questions raised by the dissemination of information.

Michael Sexton*

*LL.B. (Hons)(Melb.), LL.M. (Va), Barrister-at-Law New South Wales.

FOOTNOTES

1 *Rookes* v. *Barnard* [1964] AC 1192.
2 *Uren* v. *Australian Consolidated Press Ltd* (1965) 83 WN (Pt. 2) (NSW) 229.
3 *Australian Consolidated Press Ltd* v. *Uren* (1966) 117 CLR 185.
4 *Australian Consolidated Press Ltd* v. *Uren* (1967) 117 CLR 221.
5 *Gorton* v. *Australian Broadcasting Commission* (1974) 22 FLR 181.
6 *Calwell* v. *Ipec Australia Ltd* (1975) 135 CLR 321.
7 *New York Times* v. *Sullivan* 376 US 254 (1964).
8 *Porter* v. *Mercury Newspapers Pty Ltd* [1964] TasSR 235.
9 *O'Shaughnessy* v. *Mirror Newspapers Ltd* (1970) 125 CLR 166.
10 (1942) 42 SR(NSW) 171, 174.
11 See ss 49-53 of the Defamation Act 1974 (N.S.W.).
12 For a consideration of the legal issues that arose out of the trial see *R.* v. *Hardy* [1951] VLR 454.
13 Film and Video Tape Classification Act 1984 (N.S.W.) s.9(2).
14 Joint Select Committee on Video Material.
15 *Commonwealth of Australia* v. *John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50-54.
16 *Id.*, 54-57.
17 *Attorney-General* v. *Jonathan Cape Ltd* [1976] 1 QB 752. *Cf. Argyll* v. *Argyll* [1967] 1 Ch 302.
18 Contempt of Court Act 1981 (U.K.).
19 See ss 77-79 of the Crimes Act 1914 (Cth).

Understanding Land Law, by J. OXLEY-OXLAND, B.A., LL.B. (Rhodes), LL.M. (Yale), Senior Lecturer in Law, University of Sydney, and R.T.J. STEIN, LL.B. (A.N.U.), LL.M. (Dalhousie), PH.D. (Sydney), A.Mus.A. (A.M.E.B.), Senior Lecturer in Law, University of Sydney, (Law Book Company, 1985), pp.i-xix, 1-171, with Table of Cases and Index. Cloth recommended retail price $22.50 (ISBN 0 455 20303 2), limp recommended retail price $12.50 (ISBN 0 455 20304 0).

In their preface to this book the authors make an important point: a knowledge of legal history is needed to understand the concepts and operation of contemporary land law. The book attempts to do just that by devoting more or less equal attention first, to the development of English land law from the Norman conquest to 1788 and, second, to the supervening Australian experience.

The authors' approach to legal history is in one sense novel but in most others thoroughly traditional and conservative. The novelty chiefly resides in the fact that they attempt to explain the legal rules and principles in the context of actual historical events. Thus the system of feudal tenure is explained in terms of the functional requirements of William the Conqueror's reign: land was granted to secure allegiance from the nobility. Also the role of charters and fines for evidentiary purposes in the reign of Henry I is illustrated by an example of a particular yet typical transaction.[1] This approach is supplemented by a liberal use of original source material, including extracts from the Domesday Book, translations of original writs, quotes from deeds of grant and carefully edited excerpts from statutes. The result is an extremely readable and clear exposition of major concepts and principles of land law. Also, very helpfully, they provide etymological explanations of abstruse and confusing terminology.

However, it is not in the use of original sources but in terms of its explanatory capacity that any history should be assessed. In this department the book exhibits very serious shortcomings. Thus, for the authors, the importance of the fine was due to the fact "that it took the place of livery of seisin".[2] Further, by means of common recoveries "conveyances were perfected before the close of the 16th century"[3] to ensure that a tenant in fee tail could pass a fee simple. These 'facts' are, however, stated without any explanation as to: a) why certain interests saw livery of seisin as a 'defective' mode of transfer of land; b) why tenants for life would want to bar the heirs of the body from the estate in the first place; c) why they were able to get away with it; and d) why those developments happened when they did. Historically, one factor at least cannot be ignored: with the availability of footloose merchant capital in the 16th century on an unprecedented scale, in conjunction with a general decline in income from land due to inflation (rents being based on fixed payments), there was considerable demand for land as secure investment.[4] No rational investor was attracted by the distinctly uncertain life interest, so pressure built up to supply this demand.

Additionally, the concept of seisin based on the fact of physical possession as proof of title was eminently serviceable where trade in land was minimal and most landholders generally remained tied to land for generations. However, a climate of rapid transfer of real property and the increase in absentee and temporary ownership, intensified pressures for documentary proof. It is impossible to describe what the fine, the common recovery and the protection of the copyholder in the

Royal Courts were about without adverting to these very real 'facts'.[5] Perhaps it might be objected that such explanations have no place in a brief survey of the history of these land law doctrines. This, however, ignores the fact that the text *does* contain a plethora of explanations *why* various doctrines emerged. All of these conform to a general image: that of landholders wanting to convey and the legal system providing the necessary institutional means. What must be noted, however, is that a whole range of other interests, specifically in this case, those of heirs, remaindermen and reversioners were presumably wanting just the opposite. In this history such wants go unregistered because each legal change is described in terms of perfecting the imperfect obstacles to free transfer of land.

In a recent survey of contemporary legal historiography, Robert Gordon identified the "evolutionary-functionalist" model as paramount and, historically speaking, the most entrenched.[6] This model approaches history suffused with the notion that an *essential* feature of law is that it responds to various social needs (even though at times there might be dysfunctional lags and delays). On a more philosophical level this approach tends to adopt one of two different credos, the formalist or the realist. The formalist credo insists that legal rules and law generally have their own immanent logic such that any legal development represents the expression of an internal professional ethos of doctrinal improvement. The realist, on the other hand, sees the law as being one discourse among the many that officials of all kinds (lawyers, administrators, legislators) use in their day-to-day practices. Both forms of functionalism, with their core concept of history-as-progress are profoundly normative. Formalist evolutionary functionalism extols the virtues of the doctrinal clarification. Realist evolutionary functionalism upholds the ideal of the lawyer as policy-maker, welding these different discourses into a program of efficient social engineering. This book is an unambiguous example of the former branch, the most salient themes of which, Gordon notes, are that:

> [t]he common law over time tends to work itself pure.
>
> Progressive improvements in legal science have tended to clarify legal doctrine, making it ever more certain and predictable, as well as more adaptable to social needs.
>
> Common law rules have tended to become more efficient.[7]

This is manifested most dramatically in the chapter which concludes the English history section of the book : the "tortuous and ungodly jumble" of the legal system (as, the authors note, Oliver Cromwell described it)[8] is seen to have been rationalised by Blackstone in his *Commentaries on the Laws of England.* This is characterised as the end of the medieval period proper, when the morass of inconsistencies was organised and rationalised into the conceptual categories of "rights of persons" and "rights of things", land rights being one subset of the latter. In this chapter basically two themes are illustrated: the heroic

role of the doctrinal expert and the essential continuity through clarification of land law. However, as Duncan Kennedy has shown, Blackstone's insistence that property rights were absolute had significant political dimensions and consequences.[9] In particular, by implicitly denying that property involved rights between persons, this categorical scheme tended to legitimate the patterns of hierarchy and domination prevalent in 18th century English society. A historical perspective which sees only the law working itself pure, becoming ever clearer is, however, disabled from identifying such factors.

The authors' emphasis gives an undeniable impression that each change in the law is merely a response to a rational conveyancer's consensus as to desirable improvement. Thus, "free tenants began to want to be able to use a simpler, but as effective, conveyance... Their lawyers first of all provided them with the fine ... the common recovery ... the lease and release".[10] The result is a profoundly Whiggish history, the present being more or less the accretion of the professional wisdom of the past. As further evidence of this, the terms "defects" and "remedies" are the key concepts and metaphors employed in explanation. Historical narrative in this mode, therefore, operates by means of ignoring major conflicts and struggles between, and defeats of, oppositional interests and rights.

Nowhere is this historiographical tendency more evident than in the account of the early history of New South Wales. The same order of detail is employed to describe Governor Phillip's arrival at Sydney Cove as that of William's in Kent. The differences in interpretation of these events are, however, considerable. The legal authority of William, as "Conqueror", is seen as contingent on "crushing all the rebellions".[11] Further, the practice of subinfeudation was developed "[i]n order to ensure that he [each tenant-in-chief] would be able to fulfil his military obligations to William".[12] Land law is thus characterised as an integral element in the network of political power in feudal England, as, of course, it was. As the authors' later reference to the defeat of Hereward the Wake shows, the development of the system of tenure was premissed on the extinction of competing legal orders. The account of Governor Phillip's exploits, however, is of another character entirely. Under the revealing sub-heading, "Settlement",[13] the "settlers" brought with them the Blackstonian jurisprudence then operative in England. The authors omit to mention that for Blackstone the principles of law applicable to settlement differ from conquest or cession. In the latter, the rules of law actually in operation remain in force until changed by the Crown. In the former, the totality of English law applies from the moment of settlement. The authors, however, merely conclude that the New South Wales Constitution Act 1828 (Imp.) confirmed the settlement thesis such that "no doubt remained as to what law was applicable".[14] The point, however, is that no doubts exist only so long as the settlement thesis is held and, implicitly, that the brutal, systematic

and often genocidal conquest of Aborigines is written out of history. There is one belated and exiguous reference to Aborigines in the account of the case of *Attorney-General* v. *Brown*[15] which reiterated the principle of Anglo-Australian law that all land is held of the Crown. This is held to deprive Aborigines of land rights except when granted by the Crown. But this question is surely secondary. The primary juridical question is why the classification of settlement was employed in the first place, a question which any serious historical study must address. In contrast to the account of William the Conqueror there is no mention whatever of "crushing all the rebellions". Not a shred of evidence is given to suggest how early jurists saw settlement where a more detached view might have concluded the opposite. In other words there is no attempt to step outside the legal doctrinal categories current then and now in the legal system. It would be hard to deny that this is yet another example of a conspiracy of silence. Another reason for this, surely, is that the reference to conquest to explain land law in William I's time is so far in the past that it is not likely to cast doubt on the autonomy of law from politics thesis so cherished by the conservative private lawyer today. A reference to the conquest of Aborigines necessarily forces us to consider possible political considerations which may have led to the adoption of the settlement doctrine, the possible historical adequacy of such a professional view and the lamentable contemporary consequences. A history more interested in the normative underpinning of professional ideology under the theme of legal history as legal progress is unsurprisingly deaf to such questions.

One aspect of formalist evolutionary functionalism is a heavy emphasis on teleology: history is seen as the unfolding of an inevitable process, a logic whose culmination is almost predetermined. The text greatly conforms to this model. Thus contemporary conveyancing practice is seen to have its first precedent when William "had *conveyed* Kent ... to his half-brother, Odo ..."[16] [emphasis added]. But surely, that act, historically and legally, has as much in common with developments in the decentralisation of legislative authority. To draw an implicit analogy between it and a contemporary private transfer of land by using the same term "conveyance" is a gross distortion. This much is at least implicitly recognised in most legal histories which reserve the verb "to grant" for early transactions with land.

There can be no denying the lucidity of the authors' brief survey of contemporary land law from the modified forms of the rule against perpetuities to the origins and intricacies of the Torrens system. This section also contains some useful focus on defects in the operation of the present system. But this fails to override the sense of self-congratulation which characterises their overall view of land law. This is reinforced by the flag-waving anglocentrocism in describing the unspecified "English law world".[17] They see common law jurisdictions as "[u]nlike other nations"[18] in having had a set of legal concepts in the

medieval era which have been serviceable ever since. This again exemplifies the formalist and evolutionary tendencies noted above in its emphasis on internal doctrinal continuity and its intimation that the legal system has improved itself from within by its inherent adaptability (by means of the profession's responsiveness) to changes without. What better way is there to underscore these positive evaluations than by saying that we have been more successful at this than all others. The authors seem to ignore the fact that, for instance, Civil law jurisdictions with their origins in Roman law have an arguably more ancient pedigree.[19] Also, it is equally arguable that land law today given the importance it attaches to marketability and residential functions can only be understood by acknowledging the essential eclipse of feudal concepts (especially "tenure") infused as they were with the political dimensions of land-holding. Moreover, the authors' evolutionism forces them to distort the actual configurations of land law in New South Wales today. Much attention is given to the feudal residues of the rule against perpetuities and the effect of the repeal of the Statute of Uses by the Imperial Acts Application Act (1969). Yet nowhere is there a mention of the enormously significant Crown Lands or Strata Titles legislation. These, of course, represent radical departures from traditional concepts and cast considerable doubt on the theme of gradual internal development indicated by the title, "Transition" (ch. 8), and the claims that "the existing law of real property is [thus] feudal", not to mention the conclusion that "radical changes to the land law and proprietorship rights ... have not occurred generally in common law jurisdictions".[20] Indeed the latter is a strickingly eulogistic description of a process covering inter alia the enclosures, the dissolution of the monasteries and the systematic extinction of customary feudal rights. It is important to note that the regularly expressed British exasperation at contemporary E.E.C. agricultural policy is very much a reflection of the fact that the British have more radically and efficiently modernised and capitalised land-holding (by means of early expropriation and dispossession of the peasantry) than most other European nations.[21]

The overall "understanding" provided by this book therefore has little to do with explanation of the major historical forces which have given rise to contemporary land law. As formalism the account is exemplary. As doctrinal exegesis it is clarity and conciseness itself. As history it is something else entirely.

Brendan Edgeworth*

* LL.B., M.A. (Sheff.), Lecturer in Law, Macquarie University.

FOOTNOTES

1 P.78.
2 P.60.
3 P.61.
4 See *e.g.* Samuel Thorne, "Tudor Transformation and Legal Change" (1951) 26 *NYU L Rev* 10.
5 See *e.g.* R.H. Tawney, *The Agrarian Problem in the Sixteenth Century* (1912).
6 Robert W. Gordon, "Critical Legal Histories" (1984) 36 *Stan L Rev* 57.
7 *Id.*, 65.
8 P.55.
9 D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 *Buffalo L Rev* 209.
10 P.57.
11 P.7.
12 *Ibid.*
13 P.86.
14 P.88.
15 (1847) 2 SCR App 30.
16 P.4.
17 P.v.
18 *Ibid.*
19 See *e.g.* Karl Renner, *The Institutions of Private Law in Relation to their Social Function* (1949, English trans., O. Kahn-Freud (ed.)).
20 P.v.
21 For comparative studies, see *e.g.* Barrington Moore Jnr, *The Social Origins of Dictatorship and Democracy* (1967); Robert Brenner, "Agrarian Class Structure and Economic Development in Pre-Industrial Europe" Feb. 1976, *Past and Present*, 30.

Australian Federal Constitutional Law, by COLIN HOWARD LL.M. (Lond.), Ph.D. (Adelaide), LL.D. (Melb.), Hearn Professor of Law, Faculty of Law, University of Melbourne. (The Law Book Company Ltd, Sydney, 3rd ed. 1985), pp.i-lxxviii, 1-611 with Table of Cases, Table of Statutes, Bibliography, The Commonwealth of Australia Constitution Act and Index. Cloth recommended retail price $49.50 (ISBN 0 455 20573 6). Paperback recommended retail price $39.50 (ISBN 0 455 20574 4).

> These are times of ferment in legal academia. Standard doctrinal analysis, which all but occupied the field a decade ago, is now retreating before the onslaught of all sorts of fancy new techniques ... New ideas are spreading across the empire of doctrinal analysis.[1]
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> [T]he work of the [United States] Supreme Court is the history of relatively few personalities ... The fact that they were *"there"* and that others were not, surely made decisive differences. To understand what manner of men they were is crucial to an understanding of the Court.[2]