THE MARGARET STONE LECTURE 2023

"MARGARET STONE: LEGAL SCHOLAR, JURIST AND PHILOSOPHER – WHY PROPERTY LAW IS 'BEAUTIFUL' AND ITS INFLUENCE ON LEGAL THINKING AND DEVELOPMENT"

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Introduction

1. In 2000, on her swearing in as a judge of the Federal Court of Australia, The Hon Justice Margaret Ackery Stone AO, wisely and prophetically said:[1]

> "… [T]he challenge for a judge is both to heed … criticism, to profit from it and yet not be overwhelmed by it. To maintain one's integrity but to benefit from the criticism and the helpful comments of others. Probably even the unhelpful ones. That seems to me to be the essence of the task. I have

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1 Transcript of Proceedings,

> some confidence that everything yields to hard work and I can undertake to put in that hard work. For the rest I rely on the guidance of the whole of the legal profession, coupled with my own natural inclination to ignore it at times."

2. My first interactions with The Hon Justice Margaret Stone were from the other side of the bar table, not long after her swearing in as a judge of the Federal Court. As Counsel, she sought my guidance, she interrogated that guidance and she ignored aspects of that guidance. And in doing so, Margaret immediately revealed her formidable intellect, her extraordinary capacity for hard work, and her interest in, and commitment to, identifying and interrogating the underlying principles at issue in any given dispute. Margaret's approach to the law was one of principle, not nomenclature. It was an approach informed and revealed by values and characterised by absolute intellectual rigour and wise judgment. In subsequent years I became the beneficiary of Margaret's guidance as a colleague, companion and confidant. Guidance, not advice, that you ignored at your peril. It is an absolute honour and privilege to be asked to deliver the inaugural Margaret Stone Lecture in the presence of her family, her friends and her colleagues.

3. Margaret's appointment to the Federal Court was the third chapter in a long and distinguished life. The reference to a "chapter" is in fact a misnomer, because many aspects of Margaret's extraordinary

6. One need only glance at Margaret Stone's academic scholarship to appreciate that her fascination with property law, particularly real property law, continued well beyond law school. It is evidenced, in particular, by her part authorship of several editions of [5] (which is the prescribed text for many property law courses) and joint authorship of .[6] In her academic work, both teaching and writing, Margaret placed great importance on situating law in its historical context. Both her property law texts traverse

is these very principles and values that underpin the past development of the law, which will inform its future development and application.

8. Because history played the part it did in Margaret Stone's academic work and informed and explained so much of her later judicial method, let me try to offer a potted version of the history she treated as informing her work in property law. That history covers many centuries. But it is the breadth and depth of that history that both reveals and underpins what I later say about Margaret's overall understanding of, and approach to, the law as depending upon identifying the relevant underlying principles and values.

9. Archaeologists have identified that various property systems existed far beyond written history and that the suggestion that property rights emerged with agriculture is inaccurate.[7] Throughout history, and across different societies, there have been all kinds of variations of property systems: the traditional relationships of indigenous peoples to land; the landed hierarchy of a feudal system; the command structure of a socialist State; private systems of ownership where much is left to the competence of individuals – to the market – to make decisions over the allocation of property resources. The choice of property system, and how it has been refined, warrants consideration, not only because the distribution of property rights has a profound impact on economic, cultural and social dynamics, but because the converse is equally true – the development of property law was driven by and reflects developments in society, its activities and its organisation. In this way,

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7 Nordtveit, "The changing role of property rights: an introduction" in Nordtveit (ed), (2023) 1 at 1.

the law of property can be seen as a tapestry that has been interwoven with, and which on closer inspection reveals, the threads of societal change. A tapestry which is forever being added to as the concept of property, and the rights to which it gives rise, evolve in response to new economic, social, legal and technological changes.

10. Throughout history, societies have had arrangements for sharing or allocating resources between persons, the State and other actors, and thus, have had arrangements for delineating legal rights in relation to those resources. As Sir William Blackstone noted in the opening pages of Book 2 of his on "Of the Rights of Things":[8]

> "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original [sic] and foundation of this right."

11. Failure to "give themselves the trouble to consider the origin and foundation" of rights of property is a folly.

development, which was not unbounded by the past, and not untethered from principles or values.

12. At the end of the 19th century it was said of English land law that it was of "mixed origin".[10] That was an understatement. The elements in that mixture included:[11]

> "The customs of the early Teutonic invaders, the effect of conquest and settlement of the land on a large scale, the gradual and what may be called the natural growth of feudal ideas, the effect of the Norman Conquest in developing these ideas into a system of law and in importing doctrines unknown before, the subsequent influence of the Roman and Canon law ..."

13. These are all elements of which account must be taken in tracing the development of the law of property. And all of them are elements that not only historically informed an understanding of whether and how real property law could or should be applied in new and emerging areas of human endeavour, but that continue today to inform an understanding of developments in property law and the principles and values that the law codifies and protects more generally.

14. Four fundamental changes in the development of real property law in England – first, the feudal system of 1066; second, the of 1290; third, the of 1596; and fourth, the development of registration of title – will be considered. I will then briefly address two fundamental changes in Australia, before turning to

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10 Digby, 5th ed (1897) at 1.

11 Digby, 5th ed (1897) at 1.

consider how that history informed Margaret's conception of property law and her approach to legal analysis, and what we can all learn from this.

A potted history

15. Turning first to the feudal system. For any common law jurisdiction where principles of property law have come from, or have been significantly influenced by, English common law, a tale of real property law cannot be told without an appreciation of the doctrine of tenure developed by the feudal system. As John Rood explained in 1910:[12]

> "While unmistakable evidences of feudal tenures exist in the Saxon records, it remained for the military genius of the Norman conquerors under William and his successors to establish as the national policy of England that system of society and government invented by the northern Teutonic tribes, and used with such decisive effect by them in their invasion of the provinces of the disintegrating Roman empire, and in establishing themselves in their newly acquired territory."

16. Introduced in 1066

receiving of them back from the Crown as feudal tenants, subject to the obligations which the feudal system imposed.[13]

17.

21. The of 1290 – also called the Third Statute of Westminster – forbade subinfeudation. It prevented tenants from disposing of land to sub-tenants, who felt dependent on and accountable only to the mesne lord from whom they immediately held the land.

22. Pollock said the was accepted with satisfaction by all.[19] Why? He explained:[20]

> "It dealt a heavy blow to the consistency and elegance of the feudal theory, but made the conditions of land tenure far more simple.
>
> It was the first approximation of feudal tenancy to the modern conception of full ownership.
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> ...
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> It was enacted that every free man might thenceforth dispose at will of his tenement, or any part thereof, but so that the taker should hold it from the same chief lord, and by the same services ...
>
> Since that day – the feast of St. Andrew in 1290 – it has been impossible to create a new feudal tenure of a fee simple estate; and any chief or quit rent now payable to a superior lord out of land held in fee simple must have been created before that time.
>
> The statute enabled the fee simple tenant to deal with his land as property, without consulting his lord; and in this respect it was a great economical advance."

23. The advances were significant – legally, socially, economically. But there were long term consequences; the profits of feudalism increasingly

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19 Pollock, (1887) at 67-69.

20 Pollock, (1887) at 67-69.

became the profits of the Crown.[21] By Tudor times, the incidence of mesne lords had declined, but the skills of avoiding feudal incidents – which included military service, homage, fealty and suit of court; wardship and marriage; relief and primer seisin; aids and escheat; and forfeiture[22] – had increased. Thus, the need for the of 1536.

24. The (1536) was described by Sir William Holdsworth as "perhaps the most important addition that the legislature has ever made to our private law".[23] Others took a far less favourable view.[24] Sir Frederick Maitland said: "It is not a mere Statute of Uselessness but a Statute of Abuses." The import of this legislative reform, however, cannot be doubted.

who might be the landowner himself or a third party. As one legal academic explained:[25]

> "The principal reason for the development of uses lay in the fact that feudal burdens and disabilities related only to the

beneficiary liable to the payment of feudal incidents.[29] The Statute saw the reimposition of feudal incidents, but it also became the means by which legal title could be transferred by document alone, thus providing for secrecy of title.[30]

28. But that secrecy of title itself became a problem. And it was a problem that was sought to be avoided by the enactment of the later that same year (1536).

29. As Sir Francis Bacon explained in his , the was really a proviso to the [31] The was intended to alleviate the secrecy permitted by the , by providing a register of conveyances. The required bargains and sales to be by way of indenture, to be enrolled within six months either in the courts at Westminster or in the county in which the land was located.[32]

30. That system relied upon property having been granted by the Crown and transferred by a particular document, referred to as a deed on conveyance, on each transfer of title. The documents, the "title deeds", together comprised the chain of title. Only where the transferor had the

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29 Simpson,

right and capacity to transfer the relevant interest would the transferee acquire a legal interest.

31. The effectiveness of such a system was thus dependent upon the execution and preservation of original valid instruments and, consequently, the system inevitably had several defects:[33]

- the difficulty in understanding the series of documents making up the chain of title;
- issues of insecurity of title as a consequence of potential fraud and forgery;
- the requirement for retrospective investigation to assure oneself of security of title;
- the increase in complexity as the chain of title expands;
- the need to manage the system;
- maintenance of the volume of records from a practicality perspective; and
- the possibility of error.

32. Following the , no further system of registration developed in Tudor England. It was not until two centuries later, in the 18th century, that the position changed, with the adoption of a new system of registration of deeds, first in Yorkshire in 1703,[34] and then in Middlesex in 1708.[35]

33. The expansion of a system of title by registration was the subject of parliamentary debate throughout the mid-to-late 1700s and the early 1800s,[36] but it was not until February 1828 when a Royal Commission was appointed to examine the law of real property of England and Wales that things began to move. Jeremy Bentham became one of the main champions of land law reform during the latter stages of his life, writing on the topic between 1826 to the time of his passing in 1832.[37]

34. The Royal Commission into Real Property issued four reports. Of these, the second report dated 8 June 1830 concerned the subject of a general registry of deeds and instruments relating to land.[38]

35. It has been observed:[39]

> "The genesis of land registration in England has been traced to the second report of the Real Property Commissioners issued at the end of the year 1830. ... The question of registration of title, as distinguished from registration of assurances, was not directly dealt with in the report. It was, however, suggested to the Commissioners that it would be both expedient and practicable to establish a registry on the same principle as registers of stocks, where title depends on entry in books, not on any instrument itself".

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36 Stein and Stone, (1991) at 12.

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36. Though the Bill introduced consequent on the recommendations in

39. The Act introduced to South Australia the system of Torrens Title – the system of title by registration which now enables real property to be transferred by registration of a transfer of title. But, as James Hogg acknowledged in his 1905 work entitled "Australian Torrens System", "the germ of the Torrens System may be said to have been planted in English jurisprudence by the publication of the second report of the Real Property Commissioners in 1830 ...".[41] As you all know, the Torrens System is now used in all States.

40. Any discussion of Australian property law would be incomplete, however, without reference to a second significant development 150 years later – the 1992 decision of the High Court in

[42] As Brennan J said:[43]

> "The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterising the indigenous habitants of the Australian colonies as people too low in the social organization to be acknowledged as possessing interests and rights in land. Moreover, to reject the theory that the Crown acquired absolute beneficial ownership of land is to bring the law into conformity with Australian history. The dispossession of the indigenous inhabitants of Australia was not worked by a transfer of beneficial ownership when sovereignty was acquired by the Crown, but by the recurrent exercise of a paramount power to exclude the indigenous inhabitants from their traditional lands as colonial settlement expanded and land was granted to the colonists. Dispossession is attributable not to a failure of native title to survive the acquisition of sovereignty, but to its subsequent extinction by a paramount power."

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41 Walker, "The Genesis of Land Registration in England" (1939) 55(4) 547 at 547.

42 (1992) 175 CLR 1.

43 (1992) 175 CLR 1 at 58.

41. The Australian continent was "an inhabited territory which became ... settled colon[ies]"; it was not a legal desert.[44] Native title, though recognised by the common law, was not an institution of the common law and was not alienable by the common law.[45] But the common law could, by reference to the traditional laws and customs of an indigenous people, identify and protect their native rights and interests.[46] Whether or how common law property notions intersect with native title is now working its way through the Australian legal system. I say no more about it.

Conceptualising property

44. While often considered a stable body of law, with deep roots and developing slowly, as Professor Ernst Nordtvelt has recently said:[47]

> "If this was ever true, it is not so any more. Basic tenets exist, of course, and the development of new forms of property rights is often based on older forms. However, contemporary property law is a dynamic system that changes alongside technological, economic, financial, social and ecological changes to meet new needs, achieve more effective use of resources and conform with the dominant values in society ... As with any other complex and dynamic system, ownership and property rights are more than the sum of the single functions they contain at any given time, due to the feedback effect from innovation. These attributes of property rights are the primary basis for economic growth and innovation in society."

45. Indeed, every development in property law has brought with it challenges to our thinking and conceptualisation of the area. Almost always, however, our identification of the challenges and our thinking about how the challenges are to be met depend upon us recognising what has gone before. Even then, while property, and property rights, can seem to be a nigh on universal phenomenon – deeply embedded in human history – ownership and property rights remain among the legal realities that are hardest to define. Few other legal concepts, if any, have caused such strong debate.

46. Today, the word itself – "property" – remains ambiguous. In ordinary parlance, the word is often used to refer to the item which is the subject of ownership. Thus, you frequently hear people speak of "a person's property" in the sense of the things that are owned by them or, alternatively expressed, that are the "objects of [their] right of

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ownership".[48] "Property" in this sense, therefore, refers to the object of legal rights.

47. However, in legal discourse, the term "property" is used more often than not to denote a specific type of legal right referred to as a property right. It is therefore important to differentiate between these two ways in which the word is used: (1) a legal of a particular kind, and (2) the tangible or intangible , which is the object of that right.[49] It is with the former that we are presently concerned.

48. Put broadly, and loosely, a property right gives the holder power over or in respect of the subject matter of the right. Often that power will amount to rights of exclusion, possession or occupation. But this description is altogether too short and compressed and belies much of the complexity that attends property law. The subject of property rights can be tangible or intangible (corporeal or incorporeal). Ordinarily, the object of the rights will have a separate existence independent of any person, making it possible to transfer the right over the subject-matter from one person to another.

49. The developments in the feudal system experienced as the dealing with tenures grew in complexity provide early evidence of how new forms of economic "goods" (tangible and intangible) develop as a result

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48 Nelson, (1895) at 1.

49 (1999) 201 CLR 351 at 365-366 [17].

High Court's decision in .[52] In that case, de facto partners purchased a property as tenants in common in equal shares to renovate

features" as if describing a class of tangible objects), coupled with her references to an "instrumentalist approach" and law being a "metaphysical"

phenomenon and legal concepts are tools which ought to work for us rather than impose burdens."[58] Because law is a metaphysical phenomenon, what I earlier referred to as "labels and boxes" cannot be treated as the end of legal analysis or as the premise for arguing about further development of legal principle. Attaching a label or putting a group of results into a single box may or may not be a useful way of describing what has been done, but the description is truncated and cannot be treated as if it were exhaustive. And the description of what has gone before will not, without more, tell the inquirer whether new

decisions dealing with other facts and circumstances is not inconsistent with the novel case at hand.

62. In a common law system, proper judicial method must reflect these considerations. Many cases in courts of first instance and intermediate courts of appeal are and must be decided by applying known and established rules to the particular facts of the case. But both at first instance and in intermediate courts, novel cases will arise. And in Courts of Final Appeal, many cases raise truly novel issues. Those novel issues cannot be resolved by reasoning only from a label or reasoning backwards from a desired result. The common law demands that they be resolved by identifying and justifying the principles that are applied. perceipt arn ue(he

63. These are anything but new ideas but they are of the greatest importance. They were captured by Sir Gerard Brennan in the speech he gave in 1998 on his retiring from the office of Chief Justice. He said that the High Court:[59]

> "cannot refrain from determining matters within its jurisdiction simply because a new rule must be devised for the purpose. To perform this function the Justices must master the existing authorities and from them elicit the underlying principle. In some cases it is necessary to perceive, if not to articulate, the community value which gives vitality to the law in question2 8ue7fThgives(ify)-4dt th[3(pi)6(ide)-4(rat)-3

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Therese Ackery Stone AO, a remarkable legal scholar, jurist, judicial philosopher and human.