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Restoring Real Property

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Summary

This paper seeks to understand and overcome land law's reputation as a difficult and troublesome subject that is notoriously unpopular among students. It argues that our failure to challenge land law's reputation has not only been damaging to property education but that it was reinforced by educative traditions during a period when the reputation was least justified by substantive law. The problem has been not in the law but in its exposition. It is time to reconsider real property as a teaching subject. The modern condition of real property education was researched through a questionnaire sent to Universities in England and Wales to identify teaching practices and perspectives, and through exploratory focus groups held with students to discover their learning experience. The recent history of property education was examined through the dominant works in three generations of the textbook tradition. Based on the belief that analysis of the subject itself is an essential prerequisite to revision, the idea of property was evaluated to identify inherent problems and devise effective reforms. The paper concludes with proposals to restore property as central in its study, and to develop the richness of the property phenomenon to meet the needs of law students in the twenty first century.

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1. Introduction: “The problem with land law.”

Land law has a fearsome reputation: “It has the reputation of being the most boring and the most difficult – difficult because it’s boring – course in the curriculum” (McAuslan, 1977, p19). This view has been endorsed across the common law jurisdiction: “land law is….the traditional horror story of them all” (Arden, 1976, p933), “the ugly duckling in a law degree” (Green, 1985, p65), “a difficult and dry (boring) subject” (Mugambwa,1997, p1), “an inscrutable and anomic experience” (Friedland, 2002, p581). Bad enough, but worse that these comments were made based on experience of land law by its friends, the property tutors, and worst of all that the reputation has been allowed to dominate without any comprehensive evaluation of the attitudes, beliefs and perspectives that led to it. Widespread assumptions of land law’s difficulty have entrenched barriers, severely curtailing real property as a subject for study and concealing that it can offer richer

learning opportunities than any other foundation subject. Real property is the social and legal bedrock. If it is to be restored as the enriching and fulfilling subject that it deserves to be, it is of fundamental importance that we understand and deal with the reputation problem. If there are significant issues with real property, they must be identified and constructively addressed, not simply labelled as problematic. As Maitland said of his contemporary academics who debased property law to their students: "when those who are set to teach the youth use such language as this, there are but two courses open to us – to silence the professors, or to reform the laws" (Fisher, 1911, p162). By subscribing unquestioningly to value judgments about land law's reputation, all we teach students is that land law is archaic, irrelevant and ineffective. And that, unfortunately, is one lesson that many report they have learned very well.

A highly regarded law school included in its introductory materials to land law this year the statement: "Very few people ever actually understand land law, and therefore even fewer enjoy it," adding that "results are universally disappointing." In the most recent data available since our new course was introduced in 2006-2007, we had an 8% increase in the unit total (examination and coursework) in the LLB, placing land law in the middle position, third out of five foundation law subjects at second year level. In student feedback, eighty three out of a hundred and fifteen respondent students put another subject at the same level as more difficult than land law; this was an increase of thirty four over the previous year. We hope to achieve continuing strength in real property as we improve the revisions and move into the next, electronic, stage of the research project, *The Legal Landscape*.

2. An innovative approach to revision.

2.1 Revision based on analysis of the subject.

A popular approach to modern study is to reconstruct real property within the strategies currently illustrated in many other law textbooks, such as definition boxes, case summaries, questions and answers. The extent to which real property can be ultimately served by this approach is to be questioned. As a method, it is undoubtedly facilitative, but it is not *innovative* as far as real property itself is concerned. It supports the taxonomic exposition of institutional rules characteristic of traditional property teaching. There is no new intellectual vision. The features are a means, but not an end. Revision, it is suggested, should arise from analysis of the subject itself; its advantages and disadvantages for study and the contingencies of the contemporary legal and social environment in which it operates. Based on that hypothesis, this research excluded notions that exist beyond specific property reasoning, and drew only on ideas and institutions that are internal to property.

2.2 A founding philosophy.

The first objective was to establish a philosophy of methodological and epistemological assumptions about real property (Harris and Buckle, 1976). This is fundamental. First, there must be a determinant for the many decisions to be made during revision. Second, it must be possible to justify premises in real property statements. Third, there must be an intellectually rigorous foundation for a new model of delivery. The outcomes based on

the philosophy would then determine the teaching strategies. The restoration of real property also had four general aims: to maximise the benefits of the real property as a learning experience, to focus on the way real property priorities were changing, to learn from the experience of property academics past and present and to draw on the teaching methods that research with the students had proved to be most successful.

3. Land law's reputation

The fact of land law's reputation is unfortunately all too easily established. Three recent publications serve to illustrate what has almost become the standard greeting in real property literature: "The rules of land law are numerous, complex, and in some cases substantially baffling….Students who are motivated and successful at figuring out the story told by other areas of law often find themselves beaten by land law" (Gardner, 2007, pv); "Land law has gained a reputation as a difficult subject" (Smith, 2007, pxiii); "The nature of the subject is the torment of the teacher" (Gray and Gray, 2007, pv). These authors are among the best in modern educational property writing, but for the student opening the pages for the first time, they affirm the worst that he has heard. Land law looks like a dose of castor oil: he must take it because it is good for him, but it is to be approached with dread.

Land law's reputation is endemic. 75% of the respondents to the tutor questionnaire stated that land law has a reputation as a difficult subject. Research as Programme Leader and property tutor on the Postgraduate Diploma in Law over many years reveals that about 10% of the students will come to property law every year having been told they will dislike it. A tutor on one of the most widely subscribed LPC courses in the country recently reintroduced property by reminding the students, from a range of institutions, how much they hated it at undergraduate level. If the view these illustrations endorse is correct, that land law is inherently deserving of its own fate, then all that can be done is manage its difficulties. This is what most texts, and many courses, profess to do. But if it is the case that real property has some special vulnerability and that the victim of its reputation is neither the tutor nor the student but real property itself, then it is possible to take ownership of land law.

4. Land law is not inherently complex

In the days that Cromwell famously described land law as "a tortuous and ungodly muddle," and for centuries afterwards, its difficulties could be attributed to the law's excessive technicality and its reinvention of existing forms. But modern land law should be a strong subject for progression within a law degree. Land law is concerned with something very important: the allocation of scarce and valuable resources in society. This means the law has always placed a high value on conceptual formalism in property rights and on certainty in land transactions. Land law is characterised by inherent structure, clarity and method. These qualities facilitate the process by which students must first learn the law before criticism and evaluation is possible. To this extent, land law correlates very well with Bloom's graded scale of learning (Bloom 1956), enabling its delivery in layers. Land doctrines are not difficult, but they have depth, which has by a

legerdemain been falsely associated with difficulty. The systematic approach facilitated by the subject matter allows each student to progress on a solid basis, and if necessary according to his own capacity. It is important to exploit the coherence of real property.

It is the formalism of real property that in the end makes it more straightforward than amorphous subjects based on general principles like criminal law or the law of tort, where the student must contend with blurred issues of liability. Land law has sharp edges. Students find subjects like criminal law and the law of tort initially more attractive and "user friendly" because their ideas are familiar. Their principles too seem easier at first, but their complexities emerge as the student progresses. Land law is the other way around. If not dealt with, its alien language and ideas can be a major deterrent, but the student who perseveres will soon recognise the benefits of land law's logic and structure. These are also invaluable assets in the rigorous conditions of examinations.

5. A brief review of the research into the contemporary teaching and learning experience in real property.

5.1 Discovering the student experience.

The student experience was explored through focus groups of volunteer LLB and Graduate Diploma in Law students held in alternate weeks over two terms in one academic year. There were different teams in each term. The groups chose a wide range of themes, one of which was discussed in each meeting. We explored ideas about it and worked out strategies. These were tested by delivery to the entire cohort, and evaluated in general feedback with the group the following week, using a feedback form the students decided to design and use. Wider feedback was also obtained from the whole cohort each term. The most popular strategies, from which the students felt they learned most, concerned anything with a visual, physical or interactive basis: "The use of props and things is really helpful," "I felt drawn in," "It shows us the law," "It makes it more interesting."

5.2 Discovering the teaching experience

To discover the condition of delivering real property, I sent a questionnaire to property teams at fifty six Universities. There were twenty five responses. The questionnaire investigated institutional issues about the delivery of real property, how it was taught and the tutors' views on property education. One of the most interesting observations was that real property is rarely a primary interest: "People teach it because they have to rather than as their major research and teaching interest," "Lack of academics for whom land law is FIRST subject." This may explain the relative lack of innovation.

Most land law courses seem to have a vocational emphasis, on the acquisition, transfer and protection of land, with land registration placed towards the beginning of most course contents. Registration is without doubt a very important subject. It has been the dominant concern of legislation for more than a century. It may be the natural resting place of the respondents who described themselves as practitioners as well as academics. Most current textbooks also deal with registration early. Discussion with publishers on the use

of land law texts revealed the rather surprising expectation that tutors follow the textbook they choose; if this is true, the dominant ordering in texts may be significant. However, there is no necessary structure to a land law course and registration is no less important for being dealt with later, not least because it draws on knowledge of the whole of land law.

It is easy to see how beginning with registration can affirm student preconceptions of land law's difficulty. It lacks the imaginative and dynamic qualities of common law property. As a relative newcomer, registration is an interloper that is inimical to the historical development of the law. Seeking to reconcile registration has challenged more than a century of judges, lawyers and legislative architects. This has made it into a troublesome subject, comprising overlapping, much amended systems that lack the internal coherence and logic of common law property. In the last eight years at this institution, where registration is delivered by an academic and a practitioner, the students have consistently described registration as the hardest subject. It is also the most difficult for the tutor to facilitate in respect of the two main difficulties with land law: language and lack of experiential connection. This is because registration is an abstract exercise; unlike land doctrines it is not empirically connected to the landscape. Consequently, the registration bridge is the hardest of all those that the tutor must build to the property world and its highly technical language is the most difficult to make visual.

5.3 Problems with land law listed by all respondents

Both tutors and students put language ("archaic terminology") as the greatest problem with land law, closely followed by the tutors with lack of experiential connection ("contextually remote from students' lives"). Other factors cited include: preconceptions of its difficulties ("reputation - students assume it will be difficult, therefore it is"), abstraction ("rule based approach is abstract and conceptual"), alien ideas ("what most people think they know about land law is wrong"), the wealth of history, the complexity of rules ("very technical"), the jigsaw effect ("need a wide command of many subjects before understanding one"), and the "aridity" of textbooks. Interestingly the quality I have found the most genuinely problematic with second year undergraduates, the duality of law and equity, was scarcely mentioned.

6. The idea of property and its relationship with property writing

6.1 The idea of real property

An important part of the enquiry was the investigation of the causes of land law's reputation through research into its educational history. This concentrated on three periods of real property literature, beginning with Blackstone's *Commentaries*, but focusing especially on the textbook tradition post 1925. The decision to focus the research on literature arose from the special relationship that exists between real property and its literature. This concerns the nature of real property. Real property exists in law as an intellectual construct. It is a set of fundamental ideas, contained in a property rhetoric

that has continued in common law discourse for over eight hundred years. The resulting intellectual continuity in the law is described as the "rational strength" of real property.

6.2 Real property and property writing exist in the same intellectual environment

The intellectual quality of real property creates a special synergy between the idea of property and property writing because they both exist in the same intellectual environment and express the same rationality. All the classical real property writers have expressed the prevailing idea of property through their writing in this way since real property law and its literature first emerged together in the twelfth century.

6.3 The establishment of the textbook tradition and its effect on property writing

In the twentieth century, there was a significant change in property writing. Up until then, the mapping of property writing in contemporary descriptions had demonstrated a normatively close relationship with the society as a whole that it regulated. During the twentieth century, the textbook tradition developed as a discrete property genre. This was a period of very rapid changes in landholding and use, and although the texts are seen collectively with the dominant book in each generation still featuring on most student reading lists today, they each express a radically different idea of property. Often the writing exists in an unarticulated normative framework, and although respondent tutors noted differences in style, there seems to be little recognition that each is endorsing a radically different idea of property.

This relationship between property and property writing created a particularly "property problem" at the centre of real property education. As the ideology of property shifted, a gap emerged between the established tradition and expectations of it. This looked like an educational failure, so the new generation focused on the effect (meaning the defects) of the old tradition, and in so doing omitted seeing the cause, the different rationalisation of property. In consequence, real property education has progressed as a series of reactions against established tradition, creating disharmony at its centre. Because this has meant constant reinvention, property gradually became subordinated to new themes in property writing intended to reform educational practice: the bare bones of taxonomic exposition to get through examinations, or legal theory to reclothe the law with validity. The traditional style of writing in which real property had always been central, connected to its landscape, was lost. The law was increasingly distanced from its empirical reality. Each generation added another layer of abstraction, and the law began to look more and more like a jumble of complex, conflicting and often anachronistic ideas.

7. Real property education in the textbook tradition I: "The old tradition."

7.1 GC Cheshire: The intellectual expository tradition.

Modern real property law and its educational literature began in 1925 with Cheshire's *Modern Law of Real Property*. Cheshire remained the dominant work of its generation, and is still recognised as one of the most important texts, now in its seventeenth edition (Burn and Cartwright, 2006). Cheshire has been highly influential in property education, on property thought and has been frequently cited at the highest levels, especially concerning interests in land. It was written to explain the new land law following wide reaching statutory reform in 1925. The "1925 legislation" was the eventual culmination of longstanding attempts to simplify the law to facilitate the acquisition and transfer of land, and expressed this ideology by placing all the value of property in exchange.

There were three main categories of texts in the property genre about the time of Cheshire. There were new editions of the well established student texts: *Williams and Eastwood* in 1926 (1st ed.1844) and *Goodeve and Potter* in 1929 (1st ed.1845); there were also new editions of the conveyancing works: *Strahan* in 1925, *Elphinstone* in 1925 and *Deane and Spurling* in 1925; and there were specific 1925 commentaries: by Rivington and Fountaine in 1926, and by Cherry in 1926. Cheshire's aim was "to prepare a book that would not merely record the changes but would present the law as a composite whole….to enable the students to envisage a legal system which is, in many respects, widely different from that envisaged in existing books" (Cheshire, 1925, pvi). In consequence, he avoided the last category, and surpassed the first. *Williams* remained excellent of its kind, but it was by then eighty years old. Faced with the perennial problem of editors of classics, Eastwood aimed "to disturb as little as possible the arrangement adopted in its predecessors" (Eastwood, 1926, piii). The result is an exposition of old law as amended by new law. Adopting a similar approach, *Goodeve* is entitled "Founded on the fifth edition." But that had been twenty three years before, and the new edition sadly loses its way; it is ambulatory in style and interspersed with comments justifying content and approach. Again, the editor's aim is achieved. Potter's agreement with the publishers was that "the widest possible latitude was to be allowed in rendering a scientific exposition" (Potter, 1926, piii). *Cheshire* easily gained centre of the education stage, marking the beginning of a new era in land law, its writing and education. This was well expressed at the time of its publication by Holdsworth: "I think that the successive editions of this book are destined to instruct many generations of students in the mysteries of the new law of property, even as the work of Joshua and Cyprian Williams has instructed many generations of students in the mysteries of the old law" (Holdsworth, 1946, p102).

Cheshire was written in a powerfully intellectual environment. Its author (1886-1978) had been a fellow at Exeter College, Oxford, since 1911, and was assisted with his book by academics at Oxford and other Universities. The new rationality in the law is realised in a handsomely composed, scholarly approach that reads like a common law essay written in the intellectual tradition of the Oxford Law School. The first section alone contains references to, and quotations from, thirteen jurists across the entire spectrum of

property writing from Glanvill to Stenton. In later times, the somewhat detached, elevated air and tightly woven texture Cheshire's style gave his writing led to criticisms of an academic, didactic, historicist and uncritical treatment of land law. *Cheshire* reflects the spirit of the 1925 legislation which, rightly or wrongly, was viewed as a triumph by its contemporaries. The problems caused by a system that located the law in a private property ideology, marginalising the wider traditional values that were fundamental to land use, would take another generation to appear. But by then the property world around the 1925 legislation had radically changed.

7.2 RE Megarry: The taxonomic expository tradition

The next generation of property texts was, in one sense at least, ruthlessly pragmatic. The first text was again dominant: Megarry's *Manual of Real Property*, published in 1946. The *Manual* has commonly been regarded as being in the same tradition as Cheshire, but it is very different and marks a significant shift in real property thinking and writing. The new preoccupation in the textbook tradition was to get students through examinations; in the second edition Megarry describes how "examiners and authors….pursue one another in a vicious circle" (Megarry,1955, pv) in the post war world. In this climate, Megarry (1910-2006) reacted against a perceived lack of immediacy in the intellectual tradition espoused by Cheshire. He wrote the *Manual* in an environment quite unlike Cheshire's; as a recently qualified solicitor, in practice and teaching at one of the new tutorial colleges. At an educational conference shortly after the publication of the *Manual*, Megarry spoke out for "the straight expository style of teaching," that was directed towards "the third class man [not] the first class man" (Goodhart, 1947, p346). His opening words in the first edition of the Manual are: "The book is primarily intended for the examination candidate whose main anxiety is not whether he will head the list, but whether he will appear in it at all" (Megarry, 1946, pv).

In consequence, the *Manual* is black letter law without Cheshire's black letter intellectualism. It is a practitioner approach that defines the legal rules to be learned in order to be applied to factual situations, and the study of law for purely practical purposes has no necessary need of a normative base for wider property thinking. The *Manual* deploys a directly communicative, truncated style of writing. It is arranged in brief sections in chapters whose headings correlate with the Law of Property Act 1925. Although Cheshire is always said to have defined real property by the1925 legislation, it is the *Manual* that does this. Cheshire's writing is different because it came out of the nineteenth century "principles" genre in legal texts (Williams, 1844, p5), a very different style that accommodated absorbing the 1925 legislation into real property as a whole.

The *Manual* was joined in 1957 by Megarry and Wade's *The Law of Real Property*, which became a popular student and practitioner text, now in its seventh edition. But it was the *Manual* (currently in its eighth edition) that was especially influential on property writing. Other forms of property writing were derived deductively from it, a pattern that appears to have obliterated any more innovative thinking how property could be delivered to the new widening audience of law students. At least one of the open learning courses based its *Study Manual* on the *Manual*. It begins: "Of all legal subjects, Real

Property Law has the reputation of being the most difficult and the most uninteresting. Both these strictures are justified" (c1960, p1). Another example is Teague's *Real Property in a Nutshell*. Teague had been instrumental in assisting Megarry to make the *Manual* more incisive, and the *Nutshell* is pure reductionism of the *Manual* to dense pages of black letter technical points of law. Much of its law is astonishingly anachronistic. The *Manual* is most reminiscent of *Cheshire* in its adoption of the same historicist approach, but by the mid twentieth century, that had begun to look more like antiquarianism. This was the period in which the value of the teaching of history in land law began to be questioned, but the *Nutshell* is so abbreviated and lacking in innovation that it omits any justifying rationale as part of that debate. The student must have been bewildered by what he had to learn, bearing no resemblance whatsoever to his own world. This tradition in the teaching of real property was aptly summarised by Glanville Williams: "The drive of law teaching is towards protecting the dead practices of the past against the imperative needs of the present. It is hostile to the analysis of law in action….it gives us legal habit without legal philosophy" (Williams, 1951, p215).

The preoccupation with learning in order to pass examinations, reducing legal studies to a matter of learning rules and cases (Kahn Freund, 1966, 121) had a severe effect on real property. Because property exists as an idea, its loss of context is its negation; it loses connection with any reality. Whatever the criticisms of the traditional orthodoxy represented by Cheshire, it did at least create a real property world picture through the scholarly exposition of the nature and historical development of general principles. When property writing was reduced to the taxonomic exposition of legal rules as compartmentalised abstractions, it acquired a pure learning and communicative efficiency but the idea of real property as a dynamic phenomenon in existing in legal thought and usage was lost. Conversely, however, this was the period that courts began to think inventively about property as a phenomenon, as reality forced them beyond the limitations imposed by the 1925 legislation.

8. Real property education in the textbook tradition II: "The new tradition."

8.1 A real world for real property?

The next generation of property writing marks a sharp reaction against the isolationism that defined property study first, "a knowledge of the rights and liabilities" in land and second, as "a foundation for the study of conveyancing." This endured in *Megarry and Wade* until 2000, when the editor excluded any "scientific dividing line" (Harpum, 2000, p2). The dominance of the earlier tradition meant that voices expressing any more diverse ideas about property and property study were few. An exception is worth mentioning for its excellence as one of the best student texts. In 1936, Hargreaves began *Land Law* with the statement: "I still believe that land law can be explained as well as taught….real property law is not an end but a means" (Hargreaves, 1936, pvi).

The 1925 legislation defined property narrowly, and Megarry had equated real property with that legislation. The very close relationship between property rules and society

means that the 'tyranny of enshrined ideas' problem with legislative law is always a critical one in real property. In all its history, this was most of all true in the twentieth century, because of extraordinarily fast social changes relative to land. By the mid century, the courts were increasingly facing claims from persons with no proprietary interest seeking residential security from a law that had all but excluded the use value of land. A large crack had riven the land law edifice. There was considerable judicial activism to close "the social gap" by manipulating the conceptual formalism of land law to assist persons who fell outside the narrow property taxonomy. There was a marked shift in judicial thinking from the real property rationalities of Cheshire and Megarry, based on realising and preserving an objective set of values about land, to a more dynamic, functional approach based on accommodating changing patterns of behaviour relative to land. Seminal cases of this period include *Bannister* v *Bannister* [1948] 2 All ER 133, CA; *Errington* v *Errington* [1952] 1 KB 290, CA; and *Bull* v *Bull* [1955]1 QB 234, CA. In 1958, Lawson pleaded for this thinking, "a mixed analytical and functional method" (Lawson, 1958, pvii), to be adopted in property writing. But in the academy the breakdown in the autonomy of law assumed a different existence, and the opportunity to place the academy and the courtroom in the same reality was never fully realised.

8.2 A sociological theory of land law?

The academy was dominated by parallel but different thinking. Two schools of thought, socio-legal studies and critical studies, were concerned with contextualising real property and set about achieving this by setting the law in various normative frameworks. The difficulty was that these schools of thought were not specific property initiatives, but were larger jurisprudential movements being applied in the real property context. Unlike the judges, their proponents were not confronted with the courtroom but could engage with sociological theory at an academic remove. This meant that in effect old theory was replaced by new theory. One example was the reaction against the amoralism of the traditional orthodoxy by seeking "a more explicit moral basis for the study of the subject than is usually given" (Warrington, 1984, p78). This was clearly a welcome, intellectually liberating approach after the constraints of the old style of study, but was not sustainable in a capitalist system of law that, rightly or wrongly, has ultimately always put procedural efficiency and certainty above considerations of moral entitlement. To argue the inclusion of morality was a trajectory to property understanding, and attempts to be sociological that were in reality philosophical could only impose yet more abstraction on the law. Real property does not express moral principles; conceptual formalism means the predominance of positivism in the law and flexibility draws on reserves of equity, and judicial ingenuity, within that framework. Many such cases were ruthlessly curtailed by formalism in the House of Lords. Examples are *National Provincial Bank* v *Ainsworth* [1965] AC 1175 HL, reversing CA; *Midland Bank* v *Green* [1981] AC 513, HL reversing CA; and *City of London Building Society* v *Flegg* [1988] AC 54, HL reversing CA.

8.3 Cheshire as the big bad wolf

There always comes a time for reacting against a classic, and a body of articles concerned with revising real property education at this period focused their criticisms on "the Cheshire tradition." Land law had taken a wrong turning, and Cheshire was regarded as the leader of the fateful expedition. Cheshire was to blame because of values he deliberately imported into real property through his style of writing. It was "individualistic and evolutionary" (Stuart Anderson, 1984, p80), "historicist and conceptually formalist" (Harwood, 1989, p48), and created "a dominant and even suffocating ideology in the teaching of land law" (McAuslan, 1977, p1).

Cheshire's writing expressed the intellectual orthodoxy of his period, as espoused also by the abstraction and private property ideology of the 1925 legislation, but that law was scarcely a Cheshire or an Oxford School conspiracy. Property writing cannot be expected to operate as a pure language of reference; it is itself a lived experience and its underlying tenets in property writing, however revised in subsequent editions, will inevitably recall the earlier and very different social reality in which they were written. Focusing the blame on Cheshire for the condition of real property teaching omits recognising the subtlety and contingency of the real property institution. It also obscures that Cheshire stood in the same social and intellectual continuum of property thinking and writing as his critics. Historicism and analytical thinking divorced from reality were nineteenth century legacies, as typified respectively by Maine (*Ancient Law*, 1861) and Holland (*Jurisprudence*, 1880). Much of the literature of this period does what it blames Cheshire for doing; writing in his own intellectual environment. Property thinking is all too easily delusive; because it exists as an idea, it is readily reconstructed within the intellectual patterns of later and quite different property realities.

Difficulties did result from the "black letter" orthodoxy, but that was an interesting consequence of the relationship between the idea of property and property writing. The dereification of property in the 1925 legislation created a powerful synergy with the academic tradition of its period. The academy was provided with an extremely convenient construct of property. It was abstract, highly manipulable and ideally suited to theoretical conjecture. It arguably served scholarship better than it did substantive law, and gained a stronghold from which property thinking has never disengaged. It resulted in the best known description of twentieth century real property: "[Real property is] more logical and abstract than anything that….can be found in any other law in the world….a world of pure ideas." (Lawson, 1951, p79)." This idea proved very durable in the academy (eg Rudden, 1980, p325; Riddall, 1979, pvii; Gray, 1987, p51).

One example of the anti Cheshire movement claims that Cheshire "'smuggles in'….assumptions giving priority to an individualistic and rights based perspective associated with private sector orientation, over that of a collectivist and social policy-based approach associated with social democracy and socialism more generally" (Doupé and Salter, 2000, p66). Even from a socio-legal perspective, this seems unduly severe. The revolutionary extremes of collectivism were seen in the 1920s as a real national danger and individualism as a bulwark was a far from novel idea in real property law. Cheshire is criticised because it is said that in contrast Megarry spoke in "highly

ideological terms" (ibid) in the *Manual* about collective legislation. First, the Manual came twenty years after Cheshire; *Megarry and Wade* thirty years. By the mid century, the idea of property was radically different; property concerned the public interest in land, and was directed towards promoting wider welfare and amenity values in land. Second, Cheshire was a common law property lawyer, the last of the pure property writers. The emphasis of Megarry's exposition is legislation. Especially, he liked the 1925 legislation. He ends the *Manual* with the observation that "there can be no doubt of the success of the legislation" (Megarry, 1955, p615) and he provided its best known description: "[The statutes are] without doubt the greatest single monument of legal wisdom, industry and ingenuity which the statute book can display" (*Megarry and Wade*, 1984, p1144). But whether, third, Megarry can be described as highly ideological about public regulation per se is not at all clear. The *Manual's* final chapter is on *The Social Control of Land*. It deals with legislation relative to taxation, planning and landlord and tenant laws introduced since the 1920s. Megarry lacks Doupé and Salter's loaded prose and moral judgments. He is simply factual: "Both landowners and conveyancers have become far more subservient than they were to the public weal" (Megarry, 1955, p615). Megarry was ever realist and a pragmatist; he recognised existing trends and responded to them. Even his obituary described him as being "fast out" (The Times, October 16th 2006) in responding to trends in the textbook market. Megarry appears neutral on the question of public regulation of land: "The fee simple remains the same fee simple as before. All that has happened is that the fruits of ownership have become less sweet, but that is nothing new in land law" (Megarry, 1955, p596).

Doupé and Salter refer further to the 1967 edition of Cheshire. They claim that Cheshire's comment on how real property has historically always adapted internally to change, without public intervention, as "an overt expression of political hostility" (Doupé and Salter, 2000, p67). If Cheshire was breathing fire in 1967, it must be said that at eighty one he was a very old dragon. Perhaps he was entitled to recall this self renewing quality of property as against legislation which can be traced in the common law property lawyers back at least to Blackstone (Blackstone, 1794, p10); or perhaps he was expressing in the property context a general concern of the day that a common law jurisdiction which had grown up based on horizontal relationships was being superseded by a vertical system of social regulation.

8.4 K Gray: the "value laden" tradition

What is generally recognised to have become the dominant student text in the third generation began its life in what appeared to be a strikingly visionary text, a book entitled *Real Property and Real People*, written by Gray and Symes in 1981. Its professed aim was to avoid the teaching of land law "as if it had no reference to real everyday life" (Gray and Symes,1981, pvi) and to follow the thinking of Kahn Freund that legal study should be directed towards "the social purposes of the law" (Kahn Freund, 1966, p61). Reacting against the taxonomic exposition of the last period, this became in *Real People* the idea that studying law should concern "not the learning of rules, but the critical perception of value" (Gray and Symes,1981, pv). This became known as the "value laden" idea of property (Gray, 2005, p102).

An axiom of teaching real property in *Real People* is that the entirety of the law could be deduced from a few propositions; therefore real property could be approached based on its most fundamental requirement, or value, residential security. This is measured by borrowing a sociological taxonomy of relationships: *gemeinshaft* and *gesellschaft*. The first means "values of affection, loyalty, voluntarily assumed obligation and community based solidarity" (Gray and Symes, 1981, p15), and the second means "an atomistic world of self determining individuals locked in remorseless competition" (ibid, p16). It was unfortunately another case of land law, always pragmatic, failing the theory that sought to validate it; while the authors clearly favoured the first, their subject matter was rooted in the second. Real People received mixed reviews (Rudden, 1982, p238; Stuart Anderson, 1982, p346) and was a step too far from taxonomic exposition to gain a place as a mainstream student text. In 1987, it metamorphosed into *Elements of Land Law*, shortly to go into its fifth edition. *Elements* is a work of remarkable scholarship and is strongly legalistic in style. It has a massive text, and copious footnotes. It is noteworthy that another axiom of teaching real property in *Real People* is that most land law doctrines are better illustrated by "perhaps a dozen cases than….the hundreds of cases" (Gray and Symes, 1981, pvi) that normally confront students. The first edition of *Elements*, six years later, had 3504 cases. The greatly increased wealth of authority in later editions, much of which is from the USA and the commonwealth, together with a still strongly individualistic approach makes *Elements* more useful as a work of reference than a teaching text. In 1999, the third book in this family appeared, *Land Law*. Now in its fifth edition (Gray and Gray, 2007), this was the most widely used textbook reported by the tutor respondents. While strong on values in land law, it is interestingly reminiscent of the Megarry tradition in its reductionism from a larger text, layout and directional style.

9. Conclusion on Reputation

The old property writers spoke of the difficulty of real property law, especially the highly technical nature of property rules as they accommodated all the new nineteenth century demands on property that were overlaid onto the existing law: "the increasing difficulties of Real Property Law" (Williams, 1844, pvi), "the technical complication and difficulty of our laws" (Pollock, 1887, p3), "vast masses of antique and unintelligible law" (Fisher on Maitland, 1911, p170); "intricate and abstruse technicalities" (Sweet on Challis, 1911, p1). The objective of the 1925 legislation was to eliminate technicalities in realty by assimilating it with personalty and ensuring that its transfer was as simple. By the mid twentieth century, most writers concurred that it was no longer necessary to look back to that old condition of the law. Yet it is in this period that the idea of land law's *reputation* becomes entrenched.

"Reputation" marks a shift in the real property dilemma. It is about perspective, being known, having a name, acquiring a character. It is a vantage point, how a thing is seen or experienced. Significantly, most of the respondents' references to land law's difficulty referred to the experience of studying land law. They said, for example, that the abstraction of land law made it problematic as a teaching and learning subject. This paper has examined how that quality of real property was affirmed in the 1925 tradition, and how it was variously and emphatically reinforced through three distinct generations in the

textbook tradition: the intellectual expository tradition, the taxonomic expository tradition, and the sociological tradition.

But academic educational property writing begins much earlier, with the beginning of law as a taught academic subject. As Vinerian professor at Oxford, Blackstone delivered his inaugural lecture, "On the Study of Law," on October 25th 1758. Blackstone wrote about property as his predecessors did, to open the world of property to their readers. This visionary quality is characteristic of the property writing of Littleton and Hale. Blackstone is concerned with wider education than they were, so he does a little more. He begins with his audience's world picture, and he shows them the legal features in their landscape. His objective is to explain the law as it related to them, whoever they were: "its particular uses in all situations of life" (Blackstone, 1794, p6). By the twentieth century, something very different had happened in property writing. The students' own world had vanished. He had been yanked out of it, and dropped into a legal world of property, sometimes described as "a world of pure ideas." It is a world that comprises legal rules and systems, and students are locked inside it until they have learned how it works. The features in this world are alien ideas, arcane language and it bears very little resemblance to anything they know elsewhere; not surprisingly, its inhabitants tell us they do not like it very much. Perhaps it is not too far fetched to suggest that it is a world to some extent perpetuated by its survivors. Pollock expresses a similar idea in the opening words of his new *Law Quarterly Review*: "When a man has mastered an intricate and difficult system, he takes a positive pleasure not only in the superiority which his knowledge gives him, but in that knowledge itself" (Pollock, 1885, p1).

10. A way forward: restoring the real property experience

Even the student who has bought and sold property will probably know nothing of the subject when he comes to it, and his whole experience is in our hands. This is illustrated by one of the tutor respondents description of his own experience of studying land law: "Despite its reputation for difficulty, I enjoyed it. Moral? It's all down to the lecturer." It is not the objective of this paper to suggest how land law should be taught. That approach has been offered, and its usefulness has been limited by the individualistic nature of the proposals. There are, however, two things that might be considered in devising courses that seek to restore teaching and learning real property as a fulfilling and enriching experience.

10.1 The idea of property as core.

Teaching must be based on the contemporary prevailing idea of property. It is preferable to learn from past ideologies rather than criticise them. As Maitland said, the point of studying history is to learn from the past how "each generation has an enormous power of shaping its own law" (Zutshi, 1995, p104), or alternatively, its method of real property education. The legal parameters are constantly shifting, and the tyranny of a narrow perspective has been clearly shown. More than half a century of case law has made clear that real property has moved towards a pluralist idea; it exists as a phenomenon to be constructed in response to the fast changing demands made of it. Blackacre or Whiteacre, existing as something of a cross between Agatha Christie and Cluedo, operated in the

black and white age of property rights as defined in ss1(1), (2), (3) of the Law of Property Act 1925. A wider understanding of property and property thought provides students with the flexibility to deal with the land law problems of the future.

10.2 Real property is special.

It must be said that the marker of modern land law is neither a smoke ball in the nineteenth century, nor a snail in the twentieth century, but William the Conqueror in the eleventh century. Combined with the importance of land as the main source of wealth for most of its history, this has given real property law qualities that distinguish it from other subjects. Too often, these have been translated into land law's difficulties. It is essential that they are identified and given careful consideration. This has been almost wholly omitted, yet the attributes of real property as a subject for study are as much part of the educational experience as the way the doctrine of estates is taught. Some qualities seem ostensibly disadvantages, and the failure to develop a policy in respect of them has built them into barriers to entry. In this category are arcane language, lack of experiential connection, abstraction, and history. But these qualities are only problematic if not dealt with, and all can be turned to advantage. It is very easy for example, to develop language strategies that avoid the philological and etymological approaches adopted in many land law courses which are as meaningless to the students as the word they seek to understand. All this does is deaden the experience of language, and in so doing destroys the opportunity to learn about the precision value of language. It is equally easy to deal with lack of experiential connection. The tutor only has to manufacture the situations most easily imagined by the student, either in the context of land or analogously, to give him the inbuilt referencing system he needs. The inherent logic of land law means that in many doctrines the student can then be led towards formulating the rules based on his own common sense approach to that situation.

Other qualities of real property are more clearly advantageous in the first instance. Real property situations provide wonderful opportunities for discussion. Especially, there is the opening into the jurisprudence of the second half of the twentieth century; how the formal, highly defined *numerus clausus* of property rights can be brought to bear on the infinite variety and changing nature of situations that they must regulate, particularly in respect of persons who do not order their property affairs in the image of the law. This facilitates the wider thinking of a liberal education and encourages intellectual exploration and development that reach far beyond the bounds of taxonomic exposition.

11. The restoration of real property on the foundation stone.

There is without doubt a strong argument to suggest that the land law experience has been exacerbated by teaching traditions in the twentieth century. A bad reputation is not a necessary condition of land law, and understanding its legacy enables us to ensure that we do not reinforce twentieth century chains with twenty first century steel. We can do no better than restore real property on the foundation stone of the academy as Blackstone laid it down: "If either [the tutor's] plan of instruction be crude and injudicious, or the

execution of it lame and superficial, it will cast a damp upon this most useful and most rational branch of learning (Blackstone, 1794, p2)."

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