

Law, Property & Society

Reappraisals in the Law of Property

John V. Orth

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JOHN V. ORTH

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ASHGATE

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REAPPRAISALS IN THE LAW OF PROPERTY

Law, Property and Society

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Robin Paul Malloy

The Law, Property and Society series examines property in terms of its ability to foster democratic forms of governance, and to advance social justice. The series explores the legal infrastructure of property in broad terms, encompassing concerns for real, personal, intangible, intellectual and cultural property, as well as looking at property related financial markets. The series is edited by Robin Paul Malloy, and book proposals are welcome from all interested authors.

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Preface

This book began ten years ago as a series of articles on property law published in the *Green Bag 2d*, self-described as “an entertaining journal of law” – entertaining, not in the sense of comic, but in the sense of lively and engaging. Whether my articles, or indeed any articles on law, can measure up is not for me to decide. For all my professional life, more than thirty years, I have found property law fascinating, a mixture of history, economics, language, logic, politics, and sheer self-interest. Sir William Blackstone was onto something two hundred and fifty years ago when he wrote that “there is nothing that so generally strikes the imagination, and engages the affections of mankind, as the right of property.” At least, it is so with me.

My original proposal was for a series of three articles, one each year for three years. As the final installment was in press, a further idea or two came to me, and with the encouragement of the *Bag*’s editor-in-chief, Ross Davies, I continued the series. And so it has gone on, year after year, for ten years, until it became what may be the longest-running, single-author series in law review history. At first, I had no particular agenda, other than to re-examine traditional doctrines of basic property law and the forces that tugged and pulled at that law. What attracted me to topics was a perhaps perverse interest in those areas of the law where the join between old and new seemed most obvious, where the ideal and the real seemed most at odds, or where the claims made for reforms of one kind or another seemed particularly overstated.

This hit-or-miss approach suited the *Bag*’s editor and suited me, because I did not, and do not, think there is an overall plan for or unifying theory of the law of property – or of the law of anything else, for that matter. But as entries in the series accumulated, I began to see not a unifying theme, but rather a unifying question – a single quest – that inspired all my investigations. How did this hodge-podge of ancient rules and modern conveniences that make up the “American law of property” come to be assembled? And how well does this contraption work to serve the needs of contemporary society?

This book is the result of trying to answer those questions, not comprehensively but by examining a wide range of property rules and some of the most important forces that shaped them. The *Green Bag* articles are here, refocused, rearranged, and (more or less) consolidated. In addition, a couple of articles along the same lines, but that were not, for one reason or another, part of the original series, are included, and one previously unpublished entry is added – the whole bound together by an introduction and, if not a conclusion, at least an afterword on what I think it all means.

As I re-examine – reappraise – what I have written, I am struck by two things in particular. The first is the extensive use I have made of citations to North Carolina cases and statutes and to the North Carolina State Constitution. Although the tables at the back of the book contain references to authorities drawn from just about every American jurisdiction, as well as to English cases and statutes, North Carolina is obviously over-represented. There is no mystery about why this is so. I have lived and taught in this state for more than three decades and written about its law and constitution. All property law is local, the law of the *situs*, the place where the land lies or where the owner of personal property is domiciled. There is very little national law of property, and what there is is mostly incident to federal taxation or financial regulation, which is why I earlier put quotation marks around the phrase “American law of property.” Nonetheless, it is possible to write about property law in general, derived as our system is mainly from English common law. The citations are there not to document the law of any particular state, but to illustrate my points and demonstrate that I am writing about what was really the law at some specific time and place.

The second thing I noticed on rereading these pages is that I sometimes use the same examples to illustrate different points. I have done my best to eliminate needless duplication and to insert cross-references to other chapters in which the subject is more fully examined, but I am aware that some repetition remains. I can only hope it reinforces the argument and does not detract from it. In the end, there is no better way to describe my own appraisal of what I have done than to repeat the words used by H.W. Fowler in the preface to his book on proper English usage: “I think of it as it should have been, with its prolixities docked, its dullnesses enlivened, its fads eliminated, its truths multiplied.”

J.V.O.

Chapel Hill, N.C.

May, 2010

List of Abbreviations

Note: In a few instances, an edition other than the one listed below is cited. In those cases, a full citation appears in the footnotes.

- Am. L. Prop.* *The American Law of Property* (A. James Casner ed. 1952).
- Atkinson, Wills* Thomas E. Atkinson, *Handbook of the Law of Wills* § 62, p. 293 (2nd ed. 1953).
- Bl. Com.* William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (1979).
- Broom, Maxims* Herbert Broom, *A Selection of Legal Maxims* (8th ed. 1882).
- Brown, Personal Property*
Ray Andrews Brown, *The Law of Personal Property* (2nd ed. 1955).
- Bruce & Ely, Easements*
Jon W. Bruce & James W. Ely, Jr., *The Law of Easements and Licenses in Land* (2001 and annual supplements).
- Cardozo, Judicial Process*
Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921).
- Carter, Law* James C. Carter, *Law: Its Origin, Growth and Function* (1907).
- Co. Litt.* Edward Coke, *Commentary upon Littleton*, 16th ed. by Francis Hargrave & Charles Butler (1809).
- Cribbet, Property*
John E. Cribbet et al., *Cases & Materials on Property* (9th ed. 2008).
- Dicey, Law and Opinion*
A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (1905).
- Digby, History of the Law of Real Property*
Kenelm Edward Digby, *An Introduction to the History of the Law of Real Property* (5th ed. 1897).
- Dukeminier, Wills, Trusts, and Estates*
Jesse Dukeminier et al., *Wills, Trusts, and Estates* (7th ed. 2005).
- Fifoot, Mansfield*
C.H.S. Fifoot, Lord Mansfield (1936).
- Geldart, Introduction to English Law*
William Geldart, *Introduction to English Law* (D.C.M. Yardley ed., 9th ed. 1984).

Gray, *Rule Against Perpetuities*

John Chipman Gray, *The Rule Against Perpetuities* (4th ed., Roland Gray ed. 1942).

Gray, *Nature and Sources of Law*

John Chipman Gray, *The Nature and Sources of the Law* (2nd ed., Roland Gray ed., 1927).

H.E.L.

William Holdsworth, *A History of English Law*, ed. by A.L. Goodhart and H.G. Hanbury (1966).

Holmes, *Common Law*

O.W. Holmes, Jr., *The Common Law* (1881).

Kent Com.

James Kent, *Commentaries on American Law* (12th ed., O.W. Holmes, Jr., ed., 1873).

Litt.

Thomas Littleton, *Tenures*, in Edward Coke, *Commentary upon Littleton* (16th ed., Francis Hargrave & Charles Butler eds, 1809).

Plucknett, *History of the Common Law*

Theodore F.T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956).

Pollock & Maitland, *History of English Law*

Frederick Pollock & Frederic William Maitland, *The History of English Law* (2nd ed. 1898).

Schoshinski, *Am. Law L. & T.*

Robert S. Schoshinski, *American Law of Landlord and Tenant* (1980).

Simes, *Future Interests*

Lewis M. Simes, *Handbook of the Law of Future Interests* (2nd ed. 1966).

Simpson, *History of the Land Law*

A.W.B. Simpson, *A History of the Land Law* (2nd ed. 1986).

Simpson, *Leading Cases*

A.W. Brian Simpson, *Leading Cases in the Common Law* (1995).

Thompson on Real Property

Thompson on Real Property: Thomas Edition (2nd ed., David Thomas ed., 2004 and annual supplements).

Webster's Real Estate Law in North Carolina

Webster's Real Estate Law in North Carolina (5th ed., Patrick K. Hetrick & James B. McLaughlin, Jr. eds, 1999 and annual supplements).

*Private property began the instant
somebody had a mind of his own.*
e.e. cummings

Contents

<i>Preface</i>	vii
<i>List of Abbreviations</i>	ix

Introduction	1
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PART I GETTING DOWN TO CASES

1	Finding: Asking the Wrong Question	5
2	The Rule in Shelley's Case: Staying Too Long	15
3	Joint Tenancy: Accounting for Continuity	25
4	Tenancy by the Entirety: Adapting to Change	35
5	Leases: Misled by a Simile	47
6	The Burden of an Easement: Playing a Word Game	57
7	Covenants of Habitability: Doing the Right Thing	63
8	Escheat: Picking Up the Pieces	75

PART II DRIVING FORCES

9	Intention: The Law of Unintended Consequences	85
10	Competition: The Race to the Bottom	95
11	Fiction: Pious Fraud	105
12	Labels: Argumentative Jargon	117
13	Second Thoughts: Full Enlightenment?	127

Afterword	137
<i>Table of Cases</i>	141
<i>Table of Constitutions and Statutes</i>	147
<i>Index</i>	155

Introduction

Property law is a large subject, and getting larger all the time. In the mid-eighteenth century, when Americans were beginning to think about independence, Sir William Blackstone filled one volume, and that the thickest, of his four-volume *Commentaries on the Laws of England* with the law of property. By the middle of the twentieth century, the magisterial treatise on the *American Law of Property*, edited by Professor A. James Casner, required eight volumes. The latest edition of *Thompson on Real Property*, edited by Professor David A. Thomas, runs to more than twice that length. On so vast a subject it is difficult to gain perspective.

In consequence, this book makes no attempt to summarize the entire body of property law. The author has neither the time nor the patience – and probably not the skill – for that task. Instead, it is an attempt to think critically about a number of representative topics drawn from that body of law. Abstracted from the mass, they may be seen entire – and fresh. Reappraisals of parts of the whole, worthwhile on their own account, may also develop skills useful for other projects and may even suggest new approaches to the larger subject. In other words, this is not a reappraisal of the law of property, in the sense of a rethinking of property law in all its aspects. It is, rather, a series of reappraisals in the law of property.

The chapters are arranged in two parts. “Getting down to cases” is what lawyers trained in the common law tradition do best, so Part I is devoted to individual subjects chosen from categories familiar to every student of property law. It begins with one of the most ordinary, yet most intractable problems in the law of personal property: the rights of finders of lost articles. The inquiry then moves through successive topics in the law of real property: estates and future interests, concurrent estates, landlord and tenant, servitudes, and conveyancing. The first part ends, literally, at the end of the line, with the law of escheat, when private property in both land and chattels ends, and the state takes over. The specific topics are meant as examples illustrating the forces that made and continue to make the law of property. If the topics are well chosen, they will act like leading cases, teaching more than a specific rule by demonstrating the law’s approach to problems of that kind.

The second part, “driving forces,” covers more general topics, spanning the whole law of property: trying to respect intention while maintaining a rule-based system, the pressure of jurisdictional competition, the use of legal fictions and clever labels to facilitate legal change, and, finally, the seemingly endless search for the most enlightened legal rules. The primary purpose of this part is to take a close and critical look at forces that affect broad areas of property law.

If there is any unifying theme, it is that property law today is no more than a collection of legal rules accumulated over many centuries. Rules embodying

outmoded social policies are slow to disappear, sometimes lingering in obscurity, sometimes gradually modified to serve purposes they were never designed for. New rules, supposedly better suited to new needs, are awkwardly inserted. The preservation of continuity, sometimes merely verbal; the demand for predictability, in order to allow counseling and planning; the pressure to recognize new social realities, ever appearing and disappearing; the imperative to respond to economic necessities, as perceived by one group or another – make property law a bundle of rules rather than a bundle of rights. The only constant is the need to resolve the seemingly endless parade of disputes, petty as well as grand, brought to the judges for final resolution.

PART I

Getting Down To Cases

Chapter 1

Finding: Asking the Wrong Question

The manuscript unfortunately was abandoned. I use the word in the sense of lost or mislaid.

Oscar Wilde

The law of finders is supposed to govern cases in which persons assert rights to presently unowned or unclaimed items of personal property.¹ A finder acquires a right in a found item by taking possession of it,² but the finder's right remains subordinate to the right of the owner, if any, until the owner's right is terminated by abandonment or the running of the statute of limitations.³ The law determines whether a chattel is unowned by asking whether the owner has abandoned it, that is, has relinquished physical control of the item with the intention of no longer owning it.⁴ An unclaimed chattel is one, the owner of which has relinquished control without intending to surrender ownership.

As between competing persons each claiming to be a finder of unclaimed property, the law may require a determination of whether the item was originally lost or mislaid. Lost property is property that the owner unintentionally left behind and still wishes to recover,⁵ while mislaid property is property the owner intentionally placed somewhere and, for an unknown reason, is slow to reclaim.⁶ The classic examples of lost and mislaid property, drawn from the leading cases,

1 The unowned or unclaimed items that are discussed here are the type that ordinarily end up in a lost-and-found department; that is, usually small items of tangible personal property, such as umbrellas or, occasionally, money or pieces of jewelry. Items of property on deposit, held for named owners who have not taken any action with respect to them for a significant period of time, such as the balance of inactive bank accounts or uncashed dividend checks, are "presumed abandoned" and taken into the state's custody. They are discussed in Chapter 8, Escheat: Picking Up the Pieces.

2 Possession may be defined as taking physical possession of an item with the intention to assert a right to it. A valuable review of the history of the concept of possession is in C.H.S. Fifoot, *Judge and Jurist in the Reign of Victoria* chap. 4 (1959). For modern concepts, see Carol M. Rose, Possession as the Origin of Property, 52 *U. Chi. L. Rev.* 73 (1985), and Richard A. Posner, Savigny, Holmes, and the Law and Economics of Possession, 10 *Geo. Mason U. Civ. Rts. L. J.* 121 (1999).

3 The finder's right may also be subordinate to the rights of others, such as the owner's bailee or even a prior finder.

4 1 *Am. Jur.* 2d, Abandoned, Lost, and Unclaimed Property, § 10 (2005).

5 *Id.* § 4.

6 *Id.* § 6.