Property Law: Commentary and Materials
Alison Clarke and Paul Kohler
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This book is a joy. The authors present an intelligent and intelligible account of property law. This is not property law as arcane rules and crabbed reasoning, but property law as a vital and contentious area of legal and human culture. They achieve this task without ascending to levels of generality so abstract that one is left giddy, returning again and again to the law mediating real conflicts over real resources. There is no adoption of any *a priori* philosophical or ideological posture. With humility too often absent in academe the authors open up for the reader possible ways of understanding property law, rather than trying to impose any particular one. The book is clearly and well written. Both the exposition and arguments are rigorous: there is no substitution of colourful language for precision and regard for logic. The authors confront the reader again and again with novelty of example, and an awareness of the importance of value judgements in the evaluation of property law. In short this book succeeds in introducing property law as a subject area that can be reflective and considered. It is mature and magisterially well informed about the law of property in the common law world.

There is always some difficulty in reviewing a book made up of selected readings, essentially a book constructed from excerpts from the works of other authors. Indeed, in a very real sense such books are collaborative in nature, built upon the efforts of many authors over time. The quality of authorial and editorial performance could be measured by several criteria: the selection of materials to be excerpted; the editing of the excerpts; the ordering of the excerpts; the commentary and articulated structure of the book; the guidance for further reading of the excerpted materials and other suggested materials; and the suggestions or prompts, designed to help the reader to take the most from the excerpted material by inviting analysis and reflection. For the record, the standards met by *Property Law* on all of these criteria are of the highest. However, it is the particular genius of this book to blend, explain, bring into contrast, and order materials of the highest quality, until the resulting whole is far more than the disassembled parts. It is often hard to articulate the nature of the intellectual operation termed "synthesis". This book is an exemplar of synthesis of the highest quality, and to achieve this the authors have made themselves unassuming. As with craftsmanship generally the virtue of the craft worker is the greater the less it draws attention to itself. Hence, an adjective used in praise of craft work is "seamless". *Property Law* is crafted to the highest standards; the book is a seamless exposition and arrangement of materials embedded in a very soundly constructed conceptual structure.

A few caveats need to be made. The book is predominantly devoted to land law, although there is also significant and valuable material on goods. There is very little material on intangible property. The book is not complete in itself. An oddity of the book is that few edited judgments or statutory provisions are reproduced. These sources, the mainstay of most legal books of materials, are reproduced on a website, in an effort to keep the book to a manageable length. As the book approaches 800 pages this was probably a necessary recourse. Access to the website is not

problematic, but the web address given: www.cambridge.org/propertylaw/ was not functional when last accessed. It seems to be necessary to navigate via the web page on the book hosted by the publisher, Cambridge University Press. Finally, the work is often demanding of the reader. Most students will require significant support in dealing with the book. However, the benefits it offers to readers more than return the costs of reading the book.

In *Property Law* the reader is led from the general and theoretical to the practical and applied. The basic structure of the book is to start with the broadest questions of justification and purpose of the law (Part 1); then, move on to the specific concepts and discriminations necessary for an intelligent account of the law (Part 2); and finally, to give an account of aspects of the law that illustrate and use the theoretical tools, criteria for evaluation, and insights, that have been provided (Parts 3 and 4). Thus, the aspiration is to introduce the law at levels of very high generality in the service of analyses operating at relatively low levels of generality. This movement can also be described as from the theoretical to the doctrinal: in such a manner that the theoretical informs, structures, and illuminates the doctrinal. Where wholly successful the book produces an account of the common law of property that manages to integrate exposition and analysis. At the same time it provides an articulation of the social and formal limitations on property law, and an account of evaluative criteria applicable to the law. Such an attempt represents a combination of intellectual ambition and maturity of approach that is all too rare.

Part 1 is concerned with general issues: matters of definition; analytical terms of art; theoretical perspectives; and moral or ethical justifications for the recognition of property rights. Included in the four chapters of Part 1 is a consideration of the initial acquisition of property rights. These issues are introduced through such topics as the dispute between the fox hunt and an interloper; the legal "systems" created by whale hunters to resolve conflicting claims to harpooned whales; the legal reflections of bruising conflicts over meaning and claims to land use between indigenous peoples and European conquerors in Australia; and the often fierce debates between advocates of free markets and defenders of alternative means to manage scarce resources. Whilst some passages are demanding the authors have clearly paid great attention to grabbing, and keeping, the interest of the reader.

Part 1 introduces the reader, *inter alia*, to John Locke and Felix Cohen, Bernard Rudden and Wesley Hohfeld. Of particular value is an extensive and extremely readable introduction to writers in the tradition generally described as "law and economics": an introduction supported in the commentary by a very useful account of terms such as "transaction costs" and "Kalder-Hicks efficiency". There is a lot of valuable work that is obscure to many lawyers due to unfamiliarity with economic terminology. *Property Law* provides an excellent introduction to this literature for the lawyerly economics novice. Finally, there is an interesting and practicable classification of types of property regimes into "private", "communal" (open or limited access), "state", and "no property". This classificatory system promotes clarity of thought when considering "tragedy of the commons" problems, and is well thought out and explained. Legal discourse will be improved if the system becomes generally adopted.

Within Part 1 property law is viewed in several contexts. Property law is viewed as part of economic systems, as an institutional tool that generates, or impedes, economic efficiency. Property law is described as a means to make its subject matter multi-purpose, expanding the potential usefulness of the physical and social world through fragmentation of ownership. Property law is recognised as an area of ideological dispute. Concrete examples are used to illustrate for the reader the legitimate range of diversity of approach when considering property law. The commentary supports the reader, explaining terms used and the context of an author's work, identifying key strengths and weaknesses of the excerpted pieces.

Part 2 (chapters 5 to 9) has a more restricted ambition than Part 1. It attempts to identify and explain the key concepts needed for an intelligent reflection upon property law. Thus, we have the distinction between personal and property rights; accounts of "ownership" and of "possession"; reflection on the restrictive attitude of the law to novel property interests; and an introduction to that most distinctive aspect of common-law systems the "fragmentation" of ownership. There is no doubt that the constitutive chapters all deal with vital concepts. However, it might be worth reconsidering the relatively central role given to, and the extensive contents of, Chapter 6 on ownership.

Undoubtedly, the exposition of Honore's description of the *indicia* of ownership in Chapter 6 is of great value. However, the emphasis on ownership as a central concept in property law rather minimises the role of fragmentation, which is almost treated as an irritating complication that has to be dealt with. Further, there is relatively little attention given to the problems posed by identification of the subject matter of established species of property. The reification of rights by the common law, that shifting of property claims from things (that physically exist) to claims to things that have juridical substance alone (reified "estates", "interests", and "property in"), is not fully explored. This comparative neglect of the peculiarity of the subject matter of property law means there is no consideration of the dividing lines of property law (between land and other; between choses in action and in possession; between negotiable and non-negotiable). This neglect of divisions means that there is no recognition of the tendency of some legal institutions to operate across such divisions (such as the trust), and of others to be restricted to one type of property (such as the restrictive covenant). This neglect in turn obscures the need to consider how far it might be possible to forge a unified law of property, rather than accepting that we must have laws of properties. One of the real strengths of a fragmentation approach to property law is the very bright light it shines upon the patently artificial nature of the subject matter of property law. A concentration upon ownership as a central organising concept leaves the artificial nature of what is owned somewhat in the shadows.

Chapter 6 also carries a heavy load of law and economics scholarship. The discussion of law and economics in relation to nuisance is perhaps a little hard going – a lot of material is introduced, leaving the reader struggling to assimilate everything. Even if the present balance between ownership and fragmentation is retained it might be better to introduce the Calabresi and Melamed analysis of different types of legal response to disputes over land use elsewhere. Ownership and nuisance do not necessarily have to be dealt with in the same place. Given the wealth of analysis directed by law and economics scholars to the conflicting pressures on utilisation of

land, perhaps this material could have be given independent development elsewhere. Perhaps, nuisance could be considered in a chapter that introduces a distinction between legal problems of physical use and legal problems of value (or property as wealth; or as investment; or even as "capital", as that idea is expounded by De Soto in *The Mystery of Capital*). This distinction could then be utilised when considering the problems the law faces when dealing with ownership of the family home. The contrasting nature of a predominantly financial claim against land, such as a typical mortgage, and a predominately functional claim, such as a right of occupation derived from status, would also resonate with some of the discussions dealing with nuisance, and appropriate remedies for interference with the enjoyment of land.

Part 2 is a very ambitious attempt to describe the key concepts needed to describe property law, and to give a law and economics view of the same. Such ambition must involve a Sisyphean undertaking, and no arrangement will meet with universal acclaim. Company law is introduced within the treatment of fragmentation. This further weakens any focus on the solely jural nature of the subject matter of property, as it suggests fragmentation is about control, rather than being about what is owned. Ultimately, Part 2 is partially successful, definitely useful, and a reminder of just how difficult it is to identify the crucial concepts for an analysis of law. Chapter 7, on possession, is quite doctrinal in tone, and a very good account of what has always been a central concept in the common law of property. Chapter 9, on the recognition of new types of property claim, is a particularly valuable account of this important aspect of the law.

Parts 3 and 4 are directed towards the application of the theoretical material of Parts 1 and 2. Thus, they are more doctrinal in focus. Together they make up less than half of the book. However, the first chapter in Part 3, Chapter 10 on title, makes a good link with Part 2, having a concept for its subject matter. It is a very valuable account of the concept of title; the principles of *nemo dat*, and relative title; and the need for rules to determine priority between interests. The breadth of kinds of property considered is unusually broad, including money as well as land and goods. The remaining chapters of the book are focussed on specific doctrinal problems.

Chapter 11, which is largely devoted to adverse possession, is sound in its law and well integrated with Chapter 4 on the allocation of property rights. The discussion of justifications for adverse possession is unusually well argued and discriminating. The critical account of the Law Commission's discussion of the same is persuasive. The chapter is very valuable exploration of a subject that is rarely dealt with in such clear terms. Chapter 13, which is concerned with prescription, is shorter and less concerned with integration. The chapter is a solid account of the relevant law, but not related back to the discussion on nuisance and restrictive covenants in Chapter 6 as strongly as one would have expected. The use by a landowner of a neighbour's land (an easement or profit), and restrictions imposed by a landowner on the use of a neighbour's land (a restrictive covenant, right of light, or easement of support), are fairly obviously linked to disputes over the uses of neighbouring plots of land. The easement and covenant are the institutional embodiment of the settlement by negotiation of disputed land use so beloved of the economic analysis. The protective attitude of the law towards long established use effects the transformation of nuisance or trespass into claim of right; but stops short of allowing a claim to grow from mere absence of use by a neighbour. Surely, this aspect of the law emphasises the

problematic aspect of using property law to resolve a use dispute, as former usage is given priority over future usage, a problem as inherent in grant as in prescriptive acquisition. It is here that the material in Chapter 6 should bring illumination, but, to be brutal, it does not.

Chapter 12, on grant and transfer, is extremely clear and useful; in particular the discussion of formalities is very good. It is the law of formalities that many people think of when they think of property law, and this account is unusually articulate and informative. Chapter 14, on the enforceability and priority of interests is also useful. The very distinction in the title of the chapter between: "enforceability" – against the grantor or someone who acquires the interest of the grantor; and "priority" –against competing interests amongst one another; is a helpful distinction. The distinction clarifies the nature of some potentially confusing problems of property law. The explanation that often the problem faced by property law is one of balancing legitimate interests is clear and cogent. Both chapters are valuable, although not firmly embedded in the theoretical material that preceded them. They are both examples of good doctrinal exposition and analysis, combined with an acute policy analysis of the law.

Chapter 15, on registration, is surprisingly open textured. It incorporates elements of comparative law, and, as one would expect, clearly explains that registration systems have to balance legitimate interests. The treatment is at an unusually general level, for a discussion of registration, and is very interesting. Chapter 15 is the final chapter in Part 3. Part 3 is overwhelmingly focussed on land law, although there is some material relevant to goods included.

The final part, Part 4, comprises just three chapters. None of the final chapters are well integrated into the theoretical discussion that formed Parts 1 and 2. Chapter 16 is concerned with co-ownership. It is pedestrian on co-ownership of land, and perhaps a little too speculative on the possible application of the *Re Denley* principle. Chapter 17 is devoted to leases and bailment. It is a little odd that the discussion of some of the more bizarre developments in leasehold law discussed, are not related back to the concerns of Chapter 9. After all, the legal context of the developments is the restrictive attitude taken to the lease, and the denial of contractual freedom to develop non-leasehold residential arrangements that avoided statutory provisions (*Street v Mountford*). Such subsequent monsters as the "tolerated trespasser" and the "non-proprietary lease" are, at least in part, the courts failing to find a methodology for dealing with pressure from the social housing sector for non-traditional proprietary solutions. It is an inherent limitation of property law that a restrictive attitude to novel claims needs to be maintained, as is so well explored by Chapter 9. The discussion and exposition of the law of bailment are extremely useful and informative. Finally, Chapter 18 is concerned with security interests. The material is not limited to doctrinal law, but again is not supported by the earlier theoretical discussions. As with everything else in this very impressive book the chapter repays the effort of reading. It provides a conceptualised exposition of the law that reflects a wealth of intelligent reflection of the problems posed to property law by security interests.

The successes that *Property Law* achieves are inspirational. The authors demonstrate that it is possible to be in command of the detailed developments in the law, and to approach analysis with useful insights gained from scholarly efforts. They repeatedly

show that it is possible to do more than develop a one-dimensional analysis, whether of the doctrinal or theoretical mode. The authors manage to combine an inside perspective of the law, lawyers law or doctrine, with an outside perspective of the law, law as evaluated by non-lawyers and judged by non-legal criteria. As such *Property Law* bears witness to an immense achievement of synthesis. We now know it is possible to achieve such a synthesis, because this book manages to do so.

Paul Kohler, PROPERTY LAW: COMMENTARY AND MATERIALS, pp. 345-379, Alison Clarke, Cambridge University Press, 2005. SOAS School of Law Research Paper No. 01/2011. 36 Pages Posted: 27 May 2011. See all articles by Paul Kohler. Paul Kohler. SOAS, University of London. Date Written: 2005. Abstract. In this chapter, we will consider the essentially dynamic quality of property. While it is important that the categories of property are clear and certain, it does not follow from this that the list should be eternally fixed and incapable of development. As you will see, there is constant pressure to re Alison Clarke and Paul Kohler. cambridge university press Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, SÃ£o Paulo Cambridge University Press The Edinburgh Building, Cambridge cb2 2ru, UK Published in the United States of America by Cambridge University Press, New York www.cambridge.org Information on this title: www.cambridge.org/9780521614894 Â© Alison Clarke and Paul Kohler 2005 This publication is in copyright.Â We have both been involved in teaching all the topics covered in this book, but have taken separate responsibility for different parts of the book: Chapters 1â€“5, 7â€“8, 10â€“15 and 17â€“18 were written by Alison Clarke, and Chapters 6, 9 and 16 by Paul Kohler. These materials are accompanied by a critical commentary, as well as notes, questions and suggestions for further reading. It will be of interest to undergraduate property law students and to non-law students taking property law modules in courses covering planning, environmental law, economics and estate management. â€¢Â 4 Other common law property doctrines have also reflected the subtle calibration of property rights in light of other competing interests: the common law doctrine of nuisance, for example, prevents owners from using their land in a way that interferes unreasonably with the rights of their neighbors (Clarke and Kohler 2005). Software is property to the extent it is regulated by laws governing copyright, patents, and trademarks. ...Â Alison Clarke. Paul Kohler.