§ Law in Context

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Property Law

Commentary and Materials

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Recognition of new property interests

In this chapter, we will consider the essentially dynamic quality of property. While it is important that the categories of property are clear and certain, it does not follow from this that the list should be eternally fixed and incapable of development. As you will see, there is constant pressure to recognise new property interests, although, for reasons we shall examine, it is not easy for an interest to cross the threshold into property. However, the history of property bears witness to the constant expansion of the range of property interests in response to society's changing needs and increasing complexity.

In section 9.1 we will consider the reasons why the property label is (and is not) attached to certain interests. While in section 9.2, we shall illustrate the dynamic nature of property by examining examples of interests that have (at least intermittently!) been accorded proprietary status. We will contrast this, in section 9.3 where we consider the law's general reluctance to embrace new property interests, with an example that did not even fleetingly cross the property threshold. This will enable us to examine the principles which underscore the recognition of new property interests before subjecting them to a critical evaluation, in section 9.4, when we consider a comparative and economic study which casts doubt on much that has gone before. Finally, in section 9.5 we will turn to speculate on possible new directions in which the law of property might develop.

9.1. Why are certain interests regarded as property?

In order to consider why the property label is attached to certain interests we need briefly to consider the abstract function of property, the reason why it is only adopted as a measure of last resort and finally the requirements that must first be satisfied before any interest can be accorded proprietary status.

9.1.1. The function of property

The property label basically performs three related functions which we will briefly consider here although they are covered in much greater detail in Part I.

9.1.1.1. As a means of allocating scarce resources

There would be no need to have property rights in a world of infinite resources. For what would be the point in distinguishing yours from mine (or theirs from ours) if there were no limitations on what was available. For it would not matter how much your neighbour took as there would always be more than enough left for you to take (and as much as you wanted without, in turn, causing any problems for those who came along afterwards). Property rights are in effect a response to scarcity where it becomes important to demarcate rules governing the use of finite resources, for otherwise there will be endless disputes and conflicts in respect of how the particular resource should be exploited.

9.1.1.2. As an incentive to promote their management

The property label also provides an incentive that tends to promote the more productive management of such resources. There is little point in your (or our) cultivating a field if its harvest can be reaped by another. Similarly (although not the same – can you say why?), what would the point be in the Sony Corporation, for example, expending time and effort (and therefore money) in developing a new invention if there was no means of preventing others usurping their design or process (but not simply the idea – see section 9.5.2 below)? The institution of property enables rules to be established that prevent such takings and so provide an economic incentive towards better husbandry of both existing and new resources.

9.1.1.3. As a moral, philosophical or political statement

Property is one of the means by which moral, philosophical and political perceptions are given tangible expression. It does not (for these purposes at least) much matter what general justification we offer as to why the farmer in the field should (or for that matter should not) reap the benefits of the harvest. For whether your argument is founded on Marxism or libertarianism, utilitarianism or natural justice, attaching the property label is the first stage in the process. Yet this is more problematic than it at first appears when it comes to specific justifications concerning what sort of things should be considered property. While disagreements over who should reap the harvest will probably all proceed on the assumption that the harvest is a suitable object in which property rights (of some kind) might vest, the same would not be true, for example, of a human kidney. For the debate there would centre not on who should own but about whether anyone should be capable of owning such a thing.

9.1.2. The danger of property

Property rights are dangerous things. For, unlike contractual rights, they have the power to bind third parties who are not party to the legitimate processes by which interest holders acquire their interest. Thus if you purchase a stolen car from a thief, you will normally be bound by the interest of the person from whom the car

was stolen. For as long as they remain owner their claim will bind third parties such as you despite your lack of knowledge concerning the car's provenance. You would consequently have no defence to an action in conversion brought by the legitimate owner and would have to make do with a personal claim against the (often disappeared) thief. Similarly, if you as the owner of an estate in land grant a legal easement (see Chapter 8) to me, my interest will attach to the land and bind whosoever purchases the estate from you irrespective of whether they knew about this interest burdening their estate (subject to the rules about registration we consider in Chapter 15). This might have very serious consequences for the purchaser if my easement is incompatible with the purpose for which he bought the estate in the first place.

We will consider elsewhere the various means by which these potential difficulties might be surmounted (see Chapters 14 and 15 below). However, it is necessary here to note that the traditional approach of property law to the problem (both in this jurisdiction and beyond – see Extract 9.2 below) has been to limit the number of different types of property interest that might exist. This is often referred to by the shorthand term *numerus clausus* which, literally translated, means 'finite number', in recognition of the limited list of property interests known to the law. Third parties are, in this way, protected from being surprised by novel interests that they could not possibly have foreseen. We will consider the legitimacy of this approach in section 9.4 below, but must now content ourselves with noting that the courts and legislature have, in the face of these concerns, taken an extremely cautious approach to the recognition of new property interests.

Thus a right holder's interest will not be accorded the status of a property right if the interest can be adequately protected without making the interest binding on third parties. For example, in *Hill* v. *Tupper* (1863) 2 H&C 121; 159 ER 51 (see Extract 5.1 above), the owners of a canal entered into a contract with Hill granting him the 'exclusive right' to hire out boats on the canal. However, Tupper, a local publican, was allegedly hiring out boats on the same stretch of canal, and Hill consequently sued him for infringing his 'exclusive right' to do so. The court unanimously held that Hill's exclusive right to hire was simply a contractual right between him and the owner of the canal which consequently gave him no rights against third parties such as Tupper. In contrast, the owner of the canal (who by definition did have a property interest in it) could prevent third parties such as Tupper trespassing onto the canal and in failing to do so breached his contract with Hill, who could sue him accordingly. Thus Hill's interest could be adequately protected without the need to turn the 'right to ply for hire' into a new property interest in land.

9.1.3. The requirements of property

Before an interest can be accorded proprietary status, it must fulfil certain conditions. If it lacks certainty, potential transferees of the interest will be reluctant to assume it, as they will not know what they are getting. More importantly, potential

transferees of a *different* property interest in the *same* thing will be put off acquiring that different interest because they will not know how the interest they are acquiring will be affected by the uncertain interest. Similarly, it is often said that a property interest in a thing must have a degree of stability and predictability, for otherwise it will again put off potential transferees of that and any other property interest in the thing. (See the discussion on *National Provincial Bank* v. *Ainsworth* [1965] AC 1175 in Extract 9.1 below where we consider the argument that these criteria are circular and self-fulfilling – can you see why?)

We have so far concentrated on problems which would affect future dealings with a specific thing which was subject to an uncertain, unstable or unpredictable property interest. However, a much more fundamental problem would arise if the interest, while not necessarily suffering from any of these vices, was simply difficult for third parties to identify. For then potential transferees would not only be put off acquiring a specific thing but would have a very real disincentive in acquiring anything which might have such an interest attached (whether or not it in fact did) because there would be no easy means of finding out. This, in part, explains the law's historic reluctance (considered briefly above) to welcome novel property interests into the fold. Arguably, if the system was too willing to do so, purchasers would be more reluctant to acquire interests in things generally as they might latterly be subjected to other (possibly conflicting) interests that no one knew existed at the time of acquisition but which the courts were subsequently willing to hold were subsisting at that time.

9.2. The dynamic nature of property

It is time to redress the balance. The preceding discussion has described a system which one might be forgiven for assuming was static and rigid with little prospect of change or development. But this is simply not the case for, despite the law's reluctance to embrace new property interests, the pace of human development is such as to make the recognition of new interests an economic and/or social necessity. Prior to the invention of the printing press, for example, there was little incentive in recognising a general property right to copy books. Yet, in the wake of Guttenberg's invention coupled with (and linked to) the emergence of a sufficiently large literate audience, it is hardly surprising that a law of copyright (literally the right to copy) should soon follow. Nor that the pressure to recognise a legally enforceable right to copy came not from authors struggling with their muses but from those with the technological expertise to benefit from such a right, namely, the publishers and printers (see Feather, 'Authors, Publishers and Politicians').

The history of the common law is littered with such instances. As society changes, the notion of what is and what is not a useable resource capable of being the subject of property also changes. For example, up until the sixteenth century, there is little evidence of the term property being applied to land under the English common law

(Seipp, 'The Concept of Property in the Early Common Law'). In 1828, when C. J. Swan, the Secretary to the Real Property Commissioners, invited Bentham to help the Commission in its deliberations, one of his first tasks was to list those things which were not regarded as property and which had not been included in Blackstone's work on the subject, such as company shares and copyright (Sokol, 'Bentham and Blackstone on Incorporeal Hereditaments').

We will consider two examples, one primarily economic and the other broadly social, in which the courts have grappled with the difficulties inherent in such an endeavour. We will begin with the restrictive covenant before turning to the wife's (or is it the spouse's?) right of occupation.

9.2.1. The recognition and limits of the covenant as a proprietary interest

The recognition, in *Tulk* v. *Moxhay* (1848) 2 Ph 774, of the restrictive covenant (whereby the owner of land is restricted from using it in certain ways) as a property interest in land similarly evolved in response to economic pressures stemming from the industrial revolution and social change in respect of demographic upheaval and the breakdown of the feudal structures which had previously controlled land use (see Chapter 6 for a more detailed account). Despite the generality of some of the language employed in the case, subsequent decisions did much to limit the principle, including a requirement drawn from the law of easements that there must be both a dominant and a servient tenement (*London County Council* v. *Allen* [1914] 3 KB 642). In other words, the benefit of a restrictive covenant must attach to some land (referred to as the *dominant tenement*) and cannot exist in gross (i.e. unattached to land).

In spite of the somewhat arcane nature of the language employed, the restriction can be readily understood if one adopts a practical perspective. A restrictive covenant limits what can be done on a piece of land (referred to as the *servient tenement*) and while there were compelling social and economic reasons for recognising the proprietary status of such a restriction these held only in so far as the restriction benefited other land. The restrictive covenant enabled owners of land to sell the freehold interest in a portion of their land safe in the knowledge that they could impose restrictions on the land disposed of that would survive subsequent changes of ownership and ensure that things were not done with it which would devalue the land retained. This had the effect of freeing up the market in land and promoting alienability even though taken in isolation the burdened land is arguably made less attractive by subjecting it to restrictions in this way.

However, the balance only tilts towards alienability provided there is a dominant tenement able to benefit from the restriction. If there was no such requirement a restrictive covenant might have an entirely negative effect on alienability for it would then continue to make the servient tenement less attractive to potential purchasers without necessarily promoting the alienability of other land. For without the dominant tenement requirement there would be no need for the seller to retain any land with an aspect that needed preserving. Consequently, as

such a vendor has no economic interest in how the sold land is subsequently utilised, the courts at the turn of the last century chose to provide him with no proprietary means of restricting its use. (There are, of course, strong environmental arguments to the contrary but it would be anachronistic to criticise judges from another era for failing to take account of issues which are, in any case, today catered for by other mechanisms – see Chapter 6.)

It would seem to follow from such an analysis that the principle of *Tulk* v. *Moxhay* would be inapplicable to chattels because as moveables they can always be removed from a source of interference. But before the principle of a dominant and servient tenement had been fully established, by cases subsequent to *Tulk* v. *Moxhay*, Knight Bruce LJ in *De Mattos* v. *Gibson* (1859) 4 De G&J 276 at 282 made the following observation:

> Reason and justice seem to prescribe that, at least as a general rule, where a man by gift or purchase, acquires property from another with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or the seller. This rule, applicable alike in general as I conceive to moveable and immoveable property, and recognised and adopted, as I apprehend, by the English law, may, like other general rules, be liable to exceptions arising from special circumstances, but I see at present no room for any exception in the instance before us.

The case concerned an interlocutory application by the hirer of a ship seeking an injunction to prevent both the owner and the ship's mortgagee (who, at the time he acquired his interest, knew of the charterparty under which the terms of hire were fixed) acting in a way which was inconsistent with the charterparty. It is clear, from the above extract, that in holding that the mortgagee would be bound Knight Bruce LJ was drawing on the comparatively recent case of *Tulk* v. *Moxhay* decided little more than a decade before. In contrast, the other judge in the case, Turner LJ, seems much less persuaded, leaving the matter open because in his view it deserved greater consideration than could be devoted to it at an interlocutory hearing. This would not appear to have taken place for when it came to the full hearing it was held, on appeal by Lord Chelmsford LC, that the charterparty was 'far too uncertain and indefinite' to enforce. Thus the position of the third party mortgagee ceased to be an issue with the Lord Chancellor offering no more than the *obiter* aside that the mortgagee should 'abstain from any act which would have the immediate effect of preventing [the charterparty's] performance'.

Lord Chelmsford cited no authorities in support of his proposition and, in light of the introduction of the dominant tenement requirement, many judges took the view that (even had it once been so) the principle could no longer be said to apply to chattels. Thus, in *Barker* v. *Stickney* [1919] 1 KB 121 at 132, Scrutton LJ stated that 'a purchaser of chattels is not to be bound by mere notice of stipulations made

by his vendor unless he was himself a party to the contract in which the stipulations were made'. Such dissent was neither new nor confined to the higher courts. In *Taddy* v. *Sterious* [1904] 1 Ch 354 at 356, for example, Swinfen Eady J had already stated at first instance that '[c]onditions of this kind do not run with goods and cannot be imposed upon them' even though *De Mattos* v. *Gibson* was seemingly to the point and had been cited to him.

Despite the less than auspicious reception, Knight Bruce LJ's *dictum* was resurrected by the Privy Council in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* [1926] AC 108 (see Notes and Questions 9.1 below). The case again concerned a charterparty (can you begin to speculate why this might be significant?) whereby the Dominion Coal Company chartered a ship for ten years. During that time, the ownership of the ship changed hands on a number of occasions eventually being bought by the Lord Strathcona Steamship Company who obtained the ship on the following terms:

> The steamer is chartered to the Dominion Coal Company ... [and] the buyers undertake to perform and accept all responsibilities thereunder as from date of delivery in consideration of which the buyers shall receive from date of delivery all benefits arising from said charter.

Despite agreeing to these terms, the Lord Strathcona Steamship Company refused to honour the charterparty. In response, the Dominion Coal Company sought a declaration that they were obliged so to do and an injunction restraining the ship from being used in a way that was inconsistent with the charterparty. The judgment of the board was given by Lord Shaw who, in granting the charterer the relief sought, stated that the *dicta* of Knight Bruce LJ in *De Mattos* v. *Gibson*, 'notwithstanding many observations and much criticism of it in subsequent cases, is of outstanding authority ... [for] equity would grant an injunction to compel one who obtains a conveyance or grant *sub conditione* from violating the condition of his purchase to the prejudice of the original contractor'.

The case received much adverse comment, particularly from Diplock J in *Port Line* v. *Ben Line Steamers* [1958] 2 KB 146, which we will deal with below after you have had a chance to examine the primary materials yourself. This will also afford us an opportunity to examine Lord Shaw's reasoning in the case and a possible alternative rationale offered by Browne-Wilkinson J in *Swiss Bank Corp.* v. *Lloyds Bank Ltd* [1979] Ch 548. However, before embarking on this task, and without seeking to prejudge the issues, we suggest you consider what relevance the following words of Lawson and Rudden (*The Law of Property*, p. 30) might have in resolving the apparent inconsistencies evidenced by the case law:

> Ships are indeed governed by special rules of law and are for some purposes treated almost as though they were floating plots of land.

Can you also suggest how such an approach might be consistent with the general thesis of this chapter that, despite its reluctance to do so, the law is willing

(and able) to recognise new proprietary interests when there are compelling economic or social reasons so to do?

Notes and Questions 9.1

Consider the following notes and questions both before and after reading *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* [1926] AC 108 and the materials highlighted below (either in full or as extracted at www.cambridge.org/propertylaw/).

1 Why do you think the Privy Council resurrected the principle of *De Mattos* v. *Gibson* (1859) 4 De G&J 276, after more than half a century in which the *ratio* had often held to be inapplicable in respect of other forms of personalty (e.g. *McGruther* v. *Pitcher* [1904] 2 Ch 206; *Barker* v. *Stickney* [1919] 1 KB 121)? Were the facts of the case, the particular type of property involved or the make-up of the court important factors in the decision?

2 Can you identify what interest (if any) the covenantees had in the chartered vessel other than their contractual rights under the charter? Do you think the charterers had any interest that might sensibly be described as proprietary (see *Port Line* v. *Ben Line Steamers* [1958] 2 KB 146)?

3 Does Lord Shaw's reference to constructive trusteeship clarify or obscure the issues? Does the use of such language require one to identify what property is subject to the trust and why it would be nonsensical to describe the ship itself in such terms (see *Saunders* v. *Vautier* (1841) Cr & Ph 240)? Why would it be equally unsatisfactory to describe the benefit of the charter as the trust property, and what obstacles lie in the way of identifying the benefit of the covenant in the conveyance of the trust as the subject-matter of the trust (see Moffat, *Trusts Law*, pp. 140–1)?

4 Could it be argued that the *De Mattos* v. *Gibson* principle applied by Lord Shaw is the equitable counterpart of the tort of knowing interference with contractual rights? (See *Swiss Bank Corp.* v. *Lloyds Bank Ltd* [1979] Ch 548; cf. 'Covenants, Privity of Contract and the Purchaser of Personal Property', pp. 82–3).

5 Section 34 of the Merchant Shipping Act 1894 provides:

> Except so far as may be necessary for making a mortgaged ship or share available as security for the mortgaged debt, the mortgagee shall not by reason of the mortgage be deemed the owner of the ship or share, nor shall the mortgagor be deemed to have ceased to be owner thereof.

Are there any clues in this provision to suggest that the decision in *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* is correct in the limited context of maritime law?

6 What solutions to the practical issues raised by the case, beyond the confines of shipping, are provided under the Contracts (Rights of Third Parties) Act 1999?

9.2.2. The recognition of a proprietary right to occupy the matrimonial home

Under the common law a wife has long had a right to occupy the 'matrimonial home' (*Gurasz* v. *Gurasz* [1970] P 11). This is based upon the marriage contract and the now anachronistic view that a husband is under a non-reciprocal duty to maintain his wife, although it is arguable (but by no means established) that, to the extent that any such duty still exists under the common law, it should now be borne equally by both parties to the marriage (see the comments of Ewbank J in *Harman* v. *Glencross* [1985] Fam 49 at 58B–C).

The common law right was clearly a personal one owed by the husband to his wife and having no bearing on third parties. Thus a third party who acquired an interest from the husband did not need to concern him or herself with any right of occupation owed by the vendor to his wife. However, in a series of cases in the 1950s and 1960s, the Court of Appeal, under the Master of the Rolls, Lord Denning (in response to new social pressures stemming from the increasing incidence of marriage breakdown), engaged in a process which sought to elevate the personal right into a proprietary one by means of what became known as the 'deserted wife's equity'. Under this approach the wife's personal right against her husband was transformed into an *equity* binding on most categories of third party from the moment he deserted her. As an *equity* the right, in broad terms, bound everyone with the exception of purchasers without notice (including constructive notice – see section 14.3.1 below) of the *equity*. As Gray has noted, the consequences of this common law development were simply ludicrous:

> The deserted wife's equity became a nightmare for conveyancers ... impos[ing] an embarrassing onus of enquiry on any third party entering into any transaction (e.g. sale, lease or mortgage) with a man whose household included a resident adult female. In order to be safe from adverse claims to occupy, the purchaser had to inquire, first, whether that woman was the wife of the vendor/lessor/mortgagor and, second, whether the marriage (if there was one) was happy and stable. (Gray, *Elements of Land Law* (2nd edn), p. 159)

According proprietary status to the deserted wife's right to occupy lacked the certainty and ease of identification necessary to enable the conveyancing system to work efficiently. While it is not uncommon for more than one party to have a right to occupy land (by reason of their contributions to the purchase price or arising under such doctrines as constructive trust and proprietary estoppel) interests arising in such a manner are not as susceptible to the same criticisms (although they are hardly immune – see Moffat, *Trusts Law*). The deserted wife's equity, however, stretched the boundaries of property too far, and, in *National Provincial Bank* v. *Ainsworth* [1965] AC 1175, the House of Lords heralded a return to orthodoxy by roundly rejecting Lord Denning's heresy.

Although justified, the conservative nature of their Lordships' approach clearly failed to address the social issues which had caused the Court of Appeal to adopt such a radical stance in the first place. Lord Wilberforce, however, was adamant

that (while some of the problems might be alleviated) it was ultimately not the role of the courts to solve society's ills in this way:

> The deserted wife therefore, in my opinion, cannot resist a claim from a 'purchaser' from her husband whether the 'purchase' takes place after or before the desertion. As regards transactions subsequent to the desertion this disability is somewhat mitigated by three factors. First, if it appears that the husband is threatening to dispose of the house in such a manner as to defeat her rights, she may be able to obtain an injunction to restrain him from doing so ... Secondly, the courts have ample powers to detect, and to refuse to give effect to, sham or fraudulent transactions ... Thirdly, there are some extensive powers conferred by statute (Matrimonial Causes (Property and Maintenance) Act 1958 [see now section 37 of the Matrimonial Causes Act 1973]) to set aside dispositions aimed at defeating the wife's right to maintenance ... *As regards those cases (and I recognise that they may exist) which fall outside, the deserted wife may be left unprotected – she may lose her home. As to them, it was said by Roxburgh J in Churcher v. Street [1959] Ch 251, 258: 'It would have been an advantage, in my view, if Parliament, rather than a higher court, had intervened, because in order to prevent certain cases of injustice to deserted wives, a position has been brought about which may produce considerable injustice to other people ...' I respectfully agree with this statement.* (*National Provincial Bank* v. *Ainsworth* [1965] AC 1175 at 1258–9, emphasis added)

Within two years Parliament had responded to this call by introducing a statutory scheme now contained in sections 30–31 of the Family Law Act 1996. Under the scheme both spouses have a personal right to occupy the family home which they might turn into a property right binding on third parties by registering that right in the land register (specifically, by entry of a notice: see section 15.2.4.3 below). We will deal with how the scheme works in Notes and Questions 9.2 below when we consider why statute, rather than the common law, was better able to deal with this particular issue. Ultimately, however, the spouse's statutory right to occupy the matrimonial home should be seen as a new type of property interest created by the legislature in response to social change and pressure.

Notes and Questions 9.2

Consider the following notes and questions both before and after reading the extract from *National Provincial Bank* v. *Ainsworth* [1965] AC 1175 below (a longer version, along with further materials, is also available at www.cambridge.org/propertylaw/).

1 What type of property interest was the deserted wife's equity and what were the consequences of this categorisation?

2 If Mrs Ainsworth had won the case in the House of Lords, and it had been held that all wives did have such a right of occupation, and that it was a property interest:

(a) Would husbands have had the same right as wives? Would unmarried couples living together as husband and wife have been in the same position as married couples?
(b) When would a wife's right have arisen as against her husband, and when would it have arisen as against third parties? Why was this distinction made?
(c) When would the wife's right end?
(d) If a purchaser wanted to buy a house from a man who appeared to be the sole holder of the fee simple absolute in possession of the land, how could the purchaser find out whether or not the man had a wife who claimed this right of occupation? What would have happened if, after completing the purchase, he discovered for the first time that there *was* a wife and she *did* have such a right?

3 Why was Lord Wilberforce convinced that the deserted wife's equity should not be a property right and what were the weaknesses he identifies in Lord Denning's short-lived creation?

4 Is there a degree of circularity in Lord Wilberforce's analysis?

5 What was the solution of the legislature under sections 30–31 of the Family Law Act 1996? Is the right granted under the Act a personal or a proprietary right, and why is that an unfair question? What is the effect of section 31(10), and why is there an alternative mechanism under section 31(12)?

6 Which was the better solution – the one developed by Denning's Court of Appeal or the one created by the legislature in the wake of *National Provincial Bank* v. *Ainsworth*?

7 Is the history of the deserted wife's equity a cautionary tale demonstrating the folly of judicial law-making or an example of how important it is to have a proactive Court of Appeal willing and able to challenge orthodoxy and the prevailing legal consensus?

Extract 9.1 ***National Provincial Bank* v. *Ainsworth*** **[1965] AC 1175 at 1247–8**

The position, then, at the present time, is this. The wife has no specific right against her husband to be provided with any particular house, nor to remain in any particular house. She has a right to cohabitation and support; but, in considering whether the husband should be given possession of property of his, the court will have regard to the duty of the spouses to each other, and the decision it reaches will be based on a consideration of what may be called the matrimonial circumstances. These include such matters as whether the husband can provide alternative accommodation and, if so, whether such accommodation is suitable having regard to the estate and condition of the spouses; whether the husband's conduct amounts to desertion, whether the conduct of the wife has been such as to deprive her of any of her rights against the husband. The order to be made must be fashioned accordingly; it may be that the wife should leave immediately or after a certain period; it may be subject to revision on a change of circumstances.

> The conclusion emerges to my mind very clearly from this that the wife's rights, as regards the occupation of her husband's property, are essentially of a personal kind: personal in the sense that a decision can only be reached on the basis of considerations essentially dependent on the mutual claims of husband and wife as spouses and as the result of a broad weighing of circumstances and merit. Moreover, these rights are at no time definitive, they are provisional and subject to review at any time according as changes take place in the material circumstances and conduct of the parties.
>
> On any division, then, which is to be made between property rights on the one hand, and personal rights on the other hand, however broad or penumbral the separating band between these two kinds of rights may be, there can be little doubt where the wife's rights fall. Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability. The wife's right has none of these qualities, it is characterised by the reverse of them.

9.3. The general reluctance to recognise new property rights

In deference to the dangers inherent in recognising new interests in property, both the restrictive covenant and the spousal right to occupy, considered in the previous section, have, in respect of their proprietary quality, both been heavily circumscribed in an attempt to overcome such difficulties. The restrictive covenant is limited to land (and possibly ships) and bound by stringent rules relating to the transmission of both its benefit and burden; while the spousal right to occupy the matrimonial home only acquires a proprietary status once notice is given to the world via statutory registration procedures.

Despite the excesses of Lord Denning's Court of Appeal during the history of the short-lived 'deserted wife's equity', the law's usual approach in this area is rather more cautious displaying a deep-seated reluctance to embrace too readily new property interests. We have already seen, in *Hill* v. *Tupper* (Extract 5.1 above), one example of the court's refusal to recognise a novel property right. In this section, we will concentrate on another case, *Victoria Park Racing* v. *Taylor* (1937) 58 CLR 479 (Extract 9.2 below) in which, despite compelling arguments to the contrary, the Australian High Court declined an invitation to recognise what would in effect have been (from some perspectives at least) a proprietary right to a view.

9.3.1. The facts of *Victoria Park Racing* v. *Taylor*

The case involved a dispute between two neighbours. Victoria Park Racing owned a racecourse known as Victoria Park at which they held regular horse race meetings to which the public were charged an admission fee to attend. Taylor owned a plot of land adjoining the racecourse on which he built a platform overlooking the racecourse and from where he allowed a commentator called Angles to broadcast live commentaries on the races. According to Latham CJ, Angles 'describe[d] the races in a particularly vivid manner', and the racecourse owners sought an

injunction preventing him from broadcasting from his vantage point as, in their view, the live commentaries were having a deleterious effect on the number of people paying to attend the race meetings. But the High Court of Australia, by a majority of three to two, confirmed the decision of the judge at first instance, Nicholas J, and refused the injunction sought.

9.3.2. The views of the majority

The approach of the majority in *Victoria Park Racing* v. *Taylor* is characterised by extreme judicial caution, even conservatism, in which much is made of the lack of judicial authority for the arguments raised by the racecourse owners. The court, in the words of Latham CJ, was 'not ... referred to any authority in English law which supports the general contention that, if a person chooses to organise an entertainment ... he has a right to obtain from court an order that [a third party] shall not describe ... what they see'. And similarly that '[n]o authority has been cited to support ... [the] proposition' that 'such description is wrongful'. In a similar fashion, Dixon J stated that the interest Victoria Park Racing sought to protect was 'not an interest falling within any category which is protected at law or in equity'. While McTiernan J went even further down this route in (arguably incorrectly) stating that 'there are no legal principles [as opposed to authorities] which the court can apply to protect the [racecourse owners]'.

Such statements should be contrasted with the approach evident in *Tulk* v. *Moxhay* and *Hill* v. *Tupper*, where the judgments all proceed on the basis that the court can and will recognise new rights where there are compelling reasons so to do. In contrast, the majority in *Victoria Park Racing* v. *Taylor* seem to base their decision on the simple fact that the right claimed would be a novel one and must therefore fail, irrespective of the economic or social grounds for recognising it. There are, we would suggest, powerful reasons for agreeing with the majority decision in the case, which we will canvass below. However, in choosing to concentrate on a (self-perpetuating) lack of previous authority, such arguments are left unheard.

9.3.3. The views of the minority

Rather than arguing directly for the proposition that it is possible to own a spectacle, the minority in the case approached the matter more obliquely, primarily from the perspective of nuisance. While suggesting, in the words of Evatt J, that the broadcasters were acting in an 'unreasonable', 'grotesque' and 'dishonest' way and endeavouring to 'reap where they had not sown', the judgments concentrate on the issue of the nuisance caused to the racecourse owners by the activities of Taylor and Angles. Thus, according to Rich J, because '[a] man has no absolute right "within the ambit of his own land" to act as he pleases', the court was quite justified in issuing an injunction to prevent the unreasonable activities undertaken by Taylor on the adjoining land from interfering with the 'usual, reasonable and profitable' use that the racecourse owners were making of their land.

It is understandable that, in holding Taylor liable for his actions, the minority should concentrate on the specific cause of action under which that liability arose. However, implicit in their reasoning is an assumption about the rights that should be protected under the law of nuisance which would have represented a marked departure for the law (see section 9.5.2 below). Traditionally, the courts have refused to recognise a general property right to a view (see *Hunter* v. *Canary Wharf* discussed in section 6.4.1.2 above), yet neither Rich J nor Evatt J acknowledged how radical was the departure they were in effect advocating. That is, of course, not to say that such a development would necessarily have been wrong, but rather that it was necessary to explicitly consider the underlying issues prior to embarking upon such a path.

9.3.4. The significance of the case

Why, you might ask, have we given such prominence to an Australian case of no more than persuasive authority in the English courts? Despite its relative obscurity, the case is, as Gray has noted (Gray, 'Property in Thin Air', pp. 266–7), a 'pivotal' one which 'reverberates with a significance which has outlived its particular facts' because 'the conflict between the majority and minority views in this case throws up critical clues to the identification of the *propertiness* of property'.

The case is, like *Tulk* v. *Moxhay*, a product of its time. As Evatt J noted '[t]he fact that there is no previous English decision which is comparable to the present does not tell against the plaintiff because ... simultaneous broadcasting ... [and] television [are] quite new' (*Victoria Park Racing* v. *Taylor* (1937) 58 CLR 479 at 519) It was consequently necessary to map out the limits of property in the face of such technological advances, and it is important to assess how well the case resolves these issues. For, despite Evatt J's observation, it is arguable that the judgments in general fail to rise to the challenge.

Thus in their various ways the three majority judgments all lay emphasis on the lack of previous authority for the propositions advocated on behalf of the race-course owners. But this is inappropriate when the court is asked to address how the common law should respond to technological advances which pose challenges not confronted in the past. Thus, rather than concentrate on the absence of authority, the judgments would have better achieved their purpose by considering the potential problems from recognising what was in effect, property in a view. For the law's historic reluctance to do so is based upon the very real difficulties that would necessarily arise in practice. The recognition of a general property right to a view would place undue restrictions on the development of land which are simply not sustainable in a modern society and which can more efficiently be performed by public rather than private mechanisms such as planning law (see *Hunter* v. *Canary Wharf* discussed in section 6.4.1.2 above).

In spite of their apparent radicalism, the two minority judgments may be similarly criticised. Rather than confront the practical difficulties that would arise in extending the law of nuisance in the way that they envisage, both

judgments place their greatest emphasis on the justice of the racecourse owners' case. Yet this was not in dispute, and to elevate it in this way simply falls into the 'hard cases making bad law' trap that judges, above all others, should know to avoid. Thus the language of misappropriation used by both Evatt J (who as we have seen castigated the defendant for seeking 'to reap where it had not sown': *Victoria Park Racing* v. *Taylor* (1937) 58 CLR 479 at 514) and Rich J (who spoke of the defendant 'appropriating ... part of the profitable enjoyment of the plaintiff's land to his own commercial ends': *ibid*., p. 501) simply misses the point of the endeavour. For while no one sought to argue that what Taylor and Angles did was morally correct that did not make it necessarily unlawful.

The value of the case consequently lies more in what it does not say than in what it actually does. This is what Gray was referring to when he talked about the 'clues' the case offers. But we should avoid being too critical at this juncture. In *Tulk* v. *Moxhay*, for example, despite our earlier plaudits, it would be an exaggeration to suggest that the court directly confronted the issues when welcoming another interest into the property fold. By concentrating on the conscience of the new owner of the burdened land, the court in many respects did much to obscure the proprietary quality of the interest they had thereby recognised. That only emerged gradually in subsequent cases. This is the reason why it was at that stage, rather than at the outset, that the restrictions noted earlier were introduced to limit the dangers that might otherwise arise from this upstart new property right. Occasionally, of course, the issues are confronted directly, as in *Hill* v. *Tupper* and *National Provincial Bank* v. *Ainsworth*, but often the matter adopts the role of Banquo's ghost: present but unseen by all but the audience watching from afar.

Notes and Questions 9.3

Consider the following notes and questions both before and after reading the extracts from *Victoria Park Racing* v. *Taylor* (1937) 58 CLR 479 below (a longer version, along with further materials, is also available at www.cambridge.org/propertylaw/).

1 What consequences would a contrary decision in *Victoria Park Racing* v. *Taylor* have produced? No matter what the cause of action, would a contrary finding have in effect established property in a spectacle?

2 How unfair were the actions of Angles and Taylor? Was the court swayed by the form of competition provided by Angles? How would Locke have viewed the dispute?

3 Is a microphone more akin to a quill than a camera? Would it have been different if the defendant had shot a video rather than broadcast a voice?

4 Would an analysis rooted in public policy rather than legal precedent provide a different outcome? To what extent do the judgments embrace notions of public policy and what does this say about the role of case law? Stripped of the rhetoric

of law, is legal discourse on property ever anything more than a debate on different perceptions of the general good?

5 What is the significance of the conflict between the majority and minority views in the case (See Gray, 'Property in Thin Air'.)

6 Is there a difference in the judicial techniques used by Latham CJ and Dixon J as compared to those of Rich and Evatt JJ? Are there any parallels to the contrasting approaches of the Court of Appeal and House of Lords in *National Provincial Bank* v. *Ainsworth*?

7 In Libling, 'The Concept of Property', David Libling argued that English law ought to adopt the following principle:

> Any expenditure of mental or physical effort, as the result of which there is created an entity, whether tangible or intangible, vests in the person who brought the entity into being, a proprietary right to the commercial exploitation of that entity, which right is separate and independent from the ownership of that entity.

Do you agree? Would it cause any practical problems? If the judges in *Victoria Park Racing* v. *Taylor* had adopted this as a correct statement of law, would the decision of the court have been different?

Extract 9.2 *Victoria Park Racing* v. *Taylor* (1937) 58 CLR 479

LATHAM CJ: This is an appeal from a judgment for the defendants given by Nicholas J in an action by the Victoria Park Racing and Recreation Grounds Co. Ltd against Taylor and others ...

The plaintiff company carries on the business of racing upon a racecourse known as Victoria Park. The defendant Taylor is the owner of the land near the racecourse. He has placed an elevated platform on his land from which it is possible to see what takes place on the racecourse and to read the information which appears on notice boards on the course as to the starters, scratchings, etc., and the winners of the races. The defendant Angles stands on the platform and through a telephone comments upon and describes the races in a particularly vivid manner and announces the names of the winning horse. The defendant, the Commonwealth Broadcasting Corporation, holds a broadcasting licence under the regulations made under the Wireless Telegraphy Act 1905–1936 and carries on the business of broadcasting from station 2UW. This station broadcasts the commentaries and descriptions given by Angles. The plaintiff wants to have the broadcasting stopped because it prevents people from going to the races and paying for admission. The evidence shows that some people prefer hearing about the races as seen by Angles to seeing the races for themselves. The plaintiff contends that the damage which it thus suffers gives, in all the circumstances, a cause of action ...

I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a

higher fence. Further, if the plaintiff desires to prevent its notice boards being seen by people from outside the enclosure, it can place them in such a position that they are not visible to such people. At sports grounds and other places of entertainment it is the lawful, natural and common practice to put up fences and other structures to prevent people who are not prepared to pay for admission from getting the benefit of the entertainment. In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide. The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language etc., break a contract, or wrongfully reveal confidential information. The defendants did not infringe the law in any of these respects ...

It has been argued that by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. The vagueness of this proposition is apparent upon its face. What it really means is that there is some principle (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and then describing what they see. The Court has not been referred to any authority in English law which supports the general contention that, if a person chooses to organize an entertainment or to do anything else which other persons are able to see, he has a right to obtain from a court an order that they shall not describe to anybody what they see. If the claim depends upon interference with a proprietary right it is difficult to see how it can be material to consider whether the interference is large or small – whether the description is communicated to many persons by broadcasting or by a newspaper report, or only to a few persons in conversation or correspondence. Further, as I have already said, the mere fact that damage results to a plaintiff from such description cannot be relied upon as a cause of action.

I find difficulty in attaching any precise meaning to the phrase 'property in a spectacle'. A 'spectacle' cannot be 'owned' in any ordinary sense of that word. Even if there were any legal principle which prevented one person from gaining an advantage for himself or causing damage to another by describing a spectacle produced by that other person, the rights of the latter person could be described as property only in a metaphorical sense. Any appropriateness in the metaphor would depend upon the existence of the legal principle. The principle cannot itself be based upon such a metaphor.

Even if, on the other hand, a spectacle could be said to exist as a subject-matter of property, it would still be necessary, in order to provide the plaintiff in this case with a remedy, to show that the description of such property is wrongful or that such description is wrongful when it is widely disseminated. No authority has been cited to support such a proposition ...

RICH J [dissenting]: ... A man has no absolute right 'within the ambit of his own land' to act as he pleases. His right is qualified and such of his acts as invade his neighbour's property are lawful only in so far as they are reasonable having regard to

his own circumstances and those of his neighbour. The plaintiff's case must, I am prepared to concede, rest on what is called nuisance. But it must not be overlooked that this means no more than that he must complain of some impairment of the rights flowing from occupation and ownership of land. One of the prime purposes of occupation of land is the pursuit of profitable enterprises for which the exclusion of others is necessary either totally or except upon conditions which may include payment. In the present case in virtue of its occupation and ownership, the plaintiff carries on the business of admitting to the land for payment patrons of racing. There it entertains them by a spectacle, by a competition in the comparative merits of racehorses, and it attempts by all reasonable means to give to those whom it admits the exclusive right of witnessing the spectacle, the competition, and of using the collated information in betting while that is possible on its various events. This use of its rights as occupier is usual, reasonable and profitable. So much no one can dispute. If it be true that an adjacent owner has an unqualified and absolute right to overlook an occupier whatever may be the enterprise he is carrying on and to make any profitable use to which what he sees can be put, whether in his capacity of adjacent owner or otherwise, then to that extent the right of the occupier carrying on the enterprise must be modified and treated in law as less extensive and ample than perhaps is usually understood. But can the adjacent owner, by virtue of his occupation and ownership, use his land in such an unusual way as the erection of a platform involves, bring mechanical appliances into connection with that use, i.e. the microphone and land line to the studio, and then by combining regularity of observation with dissemination for gain of the information so obtained give the potential patrons a mental picture of the spectacle, an account of the competition between the horses and of the collated information needed for betting, for all of which they would otherwise have recourse to the racecourse and pay? To admit that the adjacent owner may overlook does not answer this question affirmatively ...

There can be no right to extend the normal use of his land by the adjoining owner indefinitely. He may within limits make fires, create smoke and use vibratory machinery. He may consume all the water he finds on his land, but he has no absolute right to dirty it. Defendants' rights are related to plaintiffs' rights and each owner's rights may be limited by the rights of the other ... What appears to me to be the real point in this case is that the right of view or observation from adjacent land has never been held to be an absolute and complete right of property incident to the occupation of that land and exercisable at all hazards notwithstanding its destructive effect upon the enjoyment of the land overlooked. In the absence of any authority to the contrary I hold that there is a limit to this right of overlooking and that the limit must be found in an attempt to reconcile the right of free prospect from one piece of land with the right of profitable enjoyment of another ... Indeed, the prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognize that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life. For these reasons I am of opinion that the plaintiff's grievance, although of an unprecedented character, falls within the settled principles upon which the action for nuisance

depends. Holding this opinion it is unnecessary for me to discuss the question of copyright raised in the case.

I think that the appeal should be allowed.

DIXON J: The foundation of the plaintiff company's case is no doubt the fact that persons who otherwise would attend race meetings stay away because they listen to the broadcast made by the defendant Angles from the tower overlooking the course. Beginning with the damage thus suffered and with the repetition that may be expected, the plaintiff company says that, unless a justification for causing it exists, the defendants or some of them must be liable, in as much as it is their unauthorized acts that inflict the loss. It is said that, to look for a definite category or form of action into which to fit the plaintiff's complaint, is to reverse the proper order of thought in the present stage of the law's development. In such a case, it is for the defendants to point to the ground upon which the law allows them so to interfere with the normal course of the plaintiff's business as to cause damage.

There is in my opinion little to be gained by inquiring whether in English law the foundation of a delictual liability is unjustifiable damage or breach of specific duty. The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rules of law from which judges ought not wittingly to depart and no light is shed upon a given case by large generalizations about them. We know that, if upon such facts as the present the plaintiff could recover at common law, his cause of action must have its source in an action upon the case and that, in such an action, speaking generally, damage was the gist of the action. There is perhaps nothing wrong either historically or analytically in regarding an action for damage suffered by words, by deceit or by negligence as founded upon the damage and treating the unjustifiable conduct of the defendant who caused it as [a] matter of inducement. But, whether his conduct be so described or be called more simply a wrongful act or omission, it remains true that it must answer a known description, or, in other words, respond to the tests of criteria laid down by establishing principle.

The plaintiff's counsel relied in the first instance upon an action on the case in the nature of nuisance. The premises of the plaintiff are occupied by it for the purpose of a racecourse. They have the natural advantage of not being overlooked by any surrounding heights or raised ground ... They have been furnished with all the equipment of a racecourse and so enclosed as to prevent any unauthorized ingress or, unless by some such exceptional devices as the defendants have adopted, any unauthorized view of the spectacle. The plaintiff can thus exclude the public who do not pay and can exclude them not only from the presence at, but also from knowledge of, the proceedings upon the course. It is upon the ability to do this that the profitable character of the enterprise ultimately depends. The position of and the improvements to the land thus fit it for a racecourse and give its occupation a particular value. The defendants, then proceed by an unusual use of their premises to deprive the plaintiff's land of this value, to strip it of its exclusiveness. By the tower placed where the race will be fully visible, and equipped with microphone and line, they enable Angles to see the spectacle and convey its substance by broadcast. The effect is, the plaintiff says, just as if they supplied the

plaintiff's customers with elevated vantage points round the course from which they could witness all that otherwise would attract them and induce them to pay the price of admission to the course. The feature in which the plaintiff finds the wrong of nuisance is the impairment or deprivation of the advantages possessed by the plaintiff's land as a racecourse by means of a non-natural and unusual use of the defendant's land.

This treatment of the case will not I think hold water. It may be conceded that interferences of a physical nature, as by fumes, smell and noise, are not the only means of committing a private nuisance. But the essence of the wrong is the detraction from the occupier's enjoyment of the natural rights belonging to, or in the case of easements of the acquired rights annexed to, the occupation of land. The law fixes those rights. Diversion of custom from a business carried on upon the land may be brought about by noise, fumes, obstruction of the frontage or any other interference with the enjoyment of recognized rights arising from the occupation of property and, if so, it forms a legitimate head of damage recoverable for the wrong; but it is not the wrong itself. The existence or the use of a microphone upon neighbouring land is, of course, no nuisance. If one who could not see the spectacle took upon himself to broadcast a fictitious account of the races he might conceivably render himself liable in a form of action in which his falsehood played a part, but he would commit no nuisance. It is the obtaining a view of the premises which is the foundation of the allegation. But English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers and of other persons who enable themselves to overlook the premises. An occupier of land is at liberty to exclude his neighbour's view by any physical means he can adopt. But, while it is no wrongful act on his part to block the prospect from adjacent land, it is no wrongful act on the part of any person on such land to avail himself of what prospect exists or can be obtained. Not only is it lawful on the part of those occupying premises in the vicinity to overlook the land from any natural vantage point, but artificial erections may be made which destroy the privacy existing under natural conditions. In *Chandler* v. *Thompson* (1811) 3 Camp 80 at 82; 170 ER 1312 at 1313, Le Blanc J said that, although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained, and when he was in the common pleas he had heard it laid down by Eyre LCJ that such an action did not lie and that the only remedy was to build on the adjoining land opposite to the offensive window. After that date, there is, I think, no trace in the authorities of any doctrine to the contrary.

In *Johnson* v. *Wyatt* (1863) 2 De GJ&S 18 at 27; 46 ER 281 at 284, Turner LJ said: 'That the windows of the house may be overlooked, and its comparative privacy destroyed, and its value thus diminished by the proposed erection ... are matters with which, as I apprehend, we have nothing to do', that is, they afford no ground for an injunction. This principle formed one of the subsidiary reasons upon which the decision of the House of Lords was based in *Tapling* v. *Jones* (1865) 11 HLC 290 at 317; 11 ER 1344 at 1355. Lord Chelmsford said:

> ... the owner of a house has a right at all times ... to open as many windows in his own house as he pleases. By the exercise of the right, he may materially interfere

> with the comfort and enjoyment of his neighbour; but of this species of injury the law takes no cognizance. It leaves everyone to his self-defence against an annoyance of the description and the only remedy in the power of adjoining owner is to build on his own ground and so to shut out the offensive windows.

When this principle is applied to the plaintiff's case it means, I think, that the essential element upon which it depends is lacking. So far as freedom from view or inspection is a natural or acquired physical characteristic of the site, giving it value for the purpose of the business or pursuit which the plaintiff conducts, it is a characteristic which is not a legally protected interest. It is not a natural right, for breach of which a legal remedy is given, either by an action in the nature of nuisance or otherwise. The fact is that the substance of the plaintiff's complaint goes not to interference with its enjoyment of the land, but with the profitable conduct of its business. If English law had followed the course of development that has recently taken place in the United States, the broadcasting rights in respect of the races might have been protected as part of the quasi-property created by the enterprise, organisation and labour of the plaintiff in establishing and equipping a racecourse and doing all that is necessary to conduct race meetings. But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright, and the fact that exclusive rights to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wider generalization ...

In dissenting from a judgment of the Supreme Court of the United States, by which the organized collection of news by a news service was held to give it in equity a quasi-property protected against appropriation by rival news agencies, Brandeis J gave reasons which substantially represent the English view and he supported his opinion by a citation of much English authority: *International News Service* v. *Associated Press*, 248 US 215 (1918). His judgment appears to me to contain an adequate answer both upon principle and authority to the suggestion that the defendants are misappropriating or abstracting something which the plaintiff has created and alone is entitled to turn to value. Briefly, the answer is that it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that this right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches ...

In my opinion the right to exclude the defendants from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law. It is not an interest falling within any category which is protected at law or in equity. I have had the advantage of reading the judgment of Rich J but I am unable to regard the considerations which are there set out as justifying what I consider amounts not simply to a new application of settled principle but to the introduction into the law of new doctrine ...

EVATT J [dissenting]: ... Here the plaintiff contends that the defendants are guilty of the tort of nuisance. It cannot point at once to a decisive precedent in its favour, but the statements of general principle in *Donoghue* v. *Stevenson* are equally applicable to the tort of nuisance. A definition of the tort of nuisance was attempted by Sir Frederick Pollock (Indian Civil Wrongs Bill, c. VII, section 55), who said:

> Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property
>
> (a) by diminishing the value of that property;
> (b) by continuously interfering with his power of control or enjoyment of that property;
> (c) by causing material disturbance or annoyance to him in his use or occupation of that property.
>
> What amounts to material disturbance or annoyance is a question of fact to be decided with regard to the character of the neighbourhood, the ordinary habits of life and reasonable expectations of persons there dwelling, and other relevant circumstances ...

At an earlier date, Pollock CB had indicated the danger of too rigid a definition of nuisance. He said (*Bamford* v. *Turnley* (1862) 3 B&S 66 at 79; 122 ER 27 at 31; [1861–73] All ER Rep 706 at 710):

> I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances – the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent ...

In the present case, the plaintiff relies upon all the surrounding circumstances. Its use and occupation of land is interfered with, its business profits are lessened, and the value of the land is diminished or jeopardized by the conduct of the defendants. The defendants' operations are conducted to the plaintiff's detriment, not casually but systematically, not temporarily but indefinitely; they use a suburban bungalow in an unreasonable and grotesque manner, and do so in the course of a gainful pursuit which strikes at the plaintiff's profitable use of its land, precisely at the point where the profit must be earned, namely, the entrance gates. Many analogies to the defendants' operations have been suggested, but few of them are applicable. The newspaper which is published a considerable time after a race has been run competes only with other newspapers, and can have little or no effect upon the profitable employment of the plaintiff's land. A photographer overlooking the course and subsequently publishing a photograph in a newspaper or elsewhere does not injure the plaintiff. Individuals who observe the racing from their own homes or those of their friends could not interfere with the plaintiff's beneficial use of its course. On the other hand, the defendants' operations are fairly comparable with those who, by the employment of moving picture films, television and broadcasting, would convey to the public generally

(i) from a point of vantage specially constructed; (ii) simultaneously with the actual running of the races; (iii) visual, verbal or audible representations of each and every portion of the races. If such a plan of campaign were pursued, it would result in what has been proved here, namely, actual pecuniary loss to the occupier of the racecourse and a depreciation in the value of his land, at least so long as the conduct is continued. In principle, such a plan may be regarded as equivalent to the erection by a landowner of a special stand outside a cricket ground for the sole purpose of enabling the public to witness the cricket match at an admission price which is lower than that charged to the public bodies who own the ground, and at great expense organize the game.

In concluding that, in such cases, no actionable nuisance would be created, the defendants insist that the law of England does not recognize any general right of privacy. That is true, but it carries the defendants no further, because it is not merely an interference with privacy which is here relied upon, and it is not the law that every interference with private property must be lawful. The defendants also say that the law of England does not forbid one person to overlook the property of another. That also is true in the sense that the fact that one individual possesses the means of watching, and sometimes watches, what goes on in his neighbour's land, does not make the former's action unlawful. But it is equally erroneous to assume that under no circumstances can systematic watching amount to a civil wrong, for an analysis of the cases of *J. Lyons & Sons* v. *Wilkins* [1899] 1 Ch 255, and *Ward Lock & Co. Ltd* v. *Operative Printers Assistants Society* (1906) 22 TLR 327, indicates that, under some circumstances, the common law regards 'watching and besetting' as a private nuisance, although no trespass to land has been committed ...

In the United States, in the case of *International News Service* v. *Associated Press* 248 US 215 at 255 (1918), Brandeis J regarded the *Our Dogs* case (*Sports and General Press Agency Ltd* v. *Our Dogs Publishing Co. Ltd* [1916] 2 KB 880) as illustrating a principle that 'news' is not property in the strict sense, and that a person who creates an event or spectacle does not thereby entitle himself to the exclusive right of first publishing the 'news' or photograph of the event or spectacle. But it is an extreme application of the English cases to say that, because some overlooking is permissible, all overlooking is necessarily lawful. In my opinion, the decision in the *International News Service* case evidences an appreciation of the function of law under modern conditions, and I believe that the judgments of the majority and of Holmes J commend themselves as expositions of principles which are not alien to English law ...

If I may borrow some phrases from the majority decision, I would say that in the present case it is indisputable that the defendant broadcasting company had 'endeavoured to reap where it has not sown', and that it has enabled all its listeners to appropriate to themselves 'the harvest of those who have not sown'. Here, too, the interference with the plaintiff's profitable use of its land takes place 'precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not': 248 US 215 at 240 (1918). For here, not only does the broadcasting company make its own business profits from its broadcasts of the plaintiff's races, it does so, in part at least, by conveying to its patrons

> and listeners the benefit of being present at the racecourse without payment. Indeed, its expert announcer seems to be incapable of remembering the fact that he is not on the plaintiff's course nor broadcasting with its permission, for, over and over again, he suggests that his broadcast is coming from within the course. The fact that here, as in the *International News Service* case, the conduct of the defendants cannot be regarded as honest should not be overlooked if the statement of Lord Esher is still true that 'any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England' (quoted in *Donoghue* v. *Stevenson* [1932] AC 562 at 608–9; [1932] All ER Rep 1 at 25).
>
> The fact that there is no previous English decision which is comparable to the present does not tell against the plaintiff because not only is simultaneous broadcasting or television quite new, but, so far as I know, no one has, as yet, constructed high grandstands outside recognized sports grounds for the purpose of viewing the sports and of enriching themselves at the expense of the occupier.

9.4. A comparative confirmation and an economic critique

This chapter has proceeded on the basis of assumptions canvassed in section 9.1.2 above that there is a general reluctance to recognise new property interests. This, briefly, is because of their capacity to bind third parties and the (supposed) deleterious effects on alienation that would arise by too ready an acceptance of novel property rights. Such assumptions would appear to be borne out by comparative experience. As Rudden has noted:

> In all non-feudal systems with which I am familiar (whether earlier, as at Rome, or later), the pattern is (in very general terms) similar: there are less than a dozen sorts of property entitlement. Three confer possession, either now or later, good against strangers: fee (ownership, full or bare), life estate (usufruct) and lease ... [then there are the] non-possessory and non-security rights [which I] will ... give ... the name servitudes ... [such as] easements, profits, restrictive covenants, equitable servitudes, real covenants, land obligations ... [and finally] ... security interests. (Rudden, 'Economic Theory v. Property Law', pp. 241–2)

Rudden's purpose is to question whether this universal approach to property is correct, and he proceeds by considering the legal justifications said to support it. He begins by refuting the argument that there is no demand for a more extensive list of property interests by pointing to the pressures that do (and will continue to) exist. Next he considers the claim that third parties will then be bound by interests of which they had no notice. While acknowledging the importance of this issue, Rudden notes it is manifestly possible to create registers by which third parties might be given notice and that, in any case, the presence of notice has never been either a necessary or a sufficient ground for granting proprietary status in the past. He then moves on to consider the objection that it is wrong to bind third parties by obligations (particularly positive ones) to

which they have not personally consented but refutes this, ultimately, by the example of the lease which already does this within the proprietary field. Rudden's final substantive argument is raised against the charge of *pyramiding* (by which it is claimed that land titles will become unduly complicated by the multiplying tiers of proprietary interests) that he suggests might be dealt with by providing a version of the section 84 procedure under which the Lands Tribunal is empowered to discharge or modify obsolete restrictive covenants (see Notes and Questions 6.12 above).

Rudden takes an equally robust view of the economic arguments typically used to buttress the legal ones. First, he refutes the marketability argument by suggesting that burdening land with novel interests would not affect its marketability but simply its price. He then considers the standardisation argument in which someone who sells a non-standard product is said to impose costs on others because, from then on, everyone has to investigate what they are buying to see whether it is bound by such an interest. Rudden refutes this with the following aside:

> First, nowhere does there exist an active wholesale market in immoveables; second, every buyer may know today that, as a matter of property law, he could be bound only by certain stereotyped obligations, but he does not know what fancies any particular seller will seek to exact as a matter of contract.

Rudden continues by wondering why, if it is obvious that in a market economy contractual obligations will multiply, the opposite seems to occur in respect of property interests. After all, he argues, while the information costs in finding out about land would increase if there were a greater number of potential property interests capable of existing in it, this 'may be outweighed when it comes to acquiring' the land by the negotiation costs which would otherwise be required by the seller seeking to impose such obligations as a matter of contract (do you agree?). Rudden is equally dismissive of the land utilisation argument which suggests it is important not to sterilise land by imposing positive obligations upon it. On the contrary, he rightly contends, positive obligations might actually augment the value of both the dominant and servient tenements. The difficulty is, of course, that it is hard to quantify costs which might well extend well beyond the lifetime of the (otherwise contracting) original parties. While he does not address that point when dealing with the land utilisation issue, he does do so in his final comments on the durability of property interests. 'Contracts are born to die', he states, while by contrast 'the relations of property are built to endure' (Rudden, 'Economic Theory v. Property Law', p. 259) thus it is consequently more difficult to free your land from a property burden rather than a contractual one. But Rudden is unconvinced, noting Epstein's point ('Notice and Freedom of Contract in the Law of Servitudes', p. 1361) that making an interest proprietary rather than contractual 'only changes the identity of the party who must initiate the transaction' (but is not the point that with contractual burdens there is often no

need for such a terminating transaction because the burden will die of its own accord) while acknowledging that, in situations where the 'property entitlements and correlative burdens are widely dispersed, there will be holdout and free-rider difficulties' (Rudden, 'Economic Theory v. Property Law', p. 259).

Notes and Questions 9.4

Consider the following notes and questions both before and after reading B. Rudden, 'Economic Theory v. Property Law: The "Numerus Clausus" Problem', in Eekelaar and Bell (eds.), *Oxford Essays in Jurisprudence: Third Series* (Oxford: Oxford University Press, 1987), p. 239.

1 How, if at all, is Rudden's argument weakened by (despite the title of the essay) basing all his examples on land and at no stage considering the applicability or otherwise of much of what he says to non-land such as moveables?

2 Does the normative view of property rights we discuss below in the next section expose Rudden's legal arguments as little more than puff? While there might be no conceptual reason why we cannot embrace an ever-increasing list of property interests, along with complicated registration and removal schemes, why on earth would the market want to saddle itself with such burdens? Would the market, rather than academics insulated in their ivory towers, be willing to absorb the inevitable increase in both transaction and regulation costs for no apparent gain or advantage just so as to pander to the whims of the insane, simple, eccentric and idealistic?

3 Do you agree with Rudden's assertion that burdening land with novel interests would not affect its marketability but simply its price? Would lenders be willing to lend on property where the effect of novel encumbrances was not established and which as a consequence held little prospect of ever becoming so?

4 Is Rudden correct to assert that 'nowhere does there exist an active wholesale market in immoveables'? Do not developments within the realms of commercial property such as PISCES (where a common data standard is being established to allow for the easy transmission of real estate data between purchasers, vendors and their advisers – see www.pisces.co.uk) and REITs (Real Estate Investment Trusts, in which investors will be able to invest in a tranche of commercial property with similar flexibility to the way in which they can already invest in portfolios of shares, options and bonds) show that that is exactly where the market is heading? Contrary to Rudden's assertion, REITs are in fact already popular in overseas markets including the US, France, Japan and Australia, and are likely to be introduced into the UK following a consultation launched by the Chancellor of the Exchequer in March 2004.

5 Is there any substance in Rudden's assertion that uncertainty already exists within the market as no purchaser knows 'what fancies any particular seller will seek to exact as a matter of contract'? What would the attitude of the market and third party advisers such as agents and lawyers be to a seller who repeatedly tried to impose novel contractual liabilities on prospective purchasers?

9.5. The future of property

In the film *Total Recall*, Arnold Schwarzenegger inhabits a planet on which there is a shortage of oxygen and where, as a consequence, property in air is a valuable and alienable commodity. In contrast, the earth's atmosphere has until recently been conceived of in terms of an infinite resource. This is why Cohen, in the Socratic dialogue considered in Extract 4.5 above, uses air as an example of something to which the property label is simply inapplicable:

C: Would you agree that air is extremely valuable to all of us?
E: Yes, of course.
C: Why then is there no property in air?
E: I suppose because there is no scarcity.
C: Suppose there was no scarcity of any material object.
E: I suppose then there would be no property in material objects.

But this extract is based upon lectures given more than half a century ago, and Cohen's example has, arguably, not survived environmental developments to the contrary. There are now EC directives on air quality the effect of which appears to give individual citizens property rights in air (see Case C-361/88, *Commission of the European Communities* v. *Federal Republic of Germany* [1991] ECR I-2567 and Case C-59/89, *Commission of the European Communities* v. *Federal Republic of Germany* [1991] ECR I-2607). Similarly, in the wake of developments such as the Kyoto Summit on global warming, a market in pollution permits has been established on the Chicago Board of Trade, the effect of which is to turn air quality into a tradable resource. As United States government spokesmen Melinda Kimble noted, while discussing the emerging market in sulphur and carbon dioxide permits, 'we can trade anything' (*Newsnight*, BBC2, 28 May 1998), by which she means not that everything is property but that anything is capable of being made the subject of property. For, as we saw above, property is, from one perspective at least, simply a shorthand means of allocating scarce resources.

Now you might, at this juncture, accuse us of begging the question. What, after all, is meant by a resource? Definitions do, of course, exist, and tend to focus on the subject-matter to which property rights might attach: but this misses the point. For example, in what today seems little more than a parody of the words of Melinda Kimble, the future Liberal Prime Minister (generally recognised as the most socially liberal and radical mainstream politician of his age), W. E. Gladstone, some 200 years earlier made his debut in Parliament speaking in support of slavery,

the abhorrent and inherently racist notion of individuals owning property rights in their fellow human beings. While it is now completely unacceptable to commodify human beings in this way, technological advances are (almost paradoxically) causing us to re-examine moral arguments against commodification of the human body. Thus, in the face of the shortage of organs available for transplantation, judicial and academic voices can now be heard advocating the recognition of limited rights of property in non-renewable body parts (*R.* v. *Kelly* [1999] QB 621 and see also the Bristol Royal Infirmary Inquiry, *Interim Report: Removal and Retention of Human Material* (2001) available at www.bristol-inquiry.org.uk), and, as we briefly noted in Chapter 1, no less complex issues have to be faced about the way in which we treat other types of body part, whether attached or unattached to the living or the dead (see *Moore* v. *Regents of the University of California*, 51 Cal 3d 120; 793 P 2d 479 (1990), discussed in Chapter 1).

Faced with such a pragmatic approach to property, there seems little point offering a characterisation which seeks to transcend that reality. From this perspective, property is no more than a normative set of relationships which might be attached to whatever subject-matter society deems it necessary or beneficial to make the subject of property. We are sorry if that destroys the mystique but that really is all it is. Those who seek to offer a definition that goes beyond this are simply attempting to make property support a philosophical, moral or political burden that it cannot bear. Now we might well, of course, have views as to whether or not human body parts should be regarded as property but that is not because we have a definition of property to which they do or do not correspond but because we have certain views on the efficacy (be that in practical, moral, ethical or whatever terms) of making them subject to such a regime. In other words, it is not towards the definition of the subject-matter, but the consequences of the categorisation, that we look, when we debate whether something should or should not be regarded as property. Thus society might in the near future recognise some form of property in *in situ* kidneys, and whether or not it does has nothing to do with any definition of property to which it might subscribe but with the moral and practical consequences of adopting such a stance. That is not, of course, to deny the legitimacy of asking such questions, but simply to note they are matters to which property alone cannot provide an answer. For property is, in short, an essential mechanism for the workings of any society but is separate from the values that determine the parameters of what is and is not recognised as property within that particular setting.

Looking to the future we can but speculate. For example, in both cyberspace and outer space, the pressure to recognise new property rights is growing. The Internet has the potential to stretch the current boundaries of intellectual property to breaking point. In the face of the contemptuous disregard of the rules of copyright (and the inability to effectively counter such infringements), it is at least arguable that this will have profound long-term implications for the development of intellectual property rights in both virtual and perhaps even non-virtual reality. In the realm of outer space, speculation concerning water deposits on the Moon

has renewed interest in the once purely academic question of ownership rights in space. There are, it is true, two international treaties on the subject, namely, the Outer Space Treaty and the Moon Treaty, the latter of which outlaws property rights in celestial bodies. However, it is surely indicative that in the light of technological advance the Moon Treaty has been signed by fewer than ten countries of which only Australia has any pretensions in respect of space exploration.

In the face of such flux we will end this chapter by considering two broad developments in this area, the new property thesis and the emergence of what is often referred to as quasi-property.

9.5.1. The new property thesis

In his article, 'The New Property', Reich argued that the new forms of wealth (such as welfare benefits) which had arisen in the wake of the increased role of government demand the same legal protection as that accorded to private property. The reason for adopting such a strategy was, basically, twofold. Tactically, Reich appeared to be trying to entrench welfare payments by bringing them within the ambit of the constitutional safeguard preventing the deprivation of 'property without due process of law', while, as a polemic, the article was attempting to utilise the rhetorical power of private property.

This has led some to question how 'property rights differ from rights generally – from human rights or personal rights or rights to life or liberty, say' (Grey, 'The Disintegration of Property', p. 71). In his view, the term has become so broad as to play no useful role in, so to speak, its own right. A similar point was made by Ronald Sackville who, in rejecting Macpherson's attempt in 'Capitalism and the Changing Concept of Property' to redefine the 'concept and institution of property', noted that '[b]y expanding the concept of property to the point where it is all-encompassing, Macpherson removes its value as an analytical tool' (Sackville, 'Property Rights and Social Security', p. 250). Rather than blame Macpherson, however, Grey points to modern developments in the field (or should we, in deference to him, say *estate*) of property for bringing this about.

The charge is a serious one and the answer so pragmatic that it might disappoint. For, while there are obvious dangers in defining a term so broadly that it ceases to be of any value absent words of limitation, it is simply wrong to assert that we have, as yet, reached that point in respect of *property*. At times, admittedly, some commentators have fallen into this trap. While (for reasons we will touch on below) we would not lay this charge at Macpherson's door, it is, for example, possible to argue that Reich's *New Property* thesis suffers from just such excess. As we have seen, his argument that new forms of wealth (such as welfare payments) require the same legal protection as that accorded to private property is, from one perspective at least, simply opportunistic. Yet, as a polemic seeking to harness the rhetorical power of private property, the baby appears to have become submerged beneath the bathwater. The property parallel performs no analytical function and is simply weakened by the association. In contrast, as we saw above, used properly

(which is, after all, at the heart of the term's ontological root) the term *property* is simply a means of signposting what is (and what is not) regarded as a resource. (See Ackerman, *Private Property and the Constitution*; Etheleriadis, 'The Analysis of Property Rights'; and Waldron, *The Right to Private Property*.)

There is indeed a danger in defining *property* so broadly that it ceases to retain any real analytical force: but we must be careful. Sackville, for example, specifically exempted Reich from this charge when criticising Macpherson's approach on the surprising ground that 'the phrase "the new property" is not intended to ... be regarded analytically as identical to a claim ... to ownership of goods or an interest in land'. In his view, it was possible to use the term outside its normal confines provided one did not go as far as Macpherson who 'suggests that the concept must be broadened to embrace the right not to be excluded from the use or benefit of the community's accumulated productive resources'.

But the latitude Sackville extends to Reich is arguably as ill-deserved as the criticism he directs towards Macpherson. As Sackville himself admits, Reich's use of the term takes it outside its analytical frame of reference: he is simply attempting to harness the rhetorical power of private property without engaging in any serious attempt to analyse the *new property* in such terms. But this is exactly what we should avoid because it devalues the *property* label by turning it into little more than a political clarion call. In contrast, Macpherson was concerned not with hyperbole but with the far more profound task of re-evaluating the analytical definition of property by returning it to its historical roots. In his view, 'from Aristotle down to the seventeenth century, property was seen to include ... both an individual right to exclude others from some use or enjoyment of some thing, and an individual right not to be excluded from the use or enjoyment of things that society had declared to be for common use – common lands, parks, roads, waters'. Thus, in describing pensions and the subsidised services of a modern welfare state in terms of property, Macpherson was attempting to re-establish an analytical concept of property that extended beyond the private to embrace once more the commons.

Notes and Questions 9.5

Consider the following notes and questions both before and after reading Reich, 'The New Property', and the materials highlighted below.

1 Does Reich's use of the property epithet strengthen or weaken his analysis?

2 Is the concept of property strengthened or weakened by its use in such a context?

3 Despite its fame (as the most heavily cited article ever published by the *Yale Law Journal*), Reich's thesis has not, as he has himself admitted, had a radical effect on the legal definition of property (Reich, 'Beyond the New Property: An Ecological View of Due Process') possibly because it was not ultimately

necessary. It is after all perhaps not without significance that Reich was able to make the same arguments a few years later in Reich, 'Individual Rights and Social Welfare' without at any point using the term 'property'.

4 In what way is Macpherson's use of the term 'property' in 'Human Rights as Property Rights' different to Reich's approach? Is it a distinction of degree or substance?

5 Macpherson considered that the difference between private and common property was rooted in the concept of exclusion, and contrasted the *right to exclude* that is generally regarded as the hallmark of a private property right with the *right not to be excluded* which he regarded as the key component in communal property. Does such an analysis suggest Macpherson is more or less justified than Reich in the way in which he employs the term 'property' (cf. Sackville, 'Property Rights and Social Security')?

6 Under the Human Rights Act 1998, the European Convention on Human Rights was incorporated into English law. Under Article 1 of the First Protocol to the Convention, property is protected in the context of possession, while under Article 8 the right to privacy extends to one's home and correspondence. Does such an approach equate more with Reich's or Macpherson's analysis of property rights, and would either of them draw comfort from the property rights jurisprudence that has emerged since the Act came into force on 2 October 2000? (See Rook, 'Property Law and the Human Rights Act 1998' and Halstead, 'Human Property Rights'.)

7 Do you agree with Grey, 'The Disintegration of Property', p. 69, when he asserts that property rights are often in effect transitory, and liable 'to disappear as if by magic':

> Yesterday A owned Blackacre; among his rights of ownership was the legal power to leave the land idle, even though developing it would bring in 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.

Is this really a disappearing rabbit or simply a *trompe-l'oeil*? Has the right disappeared or just become more difficult to see? Before Blackacre was settled on trust there was no difficulty because as sole owner A would necessarily bear the loss arising from leaving the land idle. But introducing a trust into the equation necessarily complicates matters for now ownership of Blackacre is divided between B and C and it consequently becomes necessary to determine on whose shoulders the loss should fall if the land is again left idle. As trustee, B has the right to manage the land and if he chooses not to do so it seems sensible for the loss to fall on his shoulders in the form of his liability to C in breach of trust which,

despite the somewhat pejorative tone, is a compensatory remedy which does not seek to punish the trustee (see Hanbury and Martin, *Modern Equity*, p. 650).

8 In 'Property in Thin Air', Kevin Gray states that '[p]roperty is not theft – it is fraud ... a vacant concept oddly enough like thin air'. The argument is characteristically provocative and appears to be a staging post en route to his latter, more ambitious attempt to 'reconceive the law of property' as part of a process 'creating a new commonwealth of dignity and equality' (Gray, 'Equitable Property'). Gray's argument is, of course, much more complex than these various snapshots can do justice to, but is there, at its core, an irresoluble paradox? Can an argument with foundations built upon the essential vacuity of property reach a conclusion that proclaims its central importance? Does Gray manage to square the circle in the following extract, and is it appropriate to quote Bentham at this point in the argument?

> In the exercise of this dual role the notion of property serves both to concretise individual material needs and aspirations and to protect a shared base for constructive human interactions. Indeed, in a subtle mimicry of our thoughts and emotions, the language of *property* catches in a peculiarly acute form many of our reactions to the experience of living. The present paper has sought, however, to articulate a deep scepticism about the meaning and terminology of property. *Property* is a term of curiously limited content; as a phrase it is consistently the subject of naïve and unthinking use. *Property* comprises, in large part, a category of illusory reference: it forms a conceptual mirage which slips elusively from sight just when it seems most attainably three-dimensional. Perhaps more accurately than any other legal notion it was *property* which deserved the Benthamite epithet, 'rhetorical nonsense – nonsense upon stilts'. (Gray, 'Property in Thin Air', p. 305)

9 Could a *laissez faire* utilitarian such as Bentham really hold such views or has he been quoted out of context? Is it significant that, when he wrote these words, Bentham was not ridiculing property but the supposed natural right to things such as property?

9.5.2. The emergence of quasi-property

In recent years there has emerged what is commonly termed quasi-property which, although not property in the absolute meaning of the term, displays (from certain perspectives at least) enough of a proprietary aspect to make the property parallel a useful tool of analysis. Much of what we now regard as intellectual property began life as a form of quasi-property right which has slowly developed into fully fledged property interests that can be traded in the marketplace. And this is a still developing process with newly established rights such as moral rights (which preserves among other things the artist's right to be identified as the creator of the work of art) occupying a similar hinterland. Thus, while an artist now has a right, exercisable against third parties, to be identified as author of a work, which endures long

after he has sold the piece, one cannot simply use the property right parallel as a premise from which to argue that he must similarly retain a right to be paid on subsequent dispositions of the work (although as testament to property's constant state of flux there are occasional suggestions, much to the chagrin of the London auction houses, that just such a right to a levy on future sales should be introduced: *PM*, Radio 4, 16 February 2000).

The views of the minority in *Victoria Park Racing* v. *Taylor* may similarly be seen in this light as can the arguments of those commentators and judges who have sought to broaden the ambit of nuisance by advocating that persons without a property interest in the land (such as licensees and relatives) should have *locus standi* to sue (Chapter 6). The category has also been explicitly recognised in the United States where the Supreme Court, in *International News Service* v. *Associated Press*, 248 US 215 (1918), held that an injunction would issue to prevent one news service unfairly competing with another by copying news stories published on the East Coast of America for sale to customers on the West Coast. Pitney J delivering the majority view held that a 'quasi-property' in news existed to the extent necessary to issue an injunction, even though there was no need to consider 'the general question of property in news'. However, the case is also note-worthy for the powerful dissent of Brandeis J:

> [T]he fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to insure to it this legal attribute of property. The general rule of law is that the noblest of human productions – knowledge, truths ascertained, conceptions and ideas – become after voluntary communication to others free as the air [note our earlier comments] to common use ... Such takings and gainful use of a product of another which, for reasons of public policy, the law has refused to endow with the attributes of property, does not become unlawful because the product happens to have been taken from a rival and is used in competition with him. The unfairness in competition which hitherto has been recognised by the law as a basis for relief ... involves fraud or force or the doing of acts otherwise prohibited by law. In the 'passing-off' cases (the typical and most common case of unfair competition) the wrong consists in fraudulently representing by word or act that defendant's goods are those of the plaintiff.

Yet, although this is correct, it would be a mistake to assume that the proprietary parallel therefore has no role to play. The law of 'passing off' does protect property rights (in at least some senses of the word) as noted, somewhat hesitantly, by Lord Parker in *A. G. Spalding Bros.* v. *Gamage Ltd* (1915) 84 LJ Ch 449 at 450:

> There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing-off actions. The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question – property in what? Some authorities say, property in the mark, name or get-up improperly used by the defendant. Others say property in the business or goodwill likely to be injured by the misrepresentation ... [I]f the right

> invaded is a right of property at all there are, I think, strong reasons for preferring the latter view ... [for] cases of misrepresentation by the use of a mark, name or get-up do not exhaust all possible cases of misrepresentation.

The point is accepted less equivocally by Danckwerts J in *J. Bollinger* v. *Costa Brava Wines Co. Ltd* [1960] Ch 262, where he simply states that, in passing-off actions, the law 'is interfering to protect rights of property'. In recent years, the law of passing off has arguably gone even further to, in effect, substantively create new rights of property, as witnessed in *British Telecom* v. *One in a Million Communications Ltd* [1999] 1 WLR 903, where a number of large companies including BT, Virgin and Marks and Spencer successfully obtained an injunction against a company which had registered Internet domain names for these and other well-known companies in circumstances where it is extremely doubtful whether there was any real likelihood of passing off actually occurring.

This seems a questionable development. Yet the difficulty is not caused by the quasi-property label we have attached to the right but rather the Court of Appeal's reluctance to confront the real issues in the case. Aldous LJ, who gave the only judgment in the case, proceeds on the basis that British Telecom owned the name (rather than the trade mark) 'British Telecom' and had a right to exploit that name in any medium. Yet, while in the context of an act of passing off the law adopts a proprietary approach in recognising the company's right not to suffer damage to their good name, that does not provide a premise from which to assert a property right to their name even where there is no likelihood of such damage.

The quasi-property category thus provides a means by which the subtleties of the property label can be appreciated and kept within acceptable bounds as can be seen in the context of confidential information where, for example, the property label provides, from some perspectives, a useful means of analysis while in other respects it would be deeply misleading. As Gummow J stated, when considering the proprietary quality of confidential information in *Breen* v. *Williams* (1995–6) 186 CLR 71 at 129, 'it [is not] acceptable to argue that, because in some circumstances, the restraint of an apprehended or continued breach of confidence may involve enjoining third parties ... it follows that the plaintiff who asserts an obligation of confidence therefore has proprietary rights in the information in question which, in turn found a new species of legal right'.

Notes and Questions 9.6

Consider the following notes and questions both before and after reading *British Telecom* v. *One in a Million* [1999] 1 WLR 903 and the materials highlighted below (either in full or as extracted at www.cambridge.org/propertylaw/)

1 Is the decision consistent with Lord Diplock's judgment in *Erven Warnink Besolten Vennootschap* v. *Townend & Sons (Hull) Ltd* [1979] AC 731 at 742?

2 Should you be able to own your name in the same way in which you own your identity or a trade mark?

3 Does a high-tech company such as BT that was intimately involved in the emerging Internet sector have anyone but itself to blame for not registering a domain name before someone else did? What would Locke make of the defendant's actions in the case?

4 Why is it both correct and incorrect to describe confidential information as property, and why does such an approach aid, rather than obscure, understanding (see Kohler and Palmer', Information as Property')?

Part 3

The acquisition and disposition of property interests