbor's property rights, provided that the neighbor had had unobstructed access to light for 20 years (why this qualification?). Consider the consequences if the property right had instead been given to the building party. Ordinarily, the cost to the person whose windows were blocked would exceed the cost to the other person of setting back his wall slightly (all that would be necessary, given how limited the right was), so the former would buy the right. The assignment of the right to him in the first instance avoids the transaction and its attendant costs. But the courts did not extend the rule to protect distant views. If A had a house on a hill with a beautiful prospect, and B built a house that ruined the prospect, A could not claim an invasion of his property rights even if the value of his property had fallen. Here the presumption of relative values is reversed. A house with a view commands a large land area. The values that would be created by developing such an area are likely to exceed the loss of value to the one landowner whose view is impaired . . .

. . . The economic theory of property rights implies that rights will be redefined from time to time as the relative values of different uses of land change. The fencing of cattle again provides an illustration. Suppose cattle wander off the land where they are grazing and onto a neighbor's land, where they damage his crops. Should the cost be borne by the neighbor on the theory that he should have fenced the cattle out, or by the owner of the cattle on the theory that he should have fenced them in? The answer would seem to depend (and a comparison of rules over time and between different

common law jurisdictions suggests it does depend) on the ratio of cattle to crops. If there are more cattle than crops (more precisely, if more land is devoted to grazing than to crop growing), it will be cheaper for the farmers to fence their land than for the ranchers to fence theirs, and the law will place the burden of fencing on the farmers; but the burden will be reversed when the ratio of land uses reverses.

Are you concerned that continually redefining property rights to secure efficiency under changing conditions might create instability and discourage investment? X buys a farm long before there is a railroad in his area. The price he pays is not discounted to reflect future crop damage from sparks, because the construction of a railroad line is not foreseen. But eventually a line is built and is near enough to X's farm to inflict spark damage on his crops. He sues the railroad but the court holds that the level of spark emission is reasonable because it would be more costly for the railroad than for the farmer to prevent the crop loss. With property values thus exposed to uncompensated depreciation by unforeseen changes in neighboring land uses, the incentive to invest in farming will be reduced. But ... a reduced level of investment in farming may be an efficient adjustment to the possibility that some day the highest value of the farmer's land may be as a dumping ground for railroad sparks.

A more serious problem when property rights are subject to being redefined as values change is that, for people who are averse to risk, uncertainty is a source of disutility. Whether any of the methods of eliminating the risks created by uncertainty would be feasible in the situation under discussion may be doubted. However, the amount and consequences of the uncertainty are easily exaggerated. If a harmful neighboring land use is foreseen at the time of sale, the price of land will be reduced, accordingly, and the buyer will have no disappointed expectations. If the use is unforeseen chances are that it lies well in the future, and a cost to be incurred in the far future will (unless astronomical) have little impact on present decisions ... The alternative – always to assign the property right to the prior of two conflicting land uses – would be highly inefficient, for the latter use will often be the more valuable.

Notes and Questions 6.9

1 From the standpoint of efficiency who should bear the cost of damage to the crops: the farmer or the rancher?

2 Why might it be argued that the answer to question 1 is counter-intuitive? What does that tell you about your intuition?

3 Should the court only concern itself with the efficient allocation of the right?

4 Why, in reality, is it impossible to expect the court to be able to determine the most efficient solution?

5 What effect, if any, will the initial allocation of the right have on the relative wealth of the farmer and the rancher? What are the efficiency implications of your answer?

6 Studies have shown that people often demand more to give up a right than they would be willing to pay to acquire the same right. What implications does this have for the Coase analysis?

7 Do social norms and customs have any bearing on (i) transaction costs and (ii) the Coase analysis?

Extract 6.8 Guido Calabresi and A. Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089

The first issue which must be faced by any legal system is one we call the problem of 'entitlement'. Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of 'might makes right' – whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail. The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air, the entitlement to have children versus the entitlement to forbid them – these are the first order of legal decisions.

Having made its initial choice, society must enforce that choice. Simply setting the entitlement does not avoid the problem of 'might makes right'; a minimum of state intervention is always necessary. Our conventional notions make this easy to comprehend with respect to private property. If Taney owns a cabbage patch and Marshall, who is bigger, wants a cabbage, he will get it unless the state intervenes. But it is not so obvious that the state must also intervene if it chooses the opposite entitlement, communal property. If large Marshall has grown some communal cabbages and chooses to deny them to small Taney, it will take state action to enforce Taney's entitlement to the communal cabbages. The same symmetry applies with respect to bodily integrity. Consider the plight of the unwilling ninety-eight-pound weakling in a state which nominally entitles him to bodily integrity but will not intervene to enforce the entitlement against a lustful Juno. Consider then the plight – absent state intervention – of the ninety-eight-pounder who desires an unwilling Juno in a state which nominally entitles everyone to use everyone else's body. The need for intervention applies in a slightly more complicated way to injuries. When a loss is left where it falls in an auto accident, it is not because God so ordained it. Rather it is because the state has granted the injurer an entitlement to be free of liability and will intervene to prevent the victim's friends, if they are stronger, from taking compensation from the injurer. The loss is shifted in other cases because the state has granted an entitlement to compensation and will intervene to prevent the stronger injurer from rebuffing the victim's requests for compensation.

The state not only has to decide whom to entitle, but it must also simultaneously make a series of equally difficult second order decisions. These decisions go to the manner in which entitlements are protected and to whether an individual is allowed to

sell or trade the entitlement. In any given dispute, for example, the state must decide not only which side wins but also the kind of protection to grant. It is with the latter decisions, decisions which shape the subsequent relationship between the winner and the loser, that this article is primarily concerned. We shall consider three types of entitlements – entitlements protected by property rules, entitlements protected by liability rules, and inalienable entitlements. The categories are not, of course, absolutely distinct; but the categorization is useful since it reveals some of the reasons which lead us to protect certain entitlements in certain ways.

An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller. It is the form of entitlement which gives rise to the least amount of state intervention: once the original entitlement is decided upon, the state does not try to decide its value. It lets each of the parties say how much the entitlement is worth to him, and gives the seller a veto if the buyer does not offer enough. Property rules involve a collective decision as to who is to be given an initial entitlement but not as to the value of the entitlement.

Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder's complaint that he would have demanded more will not avail him once the objectively determined value is set. Obviously, liability rules involve an additional stage of state intervention: not only are entitlements protected, but their transfer or destruction is allowed on the basis of a value determined by some organ of the state rather than by the parties themselves.

An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller. The state intervenes not only to determine who is initially entitled and to determine the compensation that must be paid if the entitlement is taken or destroyed, but also to forbid its sale under some or all circumstances. Inalienability rules are thus quite different from property and liability rules. Unlike those rules, rules of inalienability not only 'protect' the entitlement; they may also be viewed as limited or regulating the grant of the entitlement itself.

It should be clear that most entitlements to most goods are mixed. Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by [compulsory purchase], and by a rule of inalienability in situations where Taney is drunk or incompetent. This article will explore two primary questions: (1) In what circumstances should we grant a particular entitlement? and (2) In what circumstances should we decide to protect that entitlement by using a property, liability, or inalienability rule?

I. THE SETTING OF ENTITLEMENTS

What are the reasons for deciding to entitle people to pollute or to entitle people to forbid pollution, to have children freely or to limit procreation, to own property or to share property? They can be grouped under three headings: economic efficiency, distributional preferences, and other justice considerations ...

II. RULES FOR PROTECTING AND REGULATING ENTITLEMENTS

Whenever society chooses an initial entitlement it must also determine whether to protect the entitlement by property rules, by liability rules, or by rules of inalienability. In our framework, much of what is generally called private property can be viewed as an entitlement which is protected by a property rule. No one can take the entitlement to private property from the holder unless the holder sells it willingly and at the price at which he subjectively values the property. Yet a nuisance with sufficient public utility to avoid injunction has, in effect, the right to take property with compensation. In such a circumstance the entitlement to the property is protected only by what we call a liability rule: an external, objective standard of value is used to facilitate the transfer of the entitlement from the holder to the nuisance. Finally, in some instances we will not allow the sale of the property at all, that is, we will occasionally make the entitlement inalienable.

This section will consider the circumstances in which society will employ these three rules to solve situations of conflict. Because the property rule and the liability rule are closely related and depend for their application on the shortcomings of each other, we treat them together. We discuss inalienability separately.

A. Property and liability rules

Why cannot a society simply decide on the basis of the already mentioned criteria who should receive any given entitlement, and then let its transfer occur only through a voluntary negotiation? Why, in other words, cannot society limit itself to the property rule? To do this it would need only to protect and enforce the initial entitlements from all attacks, perhaps through criminal sanctions, and to enforce voluntary contracts for their transfer. Why do we need liability rules at all?

In terms of economic efficiency the reason is easy enough to see. Often the cost of establishing the value of an initial entitlement by negotiation is so great that, even though a transfer of the entitlement would benefit all concerned, such a transfer will not occur. If a collective determination of the value were available instead, the beneficial transfer would quickly come about.

[Compulsory purchase] is a good example. A park where Guidacres, a tract of land owned by 1,000 owners in 1,000 parcels, now sits would, let us assume, benefit a neighboring town enough so that the 100,000 citizens of the town would each be willing to pay an average of $100 to have it. The park is Pareto-desirable if the owners of the tracts of land in Guidacres actually value their entitlements at less than $10,000,000 or an average of $10,000 a tract. Let us assume that in fact the parcels are all the same and all the owners value them at $8,000. On this assumption, the park is, in economic efficiency terms, desirable – in values foregone it costs $8,000,000 and is worth $10,000,000 to the buyers. And yet it may well not be established. If enough of the owners hold out for more than $10,000 in order to get a share of the $2,000,000 that they guess the buyers are willing to pay over the value which the sellers in actuality attach, the price demanded will be more than $10,000,000 and no park will result. The sellers have an incentive to hide their true valuation and the market will not succeed in establishing it.

An equally valid example could be made on the buying side. Suppose the sellers of Guidacres have agreed to a sales price of $8,000,000 (they are all relatives and at a family banquet decided that trying to hold out would leave them all losers). It does not follow that the buyers can raise that much even though each of 100,000 citizens *in fact* values the park at $100. Some citizens may try to free-load and say the park is only worth $50 or even nothing to them, hoping that enough others will admit to a higher desire and make up the $8,000,000 price. Again, there is no reason to believe that a market, a decentralized system of valuing, will cause people to express their true valuations and hence yield results which all would *in fact* agree are desirable.

Whenever this is the case an argument can readily be made for moving from a property rule to a liability rule. If society can remove from the market the valuation of each tract of land, decide the value collectively, and impose it, then the holdout problem is gone. Similarly, if society can value collectively each individual citizen's desire to have a park and charge him a 'benefits' tax based upon it, the free-loader problem is gone. If the sum of the taxes is greater than the sum of the compensation awards, the park will result.

Of course, one can conceive of situations where it might be cheap to exclude all the free-loaders from the park, or to ration the park's use in accordance with original willingness to pay. In such cases, the incentive to free-load might be eliminated. But such exclusions, even if possible, are usually not cheap. And the same may be the case for the market methods which might avoid the holdout problem on the seller side.

Moreover, even if holdout and free-loader problems can be met feasibly by the market, an argument may remain for employing a liability rule. Assume that, in our hypothetical, free-loaders can be excluded at the cost of $1,000,000 and that all owners of tracts in Guidacres can be convinced, by the use of $500,000 worth of advertising and cocktail parties, that a sale will only occur if they reveal their true land valuations. Since $8,000,000 plus $1,500,000 is less than $10,000,000, the park will be established. But if collective valuation of the tracts and of the benefits of the prospective park would have cost less than $1,500,000, it would have been inefficient to establish the park through the market – a market which was not worth having would have been paid for.

Of course, the problems with liability rules are equally real. We cannot be at all sure that landowner Taney is lying or holding out when he says his land is worth $12,000 to him. The fact that several neighbors sold identical tracts for $10,000 does not help us very much; Taney may be sentimentally attached to his land. As a result, [compulsory purchase] may grossly undervalue what Taney would actually sell for, even if it sought to give him his true valuation of his tract. In practice, it is so hard to determine Taney's true valuation that [compulsory purchase] simply gives him what the land is worth 'objectively', in the full knowledge that this may result in over or under compensation. The same is true on the buyer side. 'Benefits' taxes rarely attempt, let alone succeed, in gauging the individual citizen's relative desire for the alleged benefit. They are justified because, even if they do not accurately measure each individual's desire for the benefit, the market alternative seems worse. For example, fifty different households may place different values on a new sidewalk that is to abut all the properties. Nevertheless,

because it is too difficult, even if possible, to gauge each household's valuation, we usually tax each household an equal amount.

The example of [compulsory purchase] is simply one of numerous instances in which society uses liability rules. Accidents is another. If we were to give victims a property entitlement not to be accidentally injured we would have to require all who engage in activities that may injure individuals to negotiate with them before an accident, and to buy the right to knock off an arm or a leg. Such pre-accident negotiations would be extremely expensive, often prohibitively so. To require them would thus preclude many activities that might, in fact, be worth having. And, after an accident, the loser of the arm or leg can always very plausibly deny that he would have sold it at the price the buyer would have offered. Indeed, where negotiations after an accident do occur – for instance pretrial settlements – it is largely because the alternative is the collective valuation of the damages.

It is not our object here to outline all the theoretical, let alone the practical, situations where markets may be too expensive or fail and where collective valuations seem more desirable. Economic literature has many times surrounded the issue if it has not always zeroed in on it in ways intelligible to lawyers. It is enough for our purposes to note that a very common reason, perhaps the most common one, for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation.

We should also recognize that efficiency is not the sole ground for employing liability rules rather than property rules. Just as the initial entitlement is often decided upon for distributional reasons, so too the choice of a liability rule is often made because it facilitates a combination of efficiency and distributive results which would be difficult to achieve under a property rule. As we shall see in the pollution context, use of a liability rule may allow us to accomplish a measure of redistribution that could only be attained at a prohibitive sacrifice of efficiency if we employed a corresponding property rule.

More often, once a liability rule is decided upon, perhaps for efficiency reasons, it is then employed to favor distributive goals as well. Again, accidents and [compulsory purchase] are good examples. In both of these areas the compensation given has clearly varied with society's distributive goals, and cannot be readily explained in terms of giving the victim, as nearly as possible, an objectively determined equivalent of the price at which he would have sold what was taken from him.

It should not be surprising that this is often so, even if the original reason for a liability rule is an efficiency one. For distributional goals are expensive and difficult to achieve, and the collective valuation involved in liability rules readily lends itself to promoting distributional goals. This does not mean that distributional goals are always well served in this way. *Ad hoc* decision-making is always troublesome, and the difficulties are especially acute when the settlement of conflicts between parties is used as a vehicle for the solution of more widespread distributional problems. Nevertheless, distributional objectives may be better attained in this way than otherwise.

B. Inalienable entitlements

Thus far, we have focused on the questions of when society should protect an entitlement by property or liability rules. However, there remain many entitlements which involve a still greater degree of societal intervention: the law not only decides who is to own something and what price is to be paid for it if it is taken or destroyed, but also regulates its sale – by, for example, prescribing pre-conditions for a valid sale or forbidding a sale altogether. Although these rules of inalienability are substantially different from the property and liability rules, their use can be analyzed in terms of the same efficiency and distributional goals that underlie the use of the other two rules.

While at first glance efficiency objectives may seem undermined by limitations on the ability to engage in transactions, closer analysis suggests that there are instances, perhaps many, in which economic efficiency is more closely approximated by such limitations. This might occur when a transaction would create significant externalities – costs to third parties.

For instance, if Taney were allowed to sell his land to Chase, a polluter, he would injure his neighbor Marshall by lowering the value of Marshall's land. Conceivably, Marshall could pay Taney not to sell his land; but, because there are many injured Marshalls, free-loader and information costs make such transactions practically impossible. The state could protect the Marshalls and yet facilitate the sale of the land by giving the Marshalls an entitlement to prevent Taney's sale to Chase but only protecting the entitlement by a liability rule. It might, for instance, charge an excise tax on all sales of land to polluters equal to its estimate of the external cost to the Marshalls of the sale. But where there are so many injured Marshalls that the price required under the liability rule is likely to be high enough so that no one would be willing to pay it, then setting up the machinery for collective valuation will be wasteful. Barring the sale to polluters will be the most efficient result because it is clear that avoiding pollution is cheaper than paying its costs – including its costs to the Marshalls.

Another instance in which external costs may justify inalienability occurs when external costs do not lend themselves to collective measurement which is acceptably objective and nonarbitrary. This nonmonetizability is characteristic of one category of external costs which, as a practical matter, seems frequently to lead us to rules of inalienability. Such external costs are often called moralisms.

If Taney is allowed to sell himself into slavery, or to take undue risks of becoming penniless, or to sell a kidney, Marshall may be harmed, simply because Marshall is a sensitive man who is made unhappy by seeing slaves, paupers, or persons who die because they have sold a kidney. Again, Marshall could pay Taney not to sell his freedom to Chase the slaveowner; but again, because Marshall is not one but many individuals, free-loader and information costs make such transactions practically impossible. Again, it might seem that the state could intervene by objectively valuing the external cost to Marshall and requiring Chase to pay that cost. But since the external cost to Marshall does not lend itself to an acceptable objective measurement, such liability rules are not appropriate.

In the case of Taney selling land to Chase, the polluter, they were inappropriate because we *knew* that the costs to Taney and the Marshalls exceeded the benefits to

Chase. Here, though we are not certain of how a cost–benefit analysis would come out, liability rules are inappropriate because any monetization is, by hypothesis, out of the question. The state must, therefore, either ignore the external costs to Marshall, or if it judges them great enough, forbid the transaction that gave rise to them by making Taney's freedom inalienable.

Obviously, we will not always value the external harm of a moralism enough to prohibit the sale. And obviously also, external costs other than moralisms may be sufficiently hard to value to make rules of inalienability appropriate in certain circumstances; this reason for rules of inalienability, however, does seem most often germane in situations where moralisms are involved ...

... Finally, just as efficiency goals sometimes dictate the use of rules of inalienability, so, of course, do distributional goals. Whether an entitlement may be sold or not often affects directly who is richer and who is poorer. Prohibiting the sale of babies makes poorer those who can cheaply produce babies and richer those who through some nonmarket device get free an 'unwanted' baby. Prohibiting exculpatory clauses in product sales makes richer those who were injured by a product defect and poorer those who were not injured and who paid more for the product because the exculpatory clause was forbidden. Favoring the specific group that has benefited may or may not have been the reason for the prohibition on bargaining. What is important is that, regardless of the reason for barring a contract, a group did gain from the prohibition.

This should suffice to put us on guard, for it suggests that direct distributional motives may lie behind asserted nondistributional grounds for inalienability, whether they be paternalism, self-paternalism, or externalities. This does not mean that giving weight to distributional goals is undesirable. It clearly is desirable where on efficiency grounds society is indifferent between an alienable and an inalienable entitlement and distributional goals favor one approach or the other. It may well be desirable even when distributional goals are achieved at some efficiency costs. The danger may be, however, that what is justified on, for example, paternalism grounds is really a hidden way of accruing distributional benefits for a group whom we would not otherwise wish to benefit. For example, we may use certain types of zoning to preserve open spaces on the grounds that the poor will be happier, though they do not know it now. And open spaces may indeed make the poor happier in the long run. But the zoning that preserves open space also makes housing in the suburbs more expensive and it may be that the whole plan is aimed at securing distributional benefits to the suburban dweller regardless of the poor's happiness.

III. THE FRAMEWORK AND POLLUTION CONTROL RULES

Nuisance or pollution is one of the most interesting areas where the question of who will be given an entitlement, and how it will be protected, is in frequent issue. Traditionally, and very ably in the recent article by Professor Michelman, the nuisance-pollution problem is viewed in terms of three rules. First, Taney may not pollute unless his neighbor (his only neighbor let us assume), Marshall, allows it (Marshall may enjoin Taney's nuisance). Second, Taney may pollute but must compensate Marshall for damages caused (nuisance is found but the remedy is limited to damages). Third,

Taney may pollute at will and can only be stopped by Marshall if Marshall pays him off (Taney's pollution is not held to be a nuisance to Marshall). In our terminology rules one and two (nuisance with injunction, and with damages only) are entitlements to Marshall. The first is an entitlement to be free from pollution and is protected by a property rule; the second is also an entitlement to be free from pollution but is protected only by a liability rule. Rule three (no nuisance) is instead an entitlement to Taney protected by a property rule, for only by buying Taney out at Taney's price can Marshall end the pollution.

The very statement of these rules in the context of our framework suggests that something is missing. Missing is a fourth rule representing an entitlement in Taney to pollute, but an entitlement which is protected only by a liability rule. The fourth rule, really a kind of partial [compulsory purchase] coupled with a benefits tax, can be stated as follows: Marshal may stop Taney from polluting, but if he does he must compensate Taney.

As a practical matter it will be easy to see why even legal writers as astute as Professor Michelman have ignored this rule. Unlike the first three it does not often lend itself to judicial imposition for a number of good legal process reasons. For example, even if Taney's injuries could practicably be measured, apportionment of the duty of compensation among many Marshalls would present problems for which courts are not well suited. If only those Marshalls who voluntarily asserted the right to enjoin Taney's pollution were required to pay the compensation, there would be insuperable free-loader problems. If, on the other hand, the liability rule entitled one of the Marshalls alone to enjoin the pollution and required all the benefited Marshalls to pay their share of the compensation, the courts would be faced with the immensely difficult task of determining who was benefited how much and imposing a benefits tax accordingly, all the while observing procedural limits within which courts are expected to function.

The fourth rule is thus not part of the cases legal scholars read when they study nuisance law, and is therefore easily ignored by them. But it is available, and may sometimes make more sense than any of the three competing approaches. Indeed, in one form or another, it may well be the most frequent device employed. To appreciate the utility of the fourth rule and to compare it with the other three rules, we will examine why we might choose any of the given rules.

We would employ rule one (entitlement to be free from pollution protected by a property rule) from an economic efficiency point of view if we believed that the polluter, Taney, could avoid or reduce the costs of pollution more cheaply than the pollutee, Marshall. Or to put it another way, Taney would be enjoinable if he were in a better position to balance the costs of polluting against the costs of not polluting. We would employ rule three (entitlement to pollute protected by a property rule) again solely from an economic efficiency standpoint, if we made the converse judgment on who could best balance the harm of pollution against its avoidance costs. If we were wrong in our judgments and if transactions between Marshall and Taney were costless or even very cheap, the entitlement under rules one or three would be traded and an economically efficient result would occur in either case. If we entitled Taney to pollute

and Marshall valued clean air more than Taney valued the pollution, Marshall would pay Taney to stop polluting even though no nuisance was found. If we entitled Marshall to enjoin the pollution and the right to pollute was worth more to Taney than freedom from pollution was to Marshall, Taney would pay Marshall not to seek an injunction or would buy Marshall's land and sell it to someone who would agree not to seek an injunction. As we have assumed no one else was hurt by the pollution, Taney could now pollute even though the initial entitlement, based on a wrong guess of who was the cheapest avoider of the costs involved allowed the pollution to be enjoined. Wherever transactions between Taney and Marshall are easy, and wherever economic efficiency is our goal, we could employ entitlements protected by property rules even though we would not be sure that the entitlement chosen was the right one. Transactions as described above would cure the error. While the entitlement might have important distributional effects, it would not substantially undercut economic efficiency.

The moment we assume, however, that transactions are not cheap, the situation changes dramatically. Assume we enjoin Taney and there are 10,000 injured Marshalls. Now *even if* the right to pollute is worth more to Taney than the right to be free from pollution is to the sum of the Marshalls, the injunction will probably stand. The cost of buying out all the Marshalls, given holdout problems, is likely to be too great, and an equivalent of [compulsory purchase] in Taney would be needed to alter the initial injunction. Conversely, if we denied a nuisance remedy, the 10,000 Marshalls could only with enormous difficulty, given free-loader problems, get together to buy out even one Taney and prevent the pollution. This would be so even if the pollution harm was greater than the value to Taney of the right to pollute.

If, however, transaction costs are not symmetrical, we may still be able to use the property rule. Assume that Taney can buy the Marshalls' entitlements easily because holdouts are for some reason absent, but that the Marshalls have great free-loader problems in buying out Taney. In this situation the entitlement should be granted to the Marshalls unless we are sure the Marshalls are the cheapest avoiders of pollution costs. Where we do not know the identity of the cheapest cost avoider it is better to entitle the Marshalls to be free of pollution because, even if we are wrong in our initial placement of the entitlement, that is, even if the Marshalls are the cheapest cost avoiders, Taney will buy out the Marshalls and economic efficiency will be achieved. Had we chosen the converse entitlement and been wrong, the Marshalls could not have bought out Taney. Unfortunately, transaction costs are often high on both sides and an initial entitlement, though incorrect in terms of economic efficiency, will not be altered in the marketplace ...

[W]e are likely to turn to liability rules whenever we are uncertain whether the polluter or the pollutees can most cheaply avoid the cost of pollution. We are only likely to use liability rules where we are uncertain because, if we are certain, the costs of liability rules – essentially the costs of collectively valuing the damages to all concerned plus the cost in coercion to those who would not sell at the collectively determined figure – are unnecessary. They are unnecessary because transaction costs and bargaining barriers become irrelevant when we are certain who is the cheapest cost avoider;

economic efficiency will be attained without transactions by making the correct initial entitlement.

As a practical matter we often are uncertain who the cheapest cost avoider is. In such cases, traditional legal doctrine tends to find a nuisance but imposes only damages on Taney payable to the Marshalls. This way, if the amount of damages Taney is made to pay is close to the injury caused, economic efficiency will have had its due; if he cannot make a go of it, the nuisance was not worth its costs. The entitlement to the Marshalls to be free from pollution unless compensated, however, will have been given *not* because it was thought that polluting was probably worth less to Taney than freedom from pollution was worth to the Marshalls, nor even because on some distributional basis we preferred to charge the cost to Taney rather than to the Marshalls. It was so placed *simply because we did not know* whether Taney desired to pollute more than the Marshalls desired to be free from pollution, and the only way we thought we could test out the value of the pollution was by the only liability rule we thought we had. This was rule two, the imposition of nuisance damages on Taney. At least this would be the position of a court concerned with economic efficiency which believed itself limited to rules one, two, and three.

Rule four gives at least the possibility that the opposite entitlement may also lead to economic efficiency in a situation of uncertainty. Suppose for the moment that a mechanism exists for collectively assessing the damage resulting to Taney from being stopped from polluting by the Marshalls, and a mechanism also exists for collectively assessing the benefit to each of the Marshalls from such cessation. Thus – assuming the same degree of accuracy in collective valuation as exists in rule two (the nuisance damage rule) – the Marshalls would stop the pollution if it harmed them more than it benefited Taney. If this is possible, then even if we thought it necessary to use a liability rule, we would still be free to give the entitlement to Taney or Marshall for whatever reasons, efficiency or distributional, we desired.

Actually, the issue is still somewhat more complicated. For just as transaction costs are not necessarily symmetrical under the two converse property rule entitlements, so also the liability rule equivalents of transaction costs – the cost of valuing collectively and of coercing compliance with that valuation – may not be symmetrical under the two converse liability rules. Nuisance damages may be very hard to value, and the costs of informing all the injured of their rights and getting them into court may be prohibitive. Instead, the assessment of the object damage to Taney from foregoing his pollution may be cheap and so might the assessment of the relative benefits to all Marshalls of such freedom from pollution. But the opposite may also be the case. As a result, just as the choice of which property entitlement may be based on the asymmetry of transaction costs and hence on the greater amenability of one property entitlement to market corrections, so might the choice between liability entitlements be based on the asymmetry of the costs of collective determination.

The introduction of distributional considerations makes the existence of the fourth possibility even more significant. One does not need to go into all the permutations of the possible tradeoffs between efficiency and distributional goals under the four rules to show this. A simple example should suffice. Assume a factory which, by using cheap coal,

pollutes a very wealthy section of town and employs many low income workers to produce a product purchased primarily by the poor; assume also a distributional goal that favors equality of wealth. Rule one – enjoin the nuisance – would possibly have desirable economic efficiency results (if the pollution hurt the homeowners more than it saved the factory in coal costs), but it would have disastrous distribution effects. It would also have undesirable efficiency effects if the initial judgment on costs of avoidance had been wrong and transaction costs were high. Rule two – nuisance damages – would allow a testing of the economic efficiency of eliminating the pollution, even in the presence of high transaction costs, but would quite possibly put the factory out of business or diminish output and thus have the same income distribution effects as rule one. Rule three – no nuisance – would have favorable distributional effects since it might protect the income of the workers. But if the pollution harm was greater to the homeowners than the cost of avoiding it by using a better coal, and if transaction costs – holdout problems – were such that homeowners could not unite to pay the factory to use better coal, rule three would have unsatisfactory efficiency effects. Rule four – payment of damages to the factory after allowing the homeowners to compel it to use better coal, and assessment of the cost of these damages to the homeowners – would be the only one which would accomplish both the distributional and efficiency goals.

An equally good hypothetical for any of the rules can be constructed. Moreover, the problems of coercion may as a practical matter be extremely severe under rule four. How do the homeowners decide to stop the factory's use of low grade coal? How do we assess the damages and their proportional allocation in terms of benefits to the homeowner? But equivalent problems may often be as great for rule two. How do we value the damages to each of the many homeowners? How do we inform the homeowners of their rights to damages? How do we evaluate and limit the administrative expenses of the court actions this solution implies?

The seriousness of the problem depends under each of the liability rules on the number of people whose 'benefits' or 'damages' one is assessing and the expense and likelihood of error in such assessment. A judgment on these questions is necessary to an evaluation of the possible economic efficiency benefits of employing one rule rather than another. The relative ease of making such assessments through different institutions may explain why we often employ the courts for rule two and get to rule four – when we do get there – only through political bodies which may, for example, prohibit pollution, or 'take' the entitlement to build a supersonic plane by a kind of [compulsory purchase], paying compensation to those injured by these decisions. But all this does not, in any sense, diminish the importance of the fact that an awareness of the possibility of an entitlement to pollute, but one protected only by a liability rule, may in some instances allow us best to combine our distributional and efficiency goals.

We have said that we would say little about justice, and so we shall. But it should be clear that, if rule four might enable us best to combine efficiency goals with distributional goals, it might also enable us best to combine those same efficiency goals with other goals that are often described in justice language. For example, assume that the factory in our hypothetical was using cheap coal *before* any of the wealthy houses were built. In these circumstances, rule four will not only achieve the desirable efficiency and

distributional results mentioned above, but it will also accord with any 'justice' significance which is attached to being there first. And this is so whether we view this justice significance as part of a distributional goal, as part of a long run efficiency goal based on protecting expectancies, or as part of an independent concept of justice.

Thus far, in this section we have ignored the possibility of employing rules of inalienability to solve pollution problems. A general policy of barring pollution does seem unrealistic. But rules of inalienability can appropriately be used to limit the levels of pollution and to control the levels of activities which cause pollution.

One argument for inalienability may be the widespread existence of moralisms against pollution. Thus it may hurt the Marshalls – gentlemen farmers – to see Taney, a smoke-choked city dweller, sell his entitlement to be free of pollution. A different kind of externality or moralism may be even more important. The Marshalls may be hurt by the expectation that, while the present generation might withstand present pollution levels with no serious health dangers, future generations may well face a despoiled, hazardous environmental condition which they are powerless to reverse. And this ground for inalienability might be strengthened if a similar conclusion were reached on grounds of selfpaternalism. Finally, society might restrict alienability on paternalistic grounds. The Marshalls might feel that, although Taney himself does not know it, Taney will be better off if he really can see the stars at night, or if he can breathe smogless air.

Whatever the grounds for inalienability, we should reemphasize that distributional effects should be carefully evaluated in making the choice for or against inalienability. Thus the citizens of a town may be granted an entitlement to be free of water pollution caused by the waste discharges of a chemical factory; and the entitlement might be made inalienable on the grounds that the town's citizens really would be better off in the long run to have access to clean beaches. But the entitlement might also be made inalienable to assure the maintenance of a beautiful resort area for the very wealthy, at the same time putting the town's citizens out of work.

Notes and Questions 6.10

Consider the following notes and questions both before and after reading *Miller* v. *Jackson* [1977] 3 All ER 338 (either in full or as extracted at www.cambridge.org/propertylaw/).

1 Is it legitimate for Lord Denning to place emphasis on the fact that the cricket green was there first? Why under English law are such considerations normally irrelevant?

2 Do damages payable for future nuisance amount to a licence to commit wrong?

3 Should a judge, who held that no nuisance arose, play a role in determining the appropriate remedy in respect of an activity which the majority found to be an actionable nuisance?

4 Do you agree with the majority opinion that an injunction should not be granted because the interests of the public at large in the provision of cricket facilities outweigh the rights of an individual who must have known there was a likelihood of this type of disturbance when the house was purchased? Is private nuisance an appropriate mechanism for achieving a balance between the rights of the individual and the public at large?

6.5. Restrictive covenants

A restrictive covenant is a private law mechanism whereby land use is restricted. Initially, the device was no more than a contractual undertaking in which the purchaser of a portion of land agreed with the vendor to certain restrictions on how the purchased land would be used. As a contractual right the restrictive covenant was, however, of no avail once a subsequent title holder, who was not a party to the original contract, entered the frame. In an agrarian and static society where there was a technological limit on what you could do with your land so as to affect your neighbour (and little if any demographic pressure) this did no great harm and there was consequently no need (and thus no pressure) to extend it beyond its contractual limitations (especially before the onset of widespread freehold ownership loosened the restrictions which the great landowners imposed by means of the tenurial relationship). But come the Industrial Revolution and with it demographic upheaval, the spread of freehold ownership and the technology to blight neighbouring land, one can see why the law, after a suitable period, was compelled to respond. The ability to build 'dark satanic mills ... in England's green and pleasant land' (William Blake, *Jerusalem*), particularly the green and pleasant land bordering your own, had the potential to inhibit the alienation of land for there was now a very real disincentive in selling a portion of your land. The vendor had no means of protecting the land he retained from being affected by such developments on the land parted with, and every incentive to retain rather than sell any portion of his land.

The recognition of the proprietary status of restrictive covenants thus became an economic imperative freeing up the market in land (see generally Simpson, *A History of the Land Law*). A series of cases culminating in *Tulk* v. *Moxhay* (1848) 2 Ph 774 (Extract 6.9 below) established the restrictive covenant as a species of property right and thus provided a mechanism whereby it was possible to sell a portion of land safe in the knowledge that subsequent owners of the plot sold could not do something that would spoil the enjoyment (economic worth) of the plot retained.

Specifically, the principle established by these cases is that, once two plot owners enter into an agreement restricting the use of one plot of land for the benefit of the other, then, provided certain conditions are satisfied, that agreement will be enforceable between all subsequent owners of the two plots. In many respects *Tulk* v. *Moxhay* proved to be the high water mark in the development of this

principle, and in later cases the courts took care to confine it so that now fairly detailed requirements must be satisfied before a restrictive covenant can be enforced between successors in title (see *R.* v. *Westminster City Council and the London Electricity Board, ex parte Leicester Square Coventry Street Association* (1990) 59 P&CR 51 (Extract 6.10 below). For full details of the rules governing the passing of the benefit and the burden of covenants, see Gray and Gray, *Elements of Land Law* (4th edn), paragraphs 13.21–13.116).

By far the most important of the limitations subsequently imposed on the *Tulk* v. *Moxhay* doctrine is that it applies only to negative obligations – promises *not* to do something. For to enforce positive covenants against subsequent owners would place too great a burden on the land, making potential buyers liable for difficult to quantify expense, and thereby undermining the marketability of land and the basis for recognition of covenants as proprietary interests in the first place. Although the covenant in *Tulk* v. *Moxhay* itself was couched in positive terms (a promise by the purchaser of Leicester Square positively to maintain it in its then state as an ornamental garden square), the seller in that case sought only to enforce its negative element – i.e. to prevent the purchaser's successors from using it for anything else. He did not try to enforce the positive obligations undertaken (to keep the iron railings in repair, maintain the gardens etc.). It soon became established (and was reaffirmed by the House of Lords as recently as 1994 in *Rhone* v. *Stephens* [1994] 2 WLR 429) that no matter how the covenant is worded, a positive obligation is never enforceable between anyone other than the original contracting parties. So Mr Tulk and his successors could not make subsequent owners of Leicester Square use it as a garden square, they could only stop them taking positive steps to use it for any other purpose.

By way of contrast, in one important respect the scope of the restrictive covenant has been extended by the courts so that it can now provide a local regulatory law enforceable by and between all neighbours in an area. This extension involves a relaxation of the basic rule evolved from *Tulk* v. *Moxhay* that the only people who can enforce a restrictive covenant are those who can prove that they now own at least part of the land which was (a) owned by the promisee at the time when the promisor made the promise, and (b) intended to be benefited by the restriction. As demonstrated by *R.* v. *Westminster City Council and the London Electricity Board, ex parte Leicester Square Coventry Street Association* (1990) 59 P&CR 51 (Extract 6.10 below), this can be difficult to prove. More importantly, it threatened to impose an arbitrary restriction on enforceability in cases where the original seller sold off more than one plot, and wanted to subject each of them to similar restrictive covenants. Supposing, for example, a seller wanted to divide his land into three plots and sell them all off for residential development. He could require the buyer of each plot to covenant with him not to use the plot for anything other than residential purposes, but if the basic rule was applied strictly the enforceability of these covenants would then depend entirely on the order in which he sold the plots.

The seller would cease to have any interest in enforcing the covenants once the last plot was sold but who else could enforce the covenant? Admittedly, the covenant given by the buyer of the first plot to be sold could always be enforced by buyers and all subsequent owners of the second and third plots. But the covenant given by the buyer of the second plot could not be enforced by the buyer and subsequent owners of the first plot, and neither he nor the owner of the second plot would be able to enforce the covenant given by the buyer of the third plot. To avoid this unsatisfactory result the courts developed the idea of a 'building scheme' or 'scheme of development': provided there is an intention to impose a scheme of mutually enforceable restrictions on all land within a clearly defined area, the entire development is subject to the scheme from the moment the vendor sells the first plot. From then on, each owner is entitled to enforce the restrictions against every other owner within the designated area. The essential element here is reciprocity: the courts must be satisfied not only that the seller intended to set up such a mutually enforceable scheme, but also that the original buyers bought on the understanding that the restrictions would be mutually enforceable between themselves (*Elliston* v. *Reacher* [1908] 2 Ch 374; *Re Dolphin's Conveyance* [1970] 1 Ch 654; and *Emile Elias & Co. Ltd* v. *Pine Groves Ltd* [1993] 1 WLR 305, PC). For this reason, even the seller becomes bound by the scheme once it has crystallised on the first sale: thereafter even he can be restrained from using any as yet unsold land within the area in breach of the restrictions, and all subsequent sales he makes must be subject to similar restrictions (*Brunner* v. *Greenslade* [1971] Ch 993). Building schemes appear to be highly effective with developers routinely imposing them in new housing and industrial estates, presumably because their existence enhances the value of the individual units.

Nevertheless, there is an obvious potential for restrictive covenants to inhibit the development of the restricted land and reduce its marketability, whether or not they form part of a building scheme. To a certain extent this is checked by two factors. The first is that a restrictive covenant will not be enforceable against a subsequent buyer of the burdened land unless he had notice of it when he bought the land (a requirement central to the reasoning in *Tulk* v. *Moxhay*, but now taken care of by registration, which constitutes notice for these purposes). This removes the danger that the fear of hidden restrictive covenants might limit marketability of land generally (see further Chapter 15).

The second is that statutory machinery now exists to eliminate or modify restrictive covenants that have outlived their usefulness. The fairly elaborate jurisdiction set up by section 84 of the Law of Property Act 1925 and greatly expanded by amendments made in 1969 (see Notes and Questions 6.12 below) allow anyone interested in land affected by a restrictive covenant to apply to the Lands Tribunal, which has power to discharge or modify the covenant if satisfied that one of four grounds specified in section 84(1) exists – broadly, that the covenant is either obsolete or impedes some reasonable use of the burdened land

for public or private purposes, or that the proposed change will not injure the person entitled to the benefit. A successful applicant can be ordered to pay compensation to anyone suffering loss because of the discharge or modification of the covenant.

Extract 6.9 *Tulk* v. *Moxhay* (1848) 2 Ph 774

Tulk held the freehold interest in 'Leicester Square Garden or Pleasure Ground, with the equestrian statue then standing in the centre thereof and the iron railings and stone work round the same', and also several houses surrounding the Square. In 1808, he sold the Square to Elms. In the conveyance Elms covenanted with Tulk:

> that Elms, his heirs, and assigns should ... at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and square garden and the iron railings round the same in its then form, and in sufficient and proper repair as a square garden and pleasure ground, in an open state, uncovered with any buildings, in neat and ornamental order ...

Elms later sold the Square to someone else, and eventually it was sold on to Moxhay, who admitted that he knew all about the covenant at the time when he bought it. Moxhay wanted to build on the Square. Tulk, who remained owner of the houses surrounding the Square, sought an injunction to prevent him from doing so. The Master of the Rolls granted an injunction to restrain Moxhay from using the Square for any purpose other than as 'a square garden and pleasure ground in an open state, and uncovered with buildings'. Moxhay appealed.

LORD COTTENHAM LC: That this court has jurisdiction to enforce a contract between the owner of land and his neighbour purchasing a part of it that the purchaser shall either use or abstain from using the land purchased in a particular way is what I never knew disputed. Here there is no question about the contract. The owner of certain houses in the square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a square garden. It is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

... I think this decision of the Master of the Rolls perfectly right, and, therefore, that this motion must be refused with costs.

Appeal dismissed.

Notes and Questions 6.11

1 It was said above that the impetus for the development of the restrictive covenant was that an inability to regulate the use of sold-off portions of land inhibited the alienability of land. But this is not the reason given by Lord Cottenham. What reason does he give, and how convincing is it? If the seller knows that his buyer can immediately resell the land free from the covenant, what will be the difference in the price at which he will sell (a) with the covenant and (b) without it?

2 Do the arguments put forward by Lord Cottenham apply with equal force to positive covenants (for example, to keep the sold-off land fenced off, or to maintain buildings on it in good repair)? What are the reasons for refusing to allow positive covenants to be enforced against successors of the original covenantor? What are the consequences? (See further Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants* (Law Commission Report No. 127, 1984).)

Notes and Questions 6.12

Consider the following notes and questions both before and after reading Extract 6.10 below and section 84 of the Law of Property Act 1925:

1 Why should enforcement of restrictive covenants be confined to those who now hold an interest in the land that was owned by the original covenantee and was intended to be benefited by it? Compare the equivalent rule applicable to easements, i.e. that the easement must accommodate a dominant tenement (see further section 8.6 below on the distinction between those property interests that can exist 'in gross' and those that can only exist as appurtenant to another property interest).

2 Consider what the outcome would have been if the association had been able to prove that it was the present owner of some of John Augustus Tulk's land, and the LEB had then applied to the Lands Tribunal to have the covenant discharged under section 84 of the Law of Property Act 1925. How satisfactory would this outcome be?

3 The Lands Tribunal has a very broad discretion under section 84. It can refuse an application even if it is unopposed, and even if one or more of the statutory grounds for discharge or modification are established (consider why this should be so: see *Re University of Westminster* [1998] 3 All ER 1014, CA). Conversely, it can order the discharge or modification of a covenant which has only just been entered into, even if the applicant is the original covenantor so that the discharge or modification enables the covenantor to escape a contractual

obligation freely entered into (see *Cresswell* v. *Proctor* [1968] 1 WLR 906; and *Ridley* v. *Taylor* [1965] 1 WLR 611). Also, it can, and quite often does, discharge or modify covenants within a building scheme: consider whether this is likely to make building schemes more or less useful (see *Re Kennet Properties' Application* (1996) 72 P&CR 353, LT).

4 The section 84 jurisdiction is quite widely used: in the six years from 1998 to 2003, between 40 and 55 applications were made to the Lands Tribunal each year (see *Judicial Statistics*, published by the Department of Constitutional Affairs, available at www.dca.gov.uk/jsarlist.htm). Despite this, it is thought that large numbers of obsolete restrictive covenants still exist, and that this impedes the development of land (see Law Commission, *Transfer of Land: Obsolete Restrictive Covenants* (Law Commission Report No. 201, 1991)). What, if anything, does this tell us about the effectiveness of the jurisdiction?

5 Restrictive covenants provide a means of private land use regulation – essentially regulation by neighbours in their own selfish private interest – whereas the planning system is the means by which land use is regulated in the public interest. To what extent may/must the Lands Tribunal take the public interest into account when deciding whether a restrictive covenant should be discharged or modified? (see section 84(1B) of the Law of Property Act 1925; *Gilbert* v. *Spoor* [1983] Ch 27; and *Re Martin's Application* (1989) 57 P&CR 119 at 125).

6 How might restrictive covenants and the section 84 jurisdiction of the Lands Tribunal be analysed from the perspective of property rules and liability rules (see Calabresi and Melamed in Extract 6.8 above)? Does this provide a clue as to why the legislature has vested such a jurisdiction in the Lands Tribunal?

7 In addition to the statutory jurisdiction under section 84, the court has a general equitable jurisdiction to refuse to enforce a restrictive covenant. It will do so if it considers that the person seeking to enforce the covenant has lost the right either because of his conduct (for example, acquiescence in past breaches) or because of some radical change in circumstances. But this jurisdiction is very much narrower than the statutory jurisdiction, and it now appears confined to cases where it would be unconscionable for the applicant to seek to enforce the covenant in view of what has happened: see further *Chatsworth Estates Co.* v. *Fewell* [1931] 1 Ch 224 (on change in the character of the neighbourhood); *Shaw* v. *Applegate* [1977] 1 WLR 970, CA; and *Gafford* v. *Graham* (1998) 77 P&CR 73, CA (acquiescence).

Extract 6.10 ***R.* v. *Westminster City Council and the London Electricity Board, ex parte Leicester Square Coventry Street Association*** **(1990) 59 P&CR 51**

The subsequent history of Leicester Square, begun in *Tulk* v. *Moxhay*, shows the strengths and limitations of the restrictive covenant as a means of regulating land

use. By 1851, Moxhay had died, and his widow sold the Square to James Wyld, a geographer, who wanted to build in the Square a 60-foot high plaster scale model of the Earth. Wyld sought the permission of the Tulk family (who still owned Tulk's adjoining houses and so held the benefit of the restrictive covenant): permission was granted in exchange for Wyld granting the Tulk family an option to buy back half the Square in ten years' time. The model (named 'Wyld's Monster Globe') was duly built, but ten years later it was demolished, and John Augustus Tulk (who had inherited the Tulk houses from his grandfather, the original Tulk) exercised the option to buy back half the Square. John Augustus Tulk planned to build on the Square, just as Moxhay had planned. This caused a public outcry, but at that time there was no way in which such development could be prevented: there was no public regulation of land use (the planning system had yet to be invented) and Grandfather Tulk's restrictive covenant was of no use since the only person entitled to enforce it was John Augustus Tulk himself. Eventually, in 1874, a local MP, Albert Grant, bought out John Augustus Tulk (entering into a restrictive covenant in the same terms as the original covenant given by Moxhay to Grandfather Tulk) and also bought up all other interests in various parts of the Square which had been sold off, and presented the whole of the Square to the local authority to be used as a public park. Then in the 1980s the local authority, Westminster City Council, decided to grant the London Electricity Board (LEB) a 999-year lease of the subsoil of the Square for £2.5 million, to enable the LEB to build a large electricity substation underneath the Square. The £2.5 million was to be used towards the £4 million that Westminster City Council planned to spend on 'improving and revitalising' the Square. The whole scheme was strongly opposed by the local traders' and residents' association (comprised mainly of the owners of the cinemas and restaurants surrounding Leicester Square) because they feared their trade would be disrupted by the building works. Despite opposition from the association, Westminster City Council granted the LEB planning permission to build the substation. The association then tried to use the restrictive covenant to prevent the substation being built. Specifically, they argued that the grant of the lease by Westminster City Council to the LEB was invalidated by section 131(1) of the Local Government Act 1972, which gave local authorities power to dispose of land held by them but then provided that 'nothing ... shall authorise the disposal of any land by a local authority in breach of any ... covenant which is binding upon them'. The association ultimately lost on this point as well: it was held that, although the restrictive covenant was still enforceable, the disposal of the subsoil to the LEB was not a breach of it – the breach would occur later, when the LEB started to carry out the building works. So why not sue the LEB for breach of the covenant? The problem was that no one could discover who was now entitled to enforce the covenant. As Simon Brown J explained, the covenant could only be enforced against Westminster City Council (or the LEB) if they held land originally intended to be burdened by the covenant when it was reimposed by Albert Grant in 1874, and it could only be enforced by whoever now held land which John Augustus Tulk then held and which was intended to be benefited by the covenant:

SIMON BROWN J: ... Is the covenant binding upon Westminster [and therefore on the LEB when it acquired the lease]? To establish this the association have to satisfy

me on the balance of probabilities: (a) that the burden of the covenant ran with the land; (b) that the benefit of the covenant was annexed to the covenantee's land; and (c) that nothing has happened subsequent to the giving of the covenant to render it inoperative – such, for instance, as the merging of title in the burdened and dominant lands ...

The burden of a covenant runs with the covenantor's land provided first that it is negative – as plainly this one was; secondly, that it was intended to run with that land – an intention here manifest from the reference to Albert Grant's 'heirs or assigns'; and, thirdly, that the covenantee at the date of the covenant owned other land which would benefit from it. It is this last element of the association's case that Westminster contend is wanting. Mr Colyer [counsel for Westminster City Council] submits that there is simply no evidence before me to establish on the balance of probabilities that the covenantee, John Augustus Tulk, did at the date of his conveyance to Albert Grant on April 20, 1874 retain other land in or sufficiently near to Leicester Square to benefit from the covenant. I disagree. In the absence of any contrary evidence I regard as sufficient proof of this requirement the reference in the covenant itself to:

> JAT his heirs and assigns owners for the time being of freehold property in Leicester Square aforesaid.

It seems to me inconceivable that this could be a reference to the property actually being sold and one would hardly suppose that Mr Tulk and his advisers (even 25 years after the family's celebrated case) were unaware of the long-established legal requirement that for the covenant to run with the burdened land the covenantee must retain land capable of benefiting from it.

Was the benefit of the covenant annexed to the covenantees' land? The principles were usefully set out in Megarry and Wade on the *Law of Real Property*:

> The benefit will be effectively annexed to the land so as to run with it if in the instrument the land is sufficiently indicated and the covenant is either stated to be made for the benefit of the land, or stated to be made with the covenantee in his capacity of owner of the land; for then in either case it is obvious that future owners of that land are intended to benefit ...

... Adopting this approach the answer is surely plain. The same words in the covenant which I hold to have established that John Augustus Tulk retained land capable of benefiting indicate also that he was taking the covenant for the benefit of that retained land and with the intention that its future owners should reap that benefit.

Has anything occurred since this covenant was given on April 20, 1874 to render it inoperative?

The factual position is simply this: since the covenant was first imposed it ran, always with the purchaser's notice, with the several dispositions of the burdened land. Nothing, however, is known about the subsequent disposition of the dominant land, that retained by Mr Tulk. In particular, despite apparently strenuous efforts by the association, no one has discovered who now enjoys the benefit of the covenant. Does

that matter? Mr Jones for the LEB argues that it does. He contends that it constitutes a fatal flaw in the association's case; without identification of the retained land the covenant is extinguished upon the first subsequent assignment of the burdened land. That at least is how I finally understood the submission. It is advanced candidly without authority and expressly recognising that it goes further and wider than Mr Colyer for Westminster felt able to go. I reject it. Indeed, it seems to me to fly in the face of accepted principle. As Megarry and Wade put it:

> Once the benefit of the covenant is annexed to land, it passes with the land to each successive owner, tenant or occupier, even if he knew nothing of it when he acquired the land.

The same view is expressed in the seventh edition of Preston and Newsome on *Restrictive Covenants Affecting Freehold Land* in a passage at paragraph 19 citing Simonds J in *Lawrence* v. *South County Freeholds Ltd* [1939] Ch 656:

> Such a benefit may pass with the land to which it has been annexed, even though the purchaser is unaware of it ... a hidden treasure which may be discovered in the hour of need ...

In short, I conclude that this covenant remains binding on Westminster, its benefit a 'hidden treasure' in the hands of the present owner (whoever he may be) of Tulk's retained land. Whether, of course, that owner will discover it, or indeed regard the present time as his hour of need, remains to be seen.