

PROPERTY LAW

The Law of Property

by F. H. LAWSON and BERNARD RUDDEN

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The third edition of *The Law of Property* by Lawson and Rudden, as its author Professor Rudden declares, has been entirely rewritten since the second edition. This reflects in part the pace of change within the property law field since the second edition, but it also reflects a change in emphasis in the book itself. The intellectual hallmarks of the original book remain: the decision of principle to strive for a unified approach to property law, rather than dividing the subject according to the objects of property; a functional approach to the subject, emphasising a unity of purpose often obscured by a multitude of forms; the crucial distinction between those principles rooted in the market and a value based view of property, and those principles whose rationale is derived from the utility of property *in specie*; an analytical rather than a historical structure of explanation. The form of the book is also clearly derived from the earlier edition: the attempt to state the law as far as possible in non-technical terms; the abjuration of citations of cases; the attempt to provide a complete introduction to the subject. In all of this the third edition continues honourably to attempt, and realise, that most difficult of aims: a clear, accurate, and coherent overview of the law of property. However, the third edition is a very different book from the second. Whether this is a deliberate shift in emphasis, or merely reflects the demands of accommodating the legal and economic changes of the last 20 years within an introductory book of 200 pages, it is impossible to know. Before considering the nature of the difference it is necessary to consider the structure and contents of the work.

The book is divided into five parts and fourteen chapters. The first part is also the first chapter and is introductory, encompassing material on the sources of law and other relevant areas of law as well as describing the subject matter of the book.

The second part ("Property in General") contains three chapters (chapters 2–4), of which chapter two is the longest single chapter in the book. Although chapter two is titled "The Classification of Things" it contains far more than an account of the common-law classificatory system. Chapter two contains a description of the major objects of property encountered in the world, with a marked emphasis on intangibles. This chapter provides an invaluable starting point for anyone unversed in property law, and is a useful reminder to those of us steeped in the lore of tangible property of the vital importance of intangibles in modern commerce, and in property law. Chapter three is predominantly concerned with dealings with property, and chapter four with the impact of property rights upon the parties to a transaction and crucially the potential impact on third parties.

The third part ("Common-Law Techniques") contains three chapters (chapters 5–7) and the first two chapters could be described as an exploration of the distinctive features of the common-law's treatment of property. However, this leaves the final chapter in part three, "Land Legislation for England and Wales 1925–2001" rather adrift. This is probably the result of a difficulty inherent in any attempt as ambitious as *The Law of Property*. One of the author's aims is to deal with the conceptual apparatus of the law of property without dividing the field up into the laws of particular objects of property. However, some of the distinctive concepts discussed in

chapters five and six (e.g. tenure, the doctrine of estates, life estates) are indelibly marked by their origins in land law, whilst other concepts and institutions (e.g. specific performance, trusts) arose within the context of landed property, although they have since, to varying degrees, shed the association. Therefore, chapter seven is suitably placed in view of the subject matter of chapters five and six, as it brings land law up to date, but oddly out of place in part three considered thematically (as registration of title is not usually viewed as a distinctively common-law response to problems of property law).

Chapter five contains useful material on such topics as the distinction between law and equity, trusts, tracing, tenure, estates, and bailment. Chapter six is predominantly concerned with co-ownership, both concurrent and consecutive. Chapter seven is oddly placed, but a very clear and helpful overview of the statutory reforms of land law and registration of title, which incorporates consideration of the Land Registration Bill 2001 (now the Land Registration Act 2002).

The fourth part ("Standard Patterns") contains four chapters (chapters 8–11) and is even more discordant than part three. Chapters eight and nine ("Leases and the Like" and "Security") are extremely valuable explorations of two types of property transaction, the separation of rights to possession or enjoyment from reversionary rights, and the utilisation of property to provide security. Chapters ten and eleven ("Real Property: Servitudes" and "Succession") can be described without distortion as dealing with types of property transaction, however, they lack the breadth of the first two chapters, as one deals solely with land law, and the other is better described as the legal consequences of death than as transfer by (or upon) death. Chapters ten and eleven are the two shortest chapters in the book, which makes the contrast with chapters eight and nine all the more noticeable. This is not to suggest that chapters ten and eleven are anything other than extremely valuable. If there is any weakness at all it is in the overall structuring of the book, and is more accurately described as a tension than a weakness. The chapter on servitudes (*i.e.* easements and restrictive covenants) is another example of the difficulty that land law poses to the general design of the book. As for succession it could conceivably have been dealt with in chapter three ("The Acquisition of Property Interests") but that would have produced its own stresses, as the concept of administration is far easier to deal with after the consideration of trusts and funds which precede chapter eleven.

The final part (part five, "Property as Wealth") contains three chapters (chapters 12–14) including the conclusion. Of these three chapters the first, chapter twelve, is of particular importance, stressing and explaining as it does the distinction between two disparate approaches to property law; one based upon the utility of specific property and one based upon the value inherent in generic property. Chapter thirteen is concerned with the restrictions of the law in respect of perpetuities and accumulations. Chapter fourteen concludes the book.

Viewed overall the *Law of Property* is a model of clear and accurate exposition in non-technical language that whilst modestly proclaiming itself as merely introductory in fact rises above mere description and engages in both acute analysis and sophisticated criticism of the existing law. The book is of value not only to students of property law (whether they be students on land law, personal property law, or equity and trusts courses) but also to students of commercial law and insolvency law. The preface notes the potential value of the book for non-lawyers and lawyers from civil law jurisdictions. To this should be added academic lawyers considering both the potential structures of property law courses and the possible approaches to particular subjects taught within property law. Like its predecessors the third

edition achieves more than it is reasonable to expect any introductory book to achieve.

In case this smacks of hyperbole, consider the analysis of the consequences of contracts for the sale of goods and contracts for the sale of land (pp. 57–60) which penetrates differences of legal form and jurisdictional concepts to identify striking similarities in the law. Consider the analysis (in an introductory work) of hire purchase contracts and retention of title clauses in sales of goods contracts (pp. 146–148) as security transactions. Consider the treatment of “following” and “tracing” at various places in the book (pp. 68–71, 88–89, 135–136, 169–170, 175–176) which identifies the links between tracing and “overreaching” as well as managing to view the processes as both remedial and institutional. The added value of taking a functional approach, as opposed to a merely formal or classificatory approach, to property law is illustrated in abundance within the work.

Thus, this book succeeds if viewed on its own merits. Yet there is still one unresolved question: how does it compare with the second edition? Several uncontentious points of difference can be identified. The relatively copious material in the second edition on settlements has been excised. The balance between land law and personal property law has been redrawn, to the advantage of personal property, and towards intangibles in particular. The work has been updated, in what over the past ten years has been a surprisingly fast moving subject area (if we restrict our attention to statutory changes: both residential tenancies and agricultural tenancies have seen radical statutory reform, the law of landlord and tenant has seen the massive curtailment of privity of estate, the law governing the concurrent ownership of land has been reformulated, trustees’ powers of investment are now exhaustive unless expressly cut down, the law of registered land is undergoing thorough reform, and the commonhold system of land ownership is, in effect, a new form of tenure). The third edition is more interested in the commercial aspects of property law than the second edition was. What is potentially contentious is whether these changes have led to the loss of anything of value.

The second edition of *The Law of Property* had at its core an approach to property law that laid great emphasis on the fragmentation of ownership (chapters 5–6). The book was written on the premise that the best and least distorting way to approach the law of property in the common law jurisdictions was through an appreciation of the inherent tendency of the common law to partition and reify aspects of “ownership”. Indeed, the very concept of ownership was a difficult one within a common law conceptual scheme (chapter 7). This emphasis was best exemplified by land law, as the degree of fragmentation of ownership has traditionally been greatest in this field. The third edition of the *Law of Property* has reduced the centrality of the concept of fragmentation of ownership, and approaches the issue of fragmentation via a model of simple or unified ownership. Therefore, as a matter of narrative explanation, “fragmentation” is something which unified “ownership” undergoes on occasion. This shift in emphasis is deliberate, and is presented as a less confusing approach for the intended readership (at p. 90):

One of the greatest difficulties . . . from the English habit of splitting . . . ownership . . . But over-concentration on this somewhat abstract approach may lead to great confusion. Consequently . . . simple and general account of ownership, before turning to . . . fragmentation.

It is this shift away from fragmentation of ownership as a central organising concept that creates some of the tensions in organising the material contained in the book

identified above. An analysis that proceeded from the proposition that fragmentation of ownership was fundamental to the common law of property gave an extremely valuable insight into what questions could be intelligently asked about "ownership". The risk that insights offered by such an approach will be diminished, or obscured, by the new treatment of fragmentation and the structure of the book is a real danger. The unresolved issue is whether this shift in emphasis results from the adoption of a new explanatory technique (as suggested by the quotation above), is a consequence of the re-allocation of space from land law to personal property (noted above), or reflects a change in the nature of the English law of property caused by the forces of statutory reform and the growing dominance economically of intangible personality. It is by the implicit posing of this question that *The Law of Property* by Lawson and Rudden demonstrates once again that it is more than a mere basic introduction. It remains a book that excites the formulation of fundamental questions as to the nature and structure of the common law of property.

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