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Property Law Perspectives IV

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Plymouth, PL6 7 PP
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Tel.: +44 1752 202 301 | Fax: +44 1752 202 331
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Intersentia Publishing nv
Groenstraat 31
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Belgium
Tel.: +32 3 680 15 50 | Fax: +32 3 658 71 21
Email: mail@intersentia.be

Distribution for the USA and Canada:

International Specialized Book Services
920 NE 58th Ave. Suite 300
Portland, OR 97213
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Tel.: +1 800 944 6190 (toll free) | Fax: +1 503 280 8832
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Cover image © Sybille Yates – Thinkstock

ISBN 978-1-78068-370-6
D/2016/7849/3
NUR 822

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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PREFACE

1. Introduction

This book is the result of the fifth meeting of the Young Property Lawyers Forum (YPLF), which took place at Wadham College, Oxford, in September 2014. The YPLF is an informal network of junior property law researchers, which is primarily aimed at doctoral researchers but also includes researchers who obtained their doctorates within the last 5 years. The YPLF aims to bring property law scholars together from around the world and enable them to discuss their work with each other and with more experienced researchers. It provides an informal setting for young researchers to discuss innovative ideas and research in the area of property law, and to seek support in solving problems and improving their research. Property law is here taken in the widest sense of the term, encompassing fields such as EU property law, comparative property law, virtual property law, constitutional property law, environmental property law, property rights in land, water and volumes of space, and property law theory. As wide-ranging as these fields are, they all share a vision on how to give shape to the property law of the 21st century. Key to this vision is that property law is no longer confined to the borders of a single jurisdiction; that it is influenced by both legal and technological developments (e.g. in EU law, internet, social media, etc.); and that the interaction with other fields of law is crucial. The YPLF continues to form a network for property law researchers around the world with new conferences and publications for both junior and more advanced scholars. It is accompanied by this book series, *Property Law Perspectives* (PLP), in which the participants' papers are published. Past meetings of the YPLF have been held in Edinburgh (2009), Maastricht (2011), Stellenbosch (2012) and Leuven (2013). The latter three led to the publication of volumes I, II and III of *Property Law Perspectives*. The present volume, PLP IV, forms the most recent addition.

2. Renewed attention for the roots of property law

The papers presented at the YPLF are generally representative of the rapid developments currently taking place in property law and of the expansion of the field (or our understanding of it) to include aspects of environmental law, constitutional law, EU law, and internet law, to name a few. Nevertheless, the frontier research that many of the YPLF participants undertake still tends to be rooted in some of the oldest surviving

doctrines of property law, with researchers either rediscovering these doctrines or reshaping them to adapt them to the present day context. The papers contained in the first three volumes of *Property Law Perspectives* reflect the novelty of the research conducted within the YPLF network. This volume, the newest addition to the series, shows that attention is also still being paid to the roots of property law. The papers contained within it take us on legal historical journeys, exploring basic principles and well-known concepts of property law such as the *prior tempore* rule and the rules on acquisitive and extinctive prescription. It seems fitting that these papers have resulted from the YPLF's meeting at a place so steeped in history as Oxford.

3. Contributions to this volume

The contributions to this volume deal predominantly with continental European legal systems, both those that form part of the present day French and German legal families as well as Roman law. Rafaël Ibarra Garza's paper, however, also takes us across the North Atlantic to the Mexican legal system.

The contribution by Ann Apers and Dorothy Gruyaert explores the tension between, on the one hand, retention of title clauses and, on the other hand, the rule on 'immovable incorporation' by which a movable object becomes incorporated into an immovable object such that it is no longer separately identifiable and therefore becomes part of the ownership of the immovable object. The rule on immovable incorporation clearly has the potential to defeat retention of title clauses. Apers's and Gruyaert's paper analyses in particular the new Belgian legislation, which at the time of writing is yet to be enacted, that deals with this issue and mitigates some of the risks for the party relying on the retention of title clause. At the same time, the paper draws parallels with the interpretation of the 'immovable incorporation' rule provided in Dutch and German law.

Elien Dewitte's contribution takes us into the world of the sale of churches. A decline in church attendance makes it difficult to bear the costs of heating, maintenance and restoration. Since demolition is often considered to be undesirable, selling the church is often the only way to ensure its continued existence. However, a sale often also means that the church will no longer be used for the purpose for which it was originally intended. The paper investigates how the use of either a long lease, a right of usufruct or a right of superficies can ensure that the new purposes to which the church is put after sale do not detract too much from its religious character.

Laurens de Hoog's paper takes us back to Roman law and to the beginnings of one of the most well-known and fundamental principles of property law, namely the *prior tempore potior iure* rule, by which property rights created earlier in time will generally defeat property rights created later in time. He explores the origins of this rule and how it applied to conflicts between security rights, between rights of use, and between security rights and use rights. By analysing the rule's origins he endeavours to aid our understanding of how and why the rule works nowadays.

Björn Hoops's paper investigates a case of excessive state action which is similar to expropriation in that it prejudicially affects a private party's property rights, but which differs from expropriation in the sense that the private party's property rights, although

severely affected, are not taken away. Rather, the effect of the state action manifests itself such that there is a drastic reduction in the use the private party can make of its ownership. The case concerns a movable bridge in the municipality of Utrecht, the Netherlands, which was replaced by a non-movable bridge, thereby cutting off much of the river traffic crucial to the private company's business of ship building and repair. Hoops's paper analyses what, if any, legal basis there might be for a claim for compensation by the company. It does so by comparing Dutch and German law on the matter. In taking on this topic, which combines property law with constitutional law, Hoops follows a running theme throughout all of the PLP volumes, namely that of constitutional property law.

The contribution by Rafaël Ibarra Garza shows us how a concept of property law that had gone out of fashion can reappear, despite the fact that it had been replaced by new concepts and legal techniques. He explores the demise of the right of ownership as a method of securing an obligation in favour of other security devices, such as *pignus* (pledge) and *hypotecha* (hypothec/mortgage). This change in preference for security devices occurred already under Roman law, but now the use of the right of ownership to secure an obligation has reappeared in both Mexican and French contemporary law, even though the other security devices are well established. Ibarra Garza places this development in the context of what he calls the battle between legal technique and legal policy in the realm of securities and insolvency.

Johan Van de Voorde's paper provides us with a theoretical and historical analysis of the concepts of acquisitive and extinctive prescription. He compares both French and Belgian law on the subject. The paper focuses on the question of whether these two types of prescription should actually be seen as forming a unity, or whether there is still reason to treat them as two separate and distinct versions of prescription.

Oxford, Leuven, 2015

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