FOREWORD (PRIVATE LAW)

The Rt. Hon. Lord Dyson
Former Justice of the Supreme Court and Master of the Rolls

In a postscript to his masterly judgment in *The Spiliada* [6] case, Lord Goff said:

> *'I feel that I cannot conclude without paying tribute to the writings of jurists which have assisted me in the preparation of this opinion.... They will observe that I have not agreed with them on all points; but even when I have disagreed with them, I have found their work to be of assistance. For jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding'.*

Lord Goff's image of pilgrims journeying together along the road marked a distinct shift in attitude. The conventional approach had kept the pilgrims at more than arms' length from each other. The distance was so great in fact that judges were only able to entertain conversation of sorts once the jurists' journey through life had ceased. This ridiculous convention was circumvented by some extraordinarily disingenuous practices. Counsel were permitted to adopt as part of their submissions the views of academics taken directly (even verbatim) from their articles and textbooks, so long as they did not attribute them to the academic or the book from which they were taken. Even worse, even if counsel did not adopt the views of academics in this way, judges would surreptitiously adopt them and, without

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[6] *The Spiliada* [1987] AC 460, 488

acknowledgement, parade the academic writing as if it were the product of their own brilliance.

These days, judges are far more open about these things. Judgments are peppered with references to academic writings. That is, of course, how it should be. The influence of academic writings on judicial decision-making is considerable. To give one striking example, Professor Glanville Williams had noted in an article that the House of Lords in *Anderton v Ryan*[7] had failed to keep out of the '*intellectual minefield*' of the law regarding attempts to commit an offence which it is impossible to commit. Their Lordships had, in his words, failed to '*heed the 'Keep out' notice*' which Parliament had erected through section 1 of the Criminal Attempts Act 1981; a notice which was intended to ensure that the courts did not keep making '*asses of themselves*'.

Within a year of the decision in *Anderton*, and as Lord Bridge acknowledged in no small part owing to Glanville Williams' criticism, the House of Lords in *Shivpuri*[8] overturned its earlier decision.

The contribution of good quality academic writings to the development of the law is growing and cannot be overstated. It has been a great pleasure and privilege to read the three private law articles that are being published in the Oxford University Undergraduate Law Journal this year. Each of them is carefully researched and expressed in language of exemplary clarity. Each treats of a subject that is relatively new and which calls for a novel

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[7] *Anderton v Ryan* [1985] AC 560
[8] R *v Shivpuri* [1987] AC 1

approach. They illustrate how the law adapts to accommodate societal and technological developments.

'*A Home, not a House*?' addresses the difficult question of how domestic property of cohabiting unmarried couples should be allocated between them when their relationship breaks down. In recent years, this important subject has attracted the attention of senior courts in a number of common law jurisdictions. This article argues that there is a fundamental conceptual distinction between the acquisition and the quantification of interests in such a home. There is and should be scope for the exercise of judicial discretion (based on justice and fairness) in determining how such rights, when acquired, are quantified. But there is, or should be, no room for such judicial discretion in proving the acquisition of such interests in the first place. The instinctive desire to secure fairness at the acquisition stage should be rejected. To allow the court to apply vague notions of fairness and context to the acquisition stage would be a blow to the certainty and predictability of property law.

'*Algorithmic Contracts and the Resilience of the Common Law*' tackles questions for the law of contract formation and performance which are posed by the increasing prevalence of artificial intelligence and algorithm-driven automation. The article argues that the courts of the United Kingdom, Canada and Singapore have shown that the common law of contract is able to adapt to meet these new challenges just as it has evolved to adapt to other technological challenges in the past—for example, the arrival of the telex machine and e-commerce. The law can be so developed without undermining established legal principles. The author discusses the perceived concerns inherent in the use of AIs in contracting, namely (i) attribution and liability; (ii)

intention and consent; and (iii) predictability and transparency and suggests that these concerns are exaggerated. For example, regarding the particular question of who, as between an AI and its employer, should bear the liability for a contractual mistake, the author argues convincingly that it is doctrinally more sound to adopt by analogy the principle of vicarious liability in tort and fix the employer with liability.

'The Judicial Construction of Fiduciary Loyalty: A Case for English Stewardship'. This article addresses the issue of fiduciary loyalty in modern corporate governance with a particular focus on sections 172 and 174 of the Companies Act 2006 and the comparable Delaware law. The author argues that section 172 should not be interpreted as requiring only that a director act in what he or she honestly believes to be in the company's interests. It should also be interpreted as requiring a director to act for purposes the law recognises as objectively appropriate to the office. Section 172 is too often treated through subjective good faith and this has made the provision appear difficult to police. The Delaware approach is to address governance failures by stretching loyalty through the language of good faith and conscious disregard. But the author says that this solution is conceptually unstable because it blurs loyalty and care: it treats culpable inattention as a species of infidelity.