FOREWORD (PRIVATE LAW)

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The relationship between academic lawyers and practising lawyers in this country has changed enormously over the past sixty years and beyond all recognition over the past 200 years—and the change had been very much for the better.

Among the quainter principles developed by judges was the rule that what was written in a law book or article, however distinguished, experienced and respected the author was, could not be cited in court or relied on in a judgment if the author was still alive. 200 years ago, the principle was cited in judgments in common law and equity cases as clear and well established.[1] Less than 100 years ago, in 1927, the rule was confirmed by the then-Master of the Rolls.[2] Indeed, five years later, the rule was confirmed by the Law Lords in the famous case of *Donoghue v Stevenson*,[3] where it was said that 'the work of living authors, however deservedly eminent, cannot be used as authority', although it was somewhat grudgingly accepted that 'the opinions they express may demand attention'. Even after an author had died, he (as it was almost always 'he') could not rely on being taken into account by judges. Thus, in 1814, Lord Chancellor Eldon said that 'One who held no judicial situation could not regularly be mentioned as an authority'.[4] (Perhaps consistently with that

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[1] *Turner v Reynard* (1819) 1 J & W 39, 44; *Taylor v Curtis* (1816) 6 Taunt 608.
[2] *Re Ryder & Steadman's Contract* [1927] 2 Ch 62, 74.
[3] *Donoghue v Stevenson* [1932] AC 562, 567.
[4] *Jones v Jones* (1814) 3 Dow 1, 15.

approach, judges broke the 'only read when dead' rule from time to time when it suited them—especially when the author was a judicial colleague).[5]

Various lame, even laughable, reasons were advanced to justify this rule, but perhaps the most convincing was that, until the latter half of the 19th century, academic law could be (and was[6]) described as 'a fairly moribund, amateurish profession'. However, with the growth in numbers and quality of academic lawyers and academic articles and books it became inevitable that judges would start to take academic works seriously. Interestingly, it began happening in the 1880s, just after Oxford and Cambridge had set up their law faculties. In 1882, the formidable Sir George Jessel MR said that, when faced with a controversial legal principle, it was always right to ask: 'what do the text books say?' as 'although the text books do not make law they show more or less whether a principle has been generally accepted'.[7]

With the appearance of highly respected textbooks (like Megarry's Law of Real Property, written with HWR Wade) and the development of highly reputable Journals (such as the Law Quarterly Review), the position has now changed completely. '[N]owadays judges read academic articles as part of their ordinary judicial activity'.[8] If one had to single out one judge who was responsible for this, I think it would be Lord Goff of Chieveley. As a judge in the High Court, Court of Appeal and House of Lords, he frequently cited, paid tribute to, and relied on academic works. It is interesting to note that, in 1966 as a practising barrister (and in subsequent editions as judge) he wrote a seminal

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[5] *Cholmondeley v Clinton* (1820) 2 Jac & W 1, 151-152 (the same judge who decided *Turner* a year earlier).
[6] Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart 2001) 71.
[7] *Henty v Wrey* (1882) 21 ChD 332, 348.
[8] *Re OT* [2004] EWCA Civ 653 [43] (Longmore LJ).

book with a highly respected academic, the late Gareth Jones, on *The Law of Restitution*, now retitled *The Law of Unjust Enrichment*. In a speech given in 1987, Lord Goff said that it was 'difficult to overstate the influence of the jurist in England today—both in the formation of young lawyers and in the development of the law',[9] a sentiment with which almost all judges and indeed almost all practising lawyers would agree.

The very salutary fact that judges are now taking proper notice of academic writing should not blind one to the differences between the attitudes of judges and of academic lawyers. One view as to the difference between academic and judicial writing was expressed in a judgment by Sir Robert Megarry, himself a great writer of legal books. In a 1969 case,[10] disagreeing with what he had said as an author in one of his own books, he said:

> The process of authorship is entirely different from that of judicial decision. The author, no doubt, has the benefit of a broad and comprehensive survey of his chosen subject as a whole, together with a lengthy period of gestation, and intermittent opportunities for reconsideration. But he . . . lacks the advantage of that impact and sharpening of focus which the detailed facts of a particular case bring to the judge. Above all, he has to form his ideas without the purifying ordeal of skilled argument on the specific facts of a contested case. Argued law is tough law.

The academic side of the argument got the last laugh, however, as less than ten years later, the Court of Appeal held

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[9] Lord Goff, 'Judge, Jurist and Legislature' (1987) 2 Denning Law Journal 79, 92.

[10] *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16-17.

that Megarry the author had been right and Megarry the judge had been wrong.[11]

The important point is that judges can benefit very substantially from the perspective and thoughts brought by academic experts to a particular subject and the broad and rigorous examination to which they have subjected it. That perspective can often provoke ideas, which can be tested in court, but which would not otherwise have come to light in proceedings. In that way we ensure that, to borrow from Oliver Wendell Holmes, the law develops through experience in the widest possible way.

Each of the three impressive papers included in this edition of the OUULJ are excellent examples of the enormous value of academic articles can provide to the development of the law—and they also represent excellent examples of what Lord Goff referred to as the contribution made by Universities to 'the formation of young lawyers'. I have little doubt that when the law of nuisance/defamation, the law of surrogacy/organ donation, or the law of spousal guarantees come to be considered by the courts or by the legislature, the impressively developed thoughts of Juana De Leon, Bruno Ligas-Rucinski and Merit Flügler respectively will receive considerable attention. I congratulate them and their supervisors on their thought-provoking, persuasive and well-expressed papers.

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[11] *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)* [1975] 1 WLR 468.