

# Introduction

The reasons for this collection of essays, and the broader project of which it forms part, are the same ones neatly identified by Lord Simonds in 1954:

[T]he true view that emerges from a consideration of this jurisdiction through the centuries is ... that *it has been a creature of gradual growth*, though with many setbacks, and that the range of its authority can only be determined by seeing what jurisdiction the great equity judges of the past assumed and *how they justified that assumption*. ... We are as little justified in saying that a court has a certain jurisdiction, merely because we think it ought to have it, as we should be in declaring the substantive law is something different from what it has always been declared to be, *merely because we think it ought to be so*. *It is even possible that we are not wiser than our ancestors*.<sup>1</sup>

Although his Lordship was referring to equity, it was put in a very common law way. His observation raises four themes. First, the common law process was, and still is, organic. The early judges did not claim to pronounce on the whole of the common law; it would hardly have been possible, given that justice ultimately rested with the King. They decided the issues brought forward by the parties, so that only over time did a body of authority on a point or related points accumulate. In the case of the common law, over time does not mean in the lifetime of one of them, but over their lives and their successors' lives in a process that has continued for over 850 years.

Secondly, so far as we have been able to discern, it has always been a feature of the common law (with few notable exceptions)<sup>2</sup> that judges would give reasons and that those reasons would be made public. Reasons serve very many purposes, but the most important is that they facilitate a general acceptance of the law by those who are subject to it. Reasons are a balm to the parties involved; and allow others of that generation to organise themselves accordingly. Perhaps more importantly, at least in the longer run, the provision of reasons allows those who follow to examine *why* a conclusion was reached; to view both the reasoning and the outcome critically (in the proper sense); and to consider whether the premises, logic, and conclusion were and remain valid. In the common law tradition, the burden of acceptance is placed on the judges who follow. The third theme is that the effect of an organic law, developed upon reasons, means that no single judge has, or ever had, the authority to decide the law for all time or to depart without reason from what has gone before. The truly idiosyncratic is not only a conceit; it lacks respect for those who have considered the same issues in the past. Accordingly, fourthly, those appointed as judges have every reason to

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1 *Chapman v Chapman* [1954] AC 429, 444 (emphasis added).

2 See, for example, the practices of the Star Chamber.

maintain a sense of modesty in the office. The best ones recognise this trait – this sense of legal history – as inherent in the fabric of the common law.

This collection of essays has been prepared for the purpose of re-introducing a course in legal history at a Sydney University. The purposes of the collection include to introduce aspects of legal history – not necessarily the usual ones – for discussion; in that way, to highlight the breadth of the law, which, if history matters, cannot be dismissed merely as tort and contract (or tort, contract and restitution); to identify some of the great issues and personalities in and about the law; to promote further critical investigation; and, it is hoped, to encourage the virtues pointed to by Lord Simonds LC, which only come with time and an appreciation of what has gone on before.

It is not our intention to defend the study of history. As the philosophers say, you cannot convince a man who will not be convinced. However, there are things that might usefully be said about *legal* history. To begin with, the understanding and practice of law in the second decade of the 21st century really is assisted by a firm understanding of the historical roots of that law in England. A system of law which emphasises precedent as a means of continuity, consistency and judicial discipline requires it; the very fact of examining past cases is an exercise in legal history. The development of law case by case not only illustrates the boundaries of a principle, action or conclusion; that development *is* the law. Further, the presence of a constitution, written or unwritten, underpinning the common law only emphasises this point. This is, perhaps, the narrow view of legal history, but in this we cannot see any real distinction between what is required of those who study the law, those who apply it, and those in practice.

However, no narrow view needs to be taken of what constitutes legal history or how it should be presented. The purposes outlined above can be served in many ways, from original research to a synthesis of primary and secondary materials, a study in depth of particular personalities and their works, fresh attention drawn to forgotten material, or chronological, taxonomic or structural analysis. The eclectic nature of the essays here was apparent early and embraced quite consciously. Students *ought* to have the opportunity to be introduced to legal history recognising a variety of approaches, methods and styles. A further and important matter is that a consensus of opinion on some point in legal history does not make it right for all time: if it is in issue, there must be an examination of why.

Last, as to the present and to the future (including as it is being affected by the relatively recent establishment of formal legal degrees), legal history holds a claim to take its place alongside the other courses required or offered by Universities. It did not make the Priestley Eleven<sup>3</sup> essential subjects, perhaps because it was assumed that a little of it would be taught in the introduction to each. As the demands of and on students – and also on University balance

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3 The “Priestley Eleven” is addressed in Lücke, “Legal History in Australia: The development of Australian legal/historical scholarship” (2010) 34 *Australian Bar Review* 109.

sheets – increase, legal history seems to have been one of the first against the wall when the revolution came.

There are certain features of an introduction to legal history (not unique to the subject) which, taken together, can appear intimidating. The first is the language: the very early works were in a curious Latin, which Sir Francis Bacon called vulgar, and frustrating to those who were taught the disciplined form. That Latin was often translated into Norman French, which was itself distinctive, and positively barbarous for students of classical French. But very many works and cases now have been translated and, so long as the facts of translation and distance in time are kept firmly in mind, the task should not be rejected for that reason alone. Similarly, it is correct that legal history requires grappling with the legal language of the day, even if the meaning cannot be made certain: *damnum, vie et armis, disseisin, delicto*, trespass *sur le case*, *assumpsit* and so on. But this is hardly unusual for a law course, nor otherwise insuperable.

Other difficulties are more apparent than real. Although they are practically important, far from being intimidating they are really very good examples of *mere knowledge*. Some of the following may assist. The early cases and statutes are identified by *regnal year*, that is, the year of the King or Queen. Cases decided in the third year of the reign of Henry II are, for example, noted as 3 Hen II, meaning, in the Gregorian Calendar, 1156-1157. Next, from about the late 1500s judges and barristers began to publish notes of important cases, often collected in volumes and published under their own names. There are Sir Edward Coke's reports, unsurprisingly abbreviated as Co Rep; and Brook's New Cases or BNC. Such reports are often referred to as the *nominate reports*, which were then collected, roughly by reference to jurisdiction, in the English Reports (ER) series. Therefore, a case such as *Slade's Case* is cited: *Slade's Case* (1598) 4 Co Rep 91 (76 ER 1072), for the original decision of the King's Bench, and Trinity Term, 44 Eliz I (1602) 4 Co Rep 92b (76 ER 1074), for the subsequent decision of the extraordinary tribunal of "all the Justices of England, and Barons of the Exchequer". *Slade's Case* was highly controversial and so, again unsurprisingly, was reported by a number of others interested at the time, sometimes under a different name, and sometimes taking the year of the collection, not of the case: Cf *Morgan v Slade* (1602) Moo KB 667 (72 ER 827); (1688) Moo KB 433 (72 ER 677); *Slade v Morley* (1792) Yel 21 (80 ER 15). It is, as Milsom says, probably the most discussed lawsuit in the history of the common law.<sup>4</sup>

Similarly, the KB is the *King's Bench*; CB or CP the *Common Bench*, sometimes called *Common Pleas*; and Exch for *Exchequer*. These three courts made up the common law ones. Very generally, the King's Bench was the court for crimes, and near-crimes, such as trespass; the Common Pleas dealt with the ordinary cases, such as debt, or account, or covenant; and Exchequer was concerned with anything to do with the royal revenue. Later, Exchequer also claimed an

4 Milsom, *Historical Foundations of the Common Law* (Butterworths, London, 2nd ed, 1981) 352.

equity jurisdiction, and, in so doing, was probably the first court to administer both. *Chancery* refers to the office of the Lord Chancellor and his department, which had the vital job of producing all the writing required by a King. Writs to commence proceedings, therefore, were issued out of Chancery. But the King remained the ultimate authority, and could decree over or against the common law. When the volume of petitions to the King in person became too burdensome there was a delegation to the Chancellor<sup>5</sup> so that from, say, the early 1600s, the Chancellor took on the distinctly judicial function of doing justice according to conscience and equity, as the King had claimed to do before.

These courts continued from their establishment in about the 1200s until 1875 when all of them (including the Court of Chancery) were reconstituted in a single High Court for England and Wales, which was the first change of profound significance brought about by the *Judicature Acts* of 1873 and 1875. At the outset, that High Court was administered in divisions (sometimes, therefore, called the *divisional courts*), which corresponded to the courts that had existed before; for example, there was the King's Bench Division or KBD. From this time, about 1875, and continuing today, reports of cases were collected in an authorised series – that is, a series approved by the courts themselves – such as the Appeals Cases (AC) for House of Lords decisions, or reports from the Chancery Division (Ch D). The reforms of 1875 also introduced, for the first time, a Court of Appeal, but that, it is important to remember, was a statutory not a common law change.<sup>6</sup>

For a long time the House of Lords also claimed a judicial authority on behalf of the King. Certain cases could literally be heard by the whole House. The Lord Chancellor, who was obviously a member of the House of Lords, could also sit on appeal from his own decisions.<sup>7</sup> Again, this changed with the reforms introduced around 1875, so that shortly after the *Judicature Acts*, a standing judicial committee was established to do its judicial work. That committee was then constituted by judges appointed to the Lords for that purpose, with the fantastic title of Law Lord.

The next matter, and the final one for these purposes, is that an introduction to legal history brings with it new literature and personalities, which perhaps can be treated as something of a legal canon. This has the enormous advantage of generating new disputes about whether a canon can and should exist and, if so, who, and what works, need to be included.

While there certainly was an established law before the Conquest in 1066 (the Anglo-Saxon era), it is necessary to start somewhere, and the Conquest was of such a moment that it laid the foundations for a royal law across the separately governed regions of greater England, to be known as the common law.

The first work to mention then is the *Domesday Book*, dating from around 1086. It is, however, not so much a law book as a collection of facts – important ones –

5 Note the decree of Edward I in 1280, in Chapter 1, “A Sketch”.

6 *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 578.

7 See, for example, *Foley v Hill* (1848) 2 HLC 28 (9 ER 1002).

from which the law as it stood can be inferred.<sup>8</sup> The first legal books, so far as we know, were produced between 1150 and 1300. In about 1177, Richard FitzNeale (sometimes FitzNigel) prepared the *Dialogus de Scaccario* (The Dialogue of the Exchequer), which examined the practice and procedure of that department in respect of the royal revenue.<sup>9</sup> The next, probably between 1187 and 1189, and reputedly by Glanvill was the *Tractus de legibus et consuetudinibus regni Anglie* (The Treatise on the Laws and Customs of the Realm of England).<sup>10</sup> The third, by Bracton, in about 1260, was *De Legibus et Consuetudinibus Angliae* (On the Laws and Customs of England).<sup>11</sup> There is a remarkably large amount of law in these works, in particular the latter two, which is still good law today. To these might be added Fleta's *circa* 1290 *Commentarius juris Anglicani* (On the Common Law of England);<sup>12</sup> and Britton, writing in about 1300 in a work only known as *Britton*.<sup>13</sup> There is then a long pause in the production of books, and it is hard to explain why. It was perhaps considered enough in this period to study these texts and the cases already decided, and no one was moved to provide his own commentary in a unified way. Nonetheless, in a clear indication that the law was still preoccupied with real property, Sir Thomas Littleton's great work *On Tenures* was published in about 1481.<sup>14</sup> The tradition of publication by judges was continued when Sir Anthony Fitzherbert published *La Graunde Abridgement* between 1514 and 1517;<sup>15</sup> and the *New Natura Brevium* in about 1534.<sup>16</sup> At about the same time, in 1523 and 1530, St German produced *Doctor & Student* in the form of two dialogues, asking his own questions and answering them in an explanation of the law and equity.<sup>17</sup> There was then it seems another pause, until Sir Edward Coke produced his *Institutes of the Lawes of England* between 1628 and 1644,<sup>18</sup> which became vastly influential. That said, it contained some very bold claims on behalf of the law, as well as some prejudicial conclusions, and was influenced at times by what Sir Edward thought the common law ought to be, given his own view as Chief Justice and his apparent disdain for King James.

8 Fleming, *Domesday Book and the Law* (CUP, Cambridge, 1998), 5-6.

9 FitzNigel, *De Necessariis Observantiis Scaccarii Dialogus de Scaccario* (Clarendon Press, Oxford, 1902 ed).

10 Hall (ed), *The treatise on the laws and customs of the realm of England commonly called Glanvill* (OUP, Oxford, 1965) (reprinted by W Gaunt & Sons, Florida, 1983).

11 Thorne (ed), *Bracton on the Laws and Customs of England* (HUP, Cambridge USA, 1968).

12 Fleta, *Commentarius juris Anglicani* (Vol 72, Selden Society, London, 1953).

13 Nichols (ed), *Britton: An English Translation and Notes* (John Byrne, Washington DC, 1901).

14 Wambaugh, *Littleton's Tenures in English* (J Byrne, Washington, 1903).

15 Fitzherbert, *La Graunde Abridgement* (reprinted by Law Book Exchange, Clark, 2009).

16 Fitzherbert, *The new natura brevium of the most reverend judge, Mr Anthony Fitz-Herbert* (The Assigns of Richard & Edward Atkins Esqs, London, 1704).

17 St German, *Doctor & Student* (Selden Society, 1974 ed) (reprinted by William Stein, Buffalo, 1996).

18 Coke, *Institutes of the Lawes of England* (reprinted in Sheppard (ed), *The Selected Writings of Sir Edward Coke* (Liberty Fund, Indiana, 2003).

In about 1713, Sir Matthew Hale's *The History of the Common Law of England*<sup>19</sup> was published. Hale was perhaps the first to recognise that the history of that law was being lost, or at least deserved synthesised attention. However, standing over them all, at least in respect of the common law, was Sir William Blackstone's great work, prepared from his experience as a practitioner and then as one of the first academics dedicated to the common law, in his *Commentaries on the Laws of England* from about 1765.<sup>20</sup> That work was comprehensive, although derisory in respect of equity, and arrived at just the right time for export to the colonies, in particular, what were to become the United States of America and the Commonwealth of Australia.

After Blackstone, there was another pause, this time a perfectly explicable reticence on the part of anyone minded to survey the whole of the law. Rather, a new tradition was being laid down, of textbooks dedicated to specific subjects or topics. So, for example, regarding equity, one of a large number of works by the great Joseph Story, his *Commentaries on Equity Jurisprudence*,<sup>21</sup> was first published in 1836; Lewin's work, which became *Lewin on Trusts*, in 1837;<sup>22</sup> and *Snell's Equity* in 1868.<sup>23</sup> The beginning of the hegemony of contract can be seen in Sir Frederick Pollock's *Principles of Contract at Law and in Equity* of 1876,<sup>24</sup> and in Sir William Anson's *Principles of the English Law of Contract*, published in 1879.<sup>25</sup> Finally, Pollock and Wright drew together what was, at that time, most of the law of torts, in the 1888 publication of *Possession in the Common Law*.<sup>26</sup>

At about the same time, following the lead from Hale, a fourth field of interest matured: that of the legal historian. The Rev William Stubbs was probably the first, in 1871, doing the immense service of collecting together and annotating the decrees, assizes and statutes of the common law in his *Select Charters and Other Illustrations of English Constitutional History*.<sup>27</sup> In 1881, Oliver Wendell Holmes published *The Common Law*,<sup>28</sup> then Sir Frederick Pollock joined with the greatest of the historians, Sir Frederic Maitland, to publish *The History of English Law Before the Time of Edward I* in 1895.<sup>29</sup> Sir William Holdsworth went further,

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19 Hale, *The History of the Common Law of England* (reprinted by UCP, Chicago, 1971).

20 Blackstone, *Commentaries on the Laws of England* (Clarendon Press, Oxford, 1765-69) (reprinted UCP, Chicago, 1979).

21 Story, *Commentaries on Equity Jurisprudence* (Hilliard Gray, Boston, 1836).

22 Lewin, *A Practical Treatise on the Law of Trusts* (Maxwell, London, 1837).

23 Snell, *The Principles of Equity* (Stevens & Haynes, London, 1868).

24 Pollock, *Principles of Contract at Law and in Equity* (Stevens & Sons, London, 1876).

25 Anson, *Principles of the English Law of Contract* (Clarendon Press, Oxford, 1879).

26 Pollock & Wright, *An Essay on Possession in the Common Law* (Clarendon Press, Oxford, 1888).

27 Stubbs, *Select Charters and Other Illustrations of English Constitutional History* (Clarendon Press, Oxford, 1871) (reprinted by Nabu Public Domain Reprints, USA).

28 Holmes, *The Common Law* (Little Brown, Boston, 1881).

29 Pollock & Maitland, *The History of English Law Before the Time of Edward I* (CUP, Cambridge, 1895) (reprinted by Liberty Fund, Indianapolis, 2010).

between 1903 and 1966, in 16 volumes of *A History of English Law* (often HEL).<sup>30</sup> And the great American common law historian, James Barr Ames, published his *Lectures on Legal History* in 1913.<sup>31</sup> That tradition continued, although not on the same scale, with legal historians such as TFT Plucknett,<sup>32</sup> Sir Victor Windeyer (in Australia),<sup>33</sup> AWB Simpson,<sup>34</sup> SFC Milsom,<sup>35</sup> RC van Caenegem<sup>36</sup> and JH Baker.<sup>37</sup>

Finally, it should be noted that the Selden Society, established under the influence and auspices of Maitland, has, since 1870, published volumes each year dedicated to legal history; and in 1986 Baker and Milsom joined to translate some of the early cases (the first in the collection from 1199), producing what is really a new nominate series (B&M), in *Sources of English Legal History*.<sup>38</sup> The following from *Anon* (1557) BL MS Harley 1624, fo 57 (CP) gives a sense of how cases grappled with issues still resonant in law today:

An action of debt is brought on a bond. The defendant says that the bond is endorsed with a condition that if before a certain day he repaired all the banks of a river in a certain place then the bond would be void; and he says that, immediately after the date of the said bond, a great quantity of rain fell by the providence of God so that the place remained flooded throughout the time and so he was unable to repair it.

*Browne* asked whether this was a good plea.

THE COURT: Yes.

*Browne*. What if it were not so flooded but that he might have repaired it at great expense?

BROOKE CJ: Then it would be necessary to make an issue of that.

*Browne*. If it was flooded, was it not his own foolishness to bind himself to such an inconvenience?

STAUNFORD J. There is a distinction between a man binding himself to an impossibility, and binding himself to do something possible which afterwards becomes impossible.

Or, on the theme of judicial humility, from *Witham v Witham* (1669) 3 Chan Rep 41 (21 ER 723) in Chancery:

The Plaintiff moved to commit the Defendant; for that when the Plaintiff told him he came to serve him with an Order from the Master of Rolls, the

30 Holdsworth, *A History of English Law* (Little Brown, Boston, first published 1903-1966, 1941 ed).

31 Ames, *Lectures on Legal History* (HUP, Cambridge, 1913).

32 Plucknett, *A Concise History of the Common Law* (5th ed, Little Brown, Boston, 1956).

33 Windeyer, *Lectures on Legal History* (LawBook, Sydney, 1938).

34 Simpson, *A History of the Common Law of Contract* (Clarendon Press, Oxford, 1975).

35 Milsom, *Historical Foundations of the Common Law* (OUP, Oxford, 2nd ed, 1981).

36 van Caenegem, *The Birth of the English Common Law* (CUP, Cambridge, 2nd ed, 1988).

37 Baker, *An Introduction to English Legal History* (OUP, Oxford, 4th ed, 2002).

38 Baker & Milsom, *Sources of English Legal History* (OUP, Oxford, 2nd ed, 2006).

Defendant said, The Master of the Rolls kiss my Arse; but the Master of the Rolls only ordered an Attachment for the Familiarity, but said, He believed the Lord Keeper would have committed him.

Turning then, to the themes addressed in this book.

## I Foundations

The topics we have included as those going to the foundations of law in a discipline of legal history have been identified above and are expanded on a little more, below. In summary, they are:

- (i) an early law moulded around, by and with the Kings; commencing with a system of tenure; progressed by the good fortune that some Kings had an interest in administration and law; and resulting in the unique and distinct preference for possession over title or any complete theory of ownership;
- (ii) the system of writs, pleas and parties, and the courts which adjudicate on them, which are the necessary preface to understanding how the law is made and develops;
- (iii) a tradition (which inheres from the start) of respect for the analysis of others, in particular, for good and persuasive reasons as a guide or precedent for the resolution of a dispute or issue;
- (iv) an acknowledgment that ultimately the King was in charge and that there would be orders and decrees of the King intended to bind his subjects, to which the common law would necessarily conform;
- (v) while the courts of law administered the King's justice as a *common law*, a tradition was maintained of petitions to the King raising some special circumstance, to be decided according to his conscience and equity;
- (vi) a second revolution, 800 years on from the Conquest, which saw the courts of law and equity brought together, with the then distinct systems being administered in a single High Court;
- (vii) at about the same time a common law, not only for England, but suitable for export and application abroad, by which other nations in turn established systems with a law in common which could look to each other for guidance and good reasons; and
- (viii) overall, a system in which no single judge could make or dictate the law, but in which some judges and academics who most exemplified what we think is the vital tradition, brought a respect for what had gone before, and reasoned from there.

The essays commence with (I) "A Sketch", necessarily attenuated, but which looks to introduce the early but pivotal moments in the formative stages of royal law, from the Conquest of 1066 to the end of the reign of Edward I in 1307. By

the end of the reign of Edward the three features outlined above – the writ and court system, a tradition of looking to past judges and legal systems for guidance and reason, and an acceptance of the King’s authority in law – are firmly in place. These subjects are taken up in the three essays that follow.

Mr Manousaridis’ essay, (2) “The Common Law Courts: Origins, Writs and Procedure”, explores the first of these features in more detail. Grappling with the common law and its method requires some introduction to certain closely related developments: the various courts which came to administer the law; the system of writs which controlled the actions brought before the courts; and the development of pleading. To give an example of why this can matter, the writ of debt in the Common Pleas was a writ *praecipe* (a command) ordering that the putative defendant pay the sum claimed to be due, or appear in court to explain why not. Thus, and it is still the case today, the debt action is an action for a fixed sum of money. Sir Henry Maine once said that substantive law was secreted in the interstices of procedure;<sup>39</sup> but with the subsequent publication of many more early cases, it may be fairer to say that substantive law was manifested from procedure.

(3) The next essay, by Justice Emmett, considers the “Reception of Roman Law in the Common Law”. The earliest authors, encouraged by the reforms of Henry II, reflected on a nascent common law and supplemented it, in accordance with the intellectual method of the time, by looking to what the ancients did. Justinian’s *Corpus Iuris Civilis* was rediscovered and taught in Europe in the 1100s. But it did not arrive at once or take command of the whole field (as it did in Europe); it came in waves, of which at least three are apparent. Initially, and in the formative centuries, it was acknowledged by Vacarius, Glanvill and particularly Bracton. It landed again in the 1500s, with the rise of trade, and a felt need for a Law Merchant to facilitate that trade. And again in the 1700s, Blackstone encouraged an examination of just how much Roman law had in fact been taken up in England.

As has already been noted, the two outstanding works of the formative period were those of Glanvill and Bracton. They addressed the law as it was being developed in procedure (Glanvill), and law as a system and as a whole (the ambition of Bracton). They evidence a remarkably large amount of law still applicable today. To give one example, the mortgage was already in place in the time of Glanvill, the *gage* being a pledge of property as security for a loan, and the *dead gage* or mort-gage being a variation in which the rents and profits that came with possession of the property did not reduce the loan.<sup>40</sup> It is thus a-historical to refer to a mortgage (or lease, deed poll or bond) as a mere contract, in circumstances where it preceded that notion by 500 years. Thus, we think, these works can hardly be dismissed as irrelevant or precatory, so

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39 Maine, *Early Common Law & Custom* (first published 1890), 389, quoted in Maitland, *Equity also The Forms of Action at Common Law* (CUP, Cambridge, 1910), 295.

40 Glanvill, X.6.

that Gleeson SC takes a closer look in (4) “Glanvill to Bracton: The Two Great Early Legal Treatises”. These treatises are considered as early and fine works of legal literature: reflecting the world view of the high middle ages, where the rediscovery of ancient learning encouraged a desire to apply to the common law systematic organisation and intellectual principles which equally pervaded the study of politics, grammar and rhetoric. This organising method was then lost for some centuries before its rediscovery again in the 16th century. However, these treatises have never fully been lost from view up to the present. They have been referred to in over 30 decisions of the High Court in this country.

The above, then, are the foundations of a royal justice across the realm, which comes to be known as the common law. Apart from the spectacularly unsuccessful attempt of Sir Edward Coke to elevate the common law, this law has always been subject to and accommodated *statute*. There was no question about the binding nature of the laws of the Conqueror; he was, after all, a conqueror. There were questions about the propriety of other commands of the Plantagenets, so that really great laws were made in council, with the Bishops and Barons, and whether voluntarily or not (see, for example, the *Magna Carta* of 1215). Good Kings held councils, poorer ones avoided them, until a parliament was firmly established in English constitutional history. Mr Emmett’s (5) “English Statutes Shaping the Common Law” takes this up, with a focus on the laws of Edward II (that English Justinian), and then of the Tudors, when Henry VIII could hardly help himself. The essay draws attention to the statutes that embody, illuminate or foreshadow current principles of Anglo-Australian law. For a recent illustration of the significance of statutes, and a recognition of the need for some legal history, see *Marcolongo v Chen* (2011) 242 CLR 546, and the interpretation of s 37A of the *Conveyancing Act 1919* (NSW), which has its origins in *An Act against fraudulent Deeds, Gifts, Alienations, etc* 1571, 13 Eliz I c 5. Even Elizabeth’s statute was not news: see, for example, *Statute Concerning Fraudulent Feoffments* 1376, 50 Edw III c 6.

In the 1700s, and after the interregnum, was the further foundational statute of the *Act of Settlement 1700* (12 & 13 Will III c 2) (An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject). This set out, amongst other things, the foundational judicial tenure (creating the circumstances of independence) in s 3:

That after the said Limitation shall take Effect as aforesaid, Judges Commissions be made *Quam diu se bene Gesserint*, and their Salaries ascertained and established but upon the Address of both Houses of Parliament it may be lawful to remove them.

A similar formulation was used in the Constitutions of all of the States making up Australia, and judicial independence committed to the Constitution of the Commonwealth in 1901, through the separation of the Courts in Chapter III and judicial tenure in s 72(ii).

If, as we hope, these essays provide an interesting introduction to certain foundations of common law, the next topic to consider is the fourth great court (after the Ecclesiastic, Exchequer and common law courts), namely Chancery. There is no separate essay on Chancery, the use, trusts, or equity at large: these are matters well traversed, and easily accessed, and ones that are better taken up in a further or different collection of essays. The topic chosen for discussion here is (6) Ms Roughley's "The Development of the Conscience of Equity". *Conscience* and the *unconscientious* are referred to over and over again in the cases reported in Chancery, as an identification of jurisdiction and of purpose. The history of conscience is not confined to the courts or the personalities of jurists and politicians such as Sir Edward Coke, Francis Bacon or Lord Ellesmere, whose scuffles have often been seen to define the term. The conscience of equity developed during a period in which the questions of what conscience did, could, and should mean were politically, theologically and jurisprudentially contentious. This essay explores both how conscience informed the development of equity, and what informed the meaning of the concept itself. Conscience remains a unifying principle of modern equitable doctrines, most pronounced in the jurisprudence of the High Court in Australia (with a caveat against the use of the barbarous,<sup>41</sup> "unconscionability").<sup>42</sup>

The next matter of foundation is, we think, the *Judicature* reforms of 1873-1875. (7) In "Five Judicature Fallacies" Leeming SC takes up a dialogue, which is a very traditional style (see, for example, *St German's Doctor & Student*), although somewhat uncommon today. The reforms reconstituted the great courts, established a single High Court for England and Wales, and directed that the administration of law and equity happen together. These reforms are sometimes taken as the beginning of, or justification for, a fusion of equity and law, which – appropriately given the metaphor – is regularly attended by great heat. As to fusion, the important questions were asked by the late Justice Lehane in a *Cambridge Law Journal* book review: what does fusion mean; how did it happen; and what follows from that?<sup>43</sup>

From there, albeit before the *Judicature* reforms were complete, England's interests, and therefore the common law, were expanding abroad. Accordingly, the foundations of law in the colonies and dominions are in two parts: the law as it had developed in England; and the law as it was treated with in the colonies. In this collection the essays concern the coming of English law to the Australian colonies, then to a Commonwealth of Australia. (8) Stoljar SC has written "Invisible Cargo: The Introduction of English Law into Australia". The introduction began, as he says, with a sealed box of the orders and authorities of

41 Heydon & Loughlan, *Cases and Materials on Equity and Trusts* (7th ed, Butterworths, Aust, 2007), 330.

42 See, for example, *Blomley v Ryan* (1956) 99 CLR 362; *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; *ACCC v Berbatis* (2003) 214 CLR 51.

43 Lehane, "Specific Performance, By Gareth Jones" (1987) 46 *Cambridge Law Journal* 163, 175.

the Crown. The criminal law features prominently in the narrative of the penal colony's early years. A clear sense is conveyed of the harshness of convict life under what was essentially military rule. The story includes the establishment of civil legal institutions that presaged the growth of a free society. It ends with a discussion of how British institutions addressed the status of indigenous persons under British law, and the recognition of indigenous land rights.

Land is the topic Ms Lane takes up (9). She shows that an understanding of feudal doctrines is vital to the students of contemporary Australian land law (despite protests to the contrary). These doctrines are especially connected in Australian history to the fraught issue of sovereignty. They serve as a background to the watershed *Mabo* decision. Land law is not, however, wholly derived from the ancient past: witness the Torrens system of title by registration, one of South Australia's gifts to civilisation. Ms Lane concludes that Australia's is a plural land law.

Justice Kenny (10) then traces "Colonies to Dominion, Dominion to Nation", an essential topic in the examination of the foundations of the law today. The essay examines how the States continued the common law and the Commonwealth of Australia came to be. (11) Justice Lindsay in "Building a Nation: The Doctrine of Precedent in Australian Legal History" looks at the doctrine of precedent, as it also had to be adapted to new circumstances. These two essays, amongst all in the collection, are perhaps the most important for modern day practitioners to grasp. What is the status of a 1700 decision of Lord Mansfield; or of the judicial committee of the House of Lords before and after 1986? And for those most interested, or only interested, in the unique position of Australia, we would embrace Lücke's commendation of Finn:

Indeed, no account of Australian legal development could be completely severed from its British origins. As Paul Finn has shown, an effective way of telling an Australian legal story is to commence with English law and then show how the Australian counterpart diverged from its model.<sup>44</sup>

Closely related, (12) Gleeson SC & Mr Yezerksi have written on "The Separation of Powers and the Unity of the Common Law". The contention here is that, as the common law travelled abroad, and the colonies and nations grew, a new and potentially very powerful jurisprudence emerged, in which the common law nations – the subjects and beneficial recipients of English law – could legitimately look to each other for authorities and principles. By the time of Blackstone, English domestic law retained the proposition from Bracton that the King's action could not be scrutinised by the Courts, and otherwise had come to regard *Parliament's will* as expressed in statutes as binding on the Courts. With the American Revolution and the age of written Constitutions in the new United States expressing a *will of the people*, a radically new norm held the legislature

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44 Lücke, "Legal History in Australia: The development of Australian legal/historical scholarship" (2010) 34 *Australian Bar Review* 109, 142, referring to Finn, *Law and Government in Colonial Australia* (OUP, Melbourne, 1987).

and executive subject to the Constitution, and that Courts could strike down statutes that were considered contrary to it. Expressed most eloquently in *Marbury v Madison* in 1803, this foundational United States doctrine in turn became the source of the parallel institution of judicial review in Australia after Federation in 1901. Arguably, in the past 20 years, the legal relationship of the United Kingdom with European law has come, perhaps reluctantly, closer to embracing a role for the Courts expressed in *Marbury*.

Finally, to conclude the essays on foundational matters, the collection turns to consider the role of individuals and academics. There are, we think, those judges who in their moment have exhibited the traits of the great judge: a modesty and respect for the thinking that had gone before; a tolerance and respect for the arguments put forward on behalf of the litigants; a knowledge of, and deference to, the history and method of the law; and an ability to manifest these attitudes in reasons that are not only persuasive in the sense of precedent, but are commandingly rational, and therefore demand respect from those who follow.

Justice Allsop and Ms Foong have written on (13) “Justice Joseph Story”, whose work was prodigious, and vastly influential *because* of his knowledge of and respect for the history that preceded him, in particular the commercial law and equity that had come to the United States from England. His analysis of equity was so compelling that it quickly travelled back to England (and to Australia) to be properly treated as authoritative as a text could be.<sup>45</sup> As a second example, Justice Hayne turns to (14) “Sir Owen Dixon”, an Australian High Court Justice, Ambassador to the United States, and mediator of the dispute between India and Pakistan over Kashmir; a man who English judges wished was a judge in England; and otherwise described as the greatest common law judge in his tenure. The question to be asked for these purposes is, *why?* What are the features of his judgments, method and reasoning that, 60 years on, make his work the most regularly referred to and followed by modern High Courts?

Finally for this part, concluding foundations (15) Dr Higgins’ essay “The Jurisprudes” introduces some of the great thinkers inside and outside the practice of the law. Although the common law proceeds by deference to the cases that have gone before, commentary and academic criticism have also had a vital influence. It has already been shown that the common law is far from mere precedent. The sort of deference which inheres in the common law extended and extends to thinkers in the academy.

The project would not have been possible without the generous donation of both the time and the talents of the authors of these essays. The editing cannot improve on the essays, and there is no particular credit in the title “ed”, but we do hope, at least, that it has not let anyone down. We record once again our thanks.

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45 On the influence of academics and texts, see Heydon J in *Australian Crime Commission v Stoddart* (2011) 244 CLR 554; 86 ALJR 66, 84-96 [88]-[131]; [2011] HCA 47.

## INTRODUCTION

Finally, we hope that some readers will find somewhere in all of this their own particular muse. As McHugh J once said in argument: “A lack of understanding of legal history is a misfortune, not a privilege”.<sup>46</sup>

JTG  
JAW

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<sup>46</sup> *Rich and Silberman v CGU Insurance Ltd* [2004] HCATrans 366.