

# A

## ***a fortiori***<sup>(Lat)</sup>

Much more; by or with stronger reason.

## ***a posteriori***<sup>(Lat)</sup>

From effect to cause; resulting from that which comes after. As deduced by reasoning from the particular to the general, or from the known effect to the demonstrable cause.

## **à prendre**

See **profit à prendre**.

## ***a priori***<sup>(Lat)</sup>

From before; from what goes before. As deduced by reasoning from the general to the particular or from cause to effect.

## **AAA rating**

See **triple A rating**.

## ***ab extra***<sup>(Lat)</sup>

From without; from outside. See **contract**.

## ***ab initio***<sup>(Lat)</sup>

From the beginning. See **adverse possession**, **rescission**, **trespass**, **void contract**.

## ***ab intestato***<sup>(Lat)</sup>

From an intestate. See **intestacy**.

## ***abandon***<sup>(F)</sup>

abandon; **abandonment**; **renunciation**; **surrender** (of a right or claim). In particular, the unilateral act by which the holder of a real right (*droit réel*) relinquishes or disclaims it, without any intention of resuming that right. The terms *déguerpissement* and *renonciation* are synonymous in this context. *Exponse* is used in the same sense in respect of a loss of a right to a *droit de superficie*.

(*abandon des poursuites*: abandonment of an action)

(*bien à l'abandon*: ownerless property. See *res derelictæ*). See also *délaissement*.

F. Terré et P. Simler. *Droit Civil, Les Biens* (7ème éd. Paris: 2006), §§ 417, 496, 746 et seq., 878, 892, 907.

## **abandoned property**

Property that has been voluntarily surrendered or vacated, or to which title has been relinquished, without any intention of reclaiming it or transferring it to another. See also **escheat**, **abandonment**, *res nullius*, **treasure trove**, **vacant**.

## **abandonee**

One who takes over the right to a property that has been abandoned. See also **abandonment**.

## **abandonment**

1. The act of giving up or proscribing completely. Yielding, ceding or giving up totally, especially ceding permanent control to another.

2. The voluntary relinquishment or surrender of property, or an interest in property, without any intention of resuming enjoyment or possession, or an intention of vesting it in anyone else. The disclaiming of a right, expressly or by implication, without leaving any evidence of an intention to reclaim that right. Thus, abandonment requires two elements: an intention to relinquish a right or property and the act by which the intention is carried into effect (*Roebuck v. Mecosta County Road Comm'n*, 59 Mich App 128, 229 NW.2d 343, 345–6 (1975)). Abandonment is a voluntary and willful act and may thus be distinguished from **eviction** and **forfeiture**, either of which can arise as a result of an illegal act or omission.

The ownership of a **fee** title to land may be given away or sold, and it may be lost by the **adverse possession**, but it cannot be abandoned, no matter how long the land may be left empty, unoccupied or derelict (*Williams Brothers Direct Supply Ltd v Raftery* [1958] 1 QB 159, 170-173; *East Tennessee Iron & Coal Co. v. Wiggin*, 15 CCA 510, 68 F 446, 37 US 129 (6th Cir. Tenn 1895); *Waldrop v. Whittington*, 213 Miss 567, 57 So.2d 298 (1952); *Jones v McClean* (1931) 2 DLR 244 (Can)). A right to possession or use of an interest in land may be abandoned, provided there is an intention not to resume that right or interest, or some overt act or failure to act that supports that intention.

Simply not using an **easement** does not of itself constitute abandonment; mere non-user is not sufficient (*Swan v Sinclair* [1924] 1 Ch 254, 266, aff'd [1925] AC 227 (HL); *CDC2020 plc v Ferreira* [2005] 3 EGLR 15; *First National Bank of Boston v. Konner*, 373 Mass 463; 367 NE.2d 1174 (1977); *Pendecar Associates, Inc. v. Glasgow Trust*, 446

A.2d 1097 (Del 1982)—non-use for 170 years!). There must be a clear intention to abandon, or an overt act that is repugnant to the right of user (*Tebidy Minerals Ltd v Norman* [1971] 2 QB 528, [1971] 2 All ER 475 (CA); *Zimmerman v. Young*, 74 Cal App.2d 623, 169 P.2d 37 (1946); *Ellis v. Brown*, 177 F.2d 677 (6th Cir. Ky 1949); *Gabel v. Cambruzzi*, 532 Pa 584, 616 A.2d 1364, 1367 (1992); *Pekarek v. Votow*, 216 AD.2d 829, 628 NYS.2d 859 (1995); 28A C.J.S., Easements (St. Paul, MN), §§ 124–6). For example, keeping a doorway bricked up for a number of years may not of itself amount to sufficient indication of an intention not to reopen it, but removing a wall that contained a window, and then waiting many years before rebuilding it, shows that the beneficiary does not need the right to the light and demonstrates an intention to abandon the need for the right of light (*Cook v Bath Corp'n* (1868) LR 6 Eq 177, 18 LT 123; *Williams v Underwood* (1983) 45 P & CR 235, 256; *Williams v Sandy Lane (Chester) Ltd* [2006] EWCA Civ 1738, [2007] 07 EG 144, 154 (CA); The American Law Institute, Restatement of Property (Servitudes) (St. Paul, MN: 1944), § 504; *Ernst v. Keniry*, 19 AD.2d 938, 244 NYS.2d 239 (1963); *Mueller v. Hoblyn*, 887 P.2d 500, 505 (Wyo 1994); Anno: 98 ALR 1291: Loss of Easement).

A **lease** cannot be abandoned unilaterally during its term (*Colles v Evanson* (1865) 19 CB (NS) 372, 19 Eng Rep 831; In *Gruman v. Investors Diversified Services, Inc.*, 247 Minn 502, 78 NW.2d 377, 380 (1956); *K & C Associates v. Airborne Freight Corp.*, 20 Wash App 653, 581 P.2d 1082, 1084 (1978)). However, if a tenant leaves empty the premises that are leased to him, or demonstrates a manifest intention not to occupy the premises, and then permits the landlord to re-enter and take absolute and unqualified possession of the premises, or the tenant acts in a way that is unequivocally inconsistent with the continuation of the lease, the tenancy may be said to have been abandoned or, more precisely, the tenant has offered and the landlord has accepted a **surrender** of possession. There may be said to be a ‘surrender by operation of law’ (*Pbene v Popplewell* (1862) 12 CB (NS) 334, 342, 142 Eng Rep 1171; *Boyer v Warby* [1953] 1 QB 234, 244–55 (CA); *tenBraak v. Waffle Shops, Inc.*, 542 F.2d 919, 924 (4th Cir. Va 1976); *Atkinson v. Rosenthal*, 598 NE.2d 666, 668 (Mass App Ct 1992); 51C C.J.S., L & T (St. Paul, MN), § 124; 2 Powell on Real Property (Albany, NY: 1997- ), §§ 17.05[1], 17.74). Alternatively, there may be a

form of **constructive eviction** where the landlord takes an action that prevents the tenant’s further use of the premises.

In the US, there is a considerable difference of opinion as to whether a landlord has a duty to mitigate the tenant’s loss by taking steps to re-let the premises after the tenant has abandoned them. In some jurisdictions, if a tenant abandons the premises before the end of a term and the landlord re-enters, the landlord is obliged to make reasonable efforts to re-let the premises in order to minimize any claim that he may have against the tenant for past rent due (e.g. *Snyder v. Ambrose*, 203 Ill Dec 319, 266 Ill App.3d 163, 639 NE.2d 639, 640 (1994)). As a corollary, some jurisdictions take the view that re-letting the premises amounts to accepting a surrender of the lease by the landlord, relieving the tenant of all further liability for payment of rent (e.g. *Mesilla Valley Mall Co. v. Crown Industries*, 111 NM 663, 808 P.2d 633 (1991)). Whereas other jurisdictions take the view that, even if the premises are re-let, the tenant remains liable for any loss of rental value suffered by the landlord during the remaining term of the lease (*Yates v. Reid*, 36 Cal.2d 383, 224 P.2d 8 (1950); Anno: 21 ALR3d 534: Damages—Mitigation by Landlord (1968); *Lefrak v. Lambert*, 93 Misc.2d 632, 403 NYS.2d 397 (1978); *Boise Joint Venture v. Moore*, 106 Or App 83, 806 P.2d (1990); *Austin Hill v. Palisades Plaza, Inc.*, 948 SW.2d 293, 295 n. 1 (Tex 1997)—note 1 lists cases from 42 states and the District of Columbia that have recognized a landlord’s duty to mitigate damages in at least some situations). The Uniform Residential Landlord and Tenant Act (URLTA), which has been adopted by several states, provides that if the tenant abandons a dwelling unit, the landlord shall “make reasonable efforts to let it at a fair rental”, § 4.203(c). The Model Residential Landlord-Tenant Code, § 2-308(4) contains a similar position. In California, if a tenant vacates premises the landlord has a right to declare abandonment, either by a judicial process or by notice after a period of non-payment of rent (Cal CC, § 1951.3).

In Australia, opinion is also divided, with an increasing view that a lease is like any other contract and a landlord must seek to mitigate his loss by seeking another tenant (*Vickers v Stichtenoob Investments Pty Ltd* (1989) 52 SASR 90, 100 (SA); Cf. *Tall-Bennett & Co Pty Ltd v Sadot Holdings Pty Ltd* (1988) 4 BPR 9522 (NSW)).

Although the English courts accept that the landlord has an obligation to mitigate his loss as with any other contract, the landlord is not obliged to accept forfeiture of the lease and seek another merely because the tenant vacates the premises because of insufficient business (*Reichman v Beveridge* [2006] EWCA Civ 1659, [2007] 08 EG 138 (CA)); if the current market rent is higher than the rent passing, the landlord may well prefer to take back the premises and re-let at the higher rent; if not, he would probably prefer to claim the contractual rent and leave the tenant to find another tenant). Cf. **laches**, **repudiation**. See also **escheat**, **estoppel**, **frustration**, **lapsed land**<sup>(US)</sup>, **release**, **res nullius**.

Anno: 40 ALR4th 1012: Zoning—Use Abandonment by Part Occupancy.

Anno: 84 ALR4th 183: Abandonment of Leases—Modern Cases.

Anno: 62 ALR5th 219: Private Easement—Loss by Nonuse.

Anno: 18 ALR5th 437: Rent-Free Occupancy.

1 Am.Jur.2d., Abandoned (Rochester, NY), Lost, and Unclaimed Property, §§ 1–44.

63C Am.Jur.2d., Property (Rochester, NY), § 72.

25 Am.Jur.2d., Easements and Licenses (Rochester, NY), § 112–4.

49 Am.Jur.2d., Landlord and Tenant (Rochester, NY), §§ 249–51, 295, 485.

1 Cor.Jur.Sec., Abandonment (St. Paul, MN), §§ 1–12.

52A Cor.Jur.Sec., Landlord & Tenant (St. Paul, MN), §§ 120–9, 477.

J.E. Cribbet et al. *Cases and Materials on Property* (8th ed. Westbury, NY: 2005), pp. 548–51 (abandonment of easement).

2 Powell on Real Property (Albany, NY: ©1997- ), § 17.05 ‘abandonment by tenant’.

3 Powell on Real Property (Albany, NY: ©1997- ), § 34.20 ‘Easement—Abandonment’.

6 Powell on Real Property (Albany, NY: ©1997- ), § 79C.06[f] ‘abandonment of nonconforming use’.

7 Thompson on Real Property (2nd ed. Charlottesville, VA: ©1994-), § 60.08(b)(3) ‘Abandonment of Easements’.

5 Thompson on Real Property (2nd ed. Charlottesville, VA: ©1994-), § 40.11 ‘Abandonment of Leased Premises’.

22 *Halsbury’s Laws of Australia*, Real Property, § [355-12235].

*Gale on the Law of Easements* (17th ed. London: 2005), §§ 12-14—12-82.

16(2) *Halsbury’s Laws of England*, Easements and Profits à Prendre (4th ed. Reissue), §§ 134–5.

3. The discontinuance of a use of land for a considerable period of time, especially a **non-conforming use**, so that the use may not legally be resumed. It may be said that, “the actual abandonment of a nonconforming use is fatal to its continuance”, *Borough of Saddle River v. Bobinski*, 108 NJ Super 6, 259 A.2d 727, 733 (1969). However, as a rule, there must be a clear intent to abandon that use, as well as actual cessation, not merely a discontinuance of the use (83 Am.Jur.2d., Zoning and Planning (Rochester, NY), §§ 682–97; Anno: 57 ALR3d 279: Zoning—Resumption of Nonconforming Use; Cf. *City of Glendale v. Aldabbagh*, 189 Ariz 140, 939 P.2d 418 (1997)—which did not require an ‘intention’ to abandon, but the use was lost through “negligence or inadvertence”). A holder of a vested building permit does not lose that consent merely by a delay in construction; there must be a manifest intention to abandon the right, unless the consent was made subject to completion within a specified (and reasonable) period of time and due notice has been given, but not acted on, by the permit holder. A building permit holder who has vested rights as a result of commencing construction and carrying out substantial building work does not abrogate those rights because he is obliged to cease construction due to adverse economic circumstances (*Pardee Construction Co. v. California Coastal Comm’n*, 95 Cal App.3d 471, 157 Cal Rptr 184 (1979)).

In English planning law, the abandonment of a use produces the result that the resumption of that use may constitute **development** and, therefore, requires planning permission. “[I]t is perfectly feasible in this context to describe a use as having been abandoned when one means that it has not merely been suspended for a short and determinable period, but has ceased with no intention to resume it at any particular time”, *Hartley v Minister of Housing and Local Government* [1970] 1 QB 413, 420, 421 (CA). In this connection, factors to be considered are: (i) the condition of the property; (ii) the period of time for which the use is discontinued; (iii) whether there is any intention to re-establish the discontinued use, which may be judged from the state of the property or any elected action on the part of the party seeking to re-establish the use; and (iv) any intervening user (*Hughes v Secretary of State for the Environment, Transport and the Regions* [2000] 1 PLR 76, [2000] JPL 826, (2000) *The Times*, February 18 (CA)). A new use,

received over a period of time after deducting directly related expenses, i.e. net income received from an investment. Cf. **profit**. See also **cash flow, income**.

**earnings approach**<sup>(AmE)</sup>

See **income approach**.

**earnings multiplier**

See **price-earnings ratio**.

**earnings yield**

The percentage relationship between the net profits or earnings that a company could make available for distribution as dividends to the ordinary shareholders and the current share price.

The earnings yield is calculated as follows:  

$$\frac{\text{earnings per ordinary share after tax} \times 100}{\text{market price per ordinary share}}$$

The earnings yield is the reciprocal of the **price-earnings ratio**. The earnings yield available to an ordinary shareholder in a company is comparable with the **cash-on-cash return** available to an investor in real estate, as both measure the total return on equity (before the investor's personal liability for tax). Cf. **dividend yield**.

**easement**

Derived from the Old French *aisement*, 'convenience or accommodation'. A right or privilege that the owner of one area of land enjoys over the land of another in order to enjoy a benefit for the former's land. "A privilege without profit which the owner of one neighbouring tenement hath of another existing in respect of their several tenements", *Termes de la Ley*; 25 Am.Jur.2d., Easements and Licenses (Rochester, NY), § 1). The owner of the one parcel of land derives a particular benefit from the use of the other land, such as a **right of way, right of light, right to air**, or a **right of support**. The right to use the other persons land does not grant a right to retain possession, or a right to take any profit from the land, and should not be inconsistent with the general use of the land over which the right is being exercised. The land that has the benefit of this right is called the 'dominant tenement' (or dominant land) and the land that is subjected to the burden is called the 'servient tenement' (or servient land). The owner of the servient tenement retains full dominion over his land,

subject only to the limitation imposed by the easement. Normally an easement is enjoyed for a specific purpose, is a permanent interest over the land of the other, but is not inconsistent with the ownership of the servient tenement. It is not a right that is personal to the owner of the land, but is said to be **appurtenant** or incidental to the land affected.

An easement is an **incorporeal hereditament**, i.e. it creates no **estate** in land because the dominant tenement does not derive any right of ownership over the servient tenement. It does not confer any right to possession, as with a **lease**, but is merely a right to impose proprietary restrictions. An easement does not grant a right that is intended to exclude use of land by the owner of the servient tenement, unless that use is incompatible with the easement (*Batchelor v Marlow* [2003] 1 WLR 764; *London & Blenheim Estates Ltd v Ladbroke Retail Parkes Ltd* [1992] 1 WLR 1278). However, it is an **interest** in land and an easement may continue even if there is a change in the ownership of the land; it is said to 'run with the land'; although it is extinguished if both tenements come into the same hands.

In common law, the essential requirements of an easement may be summarised as follows: (i) there must be an identifiable dominant that is benefited and a servient tenement over which the right is exercised (a public right of way is not an easement because it does not benefit a particular property—there is no dominant tenement); (ii) the easement must accommodate or benefit the dominant tenement and there must be a *nexus* between the right enjoyed and the user of the dominant land (it must do more than simply benefit the owner of that land as a personal right); (iii) the owners or occupiers of the dominant and servient tenements must be different parties (an easement is a right *in alieno solo*—'against another's land'); and (iv) the easement must be capable of forming the subject matter of a **grant**, whether express, implied or presumed, i.e. it is a right that is sufficiently definite (both as to the parties and the subject land) that it is capable of being (although it need not be) set down in a deed (*Re Ellenborough Park* [1956] Ch 131 (CA); *Riley v Pentilla* [1974] VR 547, 557 (Aus); *Canadian Pacific Ltd v Paul* (1988) 53 DLR (4th) 487 (Can); *Kellett v. Ida Clayton & G. W. Wagon Road Co.*, 99 Cal 210, 33 P 885, 886 (1893); *City of Hayward v. Mohr*, 325 P.2d 209, 212 (Cal 1958); *Drye v. Eagle Rock Ranch*,

Inc., 364 S.W.2d 196 (Tex 1963); 28A C.J.S. Easements § 6). The dominant and servient lands need not be contiguous, although they frequently are, but they must be proximate in order to enable the dominant land to derive benefit from the easement. The right should not amount to the exclusive use or possession of the servient tenement (or a joint use with the owner of the servient tenement); the right to exclude others from the servient tenement extends only so far as to prevent their interference with the prescribed use of that land (*Copeland v Greenbalf* [1952] 1 All ER 809; *Batchelor v Marlow & Another* [2003] 1 WLR 764, [2003] 4 All ER 78 (CA); The American Law Institute, Restatement of Property (Servitudes) (St. Paul, MN: 1944), § 450; *Howard v. County of Amador*, 220 Cal App.2d 962, 269 Cal Rptr 807 (1990)).

At common law, the right must be clear and prescribed; an undefined or vague right (such as a **right to view**, or a right of privacy) cannot constitute the subject of an easement: “there is no such right known to law as a right to a prospect or view; see *Bland v Moseley* (1587), cited in *Aldred’s Case* (1610) 9 Co Rep at p. 57b”, *Phipps v Pears* [1965] 1 QB 76, 83, [1964] 2 All ER 35, 37 (CA) (although in the US, in some jurisdictions, a right to a view may be recognized as a valid easement where it has been enjoyed as a long, continuous, obvious or manifest use (*Rohde v. Beztak of Arizona, Inc.*, 164 Ariz 383, 793 P.2d 140 (App Ct Ariz 1990)). As a rule, an easement does not impose a positive duty on the owner of the servient tenement, such as to construct or maintain a right of way, but the easement may be granted with express obligations such as an obligation to maintain a right of way, a gate or a fence and in some cases there may be an implied obligation to repair the servient land, especially to prevent possible injury to third parties (*Jones v Price* [1965] 2 QB 618, 631 (CA); *Holden v White* [1982] 2 QB 679, 683 (CA); *Carter v Cole* [2006] EWCA Civ 398 (CA); The American Law Institute, Restatement Third, Property (Servitudes) (St. Paul, MN: 2000), § 4.13).

An easement may be classified as ‘continuous’ or ‘discontinuous’. A continuous easement does not require the interference of man for its existence, as with a right of light; whereas a discontinuous easement requires the intervention of man, as by the exercise of a right of way. The former requires the adaptation of the dominant

tenement (as by the creation of a window), whereas the latter does not require any permanent adaptation of the dominant tenement.

In the US, many jurisdictions do not consider that the existence of the dominant tenement is an essential element to an easement, and a similar irrevocable right, which does not benefit another parcel of land, is considered to be a valid easement and is called an **easement in gross** (*Jolliff v. Hardin Cable Television Co.*, 22 Ohio App.2d 49, 258 NE.2d 244, 247 (1970); 3 *Tiffany on Real Property* (3rd ed. Chicago: 1939), § 758, p. 204). Thus, an easement may be defined as “a right or advantage which one has in the land of another. ... a liberty, privilege, or advantage in land without profit, existing distinct from the ownership of the soil. It is a right which one person has to use the land of another for a specific purpose”, *James v. Drye*, 314 SW.2d 417, 420 (Tex Civ App 1958).

In the US, ‘easement’ is more generally used to refer to a right of way (or an analogous rights such as a drainage or utility easement), or a right to light or air. In English law, a broad number of such rights that have been classified as ‘easements’ (*A-G of Southern Nigeria v John Holt & Co (Liverpool) Ltd* [1915] AC 955, 617 (PC)—a right to store casks and trade products on neighbour’s land; *Dowty Boulton Paul Ltd v Wolverhampton Corpn* (No 2) [1976] Ch 13—right to use an airfield; *William Hill (Southern) Ltd v Cabras Ltd* [1987] 1 EGLR 37—right to fix a signboard to the wall of an another’s house; *Gale on the Law of Easements* (17th ed. London: 2005), §§ 1-64—1-68).

An easement may be distinguished from a **profit à prendre** as the latter allows someone to take something physically from the land or benefit from the profits of the soil, whereas an easement does not (*Alfred F Beckett v Lyons* [1967] Ch 449, 482B; *McDonald v. Board of Mississippi Levee Comm’rs*, 646 F Supp 449, 463 (ND Miss 1986); 25 Am.Jur.2d., Easements and Licenses (Rochester, NY), § 4). Also, a profit à prendre may exist ‘in gross’, i.e. it need not benefit another parcel of land, whereas at common law (but not in most jurisdictions in the US) an easement cannot exist without a dominant and servient tenement (*Boatman v. Lasley*, 23 Ohio St 614 (1873); *London & Blenheim Estates Ltd v Ladbrooke Retail Parkes Ltd* [1992] 1 WLR 1278).

An easement may be distinguished from a **licence** as the latter does not create any interest in land, but is merely a privilege that is personal

M. Ratterman. Using Residential Appraisal Report Forms: URAR 2005 (Form 1004) and Exterior Inspection (Form 2055) (Chicago: 2005).

**federal rule**<sup>(US)</sup>

See **before-and-after method**.

**federally related transaction (FRT)**<sup>(US)</sup>

See **real estate-related financial transaction**.

**fee**

1. Derived from the Old English *fief* or Latin *feudum*. Historically, the quantity of land, or the annual income therefrom, that was sufficient to maintain a knight – the ‘fief’ or fee for services that ensured his livelihood and left him free to fight. This land, or the income therefrom, was held with the benefit of a right of inheritance. In turn, a ‘fee’ came to represent the right of a tenant or vassal to hold land, subject to the acknowledgement of a superior owner or lord. Similarly, ‘fee’ has a similar derivation to ‘fief’, ‘feud’, or ‘feodum’ and signified a feudal benefice, i.e. land held of a superior lord, or the Crown, subject to the rendering of a payment in kind, such as crops or services. In modern usage, unless qualified by other wording, a fee is an **estate** of inheritance, i.e. an estate that endures until the person entitled to it ‘for the time being’ dies intestate and leaves no heirs (1 *Co Litt* 1a, 1b, 18a; 2 *Bl Comm* 105). In particular, the largest estate in land that a person can hold.

As the **feudal system** of land tenure in England evolved into the modern system of landownership, a ‘fee’ came to signify an absolute estate, in perpetuity, which on the death of the owner was capable of being transferred unconditionally to his or her heirs. A fee can be qualified or limited. The annexation of the word ‘simple’ signified that the inheritance was unrestricted, but the use of a suffix, such as ‘tail’, ‘tail male’, ‘tail female’, indicated that there was a limitation on the line of inheritance. “An estate of inheritance without condition, belonging to the owner, and alienable by him or transmissible to his heirs absolutely and simply. It is an absolute estate in perpetuity, and the largest possible estate a man can have, being, in fact allodial in its nature”, *Stanton v. Sullivan*, 63 RI 216, 7 A.2d 696, 698–9 (1939).

In the US, in several jurisdictions, a ‘fee estate’ or an ‘interest in fee’ is equivalent to a **fee simple**, the more limited estate of a **fee tail** having been

abolished or severely curtailed, or, as in some states, it was never recognized. In most jurisdictions the holder of the fee estate is the absolute owner of the land and the use of the word ‘fee’ without qualification usually refers to a **fee simple absolute**. See also **allodial system**, **base fee**, **conditional fee**, **manor**, **movable fee**, **qualified fee**.

28 Am.Jur.2d., Estates (Rochester, NY), §§ 11–21.

2.<sup>(Scot)</sup>A right to hold land from another under a form of feudal tenure subject to the payment of a **feu-duty**. The holder of a ‘fee’ or ‘feu’ is virtually the owner of the land, and this right may be distinguished from the holder of land subject to a **liferent**. With the effective abolition of the feudal system, the holder of a fee or a ‘fiar’ is now an owner of land having a right of *dominium*. In particular, ‘fee’ is a right to own land, as distinguished from other real rights to land such as a servitude or a lease. See also **heritable property**.

K.G.C. Reid. *The Law of Property in Scotland* (London: 1996), §§ 88, 93.

3. A recompense, normally in the form of a fixed sum of money, paid for the rendering of a service, especially for an official or professional service or for any other service demanding a special talent or skill, such as a charge for preparing an appraisal or valuation report. A fee may be distinguished from a **commission** as the later is contingent upon success. See also **commitment fee**, **finance fee**, **quantum meruit**, **scale fee**.

**fee appraiser**<sup>(US)</sup>

An independent **appraiser** who carries out appraisal services in return for a fee, as opposed to a ‘staff appraiser’ who is an employee of the company that commissions the appraisal. See also **review appraiser**.

**fee conditional**<sup>(US)</sup>

See **conditional fee**, **fee simple conditional**.

**fee estate**

See **fee**.

**fee farm rent**<sup>(Eng)</sup>

Historically, a payment made for the right to hold farm land as a **fee** estate, as distinguished from a payment for land that was only held for life or for a term of years, i.e. a form of **chief rent** (2 *Bl Comm* 43). A right that may be considered akin to an

**emphyteotic lease** as found in the Roman law.

In English law, a fee farm rent is now considered as a form of perpetual **rentcharge**, i.e. an annual sum payable upon the purchase of a fee simple interest, generally in lieu of all, or part, of the purchase price. Such payments are now only found in a few parts of England, notably Manchester, Bath and Bristol. Most forms of fee farm rents were abolished in 1935; the remainder are being phased out so that they will all be extinguished no later than 2037 (Rentcharges Act 1977, ss. 1–3). See also **ground rent lease**<sup>(US)</sup>, **quit rent**, **right of re-entry**.

**fee insurance**<sup>(US)</sup>

See **title insurance**.

**fee on condition subsequent**<sup>(US)</sup>

See **conditional fee simple**.

**fee simple**

Derived from the term *in feodo simpliciter*. In common law, the most absolute and unqualified **estate** that can be held in **land**. The highest **freehold** estate that a person can hold, i.e. a ‘freehold estate in fee simple’. ‘**Fee**’ indicates that the owner is free to hold the land in perpetuity and transfer it without hindrance, and if the estate is not disposed of during the owner’s lifetime, that it can pass without constraint to the heirs of the owner. ‘Simple’ indicates that the estate is inheritable by any of the **heirs** of the owner; without condition, limitation or restriction as to the heir who can take the land (‘heirs general’); as opposed to a **fee tail** which can be inherited only by specified descendants (but not ascendants or relatives who are not in a direct line). One who holds a fee simple is “he which hath land or tenements to hold to him and his heirs for ever”, 1 *Co Litt* 1a. A fee simple is the most dominant form of ownership that may be held by a private party under common law; “[t]he term signifies the largest estate in land in both time and status with a right of alienation and inheritability”, *Saint John (City of) v Saab* (1987) 37 DLR (4th) 160, 163 (NB CA Can). The ownership of a fee simple “confers and since the beginning of legal history it always has conferred, the lawful right to exercise over, upon, and in respect, to the land, every act of ownership which can enter into the imagination, including the right to

commit unlimited **waste**”, H.W. Challis, *The Law of Real Property* (London: 3rd ed. 1911, reprint 1963), p. 218.

In the US, an estate in fee simple may be defined as “an estate which (a) has a duration (i) potentially infinite; or (ii) terminable upon an event which is certain to occur but is not certain to occur within a fixed or computable period of time or within the duration of any specified life or lives; or (iii) terminable upon an event which is certain to occur, provided such estate is one left in the conveyor, subject to defeat upon the occurrence of the stated event in favor of a person other than the conveyor; and (b) if limited in favor of a natural person would be inheritable by his collateral as well as his lineal heirs”, The American Law Institute, Restatement of Property (St. Paul, MN: 1936), § 14. In this text fee simple is a generic term and is subdivided into a **fee simple absolute** (usually called a ‘fee simple’); a **fee simple determinable**; and a **fee simple conditional**. In several jurisdictions, the terms ‘fee’, ‘fee simple’ and ‘fee simple absolute’ are considered synonymous, being the most absolute estate that can be held in land (31 C.J.S., Estates (St. Paul, MN), § 11).

In modern English law, an estate in fee simple may be: (i) ‘absolute’ (in particular a **fee simple absolute in possession**); (ii) subject to a ‘condition subsequent’ (a **conditional fee simple**) that creates a condition by which the holder’s interest can be brought to an end; or (iii) subject to a determining event or ‘executory limitation’ that, if it occurs, automatically bring the holder’s interest to an end (a **determinable fee simple**).

A fee simple owner, unless curtailed in some way, has the **natural rights** to land; a right of **alienation** (except as limited by the **rule against perpetuities**); and the right to **use** his land, within the confines of the law. On the other hand, there are limitations placed on any right to land. In particular: (i) statutory restrictions or regulations, such as are imposed by zoning, planning and public health laws—in the US called the ‘**police power**’ over land; (ii) a liability for any **nuisance**, as well as a **strict liability** to a neighbor; (iii) limitations on the right to take certain property from land, such as **treasure trove** and, in some cases, to extract **mineral** from land; (iv) rights of others over the land, e.g. the beneficiary of an **easement** or a **lease**; (v) any **encumbrance**,

horizontally; [7] Horizontal floors, whether accessible or not, below structural, raked or stepped floors; [8] Mezzanine areas intended for use with permanent access; [9] lift rooms, plant rooms, fuel stores, tank rooms which are housed in a structure of a permanent nature, whether or not above main roof level; [10] Outbuildings which share at least one wall with the main building; [11] Loading bays; [12] Areas with a headroom of less than 1.5m; [13] Pavement vaults; [14] Garages; [15] Conservatories; [and] *Excluding* [16] External open-sided balconies, covered ways and fire escapes; [17] Canopies; [18] Open vehicle parking areas, roof terraces and the like; [19] Voids over or under structural, raked or stepped floors; [20] Greenhouses, garden stores, fuel stores, and the like in residential property”, The Royal Institution of Chartered Surveyors, *Code of Measuring Practice: A Guide for Property Professionals* (6th ed. London: 2007), Sec. 1.0. Certain areas, such as [3], [4], [9] to [15] and [17] to [20], that are likely to have a different value applied by the user, may be better stated separately. Party walls in shared ownership are measured to their central line. (Note: this definition is accompanied in the *Code* by diagrams and detailed notes for amplification of the *Guide*. [www.rics.org](http://www.rics.org) – pdf of the Code available for RICS members. See also [www.voa.gov.uk](http://www.voa.gov.uk) *A Summary of Valuation Office Agency Definitions for Rating Purposes*.) A measurement used particularly in town planning, e.g. for assessing site coverage (including **plot ratio**); for council tax banding of houses and bungalows in England and Wales (areas with a headroom of less than 1.5m, integral garages and attached structures of inferior quality, e.g. porches, being excluded); for rating of warehouses and industrial buildings in Scotland; and for building cost estimating of residential property for insurance purposes. See also **gross building area**<sup>(US)</sup>, **gross internal area**<sup>(BrE)</sup>.

#### **gross floor area**

The total of all floor areas in a building, measured from the outside of the external walls, including any floor areas that project beyond the main building line. See also **gross building area**<sup>(US)</sup>, **gross external area**<sup>(BrE)</sup>, **gross internal area**<sup>(BrE)</sup>, **gross leasable area**<sup>(US)</sup>.

#### **gross income**

1. The total **income** receivable from a business or investment before making any deduction for

expenses, management charges, taxes, etc., or any allowance for bad debts, depreciation or payment of debt.

2. The total income collected by a property owner before deducting any expenses or outgoings. Cf. **net income**. See also **effective gross income**, **gross operating income**<sup>(US)</sup>, **gross rent**.

3. The total income received by a tenant as used to determine a **percentage rent**. As a rule, this represents the income from all sales, including concessionaires, vending machines, etc., but excluding sales taxes and any deductions agreed between the landlord and tenant. Sometimes called ‘gross sales’.

#### **gross income multiplier (GIM)**<sup>(US)</sup>

See **income multiplier**.

#### **gross internal area (GIA)**<sup>(BrE)</sup>

“[T]he area of a building measured to the internal face of the perimeter walls at each floor level.

*Including* [1] Areas occupied by internal walls, and partitions; [2] Columns, piers, chimney•breasts, stairwells, lift•wells, other internal projections, vertical ducts, and the like; [3] Atria and entrance halls, with clear height above, measured at base level only; [4] Internal open•sided balconies, walkways, and the like; [5] Structural, raked or stepped floors are to be treated as a level floor measured horizontally; [6] Horizontal floors, with permanent access, below structural, raked or stepped floors; [7] Corridors of a permanent essential nature (e.g. fire corridors, smoke lobbies, etc.); [8] Mezzanine areas with permanent access; [9] Lift rooms, plant rooms, fuel stores, tank rooms, which are housed in a structure of a permanent nature, whether or not above main roof level; [10] Service accommodation such as toilets, toilet lobbies, bathrooms, showers, changing rooms, cleaners’ cupboards, and the like; [11] Projection rooms; [12] Voids over stairwells and lift shafts on upper floors; [13] Loading bays; [14] Areas with a headroom of less than 1.5m [except in some rating valuation if under stairs]; [15] Pavement vaults; [16] Garages; [17] Conservatories. *Excluding* [18] Perimeter wall thicknesses and external projections; [19] External open•sided balconies, covered ways and fire escapes; [20] Canopies; [21] Voids over or under structural, raked or stepped floors; [22] Greenhouses, garden stores, fuel stores, and the like in residential property”, The Royal Institution of Chartered Surveyors, *Code of*



*Measuring Practice: A Guide for Property Professionals* (6th ed. London: 2007), Sec. 2.0. Certain areas, such as [3], [4], [5], [7], [9], [12], [13] and [20], that are likely to have a different value applied by the user may be better stated separately. Party walls in shared ownership are measured to their central line and the internal face is the face of the block wall or plaster face—not the surface of any internal lining applied by the occupier. (Note: this definition is accompanied in the *Code* by diagrams and detailed notes for amplification of the *Guide*: [www.rics.org](http://www.rics.org) – PDF available for RICS members. See also [www.voa.gov.uk](http://www.voa.gov.uk) *A Summary of Valuation office Agency Definitions for Rating Purposes*.) A measurement used particularly in building cost estimation; estate agency and valuation of industrial buildings (including ancillary offices), warehouses, retail warehouses, department stores, variety stores and food superstores; service charge apportionment of occupier’s liability; for new homes development appraisal purposes (excluding garages and conservatories); and in England and Wales, for rating assessment of industrial buildings (including ancillary offices), warehouses, retail warehouses, department stores, variety stores and food superstores and for many specialist classes of property that are valued by reference to building cost (i.e. on the ‘contractor’s use basis’). See also **rentable area**<sup>(US)</sup>.

**gross leasable area (GLA)**<sup>(US)</sup>

The total area of a shopping center used and occupied by tenants—excluding all common areas such as restrooms, mall corridors or pedestrian walkways, mechanical areas, car parking, and any area used for any non-retail use such as offices, apartments, etc. In particular, the ‘gross leasable area’ is “the measurement used to define how much space a tenant has leased in a center. GLA is determined by measuring the distance between the middle walls of space and the distance between front outside wall to back outside wall”, International Council of Shopping Centers, *Keys to Shopping Center Management Series*; “the total floor area designated for tenant occupancy and exclusive use, including basements, mezzanines, and upper floors. It is measured from the center line of joint partitions and from outside wall faces. In short, GLA is that area on which tenants pay rent; it is the area that produces income”, H. Carpenter, *Shopping Center Management*:

*Principles and Practice* (New York: 1984). The ‘Gross Leasable Area’ occupied by a particular tenant covers all leased space; including non-selling space. Also called the ‘gross lettable area’. See also **retail area**<sup>(BrE)</sup>, **sales area**<sup>(US)</sup>.

**gross lease**<sup>(US)</sup>

A lease which provides that the tenant pays only a fixed rent throughout the period of the lease, without any ‘pass-through’ of building expenses, i.e. the lease has no **escalation clause** and, therefore, the lessor pays all of the building operating expenses and repairs, real property taxes, insurance premiums, etc. However, the tenant is responsible for utilities and other expenses directly relating to the space he occupies. In some cases, even though some of the expenses are passed through to the tenant the lease may be called a ‘gross lease’. Most apartment and some office leases are gross leases and most industrial and shop leases are net leases. Sometimes called a ‘fixed lease’. Cf. **net lease**. See also **straight lease**.

**gross lettable area (GLA)**<sup>(US)</sup>

See **gross leasable area**.

**gross living area (GLA)**

The total area of a residential property that is used as living accommodation, including kitchen and bathroom space, but excluding areas such as garage space, basements, and balconies that cannot be considered as used for habitation. GLA does not include service areas and stairwells. The gross living area of a property is measured to the internal face of the perimeter or partition walls and is normally measured as the total of the internal area of all the rooms that are used as part of the living quarters. See also **net internal area**<sup>(BrE)</sup>.

**gross multiplier**<sup>(US)</sup>

See **income multiplier**.

**gross operating income (GOI)**<sup>(US)</sup>

The total income generated by a real estate investment at a particular point in time, or for a particular year, before any deductions or allowances, including gross rent, operating expense contributions, license fees, etc. Cf. **net operating income**. See also **effective gross income**, **gross income**.



### **laches**

Derived from the Old French *laschesse*, or Middle English *lachesse*, ‘slackness’, ‘carelessness’, or ‘negligence’. The neglect, omission or unreasonable delay in asserting or enforcing one’s rights, or in performing a duty (*Livermore v. Beal*, 18 Cal App.2d 535, 64 P.2d 987 (1937); *Wooded Shores Property Owners Ass’n, Inc. v. Mathews*, 37 Ill App.3d 334, 345 NE.2d 186, 190 (1976)). Laches embraces the maxim *vigilantibus, non dormientibus, jura subveniunt*, ‘law aids those who are vigilant, and not those who sleep on their rights’ or ‘law aids the vigilant, not the indolent’ (2 *Co Inst* 690; *Wing*. 692). “Laches is a neglect to do something which by law a man is obliged to do”, *Sebag v Abitbol* (1816) 4 M & S 462, 463, 105 Eng Rep 905. Accordingly, “A court of equity ... has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the Court is passive, and does nothing”, *Smith v Clay* (1767) 3 Bro CC 646, 29 Eng Rep 743, 744 (based on notes made by Lord Camden). Thus, laches provides in equity, a similar end to litigation to that supplied in law by a statutory **limitation** on a right of action; although laches is not based on any specific period of time, but the reasonable determination of the court (*Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221, 239, 240 (PC); *Farrell v Portland Rolling Mills Co* (1908) 40 SCR 339, 346–7 (Can); *Woodruff v. Williams*, 35 Colo 28, 85 P 90, 99 (1905); *Lake Development Enterprises, Inc. v. Kojetinsky*, 410 SW.2d 361, 367 (Mo Ct App 1966)). (In English law, the Limitation Act 1980, s. 36(2) preserves the doctrine of laches by providing that nothing in the Act shall “affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise”.) The doctrine of laches may bar an equitable remedy such as a claim for **rescission**, **rectification**, **specific performance**, or an **injunction**. It may be used also against a beneficiary who is seeking to recover trust property from a trustee after the former has

unduly and indubitably acquiesced in accepting the trustees retention of his property. Laches may be distinguished from **abandonment**, in that the latter is dependent upon intention and is voluntary, whereas laches defeats intention and acts against the will. In the US, sometimes called the ‘doctrine of stale demands’. Cf. **estoppel**.

27A Am.Jur.2d., Equity (Rochester, NY), §§ 152–76.

16(2) *Halsbury’s Laws of England*, Equity (4th ed. Reissue), §§ 910–18.

### **Lady day**

The feast of the Annunciation, 25 March. In England and Wales, one of the ‘usual’ **quarter days** for payment of rent.

### **laesæ fidei**<sup>(Lat)</sup>

Breach of faith. See **good faith**.

### **lais**<sup>(F)</sup>

**alluvion**. Cf. *relais*.

(*les lais et relais de la mer*: tidal land; **foreshore**).

### **lake**

See **littoral land**, **shore**, **water rights**.

### **Lammas day**

1st August. One of the ‘half-quarter days’ in England and Wales, or ‘term days’ in Scotland.

### **lammas lands**<sup>(Eng)</sup>

Arable or meadow land that formed part of a manor and was held in fee simple subject to a right of pasturage (usually as a **right of common** by all the tenants of the manor) for part of the year; originally from Lammas day (1 August, or reaping time, to the following Lady day (25 March), or sowing time. For the rest of the year the land was left lying waste. Sometimes called ‘half-year lands’. Cf. **shack land**.

6 *Halsbury’s Laws of England*, Commons (4th ed. Reissue), §§ 517–19.

### **land**

A dry part of the earth’s surface; any part of the earth’s surface that can be owned and exploited, whether mountain or valley, pasture or desert, town or country, dry land or land covered with water (or ice). Historically, the word land was defined as agricultural or arable land, that which could be ploughed; “any grounds, soile, or earth

# M

## **made land**

Land that is reclaimed from the sea or a lake by filling or tipping, especially when the land is an extension from the shore. See also **polder**.

## **made-up land**

Land that is brought up to the level of the surrounding area by artificial means. In particular, an area of land the level of which is raised by tipping waste material. See also **land reclamation**.

## **magasin**<sup>(F)</sup>

**shop**; store; warehouse.

(*magasin à succursales multiples*: **chain store**, multiple store)

(*magasin à bon marché, magasin discount*: **discount store**)

(*magasin de grande surface*: large retail store. In particular, a store with a gross built area of more than 1,500 m<sup>2</sup> that under French law requires approval from the *Commission Départementale d'Urbanisme Commercial* prior to the grant of a *permis de construire*.)

(*grand magasin*: **department store**).

## **magnet store**

See **anchor store**.

## **mail**

See **acceptance, offer, service**.

## **mail**<sup>(F)</sup>

**mall**; shopping mall.

## **main contractor**

See **general contractor**.

## **main residence**

See **domicile, home, principal private residence**<sup>(Eng)</sup>, **principal residence**<sup>(US)</sup>.

## **main structure**

The essential elements of a building. A term that may be considered synonymous with **structure**, although in certain contexts it may be more limiting. Essentially the main structure is the bare

shell and the additional items that are added to make those elements a complete and effective structure. However, it does not normally include the other elements added to the structure such as doors and windows, service elements, false ceilings or floor tiling (*Ibrahim v Reversions Ltd* [2001] 30 EG 116).

## **mainlevée**<sup>(F)</sup>

**release**; withdrawal.

(*mainlevée de saisie*: release of an attachment or seizure; **replevin**)

(*mainlevée d'hypothèque, mainlevée d'une inscription hypothécaire*: release of a mortgage).

## **mainmorte**<sup>(F)</sup>

**mortmain**.

## **maintenance**

The act or process of keeping or preserving something in an existing state or condition. In particular, keeping a property in good working order. Maintenance is a continuous process that may involve **repair**, but requires a greater degree of attention to the general upkeep of the property than repair. Maintenance is primarily protective, whereas repair is restorative. Maintenance of a building requires actions that will, at least, prevent a decline from the existing condition and generally requires an element of anticipation. Maintenance is not intended to extend the useful life, or improve the efficiency, of a building; that would constitute an **improvement**. It does not include significant works of rebuilding; nor does it include making material alterations; but it may include repair works that result in an element of improvement (*Sevenoaks, Maidstone and Tunbridge Ry Co v London: Chatham and Dover Ry Co* (1879) 11 Ch D 625, 634–5). In a lease, ‘to maintain’ the premises primarily means to keep in the same condition as when the lease was granted (normally excluding deterioration due to normal **wear and tear**). When used in the phrase ‘to maintain and keep in good repair’ it implies “the preservation of the status quo, or a restoration approximately to the original condition, natural wear and tear excepted. ... These words in the lease [are not] synonymous with the term ‘replace’”, *Hampers v. Darling*, 194 Pa Super 59, 166 A.2d 308, 310 (1960). See also **deferred maintenance, keep in repair, preventative maintenance**.

of land or buildings of national interest or architectural, historic or artistic interest or importance, as well as similar furniture, pictures and chattels, and to make these available for public viewing and enjoyment. The National Trust is a private registered charity that raises finance from the public. The Trust is headquartered in London and serves England, Wales and Northern Ireland. A parallel organisation, the National Trust for Scotland, was founded in 1931 and is headquartered in Edinburgh. Property owned by the Trust may be declared 'inalienable' so that such property may never be sold or given away without express Parliamentary authorisation. The National Trust (together with the National Trust for Scotland) is now the third largest landowner (by area) in Britain behind the State and the Crown, owning around 700,000 acres of land and some 350 homes, gardens, buildings or other places such as battlefields. See also [www.nationaltrust.org.uk](http://www.nationaltrust.org.uk).

<sup>34</sup> *Halsbury's Laws of England*, Open Spaces and Ancient Monuments (4th ed. Reissue), §§ 103–119.

### **nationalisation**

See **expropriation**.

### **native title**

The right rooted in the traditional law and custom of an indigenous people to the possession, enjoyment and use of **land** and waters and as a result a right that is recognized by common law. Native title is not an absolute form of private property, but is a qualified dominion based on prior use and possession of the land. A right that is dependent on the natives' right to continue the exclusive enjoyment of their land "in their own way or for their own purpose", *Mitchell v. United States*, 9 Pet 711, 34 US 711, 746 9 L Ed 283, 296 (1835). A right that survives the acquisition of sovereignty by a State or Crown, and is not lost without a clear and unambiguous declaration of such an intention (*In re Southern Rhodesia* [1991] AC 211, 233 (PC)). A right to the usufruct and habitation of the land as a spiritual right thereto, but not a right that can be alienated, except to other members or trustees of the same peoples. A right that cannot be alienated to anyone other than a local native or group of native and cannot be taken by the government without compensation, although it may be considered subservient to the right of the State (or Crown),

whose rights may in turn be based on conquest, treaty or discovery (*Attorney General (NSW) v Brown* (1847) 1 Legge 312; *Tee-Hit-Ton Indians v. United States*, 348 US 272, 99 L Ed 314, 75 S Ct 313 (1955); *Oyekan v Adele* (1957) 2 All ER 785 (PC)).

The European system of land law is derived from the principle that land is held or 'owned' by a succession of rights (freehold or leasehold, easements or servitudes, life interests or entailed interests) and in essence is a commodity to be used and traded. This right may be considered to be at variance with the rights as held by many nations where land is held by the community, the village or the family, and not by an individual or single entity. All members of the community have equal rights to the land, although in many cases the Chief or Head of the tribe or society has charge over the use of the land and in some cases is loosely referred to as the 'owner' or 'trustee' of the land. An individual may have rights to cultivate part of the land, but has no right to transfer that right, which always remains vested in the community.

During the colonial period of settlement, some of the 'discovered' land was considered *terra nullius* (land belonging to no-one). Under the principles of the common law of England, if such land was 'deserted and uncultivated', it could be peopled from a "mother country" (1 *Bl Comm* 106). On the other hand, a claim of sovereignty over a land does not unequivocally carry an absolute right of ownership, and "a mere change in sovereignty is not to be presumed to disturb rights of private owners", *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 407 (PC) (*United States v. Percheman*, 7 Pet 51, 32 US 51, 87, 8 L Ed 604 (1833)). However, there arose a conflict between those who claimed sovereignty and considered that any land that was empty was theirs as of right, and those who were living on the 'discovered' land and did not acknowledge any such claims to their lands.

In the lands that became the United States, the original inhabitants were admitted to be the rightful occupants of the soil "with legal as well as just claim to retain possession of it", *Johnson v. McIntosh*, 8 Wheat 543, 21 US 543, 574, 5 L Ed 681, 688 (1823); but this right was "necessarily, to considerable extent, impaired", *supra* at 591, 693. This impairment was a recognition of the right of the discoverer and conqueror "to appropriate to

themselves so much of [North America] as they could respectively acquire” and this right was based on the principle that “discovery gave exclusive title to those who made it”, *supra* at 572, 688. The right cannot be passed to another and the United States has the “exclusive right to extinguish the Indian Title of occupancy, by purchase or conquest”, *supra* at 587, 692. The right of occupation of the Native American tribes (the ‘Indian right of occupancy’ or the ‘aboriginal right of possession’) has been recognized in specific lands and is considered good against all but the federal government of the United States. Such a right is now generally referred to as a right to **Indian lands** or ‘Indian Title’. (This right has also been referred to as “original Indian title” or “permission from the whites to occupy”, *Tee-Hit-Ton Indians v. United States*, 348 US 272, 279, 99 L Ed 314, 320 (1955)—a case dealing with the Native Americans in Alaska.)

In Canada, the First Nations have a relationship with the land; a connection to ‘Mother Earth’. Their right to be on the land is not held as any form of ownership, nor as an exclusive right to land. It is derived from the aboriginal peoples’ historic occupation and use of their ancestral land. “Put another way, ‘aboriginal title’ is based on the continued occupation and use of the land as part of the aboriginal peoples’ traditional way of life”, *Delgamuuku v British Columbia* (1997) 153 DLR (4th) 183, 249, [1998] 1 CNLR 14 (SCC Can). The law of Canada recognises three features of Aboriginal title: 1. Aboriginal title arises from the occupation of lands in Canada by the aboriginal peoples prior to arrival of the Europeans. 2. Aboriginal land can only be alienated to the Crown in the right of Canada. 3. Aboriginal title is held communally by the “aboriginal nation” and each First Nation makes decisions about the use and holding of land in their respective Traditional Territory. Thus, to establish Aboriginal title the land must have been occupied prior to the assertion of British sovereignty; there must be a continuous possession from before that time to the present; and the occupation must have been exclusive to a particular group (*Calder v British Columbia (Attorney General)* [1973] SCR 313, 4 DLR (3d) 145 (SCC Can)). Aboriginal title provides for the exclusive use of the land by the group, and the use must be consistent with their attachment to the land. This right is protected by the Constitution (Constitution Act 1982, s. 35).

In Australia, the term ‘native title’ is a concept recognised by the ‘common law’ as available to the indigenous people where they have occupied land and have done so continuously since settlement. It is a right to continue to live on land that had not been settled by the immigrants, and has been continuously used by the Aboriginal peoples of mainland Australia and Tasmania, and the Torres Strait Islanders. In the ground-breaking case of *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57, 107 ALR 1, ‘native title’ was said to “conveniently describe the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.”. Subsequently this definition has formed the basis for the statutory definition: “the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledged, and the additional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and rights and interests are recognised by the common law of Australia”, Native Title Act 1993, s. 223(1) (*Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, 77 AJR 356 (Aus)). “Rights and interests” in this context includes “hunting, gathering or fishing rights and interests”, NTA 1993, s. 223(2). This right includes a right (i) to live on the land; (ii) to conserve the natural resources; (iii) to maintain, manage and use the land (including the protection of sacred sites); (iv) to use and enjoy the natural resources; and (v) to make decisions about the land and to control access. It may also include the right to possession of land (as with the right recognised in *Mabo* of the Meriam people as a group to possess most of the island of Mer).

To the Aboriginal people, land was created by their ancestral beings and they see themselves as the land’s inherent and perpetual custodians. Land, and all that it yields, is part of the continuum of the society and must be maintained as a source of food and shelter; passed for the use of future generations; as well as forming the resting place of their ancestors. Native title cannot be extinguished unless there is a clear and plain

an inclusion should be clearly expressed. See also **mineral, mineral rights, oil and gas lease, waste**.

#### **oil and gas lease**<sup>(US)</sup>

A **lease**, or similar right, by which a party is permitted to explore and extract naturally occurring oil and gaseous hydrocarbons, on an exclusive basis, from beneath the surface of the land. An oil and gas lease differs from a normal lease of real estate in the following ways: (i) although the lessee is granted a right to explore and extract oil over or under a particular surface area, the oil or gas percolates from one area to another under the surface until drawn or expelled; (ii) once the oil or gas is extracted it becomes personal property; (iii) the payment for the right usually takes the form of a **royalty** based on the quantity, or the value, of oil or gas extracted (although a **bonus** is commonly payable as an initial consideration for the grant of the lease, or a **delay rental** may be payable until the lessee starts drilling); (iv) because the lessee has control over exploration and extraction, various covenants are implied into the lease, unless expressly varied to the contrary; for example, to drill exploratory wells (and usually other wells if the initial wells are dry); to diligently and properly operate the wells; to drill offset wells to protect against drainage of the oil; to diligently market the extracted produce until the resource is exhausted (Merrill, *Covenants implied in Oil and Gas Leases*, 1940; E. Kuntz et al. *A Treatise on the Law of Oil and Gas* (St. Paul, MN: 1962- ), §§ 54.1—56.5); and (v) if the lessee discontinues exploration work, as when there is no more oil or gas, the lease usually comes to an end, whether by abandonment, surrender or forfeiture.

In some jurisdictions, oil and gas are considered to be owned as part of the land, i.e. ownership extends directly below the surface only within the boundaries of the designated area of land, and on this premise an oil and gas lease is “an **incorporeal hereditament** or a **profit à prendre**. It is an interest in real property”, *United States v. Stanolind Crude Oil Purchasing Co.*, 113 F.2d 194, 198 (10th Cir. Okla 1940). The oil remains the property of the owner of the land, even though a prospector may have a lease of the land, and the oil does not become personal property until it is brought

to the surface (*Black v. Solano Co.*, 114 Cal App 170, 299 P 843, 845 (1931)). In other jurisdictions, oil and gas are not considered to be owned until extracted or ‘captured’ so that the right granted is not a lease, interest in or right to land, but more in the nature of a **usufruct** or a **servitude**; an incorporeal right to take possession of land (in the form of a license or an easement, or a combination of such rights) in order to extract oil and gas (*Nunez v. Wainoco Oil and Gas Co.*, 606 So.2d 1320, 1325–6 (La App 1992); 58 C.J.S., *Mines and Minerals* (St. Paul, MN), § 195).

The right that is granted over land by an ‘oil or gas lease’ depends not only upon the jurisdiction, but also on the nature of the rights that are granted. In particular, it depends on whether there can be considered to be a grant of an exclusive right to possession over an area or strata of land for a period of time, which would thereby provide the criteria to constitute a true ‘lease’. See also **ancillary easement, cessation clause, continuous operation clause, economic interest, entirety clause, Mother Hubbard clause, rule of capture, primary term**.

B.M. Kaplan. *A Comprehensive Guide to Modern Real Estate Law, Practice & Brokerage* (Chicago: 1989), pp. 279–308.

38 Am.Jur.2d., *Gas and Oil* (Rochester, NY), §§ 1–340.  
E. Kuntz et al. *A Treatise on the Law of Oil and Gas*. 7 vols. (St. Paul, MN: ©1962- ), §§ 18.1—26.4.

J.S. Lowe et al. *Cases and Materials on Oil and Gas Law* (4th ed. St. Paul, MN: 2002), Ch. 2 ‘The Oil and Gas Lease’.

W.L. Summers. *The Law of Oil and Gas*. 3 vols. (3rd ed. St. Paul, MN: ©2004–2006, with annual supplements).

O.L. Anderson et al. *Hemingway Oil and Gas Law and Taxation* (4th ed. St. Paul, MN: 2004).

#### **old-for-old insurance**

See **reinstatement cost**.

#### **old system title**<sup>(Aus)</sup>

A **title** to land that is based on the traditional title deeds or ‘chain of title’, as distinguished from title held under the **Torrens title system**. Also called ‘common law’ title (a term that is misleading as this form of title is not strictly a part of the system of ‘common law’).

P. Butt. *Land Law* (Australia) (5th ed. Pyrmont, NSW: 2006), Ch. 19 ‘Old Title System and Priorities’.

**olographe**<sup>(F)</sup>

holograph (written entirely by hand). See **holographic will**.

**olographic will**

See **holographic will**.

**omission**

1. The failure to fulfill or complete a required action; neglect of a duty. See also **laches**, **mistake**, **negligence**.

2. Something left out by accident. A part of a document left blank. See also **misrepresentation**, **mistake**, **slip rule**<sup>(Eng)</sup>, **utmost good faith**.

**omne quod [solo] inædificatur solo cedit**<sup>(Lat)</sup>

That which is built upon the soil becomes a part of the soil. See **fixture**.

**omnes licentiam habere his quæ pro se indulta sunt, renunciare**<sup>(Lat)</sup>

Everyone has the right to renounce those things that have been conferred for their benefit.

**omnes res suas liberas et quietas haberet**<sup>(Lat)</sup>

That he should retain all his property free and undisturbed (1 *Bl Comm* 291).

**omnibus clause**<sup>(US)</sup>

1. See **dragnet clause**.

2. A provision in a judgment for the distribution of property under a will that “all other property” is to go to a beneficiary or beneficiaries named in a will. See also **residuary estate**.

**on**

In relation to real property, ‘on’ usually means actually at the property or on the surface, being more definitive than ‘at; although in relation to a building it may mean ‘in’ the building and not merely affixed to the outside. See also **time**.

**on or before**

See **time**.

**once a mortgage, always a mortgage**

A maxim which stresses the principle that, in equity, a **mortgage** is intended solely as security for a loan and not as a means to secure a collateral advantage for the mortgagor. In

other words, once the mortgagor has paid back his debt to the mortgagee, the purpose of the mortgage has come to an end and the property should be released unencumbered (*Seton v Slade* (1802) 7 Ves Jun 265, 273, 32 Eng Rep 108; *Jones v. Horton & Horton, Inc.*, 100 F.2d 345 (5th Cir. Tex 1938)). “The principle is this – that a mortgage must not be converted into something else; and when once you have come to the conclusion that a stipulation for the benefit of the mortgagee is part of the mortgage transaction, it is but part of his security, and necessarily comes to an end on the payment off of the loan”, *Noakes & Co Ltd v Rice* [1902] AC 24, 33–4, [1900–3] All ER Rep 34 (HL) (*Wiltse v Excelsior Life Insurance Co* (1916) 29 DLR 32, 35 (Alta. CA Can); *Russo v. Wolbers*, 116 Mich App 327, 323 NW.2d 385 (1982); *Jones on Mortgages* (8th ed.), § 1326). Thus, if a company lends money on condition, for example, that the mortgaged property is used only for the sale of the mortgagee’s products, he cannot insist on this tie continuing when the mortgage is redeemed, or prevent redemption for fear of losing that tie. However, the mortgagee may be able to sustain a collateral agreement if: (i) it is part of a separate and later agreement; (ii) it can be demonstrated that the advantage is not unfair and unconscionable; (iii) it does not create a penalty preventing the redemption of the mortgage; and (iv) it is not inconsistent with or repugnant to the right to redeem (*Reeve v Lisle* [1902] AC 461 (HL); *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 53, 61 (HL); *Peugh v. Davis*, 6 Otto 333, 96 US 332, 24 L Ed 775 (1877)).

In the US, some jurisdictions take the view that a collateral advantage should be enforceable when the transaction is entered into by experienced business people who are legally represented (*Ringling Joint Venture II v. Huntington Nat’l Bank*, 595 So.2d 180 (Fla App 1992)). See also **equity of redemption**, **option**, **solus agreement**.

55 Am.Jur.2d., *Mortgages* (Rochester, NY), §§ 2, 513.

G.S. Nelson & D.A. Whitman. *Real Estate Finance Law* (4th ed. St. Paul, MN: 2001), §§ 3.1—3.3.

Fisher & Lightwood’s *Law of Mortgages* (11th ed. London: 2002), § 28.8.

*Cheshire and Burn’s Modern Law of Real Property* (17th ed. Oxford: 2006), pp. 736–43.

E.H. Burns. *Maudsley & Burn’s Land Law: Cases and Materials* (8th ed. London: 2004), pp. 802–4, 811, 814–15.

of the lease, the landlord can always obtain a guarantee (an ‘Authorised Guarantee Agreement’) that the assigning tenant will remain liable under the terms of the lease (Landlord and Tenant (Covenants) Act 1995, ss. 5, 16). A landlord who assigns his reversion remains liable for the covenants in the lease throughout its term, unless he obtains an express release from the tenant. If he obtains such a release the landlord is no longer entitled to benefit from the tenant covenants under the lease (LT(C)A 1995, s. 6). A request by the landlord to be released from his covenants cannot unreasonably be refused (if it is, the landlord may apply to the county court for a declaration that it is reasonable for the covenant to be released—which does not apply to personal covenants) (LT(C)A 1995, s. 8). In addition, where the assignee remains liable under the lease, the landlord must serve notice on the former tenant within six months of any rent or service charge arrears in order to be able to claim for such payments.

This latter provision also applies to a tenancy (an ‘Old Lease’) created before 1 January 1996 (LT(C)A 1995, s. 17; *Scottish & Newcastle plc v Rogue (No 2)* [2007] EWCA Civ 150, [2007] 15 EG 148 (CA)). In addition, under the 1995 Act, there are provisions that similarly alleviate the liability of guarantors of the lease and provisions that reduce the impact of increases in value due to subsequent improvements to the property. See also **implied contract, novation, stipulation pour autrui<sup>(F)</sup>, sublessee, subrogation, trust.**

17A Am.Jur.2d., Contracts (Rochester, NY), §§ 425, 450–3.  
49 Am.Jur.2d., Landlord and Tenant (Rochester, NY), §§ 1, 102–4, 397, 439, 452, 463, 508, 528.

17A Cor.Jur.Sec., Contracts (St. Paul, MN), §§ 518–22.  
51C & 52 Cor.Jur.Sec., Landlord & Tenant (St. Paul, MN), §§ 2(2), 522, 528(3), 529, 531.

N.C. Seddon & M.P. Ellinghaus. *Cheshire & Fifoot’s Law of Contract. Eight Australia Edition* (Chatswood, NSW: 2002), Ch. 2 ‘Privity of Contract’.

*Evans & Smith: The Law of Landlord and Tenant* (5th ed. London: 1997), pp. 77–99.

E.H. Burns. *Maudsley & Burn’s Land Law: Cases and Materials* (8th ed. London: 2004), pp. 76–7, 569–71, 609–11.

*Anson’s Law of Contract* (28th ed. Oxford: 2002), pp. 421–9.

M.P. Furmston. *Cheshire, Fifoot & Furmston’s Law of Contract* (15th ed. Oxford: 2007), Ch. 14 ‘Privity of contract’, Ch. 15 ‘Privity of contract under the law of agency.

*Chitty on Contracts* (29th ed. London: 2006), Ch. 18 ‘Third Parties’, §§ 37-219—37-223.

L. Koffman & E. McDonald. *The Law of Contract* (5th ed. Oxford: 2004) Ch. 18 ‘Privity and third party rights’.

G.H. Treitel. *The Law of Contract* (11th ed. London: 2003), Ch. 15 ‘Third Parties’.

9(1) *Halsbury’s Laws of England, Contract* (4th ed. Reissue), §§ 748–64.

### **privity of estate**

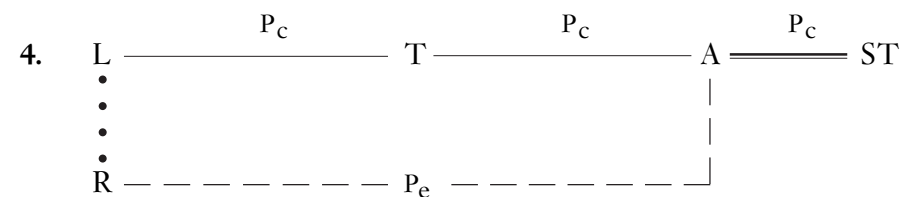
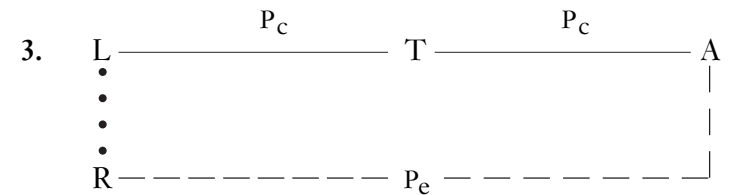
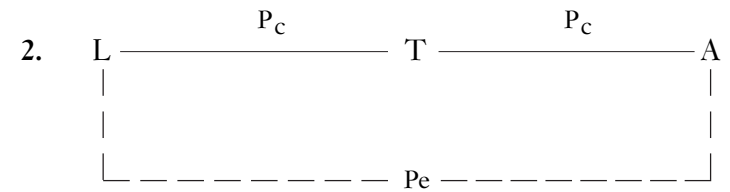
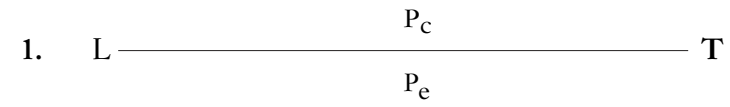
A mutual relationship that is considered present between two parties who have an interest in the same estate in land at the same time. The **privity** that exists between successors in title to the same land. For example, privity of estate exists between a lessor and lessee; between tenants in common; and between a tenant for life and a remainderman. There is said to be **privity of contract** and privity of estate between the original parties to a **lease**—the former relationship arising as an incidence of the contract and the latter as an incidence of the lease creating a tie to an estate in land. (It should be noted that there is privity of contract between the parties to an **agreement for a lease**, but strictly no privity of estate until the lease is formally executed.)

Privity of contract and privity of estate persist simultaneously between a lessor and lessee as long as a lease continues. Thus, the existence of privity of estate has no practical significance, at least until either party assigns its interest to a third party. If either the lessor or lessee makes an **assignment** of his interest to a third party, the privity of estate between the original parties no longer exists, but the privity of estate exists between the lessor, or the lessee (whichever remains as party to the lease), and the new party to the lease. In other words, if there is a right to the same property between a direct landlord and a direct tenant there is privity of estate. On the other hand, a tenant who sublets land does not transfer his estate to the subtenant, but merely carves a shorter estate out of his interest and, therefore, there is no privity of estate between a head lessor and a sublessee. Also, if a tenant sublets the demised premises and subsequently that tenant’s interest expires, even though the subtenant remains in possession of the premises, there is no longer privity of estate because the original tenant no longer has an mere contractual tenure. Tenure exists by reason of privity of estate”, *Milmo v Carreras* [1946] KB 306, 310, [1946] 1 All ER 288, 290 (CA).



SAMPLE PAGE

These relationships of privity of contract and privity of estate may be illustrated diagrammatically:



L = original lessor

T = original lessee

ST = subtenant

R = assignee of lessor

A = assignee of lessee

P<sub>e</sub> = Privity of Estate  
(but not necessarily the same contract)

P<sub>c</sub> = Privity of Contract

assignment

subletting

The effect of privity of estate is that most lease covenants are enforceable between those parties who are linked by privity of estate; even though there is no privity of contract to enable an action on the contract to be enforced. A lessor can enforce a covenant *in* a lease against an assignee; but not,

as a rule, against a **sublessee** (unless the sublessee has directly covenanted with the lessor to observe the terms of the lease). Nonetheless, at common law, a covenant may be enforced as a result of the relationship of privity of estate only if it is a ‘real’ covenant, i.e. it is a **covenant running with the land** (also referred to as a covenant that ‘touches and concerns the land’ or ‘has reference to the subject matter of the lease’). A covenant that is purely ‘personal’, for example an undertaking by the tenant to pay money to a third party, or that the landlord will not operate a competitive business at another property that is situated near the demised premises, does not ‘touch and concern the land’ and cannot be the subject of privity of estate (*Thomas v Hayward* (1869) LR 4 Ex 311; *Re Hunter’s Lease, Giles v Hutchings* [1942] Ch 124, [1942] 1 All ER 27, 29; *Anthony v. Brea Glenbrook Club*, 58 Cal App.3d 506, 130 Cal Rptr 32, 34 (1976); *Eagle Enterprises, Inc. v. Gross*, 39 NY.2d 505, 384 NYS.2d 717, 349 NE.2d 816 (1976)).

However, in the US, some jurisdictions take a less strict view on the requirement for the covenant to ‘touch and concern’ the land and will enforce most covenants where there is a relationship of privity of estate, provided the acquirer has **notice** of the existence of the covenant (*Oliver v. Hewitt*, 191 Va 163, 60 SE.2d 1 (Va App 1950); *Olson v. Jantausch*, 44 NJ Super 380, 388, 130 A.2d 650 (1957)). Also, in English law, for tenancies beginning on or after 1 January 1996, and for most covenants in other leases, the benefits and burdens of landlord and tenant covenants are enforceable by and against any party who acquires a right to the lease (including a mortgagee in possession), whether or not the covenant ‘touches or concerns’ the land (Landlord and Tenant (Covenants) Act 1995, s. 2(1)); the principle being that all lease covenants are part of the whole transaction. In the US, sometimes called ‘privity of title’. See also **horizontal privity**<sup>(US)</sup>, **restrictive covenant**, **sublease**, **vertical privity**<sup>(US)</sup>.

Anno: 70 ALR 1102: Rent—Liability of Assignee of Lease.  
3 Tiffany on Real Property (3rd ed. Chicago: 1939), § 851.  
17A Am.Jur.2d., Contracts (Rochester, NY), §§ 425, 450–3.  
51C & 52 Cor.Jur.Sec., Landlord & Tenant (St. Paul, MN),  
§§ 2(2), 240, 528(3), 526, 531.

*Cheshire and Burn’s Modern Law of Real Property* (17th ed.  
Oxford: 2006), pp. 302–3.

*Megarry & Wade: The Law of Real Property* (6th ed. London:  
2000), §§ 15-004, 15-022 et seq.

E.H. Burns. *Maudsley & Burn’s Land Law: Cases and  
Materials* (8th ed. London: 2004), pp. 569–80.  
27(1) *Halsbury’s Laws of England*, Landlord and Tenant (4th  
ed. Reissue), §§ 466–85.

#### **privity of possession**<sup>(US)</sup>

A relationship that exists between two parties that have successive rights to possession of property, as with two claimants to **adverse possession** of a property. See also **privity**, **tacking**.

#### **privity of title**<sup>(US)</sup>

See **privity of estate**.

#### **prix**<sup>(F)</sup>

**price**; consideration; quotation; cost; value.

(*prix d’achat*: purchase price)

(*prix d’adjudication*: knocked-down or actual sale price, at auction)

(*prix de detail*: retail price)

(*prix de location*: rental value; letting price)

(*prix du marché*: market price)

(*prix de remplacement*: replacement cost;  
**reinstatement cost**)

(*prix de revient*: cost price; prime cost)

(*prix de revient comptable*: book cost)

(*prix de revient effectif*: actual cost price)

(*prix de revient réel*: historic cost).

#### **pro emptore**<sup>(L.at)</sup>

As the buyer; by the title of a purchaser.

#### **pro forma statement**

A statement ‘according to form’, i.e. one that shows how a situation might develop. For example, a schedule of the projected income and expenses for a real estate investment over a given period of time. See also **feasibility study**, **operating statement**.

#### **pro rata**<sup>(L.at)</sup>

In proportion; at the rate of. See also **apportionment**.

Anno: 74 ALR 995: Sales—Pro Rata Distribution.

#### **pro tanto**<sup>(L.at)</sup>

For so much; to that extent; as far as it goes. A payment made *pro tanto* is a part payment or a payment on account. A purchaser *pro tanto* acquires a **partial interest** (something less than a complete interest), e.g. a lease. A *pro tanto* **assignment** means an assignment of part of the demised premises,

# R

## **rabais**<sup>(F)</sup>

reduction (in price); **rebate**; **discount**; **abatement**; allowance.

(*vendre au rabais*: to sell at a discount)

(*vente au rabais*: sale by Dutch auction).

## **rachat**<sup>(F)</sup>

repurchase; redemption; release; surrender.

(*rachat d'une obligation*: redemption of a debenture)

(*droit de rachat*: option to purchase. Cf. *droit de préemption*)

(*valeur de rachat*: **surrender value**; redemption price).

## **rachmanism**<sup>(Eng)</sup>

The exploitation of a tenant of residential property by taking advantage of his or her position of weakness due to income, age, race, etc. The term is derived from Perec Rachman who, in London between 1954 and 1960, “is alleged to have used hired bullies to intimidate statutory tenants by violence and threats of violence into giving vacant possession of their residence and so placing a valuable asset in the hands of the landlord”, *Cassell & Co Ltd v Broome* [1972] AC 1027, 1079, [1972] 1 All ER 801, 831 (HL). A term now used to refer to any form of **harassment** or exploitation of a residential tenant, which seeks to extract exorbitant rent or to evict the occupier in order to realise a higher price for a property by selling it with vacant possession. See also **eviction**.

Shirley Green. *Rachman* (London: 1981).

## **rack rate**

The published room rate in a hotel. Generally, the full rate that is charged to a casual traveller. See also **average daily room rate**.

## **rack rent**

The highest annual rent at which a property can be let; the full yearly value of a property. Historically, and in the US, ‘rack rent’ means the highest rent a landlord can obtain in the open market. In particular, an extortionate or exorbitant rent “to oppress men by rack-renting land is particularly detestable”, R.H. Tawney,

*The Agrarian Problems in the Sixteenth Century* (1921). In old English law, ‘rack rent’ was used to signify a rent that had been freely negotiated between a landlord and tenant, as distinguished from a charge for the privilege of land tenure under the **feudal system**: “*Rack*-rent is only a rent of the full value of a tenement, or near it”, 2 *Bl Comm* 43. In modern English usage, rack rent merely signifies the best **market rent** obtainable for a property, especially as distinguished from a lower rent payable under an existing contract of tenancy; “the value at which the premises are worth to be let by the year in the open market – that is to say, what a tenant, taking one year with another, may fairly and reasonably be expected and required to pay”, *Gundry v Dunbam* (1916) 85 LJ KB 416, 422 (CA). The payment of a **premium** indicates that the rent payable is not a rack rent (*Ex parte Connolly to Sheridan and Russell* [1990] 1 IR 1, 6 (Irl)). Rack rent is generally based on the assumption that the tenant pays his own occupancy costs (taxes, utilities and maintenance expenses) and the landlord pays for repairs.

In English statute law, ‘rack rent’ is defined in certain statutes as a rent that is “not less than two-thirds of the rent at which the premises might reasonably be expected to let from year to year” excluding all tenant’s rates and taxes and costs of repair, insurance and other expenses; a definition that is aimed at excluding premises that are let on a **ground rent** (Public Health Act 1936, s. 343; Highways Act 1980, s. 329(1), as amended). Also, in English law, if the maximum rent recoverable from a tenant is limited by statute, for instance to a **fair rent** as registered under the Rent Act 1977, then that rent is the maximum or rack rent recoverable for the premises at the time of the letting (*Rawlence v Croydon Corporation* [1952] 2 QB 803, [1952] 2 All ER 543 (CA); *Newman v Dorrington Developments Ltd* [1975] 1 WLR 1642, [1975] 3 All ER 928).

## **Radburn**

A form of layout for a residential estate, originally designed for the town of Radburn, New Jersey, USA, in which pedestrian access is segregated almost entirely from vehicular access by means of bridges and underpasses, and by means of a network of footpaths that lead to the front of each house, but do not abut onto the road as on a conventional estate. Vehicular access is provided by feeder roads from which a

series of cul-de-sacs give access to the rear of each house where parking areas and garages are located. An adaptation of this type of layout was commonly used for the design of many of the housing estates developed in the post-war English new towns. However, “the famous Radburn development in New Jersey was based on the principle of the super-block, an area surrounded by through roads into which a number of cul-de-sacs thrust their way like sperm into an ovum. On one side the houses fronting these cul-de-sacs had a short garden, beyond which was the cul-de-sac carriageway. On the other side was the main garden, at the end of which ... there was a space occupied by footways. The kind of layout loosely described as ‘Radburn’ ... constructed in Coventry, Basildon New Town and a number of places is really not like this at all. The front garden, or small garden, abuts upon the footpath and greenway, while the main garden, or back garden, abuts upon the cul-de-sac carriageway”, Lewis Keeble, *Town Planning at the Crossroads* (London: 1961), p. 121.

**radiation**<sup>(F)</sup>

(*radiation d'inscription*: termination of a mortgage, by repayment)

(*radiation d'hypothèque*: the official annulment of a mortgage registered against a property by the registrar of mortgages).

**radical title**<sup>(Aus/NZ)</sup>

The title as held by the Crown. A term that is based on the principle that all land is ultimately held from the Crown. Now a questionable view, as when the English Crown claimed sovereignty over Australia and New Zealand, that did not give it title to the all the land. Also called ‘ultimate title’ or ‘final title’. See also **Crown land**, **native title**.

**radius clause or radius restriction clause**

See **non-competition clause**, **restrictive covenant**.

**rang**<sup>(F)</sup>

order; class; priority.

(*rang hypothécaire*: mortgage priority)

(*capacité de remboursement en premier rang*: first-class covenant)

(*hypothèque en deuxième rang*: second mortgage).

**range**<sup>(US)</sup>

1. See **government survey system**.

2. See **range land**.

3. The difference between the upper and lower limits of a scale, as with a price in the range of \$1–3 million. The difference between the smallest and largest values in a frequency distribution. The group of values in a permissible group of variables.

4. A row of buildings or sections of a building.

5.<sup>(Aus/NZ)</sup> A tract of hilly or mountainous country.

6. A direction line.

**range land**<sup>(US)</sup>

An open area of land used for grazing. In particular, a large tract of open government-owned land that is used for grazing cattle, sheep or other livestock. Over the Great Plains, an area where domestic animals are allowed to roam is also called a ‘range’. See also **public lands**.

**range line**<sup>(US)</sup>

See **base line**, **government survey system**.

**ransom strip**

A strip of land that fronts a public highway and, because it is in separate ownership, prevents an owner of another parcel of land from obtaining access to the highway, i.e. a piece of land that prevents a landlocked owner from fully exploiting his land, thus placing him in a position of being held to ‘ransom’ by the owner of the strip of land. See also **compulsory purchase compensation**<sup>(Eng)</sup>, **easement of necessity**, **marriage value**<sup>(BrE)</sup>.

**rapport**<sup>(F)</sup>

1. report; statement; account.

(*rapport d'expert*: expert’s report; survey)

(*rapport d'expertise*: **appraisal report**<sup>(AmE)</sup>; **valuation report**<sup>(BrE)</sup>; survey; opinion; expert testimony).

2. **yield**; return; profit.

(*immeuble de rapport*: investment property; income-producing property)

(*maison de rapport*: tenement house)

(*terre de bon rapport*: land in good condition).

3. **restitution**; restoration.

(*restitution à succession*: **hotchpot**).

**ratable estate**<sup>(US)</sup>

A taxable estate; property designated as being subject to taxation.

‘real estate agent’ or ‘real estate broker’ is also commonly used to refer to a licensed **salesperson** employed by a real estate broker.

In Queensland and New South Wales, the term ‘real estate agent’ or ‘property agent’ is used in preference to the English term **estate agent**.

**real estate appraisal**<sup>(AmE)</sup>

See **appraisal, valuation**.

**real estate appraiser**<sup>(AmE)</sup>

See **appraiser**.

**real estate assessment**<sup>(AmE)</sup>

See **assessment**.

**real estate broker**<sup>(AmE)</sup>

See **broker, middleman, real estate license**.

**real estate commission (REC)**<sup>(US)</sup>

A board established at state level to make and enforce regulations to protect the public in their dealings with those involved in real estate transactions; in particular, to control the licensing of persons engaged as real estate brokers or salespersons. See also **real estate license**.

See also: [www.deltaalpha.com](http://www.deltaalpha.com) **Associations:** Association of Real Estate Licence Law Officials.

**real estate contract**<sup>(US)</sup>

See **contract for deed, contract for sale, installment contract, land contract**.

**real estate corporation**<sup>(AmE)</sup>

A corporation that invests in **real estate**. See also **property company**<sup>(BrE)</sup>, **real estate investment trust, real estate operating company**.

**real estate credit**<sup>(AmE)</sup>

A loan granted against the security of **real estate**. See also **finance**.

**real estate development**<sup>(AmE)</sup>

See **development, development analysis**.

See also Appendix A, Bibliography: **Construction, Development and Land Economics**.

**real estate investment trust (REIT)**<sup>(US)</sup>

A corporation, business trust, or association that is (i) managed by one or more trustees or directors, and pools the funds of a large number of investors in order to place money exclusively in real estate,

whether by direct investment, by financing, by leasing arrangements, or by a combination of such methods; and (ii) has a tax status that enables the beneficial owners to be subject to only one level of taxation. Real estate investment trusts originated in the United States under the Real Estate Investment Act of 1960, which was enacted to enable a group of investors to participate in real estate without the income derived from the underlying investments being subjected to taxation both at a corporate and at an individual level. A REIT is much like a mutual fund, being essentially a passive investment vehicle. Control is vested in the trustees or directors, and a REIT’s income must accrue from such sources as rent and mortgage interest, and not from property trading and development, with at least 75% of the trust’s income being derived from real estate. A REIT may be ‘self-administered’, i.e. it is managed by the employees of the trust, or it may be ‘externally advised’. The beneficial ownership of a REIT is evidenced by transferable shares, or by transferable certificates of beneficial interest, and its special tax status distinguishes it from a domestic corporation. A REIT may be considered as “a **business trust** for the purposes of holding assets, in which the shareholders directly own an undivided interest and is unlike a corporation whereby the stockholders have no direct ownership interest”, *Sec. & Exchange Comm’n v. American Realty Trust*, 429 F Supp 1148, 1152 n. 1 (DC Va 1977).

A REIT is not taxed as a separate entity (except on its retained earnings), provided that the trust follows the statutorily prescribed rules, including: (1) it has no fewer than 100 shareholders or beneficiaries; (2) it is not more than 50% owned by five or fewer individuals; (3) at the end of its fiscal year at least 75% of its assets are held as real estate (including real estate loans and securities), cash or government securities; (4) the real estate is not held primarily for sale; (5) at least 75% of its gross income is derived from rents, mortgage interest and gains from the sale of real estate; (6) has no more than 20% of its assets in stocks of taxable REIT subsidiaries; and (7) it distributes at least 90% of its taxable income to its investors (26 USCA, Internal Revenue Code, §§ 856–60). The investors are taxed only in their individual capacities. Most insurance companies and other financial institutions cannot elect to be REITs (26 USCA, Internal Revenue Code, § 856(4)),

although they may invest in REITs.

A REIT may specialize in direct property investment (especially income-producing property)—an ‘equity trust’ or ‘equity REIT’; in mortgage lending—a ‘real estate mortgage trust’ (REMT) or ‘mortgage REIT’; or it may invest in equity and mortgage interests—a ‘hybrid trust’, ‘combination trust’ or ‘hybrid REIT’. A REIT may have an indefinite life, as with any other corporate entity, or may be established with the objective that it will sell off its investment within a specified period of time, a ‘finite life real estate investment trust’ (FREIT).

Outside the United States, the term REIT is used to refer to an investment company or trust that invests directly in real estate and has a similar tax status so that the entity is exempt from tax and only the investors pay tax on the income received. Generally, such funds must distribute at least 90% of their income to maintain their special tax status. In several countries, a similar vehicle is referred to by an appropriate prefix, e.g. H-REIT (Hong Kong REIT), J-REIT (Japanese REIT), etc., and in Australia a similar investment vehicle is called a ‘Listed Property Trust (LPT)’ or ‘Unlisted Property Trust’. See also *organisme de placement collectif immobilier (OPCI)*, **real estate mortgage investment conduit**, *société d’investissements immobilières cotées (SIIC)<sup>(F)</sup>*, **umbrella partnership REIT**.

See also: [www.deltalpha.com](http://www.deltalpha.com) **Associations:** National Association of Real Estate Investment Trusts, Inc.  
 4A Powell on Real Property (Albany, NY: ©1997- ), §§ 573B[7]–573C[4].  
 47A Cor.Jur.Sec., Internal Revenue (St. Paul, MN), § 381.  
 R.L. Block. Real Estate Investment Trusts (3rd ed. New York: 2006).  
 D.F. Windish. Real Estate Taxation: A Practitioner’s Guide (Chicago: 4th ed. 2005), Ch. 22 ‘Real Estate Investment Trusts’.  
 S.H. Chan et al. Real Estate Investment Trusts (New York: 2002).  
 P.M. Fass, M.E. Shaff & D.B. Zeif. Real Estate Investment Trusts Handbook (New York: 2007 ed.).  
 R.T. Garrigan & J.F.C. Parsons (editors). Real Estate Investment Trusts (New York: 1997).  
 J.A. Mullaney. REITs: Building Profits with Real Estate Investment Trusts (Hoboken, NJ: 1998).  
 M. Bloomfield & T.S. Lynn. Real Estate Investment Trusts (Vol. 29 & 29A, Securities Law Series) (St. Paul, MN: ©1994-, Loose-leaf).

National Association of Real Estate Investment Trusts. REIT Fact Book (Annual).  
 C. Davis (editor). *Tax on Property 2006–07* (Kingston-upon-Thames, Surrey: Annual), Ch. 9 ‘Real Estate Investment Trusts’.

### **real estate license<sup>(US)</sup>**

A license required by a person who wishes to act in real estate transactions as an **agent** or **broker** (including a **salesperson**). All states and the District of Columbia require that any person who wishes to act as a real estate broker or real estate salesperson must have a real estate license from the state in which he is doing business and, in many jurisdictions, there is no entitlement to a **commission** unless the broker (or the salesperson he employs) has a license at the time he is hired for the transaction for which the commission is being claimed (Anno: 80 ALR3d 318: Real Estate License—Time of Procurement). This requirement may apply to transacting the sale of a business, where the sale includes real property as part of the business assets (*Brakhage v. Georgetown Associates*, 523 P.2d 145 (Colo App 1974); Anno: 82 ALR3d 1139: Necessity of Real Estate Broker’s Licence). A real estate broker must be qualified by examination, and a broker or salesperson must have and maintain the state’s specified amount of real estate experience. Several states also require that any person who carries on business relating to real estate (including a leasing agent, property manager, mortgage broker, and trust deed servicer) must have a current real estate license (e.g. Cal B & PC § 10131–10131.3). Certain parties, such as attorneys, trustees in bankruptcy, and in some states, auctioneers, are exempt from this requirement, although they may be subject to separate regulation. See also **one transaction rule**.

Anno: 22 ALR4th 136: License Revocation—Real Estate Broker.  
 Anno: 7 ALR5th 474: Real-Estate Licensing.  
 B.M. Kaplan. A Comprehensive Guide to Modern Real Estate Law, Practice & Brokerage (Chicago: 1989), pp. 459–504.  
 C.J. Jacobus & B. Harwood. Real Estate Principles (7th ed. Saddle River, NJ: 1996), Ch. 19 ‘Licensing Laws and Professional Affiliations’.

### **real estate listing<sup>(AmE)</sup>**

See **listing**.

20 Am.Jur.2d., Covenants (Rochester, NY), Conditions, and Restrictions, § 262.

7 Thompson on Real Property (2nd ed. Charlottesville, VA: ©1994- ), § 62.14.

5 Powell on Real Property (Albany, NY: ©1997- ), § 672.

A.J. Bradbrook et al. *Australian Real Property Law* (4th ed. Pyrmont, NSW: 2007), Ch. 19, Freehold Covenants, V ‘Schemes of Development’.

*Anger and Honsberger: Law of Real Property* (Canada) (2nd ed. Aurora, ON: 1985), pp. 912–15.

*Megarry & Wade: The Law of Real Property* (6th ed. London: 2000), §§ 16-075—16-080.

E.H. Burns. *Maudsley & Burn’s Land Law: Cases and Materials* (8th ed. London: 2004), pp. 982–91, 1000–1.

E.H. Scamell. *Land Covenants* (London: 1996), Ch. 22 ‘Building schemes’.

A. Francis. *Restrictive Covenants and Freehold Land: A Practitioner’s Guide* (2nd ed. Bristol: 2006), §§ 8.29—8.41.

*Preston & Newsom’s Restrictive Covenants* (10th ed. London: 2006), §§ 2-53—2-83.

#### **scheme of management**

See **management scheme**.

#### **scheme world**<sup>(Eng)</sup>

See **compulsory purchase compensation**.

#### **science park**

A mixed industrial and office development that is intended for use by firms involved primarily in advanced scientific research, development and production of scientific instruments. The ‘park’ is a form of campus, usually sited near a university or college, which aims to provide modern premises in a pleasant environment with readily accessible support facilities for the users and to provide a link between the academic institutions and the building users. Also called a ‘research park’, ‘innovation center’ or ‘technical center’. See also **business park**.

N. Carter. *Science Parks* (Cambridge: 1989).

#### **scienti non fit injuria**<sup>(Lat)</sup>

No injury is done to one who knows of the facts. See also *volenti non fit injuria*.

#### **scintilla temporis**<sup>(Lat)</sup>

A brief moment of time. In particular, the time between the execution of two coincident documents or instruments. For example, the period of time between the completion of the purchase of a property and the execution of a

mortgage, which may affect the rights of the particular parties in terms of **priority**. Thus, if two events are “indissolubly bound together” the transactions may be treated as one and any *scintilla temporis* would be ignored (*Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085 (HL)).

#### **Scope of Work**<sup>(AmE)</sup>

The extent of the work that is to be carried out by an appraiser in order to produce a credible **appraisal report**. In particular, the disclosure to the client, and any intended user of the report, of the research and analysis conducted by the appraiser when carrying out the assignment (appraisal, appraisal review or appraisal consulting), and the way in which the appraiser’s findings impacted the assignment’s conclusions. “[T]he type and extent of research and analysis in an assignment”, The Appraisal Foundation, **Uniform Standards of Professional Appraisal Practice (USPAP)** (Washington, DC: 2006 Edition), ‘Definitions’. When carrying out an appraisal in accordance with USPAP, an appraiser must set out the Scope of Work undertaken and any limitations that apply to the report, either based on the client’s instructions or based on the appraiser’s findings. “Because intended users reliance on an appraisal may be affected by the scope of work, the report must enable them to be properly informed and not misled. Sufficient information includes disclosure of research and analyses performed and might also include disclosure of research and analyses not performed”, USPAP 2006, *supra*, Standards Rule 2-2(a)(vii). This requirement is further amplified in the ‘Scope of Work Acceptability (SCOPE OF WORK RULE)’ set out in USPAP, and new Advisory Opinions (AO-28 & AO-29) issued by the Appraisal Standards Board ([www.appraisalfoundation.org](http://www.appraisalfoundation.org)).

See also **self-contained appraisal report**.

S. Coleman. *Scope of Works* (Chicago: 2006).

#### **scrambling possession**<sup>(US)</sup>

A condition where two or more persons are struggling for possession of land, especially when there may be no legitimate claim to the land and the possession of one of the parties may well amount to a trespass. The term may be used in contra distinction to **peaceful possession** where the person entitled to possession has given an

appearance of toleration and, therefore, if no contraindication is given, that person may lose the right to claim title to the land after a statutorily prescribed period of time (The American Law Institute, Restatement Second, Torts (St. Paul, MN: 1965), § 91, Special Note). See also **adverse possession**.

#### **scrap value**

The **value** of something when it is only suitable as waste or for recycling. The value of a property when it has reached the end of its **economic life**. The value when something can no longer profitably be put to the purpose for which it was originally intended. See also **residual value**.

#### **scutage**<sup>(Eng)</sup>

A monetary levy or fine exacted from a feudal tenant by his lord or the Sovereign to pay for military services in lieu of the provision of **knight service** (2 *Bl Comm* 74). In most cases, from the middle of the twelfth century, scutage or 'escutage' came to replace the provision of knight service.

#### **seal**

A mark or impression used to ratify, confirm or authenticate a document or signature. In particular, a mark that in order to effect a **deed**. Originally, a seal was embossed in wax or imprinted onto a glued wafer of paper, but today it may take any form that can be considered as sufficient authenticity of the maker's mark: "To constitute a sealing, neither wax, nor wafer, nor a piece of paper, nor even an impression, is needed", *Re Sandilands* [1871] LR 6 CP 411, 413. Even a signature over words such as 'sealed with my seal' or a witnessed signature in a circle on a document marked *locus sigilli* (or L.S.), 'place of the seal', will suffice (*First National Securities v Jones* [1978] Ch 109; *Jacksonville, M. P. R. & N. Co. v. Hooper*, 160 US 514, 16 S Ct 379, 40 L Ed 515, 521 (1896)). Traditionally, a seal was used to circumvent illiteracy, because of a lack of any adequate means of proving the authenticity of a signature.

In English law, a seal is no longer essential to create a deed, provided the instrument "makes it clear on its face" that it is intended to be a deed ("whether by describing itself as a deed or expressing itself to be executed or signed as a deed or otherwise") and it is duly executed by being signed, properly witnessed in the presence of the signatory, and there is **delivery**. Also, if the

grantor directs another to sign a deed, as when he is incapacitated, then the signature of that other party must be attested to in the presence of two witnesses (Law of Property (Miscellaneous Provisions) Act 1989, s. 1).

In the US, in most jurisdictions, except in some eastern states, the common law need for a seal has been abolished (or, in some jurisdictions, there is a need only for a parenthetical reference or a mark that shows the intent to create a deed). In addition, there is a view that as the 'seal doctrine' has been to all intent and purpose eroded, a contract without proper consideration, even if made under seal, is not valid (*Knott v. Racicot*, 442 Mass 314, 812 N.E.2d 1207 (2004)). However, a seal may be required to authenticate a contract executed by a corporation, and a few jurisdictions still require a lease to be made under seal (115 Am.Jur.2d., *Deeds* (Rochester, NY), § 115). See also **acknowledgement**.

J.D. Calamari & J.M. Perillo. *Hornbook on Contracts* (5th ed. St. Paul, MN:2003), Ch. 7 'Contracts Under Seal'.

68 Am.Jur.2d., *Seals* (Rochester, NY), §§ 1–12.

78A Cor.Jur.Sec., *Seals* (St. Paul, MN), §§ 1–8.

#### **sealed and delivered**

See **signed sealed and delivered**

#### **sealed bid**

A **bid** made under seal, i.e. placed in an envelope and sealed until the time set for its consideration. A sealed bid is a common requirement when competitive offers are made in response to an **invitation to bid** for building work or for the provision of services. The sealed offers are submitted before a specified time and then opened for consideration at that time. Also, sealed bids may be requested when a property is offered for sale, especially when there are a number of interested parties prepared to purchase the property at a price in excess of the asking price.

#### **sealed contract**

A contract made under **seal**, i.e. a **deed**. See also **specialty**.

#### **sealed offer**

1. An unconditional **offer**, submitted by one party to a dispute to the other, that is placed in a sealed envelope to be opened by an independent expert or an arbitrator after the dispute has been settled. The offer is not intended to take precedence over



# T

## **T & I custodial account**

A ‘taxes and interest’ account. An account set up prior to the issue of a **mortgage-backed security** into which payments are made to ensure the prompt payment of real estate taxes and insurance premiums in respect of the securitized properties.

## **T mark**<sup>(BrE)</sup>

A mark in the form of a T placed on a plan to indicate who owns a boundary fence, hedge, wall or any other form of **boundary line**. The mark is placed along the boundary line on the side of the owner of the form of demarcation. A ‘T’ mark is used for identification purposes only and has no legal significance.

## **tâcheron**<sup>(F)</sup>

**subcontractor**, especially one paid for a specific service (usually on a daily basis).

## **tacit approval**

Approval of a course of action by implication, especially as a result of silence on the part of the person affected by the result. See also **implied term**, **estoppel**.

## **tacit relocation**

A term derived from Roman law (*relocatio*), and used in the civil law and Scots law, for the renewal of a lease by operation of law when the landlord and tenant have failed to take steps to end the lease after it has reached the end of its term. Such a renewal is made on the same terms as the expired lease, although it is generally limited to a maximum duration of one year. See also **holding over**, **tacite reconduction**, **tenancy at will**.

## **tacite**<sup>(F)</sup>

tacit; **implied**.

## **tacite reconduction**<sup>(F)</sup>

**tacit relocation**, i.e. the renewal of a contract or lease that arises from the implied or inferred action of the parties. Under French law, upon the expiration of a lease granted for a fixed term, if the tenant is permitted to remain in the demised

premises, and there has been no service of a notice to quit, or a request for a new lease, the tenant is entitled to a new lease upon the same basis as if he had been granted an oral lease (C. Civ., arts. 1738–9). See also **relocation**.

J.-L. Aubert (dir.). *Dalloz Action, Droit de la Gestion de L'Immeuble* (Paris: 2000), §§ 733 et seq., 3806 et seq., 4309, 4813 et seq.

## **tack**

1. See **tacking**.
- 2.<sup>(Scot)</sup> A contract for the hire of goods. A lease. See also **hire**.

## **tack duty or tack rent**<sup>(Scot)</sup>

A payment for a right of tenure. Rent under a lease.

## **tacking**

1. ‘Adding on’. The joining of a subsequent, but subsisting, **mortgage** to an existing mortgage in order to defer the **priority** of an intervening or second mortgage. For example, the acquisition of a first mortgage by a third mortgagee in order to postpone the priority of the second mortgagee. In English law, the common-law right of tacking has been abolished, except in the limited case where a **further advance** is made in respect of unregistered land, and that advance maintains its priority in accordance with the provisions of the Law of Property Act 1925, s. 94(1). In the case of registered land, a further advance may maintain its priority if the party making the advance has not received notice of the creation of the subsequent charge; there is a registered obligation enabling the further advance; there is a registered maximum amount for which the charge is secured; or there is an agreement to the contrary (Land Registration Act 2002, s. 49; Land Registration Rules 2003, rr. 107–9).

In the US, the common-law doctrine of tacking is generally not recognized because a mortgage given as security for a particular debt, whether present or prospective, is not considered enforceable for another and different debt. In effect, such a practice may be regarded as fraudulent (4 Kent’s Comm 178). In any event, in many jurisdictions, the priority of any mortgage is generally determined by the date of recording, and a subsequent mortgagee cannot alter his priority without the consent of a prior mortgagee. Cf. **consolidation**.

*Cheshire and Burn’s Modern Law of Real Property* (17th ed. Oxford: 2006), pp. 779, 789–91, 802–3.

E. Cousins. *The Law of Mortgages* (2nd ed. London: 2001), §§ 7.02—7.03, 20-42—20-49.

*Fisher & Lightrwood's Law of Mortgages* (11th ed. London: 2002), §§ 24.75—24.82.

32 *Halsbury's Laws of England*, Mortgage (4th ed. 2005 Reissue), §§ 464—6.

2. The adding or combining of successive periods of possession in order to establish a title to land by **adverse possession** or periods of use to establish a right by **prescription**. As a rule, to establish a title to property by adverse possession, the possession must be continuous (unless interrupted by periods of recognized disability, fraud, etc.) and there must be a 'transfer' of possession but, because adverse possession is a means of barring an existing title, successive periods of adverse possession by successors in title may be added together. Thus, the tacking of periods of adverse possession by parties between whom there is **privity** of possession (e.g. vendor and purchaser, decedent and heir, husband and wife, and co-tenants) may be brought into account when barring a title to property, provided that the periods are not interrupted by one party giving up possession before the other takes over (*Asber v Whitlock* (1865) LR 1 QB 1; *Perry v Clissold* [1907] AC 73 (PC); *Mount Carmel Investments v Peter Thurlow Ltd* [1988] 1 WLR 1078; *Cheatham v. Vanderwey*, 18 Ariz 35, 499 P.2d 986, 988 (1972); *Zeglin v. Gahagen*, 812 A.2d 558 (Pa App 2002); 3 Am.Jur.2d., Adverse Possession (Rochester, NY), § 84). As a rule, tacking only applies to one area of land and does not apply to land not included in the deed or contract that refers to the land at issue. A similar principle of tacking successive rights may be applied to a claim to an easement arising by prescription (*Rasmussen v. Sgritta*, 33 AD.2d 843, 305 NYS.2d 816 (1969); Anno: 72 ALR3d 648: Tacking—Prescriptive Easements). In some jurisdictions, tacking is a right that may be claimed only through heirs, devisees, or blood relatives. The term 'tacking' is rarely used in English law, although the principle of acknowledging 'successive adverse possessors' is well established.

Anno: 17 ALR2d 1128: Adverse Possession—Tacking.

Anno: 72 ALR3d 648: Tacking—Prescriptive Easement.

7 *Powell on Real Property* (Albany, NY: ©1997- ), § 1014[2].

3 Am.Jur.2d., Adverse Possession (Rochester, NY), §§ 84—92.

2 Cor.Jur.Sec., Adverse Possession (St. Paul, MN), §§ 154—68.

3. The adding of terms or conditions to a contract,

e.g. as a **rider**. See also **supplemental deed**.

**tacking of further advance**

See **further advance**<sup>(Eng)</sup>/**future advance**<sup>(US)</sup>.

**tail**

See **entailed estate**, **extender clause**<sup>(AmE)</sup>, **fee tail**.

**tail after possibility**

See **estate in tail after possibility of issue extinct**.

**tail estate**<sup>(US)</sup>

See **fee tail**.

**tail female**

See **fee tail**.

**tail general**

See **fee tail**.

**tail male**

See **fee tail**.

**tail special**

See **fee tail**.

**taille**

An estate in tail, i.e. a **fee tail**.

**tailzie or tailye**<sup>(Scot)</sup>

The grant of a perpetual right of succession to land. Such rights are now obsolete.

**take-back deed of trust or take-back mortgage**<sup>(US)</sup>

See **purchase money mortgage**.

**take-down**

See **draw-down**.

**take-down search**<sup>(US)</sup>

See **bring-down search**.

**take it or leave it contract**

See **adhesion contract**.

**take off**

See **taking-off**.

**take-over lease**<sup>(US)</sup>

See **back-to-back lease**.

**‘Inwood factor’.** See also **dual-rate capitalization factor/dual-rate years’ purchase**.

See also Appendix E, **Financial Formulae**.

**Yellowstone injunction**<sup>(US)</sup>

A specialized preliminary **injunction** that may be granted in landlord and tenant proceedings to toll the running of the tenant’s cure period and stay the expiration of the lease, pending a determination of the landlord’s claim that the tenant is in default and should forfeit the lease. Such relief is granted on the basis that an injunction is an equitable remedy and should be granted only when it is reasonable. In order to obtain such an injunction, the tenant has to be able to demonstrate that he has the desire and ability to cure the alleged default by any means short of vacating the premises (First Nat’l Stores v. Yellowstone Shopping Center, Inc., 290 NYS.2d 721, 237 NE.2d 868 (1968); Saada v. Master Apts. Inc., 152 Misc.2d 861, 579 NYS.2d 536, 540 (1991)).

**yield**

1. The net income or profit from an investment expressed as a percentage of its cost or the capital invested, usually calculated at an annual rate. The actual **rate of return** on capital.

The yield from an investment in real estate is primarily a function of (i) the comparative return on alternative forms of investment; (ii) the type of property, e.g. office, retail, industrial, hotel; (iii) the security and regularity of income; (iii) the risk of loss of capital; (iv) the liquidity of the investment and the costs of transfer; (v) the cost of management and upkeep; (vi) political and taxation risks and (vii) specific risks associated with a particular investment, e.g. risk of earthquake, expropriation, planning or zoning restrictions, lease restrictions. See also **all-risks yield, capitalization rate, cash-on-cash yield, dividend yield, earnings yield, equated yield, equity yield rate, initial yield, investment yield, net yield, redemption yield, reversionary yield, running yield, yield to maturity**.

Appraisal Institute. *The Appraisal of Real Estate* (12th ed. Chicago: 2001), pp. 487-490.

T Johnson et al. *Modern Methods of Valuation of Land, Houses and Buildings* (9th ed. 2000), Ch. 7 ‘Yield’.

2. To perform or yield services as an incident to land tenure. In old English law, to pay a sum to the lord of the manor. Thus, in a lease the words ‘yielding and paying’ are followed by the amount payable for the right to occupy the demised premises, i.e. the **rent**. See also **cede, incidents of tenure**.

3. To give up, give way or **surrender**. In particular, the surrendering of possession of property.

4. To produce or earn, as farm land yields crops.

**yield capitalization**<sup>(US)</sup>

The assessment of the capital value of a property by discounting all estimated future income to a single **present value**. The conversion of future income into a single present value by applying an appropriate capitalization rate. See also **annuity capitalization, discounted rate of return**.

Appraisal Institute. *The Appraisal of Real Estate* (12th ed. Chicago: 2001), Ch. 23 ‘Yield Capitalization—Theory and Basic Application’.

**yield gap**

The difference between the rates of return on two alternative forms of investment, or between the immediate and long-term returns from the same investment. ‘Yield gap’ may refer to (a) the difference between the yield on long-dated fixed interest government securities and an equity investment, whether in corporate stock (a dividend yield) or an investment in real estate; (b) the difference between the return from an equity investment in a real estate (**equity yield**) and the cost of servicing the debt used to purchase that investment; or (c) the difference between the **initial yield** and the **redemption yield** on a given investment. Where the yield on one form of investment is historically higher than on another (as with government securities over equity shares) and the situation reverses, the difference may then be referred to as the ‘reverse yield gap. See also **deficit financing**.

**yield on average life**

The average yield over the ‘assumed’ life of a **mortgage-backed security**. For example, in the case of a pool of 30-year mortgages, the average yield on the securities may be calculated on the assumption that the average life of the mortgages

is twelve years (i.e. on average the mortgages are repaid or redeemed within 12 years).

**yield rate**

The return on an investment. See also **equity yield rate**<sup>(US)</sup>, **free and clear return**.

**yield to maturity (YTM)**

The yield on a bond on the basis that it is held to maturity, i.e. until the entire capital is repaid. The yield on an investment based on the current cost or purchase price and bringing into account all income and expenditure until the investment is sold or written off. See also **redemption yield**.

**yield-back clause**<sup>(US)</sup>

See **yield-up clause**.

**yield-up clause or yielding up clause**

A clause in a lease which provides that the tenant must peacefully vacate the premises and leave them in a good state of repair at the end of the lease term. The covenant may read, for example, “to peacefully yield up and vacate the demised premises at the expiration of the lease term ... and to leave the premises in the same condition and repair as the same were at the commencement of the lease”; thereafter follows any exceptions such as damage by wear and tear or damage by fire or other casualty (Lexington Ins. v. All Regions Chem. Lab., 419 Mass 704, 647 NE.2d 399, 400 (1995)).

In English law, it has been held that for a tenant to ‘yield up’ the premises, and thereby end his obligations under the lease, does not necessarily mean that the tenant has handed back the keys and severed all connection with the premises, provided there is a clear intention to end the lease and the landlord is not prevented from entering the demised premises (*John Laing Construction v Amber Pass* [2004] 204 EG 128, [2004] 2 EGLR 128). Sometimes called a ‘yield-back clause’.

**yielding and paying**

A term used in a lease to indicate that the language that follows is the amount of **rent** to be paid; in effect the introduction to the covenant to pay rent. See also **implied covenant, reddendum, yield**.

# Z

## zero-coupon bond

A bond that does not pay interest, but is sold initially at a price that is substantially below its face value so that the return is paid in capital appreciation.

## zero-lot line<sup>(US)</sup>

A **building line** that corresponds on at least one side to the **boundary line**. In particular, a line prescribed under a zoning ordinance that allows a building to be constructed up to the lot line, without the need for any **setback**. The location of a building on a plot of land so that one or more sides of the building butt up against the **lot line** may be referred to as creating a ‘zero-lot line’.

## zero-rated

See **value added tax**.

## zipper clause

See **merger clause<sup>(US)</sup>**, **entire agreement clause**.

## zonage<sup>(F)</sup>

**zoning**. “This is the operation that consists of dividing an area that is designated as the subject of a development or urban plan (*plan d’aménagement ou d’urbanisme*) into zones or sectors that are to be designated for different, or a mixture, of users so that, on the one hand, it brings together occupiers and users of the land that are similar and complementary and, on the other hand, separates those users that it would be perilous to place together or that would simply be incompatible”, P. Châteaureynaud, *Dictionnaire de l’Urbanisme* (3ème éd. Paris: 2002), ‘Zonage’.

## zone

1. Derived from the Old French *zone* or *zona*, ‘girdle’ or ‘belt’. An area of land that has been designated for a specific use. “An area within which certain uses of land and buildings are permitted and certain others are prohibited ... [Montgomery County Code, § 104-2]”, *Somerset v. Montgomery County Bd. of Appeals*, 245 Md 52, 225 A.2d 294, 303–4 (1966). A district established for a particular type of use or purpose under a

**zoning classification**. See also **simplified planning zone<sup>(Eng)</sup>**, **zoning**.

2. An area or district set aside for a purpose different from the surrounding area. See also **zoning variance**.

## zone<sup>(F)</sup>

zone; district; area.

(*zone artisanale*: light industrial area, esp. an area zoned for non-polluting uses)

(*zone d’activité*: area zoned for industrial use; industrial zone, which may include commercial, warehouse or related business uses)

(*zone de concentration urbaine*: **urban region**; conurbation)

(*zone de développement*: **development area**)

(*zone de rénovation*: rehabilitation area; area of comprehensive development)

(*zone industrielle*: industrial area; **industrial estate**)

(*zone piétonnière*; *zone piéton*: **pedestrian precinct**)

(*zone urbaine*: urban area).

## zone A<sup>(Eng)</sup>

See **zoning method**.

## zone d’aménagement concerté (ZAC)<sup>(F)</sup>

comprehensive development area. An area of land that has been designated by a planning authority for comprehensive development, but not as a matter of immediate priority. A ZAC is controlled essentially by a collective or a public authority that aims to acquire land to facilitate comprehensive development (French Law of 3 January 1968, art. 16; C. urb. L. 311 et seq.). The rules for the establishment of a ZAC replace any scheme established by a *zone à urbaniser en priorité (ZUP)*.

J.-B. Auby et H. Périnet-Marquet. *Droit de l’urbanisme et de la construction* (7ème éd. Paris: 2004), §§ 707–40.

P. Châteaureynaud. *Dictionnaire de l’urbanisme* (3ème éd. Paris: 2002), ‘Zone aménagement concerté’.

P. Soler-Couteaux. *Droit de l’urbanisme* (3ème éd. Paris: 2000), §§ 716–98.

*Code Permanent: Construction et Urbanisme* (Montrouge: Loose-leaf), vol. 2 ‘ZAC’.

Y. Jégouzo (dir.). *Code Pratique de L’Urbanisme* (Paris: Loose-leaf), §§ 3.1.20—3.1.50, ‘ZAC’.

A. Pelevan et P. Bonamy. *Les Concessions d’aménagements en pratiques: Instruments juridiques des ZAC* (Paris: 2007).

## zone d’aménagement différé (ZAD)<sup>(F)</sup>

deferred development area; future development area. An area that is likely to be designated a *zone*

*d'intervention foncière* at a future date, but is currently not considered as one that requires priority treatment. The purpose of designating a ZAD is to prevent land speculation by giving a public authority a *droit de préemption* (right of pre-emption) on any land in the area that is offered for sale after the designation (French Law n° 62-848 of 26 July 1962, arts 7–12; C. urb. L 212-1 et seq.).

R. Acota and V. Renard. *Urban Land and Property Markets in France* (London: 1993), pp. 74–6, 143–6.

P. Châteaureynaud. *Dictionnaire de l'urbanisme*, (3ème éd. Paris: 2002), 'Zone d'aménagement différé'.

Y. Jégouzo (dir.). *Dalloz Action, Urbanisme* (Paris: 1998), §§ 9858–9929.

P. Soler-Couteaux. *Droit de l'urbanisme* (3ème éd. Paris: 2000), §§ 633–8.

*Code Permanent: Construction et Urbanisme* (Montrouge: Loose-leaf), vol. 2 'ZAD'.

**zone de protection du patrimoine architectural, urbain et paysage (ZPPAUP)<sup>(F)</sup>**

zone for the protection of architectural, urban and rural heritage. In particular, a conservation area where historic buildings, neighbourhoods and sites are protected by strict control of architectural design and planning (French Law n° 83-8 of 7 January 1983, arts. 70–73, as extended by a Law of 8 January 1993). Any new development in a ZPPAUP (including demolition or refurbishment of a building or the surrounds) is subject to a special architectural approval process, before the regular application can be made for a building permit.

J.-B. Auby et H. Périnet-Marquet. *Droit de l'urbanisme et de la construction* (7ème éd. Paris: 2004), §§ 544–7.

P. Soler-Couteaux. *Droit de l'urbanisme* (3ème éd. Paris: 2000), §§ 599 et seq.

Y. Jégouzo (dir.). *Dalloz Action, Urbanisme* (Paris: 1998), §§ 9930–9999.

**zone non aedificandi**

See **building line**, *non aedificandi*.

**zoning**

1. A means of land-use planning by which different areas or districts of a town or city are allocated, or zoned, on an official map for different uses, either to indicate the present use or a proposed future use. Zoning is concerned primarily with controlling or

restricting the use and development of land by setting down density controls, rules for the height, size, type and shape of new buildings and the grouping together of complementary land uses. “In its generic sense, zoning embraces all aspects of land use regulation, from the basic legislative act of adopting an ordinance and establishing use districts on the zoning map to the various administrative activities essential to the land use regulatory process. In its basic legal sense, however, zoning is regarded as a legislative act by a legislative body, representing its judgment of how land within a municipality should be utilized and where the lines of demarcation between various zoning or use districts should be drawn”, J.J. Delaney et al, *Handling the Land Use Case: Land Use Law, Practice & Forms* (St. Paul, MN: 2007), § 1.10. In particular, zoning aims to limit or exclude any incompatible use (a **non-conforming use**); to group compatible uses together according to the resources available to accommodate new development; and to guide the use and development of land without unduly fettering the scope for individual expression in terms of new building design.

In the US, zoning forms the basis of development control in most states and cities and is considered part of the **police power** available to a municipality to restrict the type of uses to which property may be put within a particular ‘zoning district’, unless the actions of the municipality have “no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, safety, morals, or general welfare”, *Nectow v. Cambridge*, 277 US 183, 48 S Ct 447, 72 L Ed 842, 844 (1928) (*Village of Euclid v. Amber Realty Co.*, 272 US 365, 47 S Ct 114, 71 L Ed 303, 314 (1926); Anno: 54 ALR 1016: *Zoning Statutes and Ordinances*).

Although the term ‘zoning’ and ‘**planning**’ are closely related processes, zoning is part of the planning control of an area or district, but planning may be carried out with or without the more defined means of ‘zoning’. “Zoning is a separation of the municipality into districts, and the regulation of buildings and structures in the districts so created, in accordance with their construction and the nature and extent of their use. Planning is a term of broader significance and connotes a systematic development contrived to

promote the common interest of the municipality, particularly with regard to its future physical growth, progress and needs”, Antonelli Constr. v. Milstead, 34 NJ Super 449, 112 A.2d 608, 612 (1955). See also **cluster development**, **comprehensive plan**, **conditional zoning**, **contract zoning**, **density zoning**, **downzoning**, **exclusionary zoning**, **floating zone**, **incentive zoning**, **inclusionary zoning**, **master plan**, **partial zoning**, **rezoning**, **special-use permit**, **spot zoning**, **zoning variance**, **zoning classification**, **zoning ordinance**.

J.E. Cribbet et al. *Cases and Materials on Property* (8th ed. Westbury, NY: 2002), Ch. 19, Sec. 1 ‘Zoning’.

J. Dukeminier & J.E. Krier. *Property* (Casebook series) (4th ed. Frederick, MD: 1998), Ch. 11 ‘The Law of Zoning’.

M. Gitelman et al. *Land Use: Cases and Materials* (6th ed. St. Paul, MN: 2003), Ch. IV ‘The Basics of Zoning’.

S.W. Johnson et al. *Property Law: Cases, Materials and Problems* (2nd ed. St. Paul, MN: 1998), pp. 868–938.

J.C. Juergensmeyer & T.E. Roberts. *Land Use Planning and Development Regulation Law* (St. Paul, MN: 2003), Ch. 3 ‘Zoning: History, Sources of Power and Purpose’.

W.B. Stoebuck & D.A. Whitman. *The Law of Real Property* (3rd ed. St. Paul, MN: 2000), §§ 9.3—9.14.

6 Powell on Real Property (Albany, NY: ©1997- ), Ch. 79C ‘Zoning’.

9 Thompson on Real Property (2nd ed. Charlottesville, VA: ©1994- ), § 85.14.

D.R. Mandelker. *Land Use Law* (5th ed. Charlottesville, VA: 2003), Ch. 4 ‘The Zoning System’, Ch. 5 ‘Zoning for Land Use, Density and Development’, Ch. 6 ‘The Zoning Process’.

D.P. Selmi & J.A. Kushner. *Land Use Regulation: Cases and Materials* (2nd ed. Frederick, MD: 2004), Ch. 2 ‘Zoning’. 83 Am.Jur.2d., *Zoning and Planning* (Rochester, NY), §§ 1–1104.

101A Cor.Jur.Sec., *Zoning & Land Planning* (St. Paul, MN), §§ 1–361.

Anderson’s *American Law of Zoning* (4th ed. Deerfield, IL: 1996, with updates).

D. Merriam. *The Complete Guide to Zoning* (New York: 2004).

Rathkopf’s *The Law of Zoning and Planning* (St. Paul, MN: Loose-leaf).

See also Appendix A, Bibliography: **Zoning and Planning Law, United States**.

2.<sup>(BrE)</sup> See **zoning method**.

**zoning board of appeals**<sup>(US)</sup>

See **board of adjustment**.

**zoning certificate**<sup>(US)</sup>

See **certificate of occupancy**, **certificate of zoning compliance**.

**zoning classification**<sup>(US)</sup>

A system of designation given by a planning commission to indicate the permitted use for an area of land or ‘use district’. Commonly used designations are (A) – agriculture; (C) – commerce; (I) general industry; (M) – manufacturing or heavy industry; (P) – parking; (R) – residential. A numeric designation limits the use more strictly, e.g. (M3) – heavy industry; (R1) – single-family residences; (R5) – residential with a floor area ratio of 5.0. The area so designated may also be called a ‘zoning district’. See also **zoning**.

7 Powell on Real Property (Albany, NY: ©1997- ), § 79C.01.

Rathkopf’s *The Law of Zoning and Planning* (St. Paul, MN: Loose-leaf), Ch. 10 ‘Zoning Districts’ and Ch. 11 ‘Special Zoning Districts and Discretionary Development Review’.

**zoning commission**<sup>(US)</sup>

A body vested with powers to regulate the application of zoning laws. See also **zoning board of appeals**.

**zoning district**<sup>(US)</sup>

See **zoning classification**.

**zoning exception**<sup>(US)</sup>

See **zoning variance**.

**zoning map**<sup>(US)</sup>

See **comprehensive plan**, **zoning ordinance**.

**zoning method**<sup>(BrE)</sup>

A method of analysing or assessing the rental value of a retail store. The zoning method is based on the principle that the rent a trader will pay for retail premises is highest at the front of the property and decreases the greater the distance from the street frontage. Accordingly, a shop is divided into notional areas or zones for which it is assumed different rental values will be paid.

To apply the zoning method of analysis the front area of the shop, or ‘Zone A’, is given the value of  $x$ , the next zone half that value, the next a quarter and so on as necessary: a process called ‘halving back’. Ancillary or non-retail space is