Law, Space & Place: Gardens and gardening

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‘Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property’

John Locke (1689) *Second Treatise of Government*, 5.27

‘Much of the genius of the common law derives from a rough-and-ready grasp of the empirical realities of life. According to this perspective the identification of ‘property’ in land is an earthily pragmatic affair’

PROPERTY AS PERFORMANCE

Importance of *changing the land* as a symbol of possession, and of *boundaries* created and maintained both
- on the ground; and
- between different types of land ownership:
  - Public
  - Communal
  - Private

‘Gardening signals a property claim in both a popular and legal register’: Nick Blomley, ‘Flowers in the bathtub: boundary crossings at the public-private divide’ (2005) p.293

Performativity theory ‘encourages us to trace how property gets variously performed, and to explain which of these performances are successful’: Nick Blomley, ‘Performing Property: making the world’ (2013) p. 46
‘Public’ property → ‘private for public use’ property, through the process of commoning

1970s-1990s: activists working for the benefit of their community
1997: grant funding, incorporation, 125 year lease from the council

Heeley People’s Park
Sheffield
‘Public’ property → ‘private for public use’ property, through the process of commoning

‘Incredible edible Todmorden’

Started 2007, with conversation between two local residents

More and more public sites used to grow herbs and vegetables

‘Community growing licences’ now issued by the council
‘Restricted-access communal property’: paying for the use of private communal gardens, but not gardening yourself

Re Ellenborough Park [1955] EWCA Civ 4

Covenants creating an easement:  
*obligation to contribute* to the upkeep of gardens, and  
*a right to access and use them in common* with others:

‘a communal garden for the benefit and enjoyment of those whose houses adjoined it or were in its close proximity. Its flower beds, lawns and walks were calculated to afford all the amenities which it is the purpose of the garden of a house to provide’
‘Restricted-access communal property’: gardening as collective DIY

*Interviews with Co-housing residents:*

‘You can volunteer to be on the garden or the disputes committee: you know, you'll have somebody who’s really interested in it and if they want to get something done they’ll hold a meeting, and anybody who's interested will go’

‘I feel that this house is our space and outside is the shared space ... space that I can use’

‘in fact the slope I think is common land ... it's just regarded as my garden, actually’
Interview with commonhold resident
‘I’ve got a big flowerbed in front of my house which I’ve ripped out and re-planted with herbs. I’ve said to my neighbours, “If you want any thyme, sage, rosemary – come and help yourselves”; it looks pretty and a bit different. It’s not my property and I suspect it’s part of the commonhold, but it is in front of my kitchen window...’
Restricted-access communal property: scope of ‘rights to garden’ as against landowner

**Mulvaney v Gough** [2002] EWCA Civ 1078

The owners of a group of cottages held, in common with each other and with the owners of the land, ‘rights of way’ over the undivided space behind the cottages – the original back yards.

Mrs Mulvaney had for some years ‘tended a garden on the strip of land consisting of a grassed area and a flower bed. On the 11th April 1996, she returned to her cottage to find that a JCB had been used [by the owners of the land] to remove the flower bed and part of the grassed surface of that area’.

She claimed (1) an easement to use the land as a communal garden, established through long use, (2) the reinstatement of her flower bed, and (3) compensation for its destruction.

Mrs Mulvaney succeeded on claims (1) and (3), but failed to establish the right to a flower bed in that particular position in the communal garden.
Gardens and gardening across boundaries between private properties: as trespass

Peter Gibson LJ, in *Beale v Harvey* [2003] EWCA Civ 1883:

‘from mid-February for about two months she [Mrs Harvey] started laying out the border alongside the fence. She planted nearly 50 plants and shrubs in that border’ (at 7).

‘... to treat what has occurred as giving Mrs Harvey the right to a permanent enlargement of her garden at the expense of the Beales with their smaller garden would be, in my view, quite disproportionate. No permanent or irremediable change in her garden had been effected by planting the shrubs and plants in the border. No reason has been suggested why what she planted could not have been moved quite easily after having been in the ground for only 6 to 8 months’ (at 39).
Gardens and gardening across boundaries between private properties: by consent
Conclusions

Transgression $\rightarrow$ Transformation over time, of Property Boundaries:

- physical
- legal:
  o ‘Public’ property
  o ‘Private for public use’ (achieved through commoning)
  o Restricted-access communal property (gardening as collective DIY; individual appropriation; scope of ‘rights to garden’)
  o Across boundaries between private properties (individual appropriation as trespass; by collective consent)

Measure of success of property performances through gardening

Acceptance $\rightarrow$ consensual agreement (how ‘legal’?)
Challenge $\rightarrow$ court decision