



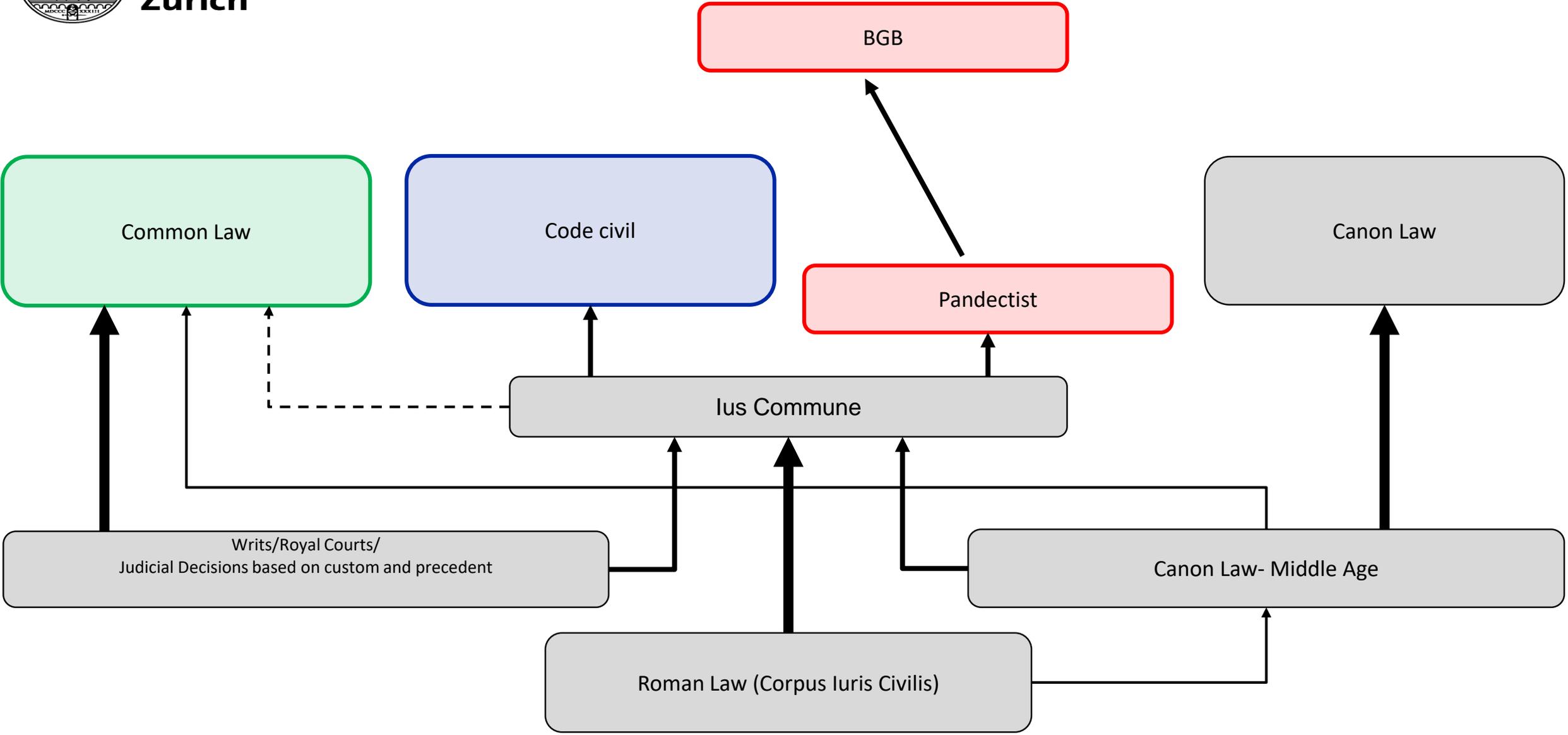
# Principles of Common Law Property Law

Principles of Common Law

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**Civil Law**

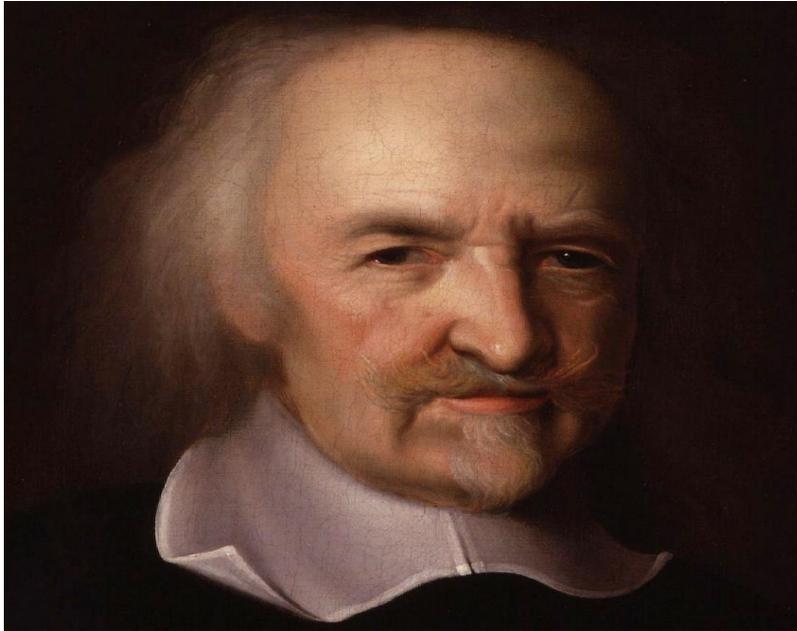
**Common Law**

Common  
Law

Equity



## T. Hobbes vs. J. Locke





## Civil Law – 1789- French Revolution

*Déclaration des droits de l'homme et du citoyen*  
(Declaration of the Rights of Man and the Citizen)

1. Men are born and remain free and equal in rights. Social distinctions may be based only on considerations of the common good.
2. The aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression.
17. Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.



# Civil Law – 1804 – Code Civil (French)

## **Art. 544- Property**

“the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations”.



## William Blackstone (1723-1780)

"There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"



“The third absolute right [personal liberty/personal security], inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land ... The laws of England are ... extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs, but by the judgment of his peers, or by the law of the land.

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land [...]



... Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained ... All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform”.

William Blackstone, Commentaries on the Laws of England Vol 1, (Oxford: Clarendon Press, 1765, Legal Classics Library, 1983), p. 133-134.



## Concepts – Translation: Common and Civil Law

- Property: «all rights which are capable of being transferred to others»
- Ownership: «it is a right or an aggregate of rights», person who has those rights of use and enjoyment, of destruction, and of disposition
- Possession: «primarily a matter of fact», two elements: some actual power of control over the thing possessed; some intention necessary to maintain that control on the part of the possessor



## Estate

«An estate is a portion of the ownership of the land, more or less in a limited time»

- Life estate (lifetime)
- Equivalent to ownership (full rights of possession and enjoyment), fee simple
- Intermediate between life estate and fee simple: Estate tail «Tenant in tail has full rights of possession and enjoyment without regard to waste. It passes to his heirs, but only to his descendants».



## Historical overview

- real property - writ of right
- Personal property- detinue - trover

*Writ = « a command of the King directed to the relevant person (official, judge), containing a brief indication of a matter under dispute and instructing the addressee to call the defendant into his court and to resolve the dispute in the presence of the parties»*



## Property law in historical context

- Historically the Monarch owned all land property, and it transferred through feudal land tenure or other feudal systems of loyalty and fealty.
- Protection of personal property rights was present in medieval common law.
- Napoleonic code was among the first government acts (1804) of modern times to introduce the notion of absolute ownership into statute
- A substantial part of English land is still unregistered

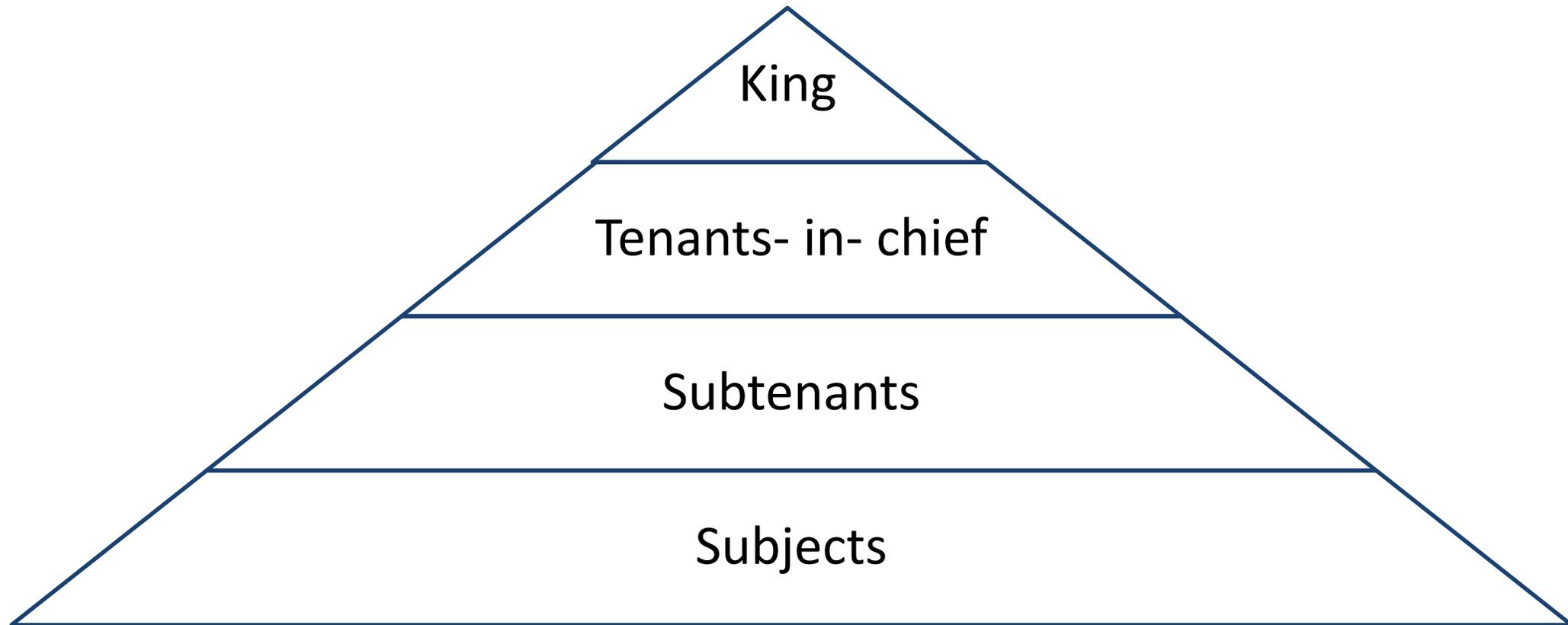


# Tenure

- Medieval period it was very significant legal commonplace that full ownership of land was possible for no person save the King
- «Landowners were regarded as ‘holding’ their land, by various forms of ‘tenure’, of the King»
- Tenure by knight service



## Pyramidal Structure: the feudal land law





## History – English Law of the Land

*Quia Emptores 1290 – “Because of the Buyers”*

To prevent tenants from alienating their lands to others by subinfeudation, instead requiring all tenants who wished to alienate their land to do so by substitution. Allowed tenants to sell their interests to other third parties more easily. Facilitated a more rapid decline of feudal tenure rights.

Direct feudal obligations were increasingly being replaced by cash rents and outright sales of land which gave rise to the practice of *livery and maintenance*

House of York v House of Lancaster in mid 15th century (1455-1485, War of the Roses)

All land held by free tenure had come to be held of the King



*Quia Emptores 1290 – “Because of the Buyers” (Edward I)*

Forasmuch as purchasers of lands and tenements of the fees of magnates and others, have many times previously entered into their fees to the prejudice of the same (lords) since to them (the purchasers) the free tenants of these same magnates and others have sold their lands and tenements to be held in fee for themselves and their heirs from the subinfeudators and not from the lords in chief of the fees, whereby the same lords in chief have often lost the escheats, marriages and wardships of lands and tenements belonging to their fees, which thing indeed seemed very hard and extreme to the magnates and other lords, and moreover, in this case, manifest disinherittance; the lord king in his parliament at Westminster after Easter in the 18th year of his reign, viz., in the Quinzime of St. John the Baptist, at the instance of his magnates, did grant, provide and decree that henceforth it shall be lawful for any free man to sell at will his lands or tenements or a part of them; in such manner, however, that the infeudated person shall hold that land or tenement from the same lord in chief and by the same services and customs by which his infeudator previously held them.



And if he shall have sold to any one any part of those his lands or tenements, the infeudated person shall hold that (part) directly of the lord in chief, and shall straightway be charged with as much service as pertains or ought to pertain to that lord for that parcel, according to the quantity of the land or tenement sold; and so in this case there shall fall away from the lord in chief that part of the service which is to be performed by the hand of the infeudator, from the time when the infeudated person ought to be attendant and answerable to that same lord in chief, according to the quantity of the land or tenement sold, for that parcel of service thus due. And it must be known that by the said sales or purchases of lands or tenements, or any part of them, those lands or tenements in part or in whole, may not come into mortmain, by art or by wile, contrary to the statute recently issued on this point. And it is to be known that that statute concerning lands sold holds good only for those holding in fee simple, etc.; and that it extends to future time; and it shall begin to take effect at the feast of St. Andrew next coming [...].



## Before 1290

- a the chief lord
  - b a mesne tenant
  - c a sub-tenant
- by a new grant - subinfeudation
- d sub-tenant

subinfeudation

## After 1290

- a the chief lord
- b a mesne tenant
- c displaced by d- substitution
- d subtenant

substitution



## Statute of Tenures 1660

- All free tenures were converted into socage
- socage = “form of land tenure in which the tenant lived on his lord’s land and in return rendered to the lord a certain agricultural service or money rent”
- 1660 marked the end of feudalism in its political aspect.



## Land Transfer act 1875

- Parliament - Voluntary system of registration of title to land

Freehold Lands

### **S.5 Application for registration with an absolute title, or with a possessory title only.**

5 Application for registration with an absolute title, or with a possessory title only.

5. A land registry shall be established, and on and after the commencement of this Act the following persons; (that is to say,)

(1) (1.) Any person who has contracted to buy for his own benefit an estate in fee simple in land, whether subject or not to incumbrances; and

(2) (2.) Any person entitled for his own benefit at law or in equity to an estate in fee simple in land, whether subject or not to incumbrances; and

(3) (3.) Any person capable of disposing for his own benefit by way of sale of an estate in fee simple in land whether subject or not to incumbrances may apply to the registrar under this Act to be registered, or to have registered in his stead any nominee or nominees not exceeding the prescribed number, as proprietor or proprietors of such freehold land with an absolute title or with a possessory title only: Provided, that in the case of land contracted to be bought, the vendor consents to the application.



## Property Act 1925

Property divided into two categories:

- Real property: «it was recoverable specifically by a real action» (included most of the interests recognised by the law)
- Personal property (chattels real) = interests in land for a term of years (leaseholds), contractual rights
- Chattels personal consist either of tangible goods, or of intangible rights as patents, stocks or shares



# Part I General Principles as to Legal Estates, Equitable Interests and Powers

## 1 Legal estates and equitable interests

(1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—

(a) An estate in fee simple absolute in possession;

(b) A term of years absolute.



(2) The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are

(a) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute;

(b) A rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute;

(c) A charge by way of legal mortgage;

(d) Land tax, tithe rentcharge, and any other similar charge on land which is not created by an instrument;

(e) Rights of entry exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge.



(3) All other estates, interests, and charges in or over land take effect as equitable interests.

(4) The estates, interests, and charges which under this section are authorised to subsist or to be conveyed or created at law are (when subsisting or conveyed or created at law) in this Act referred to as "legal estates" and have the same incidents as legal estates subsisting at the commencement of this Act; and the owner of a legal estate is referred to as "an estate owner" and his legal estate is referred to as his estate.

(5) A legal estate may subsist concurrently with or subject to any other legal estate in the same land in like manner as it could have done before the commencement of this Act.



(6) A legal estate is not capable of subsisting or of being created in an undivided share in land or of being held by an infant.

(7) Every power of appointment over, or power to convey or charge land or any interest therein, whether created by a statute or other instrument or implied by law, and whether created before or after the commencement of this Act (not being a power vested in a legal mortgagee or an estate owner in right of his estate and exercisable by him or by another person in his name and on his behalf), operates only in equity.

(8) Estates, interests, and charges in or over land which are not legal estates are in this Act referred to as "equitable interests," and powers which by this Act are to operate in equity only are in this Act referred to as "equitable powers."



## Property law – main areas

- Various forms of ownership and tenancy in real property (land as distinct from personal or movable possessions)
- Common law - personal property, real property
- Civil law system - movable and immovable property.
  - Movable property roughly corresponds to personal property (chattels)
  - Immovable property roughly corresponds to real estate or real property, and the associated rights and obligations
- Property law rights are much more strongly linked to the thing itself, as opposed to contract law which focuses on personal obligations and rights
- Property law rights often referred to as a 'bundle of sticks'



## Types of proprietary interests

- Ownership (freehold, or ‘fee simple absolute possession’)
- Lease/ rentcharge
- License to use
- Security (eg: mortgage)
- Easement
- Freehold covenant
  - All of those legal or equitable
  - Registered or unregistered land
  - Temporal priorities (who came first)



## Land Registration Act 1925

Provision was established for the registration of interests

The owner of the equitable interest had to register = it constitutes actual notice of such interests



## Leasehold Land

### Application for registration of leasehold land

(1) Where the title to be registered is a title to a leasehold interest in land—

(a) any estate owner (including a tenant for life, statutory owner, personal representative, or trustee for sale, but not including a mortgagee where there is a subsisting right of redemption), holding under a lease for a term of years absolute of which more than twenty-one are unexpired, whether subject or not to incumbrances, or



(b) any other person (not being a mortgagee as aforesaid and not being a person who has merely contracted to buy the leasehold interest) who is entitled to require a legal leasehold estate held under such a lease as aforesaid (whether subject or not to incumbrances) to be vested in him, may apply to the registrar to be registered in respect of such estate, or in the case of a person not being in a fiduciary position to have registered in his stead any nominee, as proprietor with an absolute title, with a good leasehold title or with a possessory title:

Provided that—

(i) Where an absolute title is required, the applicant or his nominee shall not be registered as proprietor until and unless the title both to the leasehold and to the freehold, and to any intermediate leasehold that may exist, is approved by the registrar;

(ii) Where a good leasehold title is required, the applicant or his nominee shall not be registered as proprietor until and unless the title to the leasehold interest is approved by the registrar;



(iii) Where a possessory title is required, the applicant or his nominee may be registered as proprietor on giving such evidence of title and serving such notices, if any, as may for the time being be prescribed;

(iv) If on an application for registration with a possessory title the registrar is satisfied as to the title to the leasehold interest, he may register it as good leasehold, whether the applicant consents to such registration or not, but in that case no higher fee shall be charged than would have been charged for registration with possessory title.



# Land Registration Act (LRA) 2002- explanatory notes

Background

Origins of the Act

3. In 1996, the Law Commission and HM Land Registry began a joint programme to update and reform the statute law relating to land registration. Their initial proposals were published in *Land Registration for the Twenty-First Century: A Consultative Document* in September 1998. Revised recommendations, amended in the light of the consultation response, were published in *Land Registration for the Twenty-First Century: A Conveyancing Revolution* on 10 July. The Act implements most of those recommendations. The joint report contains a detailed discussion of the policy behind the recommendations, and full explanatory notes on each clause of the draft Bill contained in the report.



## Title to land

4. The Crown is the only absolute owner of land in England and Wales: all others hold an estate in land. Estates, which derive from feudal terms of tenure, originally took many forms but were reduced by the Law of Property Act 1925 to two, an estate in fee simple absolute in possession, generally known as “freehold”; and an estate for a term of years absolute generally known as “leasehold”. Apart from an estate, land may have the benefit of or be subject to other interests, which are rights and obligations relating to the land, belonging to the owner or to a third party.



## The current legislation

9. The principal legislation was provided by the Land Registration Act 1925, as amended by Land Registration Acts in 1936, 1986, 1988, and 1997, and by the Land Registration and Land Charges Act 1971. That legislation provides an improved machinery of conveyancing, rather than changing the underlying law, which applies to both unregistered and registered conveyancing. Its principles and definitions have sometimes been found obscure and confusing, and its language not easy for even professional users.



The objectives of the Act

10. The joint project undertaken by the Law Commission and the Land Registry therefore faced a complex, and in many respects, out-dated piece of legislation. As work proceeded an additional factor had to be considered. The Land Registry has now automated many of its functions, which can now be accessed on line. It became clear during the Commission's work that there was wide support within the property industry and from many legal practitioners for the introduction of a system of dealing with land electronically. The Law Commission and Land Registry therefore recommend that the new legislation should aim to create the necessary legal framework in which all registered conveyancing can be conducted electronically. The Act establishes such a system. The Law Commission and the Land Registry recommend a fundamental objective. To enable an effective system of electronic dealing with land, the register should be a complete and accurate reflection of the state of the title of the land at any given time, so that it is possible to investigate title to land on line, with the absolute minimum of additional inquiries and inspections.



## Electronic conveyancing

11. The Act creates a framework in which it will be possible to transfer and create interests in registered land by electronic means. It does so by enabling the formal documents to be executed electronically; and providing for a secure electronic communications network. Because it is envisaged that the execution of those documents and their registration will be simultaneous, and the process of registration will be initiated by conveyancers, permitting access to the network is to be controlled by the Land Registry, which will also exercise control over the changes which can be made to the register. The Land Registry will be obliged to make arrangements for access to the network by those who wish to undertake their own conveyancing. Establishment of the system will require new ways of working by the Registry, and by conveyancing practitioners. It will, therefore, best be introduced in stages, starting with the simplest transactions and progressing to the more complex. The Act therefore provides for the Lord Chancellor to regulate by rules transactions that can be carried out electronically.



12. Some of the benefits of electronic conveyancing can only be maximised if it is used universally. The Act, therefore gives the Lord Chancellor power to make the use of electronic means for conveyancing compulsory, subject to appropriate consultation. The use of this power will become feasible only when electronic conveyancing has become much the most usual way of effecting transactions.



## Property law v contract law

- Property rights are rights over things enforceable against all other persons (rights *in rem* = against the thing itself)
- By contrast, contractual rights are rights enforceable against specific persons (rights *in personam* = against the person)
- Property rights may, however, arise from a contract;
- Other property rights may be created by contract: *easements, covenants, and equitable servitudes*.
- *Even minor rights, such as Licences created by a binding contract, do not give rise to property rights.*



## Property Law also applies to...

- Commercial law and insolvency.
- Trusts affects everything in **English property law**
- Legal interest/right
  - Equitable interest/right
- Intellectual property also important branch of the law of property:  
copyright, trademarks, registered designs



# Trust

“A trust is an equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or cestuis que trust), of whom he may himself be one, and anyone of whom may enforce the obligation.”



# Trust

