

PROPERTY LAW

Cases and Materials

by

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PREFACE TO THE THIRD EDITION

This edition follows the same approach as the second edition. Additional material on constructive trusts has been included in Chapter 5 and there has been internal reorganisation in other chapters. The short section on Bailments in Chapter 11 has been omitted on the ground that it added little to the material in Chapter 2 which covers possessory interests. Chapter 12 in the second edition ("Planning the Use of Land by Private Agreement") has been split into two. Chapter 12 now deals with Covenants and Chapter 13 with Easements.

The materials have been brought up to date as at 1 June 1980. This has involved some substantial rewriting of some sections of the book and the replacement of some cases and other materials with more recent authorities. In this edition where footnotes and other citations have been omitted from material reproduced this has been done without express indication in the text.

We wish to express our appreciation to Mr Kevin Pose, Senior Lecturer in Law at the University of Melbourne for commenting on the material on discretionary trusts. We also wish to thank Mr F Esparraga and Ms J Hunter, both formerly of the Faculty of Law, University of New South Wales, for research assistance in the preparation of this edition. Mr Esparraga very kindly prepared the index. The main burden of preparing the manuscript fell upon Mrs Lorna Ledger and Mrs Maria Mallos. We are grateful to each of them.

RS
MAN

November 1980

PREFACE TO THE FIRST EDITION

This book is designed to provide a coherent set of materials for the teaching of a course in the law of property in Australian law schools. However, since it contains many of the leading cases of property law, as well as an up-to-date treatment of Australian legislation, it is hoped that it will also provide a useful reference work for practitioners. The structure and contents of the book are based on four assumptions:

(i) Analysis of the nature of proprietary interests and the purposes served by the law of property facilitates a *critical* understanding of the rules and principles that comprise the modern law. Consequently, although the book deals with the traditional classifications and, from time to time, outlines historical material, its organization follows the framework established in the first chapter.

(ii) The law of property should be as responsive as any other branch of the law to social change. Moreover, despite an appearance of rigidity caused by the existence of a traditional framework, the rules can often be flexibly applied. Because of the amorphous character of apparently stable concepts, the courts often contrive to arrive at decisions which are desirable in terms of social policy. A study of property law must not only canvass legislative reform, but also the part played by the courts in effecting change, especially since they do not always openly acknowledge their role.

(iii) While recognizing that the aims and techniques of legal education remain the subject of controversy, a basic course in property law can be taught through class discussion of source material at least as effectively as other subjects in a law course.

(iv) Australian law students suffer from the lack of an Australia-wide textbook in property law, particularly when they are concerned with detailed legislative provisions. Consequently, the book endeavours to cover material already dealt with in standard texts but with a specifically Australian bias. In other words the book endeavours to be reasonably inclusive and in many cases is designed to be used as a textbook as well as a casebook. Of course, in areas where the substantive law is very detailed, want of space has made it necessary to refer students to other textbooks.

It is to be acknowledged at once that many concessions have been made to the demands of practicality. These concessions have often produced omissions and inconsistencies that cannot be explained on theoretical grounds. Thus, although the distinction between real and personal property is rejected as a basis for organization, the main focus of the book is on subjects within the realm of real property. The reason is simply that the curricula of most Australian law schools devote detailed attention in later years of the course to transactions involving personal property . . .

Any reader with a knowledge of property law will realize immediately the debt

we owe to thinkers more original than ourselves. We have attempted to acknowledge our indebtedness at appropriate places in the text. However, we have been influenced especially (although not necessarily in ways of which they would approve) by Professor Lawson's little book, *Introduction to the Law of Property* (1958), by McDougal and Haber's *Property, Wealth and Land: Allocation, Planning and Development* (1948). But while ideas have been borrowed, we have tried to keep in mind constantly that the book is primarily for Australian law students, whose capabilities, experience and expectations are rather different from their American counterparts. In this regard, of course, Australian students should be encouraged to evaluate critically the rules and concepts they study. By the same token, we accept the view, perhaps sometimes overlooked in the United States, that a complete restructuring of an area of law first requires a sound grasp of orthodox principle.

This book began life as a collection of mimeographed materials used in the Principles of Property and Conveyancing course at the University of Melbourne in 1968. The task of developing the materials into a coherent whole has been shared jointly, and no definable portion of the book has been the sole responsibility of either author . . .

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ABBREVIATIONS

Books

Brooking and Chernov	Brooking and Chernov, <i>Tenancy Law and Practice — Victoria</i> (2nd ed 1980)
Cheshire	<i>Cheshire's Modern Law of Real Property</i> (12th ed 1976 by Burn)
Fleming	Fleming, <i>The Law of Torts</i> (1977)
Ford	Ford, <i>Cases on Trusts</i> (4th ed 1979)
Francis	Francis, <i>The Law and Practice Relating to Torrens Title in Australasia</i> (vol i 1972, vol ii 1973)
Hardingham, Neave and Ford	Hardingham, Neave and Ford, <i>Law of Wills</i> (1977)
Harrison	Harrison, <i>Cases on Land Law</i> (2nd ed 1965)
Helmere	Helmere, <i>The Law of Real Property in New South Wales</i> (2nd ed 1966)
Holdsworth	Holdsworth, <i>History of English Law</i> (2nd ed 1937)
Jacobs	<i>Jacobs' Law of Trusts in Australia</i> (4th ed 1977)
Lawson	Lawson, <i>Introduction to the Laws of Property</i> (1958)
Maitland	Maitland, <i>Equity</i> (1909)
Meagher, Gummow and Lehane	Meagher, Gummow and Lehane, <i>Equity Doctrines and Remedies</i> (1975)
Megarry and Wade	Megarry and Wade, <i>The Law of Real Property</i> (4th ed 1975)
Morris and Leach	Morris and Leach, <i>The Rule Against Perpetuities</i> (2nd ed 1962)
Pollock and Maitland	Pollock and Maitland, <i>The History of English Law before the Time of Edward I</i> (rev ed 1968)
Maudsley and Burn	Maudsley and Burn, <i>Land Law: Cases and Materials</i> (2nd ed 1970)
Preston and Newsom	<i>Preston and Newsom's Restrictive Covenants Affecting Freehold Land</i> (6th ed 1976)
Robinson	Robinson, <i>Transfer of Land in Victoria</i> (1979)
Ruoff	Ruoff, <i>An Englishman Looks at the Torrens System</i> (1957)
Simpson	Simpson, <i>An Introduction to the History of the Land Law</i> (1961)
Snell	<i>Snell's Principles of Equity</i> (27th ed 1973) by Megarry and Baker)
Spry	Spry, <i>Principles of Equitable Remedies: Injunctions, Specific Performance and Equitable Damages</i> (2nd ed 1980)
Stonham	Stonham, <i>Vendor and Purchaser</i> (1964)

Sutton	Sutton, <i>The Law of Sale of Goods in Australia and New Zealand</i> (2nd ed 1974)
Sykes	Sykes, <i>The Law of Securities</i> (3rd ed 1978)
Voumard and Wikrama	Voumard and Wikrama, <i>The Law Relating to the Sale of Land in Victoria</i> (3rd ed 1978)

Legislation

1. The general Property Law or Conveyancing legislation: Chapters 4, 5, 7 (Part I), 11 (except [11.112]–[11.122]), 12, 13 (Parts I, II, IV and V), and 14 (except [14.11]–[14.17]).

NSW	<i>Conveyancing Act 1919–1979</i> (NSW)
Vic	<i>Property Law Act 1958</i> (Vic)
Qld	<i>Property Law Act 1974–1978</i> (Qld)
SA	<i>Law of Property Act 1936–1980</i> (SA)
WA	<i>Property Law Act 1969–1979</i> (WA)
Tas	<i>Conveyancing and Law of Property Act 1884</i> (Tas)
ACT	<i>Law of Property (Miscellaneous) Provisions Ordinance 1958</i> (ACT)

2. The Deeds Registration legislation: Chapter 7 (Part II).

NSW	<i>Registration of Deeds Act 1897–1976</i> (NSW)
Vic	<i>Property Law Act 1958</i> (Vic)
Qld	<i>Property Law Act 1974–1978</i> (Qld)
SA	<i>Registration of Deeds Act 1935–1973</i> (SA)
WA	<i>Registration of Deeds Act 1956–1974</i> (WA)
Tas	<i>Registration of Deeds Act 1935</i> (Tas)

3. The Torrens System legislation: Chapters 7 (Part III), 11 ([11.112]–[11.122]), 13 (Part III), 14 ([14.11]–[14.17]).

NSW	<i>Real Property Act 1900–1979</i> (NSW)
Vic	<i>Transfer of Land Act 1958</i> (Vic)
Qld	<i>Real Property Act 1861–1979</i> (Qld)
SA	<i>Real Property Act 1886–1980</i> (SA)
WA	<i>Transfer of Land Act 1893–1978</i> (WA)
Tas	<i>Land Titles Act 1980</i> (Tas)
ACT	<i>Real Property Ordinance 1925–1980</i> (ACT)

4. The Limitation legislation: Chapter 8 (Part III).

NSW	<i>Limitation Act 1969–1979</i> (NSW)
Vic	<i>Limitation of Actions Act 1958</i> (Vic)
Qld	<i>Limitation of Actions Act 1974–1978</i> (Qld)
SA	<i>Limitation of Actions Act 1936–1975</i> (SA)
WA	<i>Limitation Act 1935–1978</i> (WA)
Tas	<i>Limitation Act 1974</i> (Tas)

5. The Perpetuities legislation: Chapter 9 (Part II).

NSW	<i>Conveyancing Act 1919–1979</i> (NSW)
Vic	<i>Perpetuities and Accumulations Act 1968</i> (Vic)
Qld	<i>Property Law Act 1974–1978</i> (Qld)
WA	<i>Property Law Act 1969–1979</i> (WA)

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