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**THE STUDY OF LEGAL HISTORY: A PRACTITIONER'S  
PERSPECTIVE**

**By**

**Justice Geoff Lindsay  
Probate and Protective List Judge  
Equity Division  
Supreme Court of New South Wales  
Australia**

**INTRODUCTION**

1. The perspective brought to this topic is that of a judge of the Supreme Court of NSW, sitting in the Equity Division of the Court, currently as the Division's Probate and Protective List Judge. With a different legal training, personal experience or predisposition, others may have a wholly different perspective.
2. Asked to provide my perspective of "the uses of legal history" (or, as I prefer, "the study of legal history"), indulgently I refer to judgments and papers of my own as illustrations of that perspective, not promoting them as authoritative in any respect or insisting upon their correctness. I do not pretend to represent the views of anybody but myself. Nor do I speak, except incidentally, of law or legal practice beyond the Australian State of NSW.
3. My judgments can be accessed on the website of Caselaw NSW ([www.caselaw.nsw.gov.au](http://www.caselaw.nsw.gov.au)) or Austlii ([www.austlii.edu.au](http://www.austlii.edu.au)). Australian case law generally, and legislation, can be accessed on the Austlii website.
4. A number of the views here expressed can be found elaborated in papers on the Court's website: [www.supremecourt.justice.nsw.gov.au](http://www.supremecourt.justice.nsw.gov.au)

5. An object of this paper is to focus attention on the *influence* of a study of legal history on *legal method*. Central to both “influence” and “method” is encouragement to interrogate the tasks given to us to perform, to recognize the purpose(s) for which a court’s jurisdiction exists, and to be guided by the purpose(s) served by rules to be applied: *Why* are we doing what we do?
6. When coupled with a need to have regard to the facts of the particular case that question, regularly asked and answered as best can be, focuses attention on the identification, and attempted solution, of problems presented to a court for consideration.
7. In a court room environment, with substantive rights and obligations overlaid by procedural discretions, “rules” are often not enough to guide decision-making unless informed by the purpose(s) they serve.
8. In a simple setting, “rules” may suffice to dictate the determination of proceedings. In other settings, an understanding of underlying purposes of the law (the “why” of what is to be done) is important. Rules are important to legal practice, but a problem with rules is that the more you have, the more you need. Some things are best left to “practical wisdom” (Aristotle might say “equity” by another name) informed by purpose.
9. A managerial mindset now informs much law and the administration of justice in a modern democratic society ruled by law. Substantive rights and obligations are governed by statutory regulatory regimes administered by institutions, public and private. As evident in the types of cases dealt with upon an exercise of Protective or Probate jurisdiction of the Supreme Court, many ordinary citizens make private arrangements for management of their

affairs in anticipation of incapacity and death as an expected sequence of events. Case management philosophy has been embraced in the administration of justice, built upon adoption of a *Judicature Act* system and a proliferation of statutory courts and tribunals exercising jurisdiction analogous to that possessed by a superior court of record.

10. Management systems of thought differ from those attending an administration of justice based upon the availability of trial by jury in the determination of competing claims of right, or contested facts, tempered by considerations of equity
11. Managerial thinking lends itself to analysis in terms of a need to identify, and to give effect to, the purpose(s) served by system.
12. Parliaments have facilitated a managerial approach to legislative regulatory regimes by enacting *Interpretation Acts* that encourage a purposive approach to statutory construction. Executive government has done its part by administrative arrangements governed by mission statements and program budgeting. The Council of Australian Chief Justices has promoted “statutory construction” as an important field of study in Australian legal education. The High Court of Australia has prioritised legislative remedies over those available under the general law.
13. A study of legal history can make a large contribution to administration of the law by exposing for consideration, and debate, the essential, enduring features of a just system of law.

14. This paper is not intended to inflame passions about competing cultures of Law and Equity or the relative merits of Common Law and Civil Law systems of law. That can safely be left to others.
15. The extra judicial speeches and writing of Justice Mark Leeming (a member of the NSW Court of Appeal and a co-editor of the current, 5<sup>th</sup>, edition of Meagher, Gummow and Lehane's *Equity: Doctrine and Remedies*) suggest that a larger challenge for contemporary lawyers is to get a true measure of the general law in an environment in which legislation has long played, and continues to play, a large role. His speeches and papers are accessible on the Supreme Court website. This year he also published *The Statutory Foundations of Negligence* (Federation Press, 2019).
16. For convenience sake, this paper acquiesces in an assumption that lawyers can readily be characterised as “academics” and “legal practitioners”. That has not been my experience of life at the NSW Bar or on the Bench.
17. The Francis Forbes Society for Australian Legal History (the constitution of which has drawn on those of the Selden Society and the Osgoode Society for Canadian Legal History) is an illustration of constructive engagement between different branches of the legal profession and the wider community. Attendees at this conference include foundation members of the Society, and friends of the Society. The Forbes Society (based in Sydney) and the Australian Branch of the Selden Society (based in Brisbane) are not in competition with each other, but are equally focused on the promotion of legal history studies.

## **INSTITUTIONAL CONTEXT: AUSTRALIAN LAW AND THE SUPREME COURT OF NSW**

### **The Structure and Business of the Court**

18. The Supreme Court of NSW has two Divisions (a Common Law Division and an Equity Division) and a Court of Appeal which, although it has some of the characteristics of a Division, is not so called. Under Chief Justice Tom Bathurst (2011- ), judges of appeal with an inclination to do so from time to time sit in the Common Law and Equity Divisions. The Chief Judges at Common Law and in Equity are members of the Court of Appeal *ex officio*.
19. The business of the Divisions of the Court is, in large measure, administered through specialist lists. The Common Law Division maintains an Administrative Law List, a Defamation List, a Professional Negligence List and a Possession List. The Equity Division maintains an Admiralty List, an Adoptions List, a Commercial List, a Commercial Arbitration List, a Corporations List, a Probate List, a Protective List, a Revenue List and a Technology and Construction List. The business of a Division not allocated to a special list is described as business in the "General List." Each Division also has other lists of convenience: eg, a Duty Judge List, an Applications List.
20. As Probate and Protective List Judge, I have a close working relationship with Justice Phil Hallen, the Court's Family Provision List Judge. We often co-ordinate our lists because overlapping claims for relief are not uncommon. Our chambers, and court rooms, are in close proximity.
21. Management of a specialist list provides opportunities for engagement with particular sectors of Australian Society, not limited to the legal profession. The Probate, Protective and Family Provision jurisdictions of the Court serve a very active "constituency" which regularly calls upon their List Judges to present papers at conferences, seminars and the like. This involves

substantial conversations about current law, practice, the administration of estates and proposals for law reform. Seclusion in chambers is not an option.

22. Conduct of the business of the Court through specialist lists opens possibilities for development of the law through engagement with the community served by law, and development of an understanding of community concerns about law and legal practice, if not expertise.
23. The work of a List judge is not limited to the hearing of cases administered through his or her List. In a manner consistent with a *Judicature Act* system of court administration (adopted in NSW in 1972), all judges of the Court are able to sit in either the Common Law Division or the Equity Division.
24. Judges of the Supreme Court of NSW generally have a personal staff of two, in addition to substantial support from the Court's administration and the "Law Courts Library", shared with the Sydney judges of the Federal Court of Australia. Conventionally, in current practice, a judge's "Associate" is akin to a private secretary (often with a long established working relationship with the judge), and a judge's "Tipstaff" is a recent law graduate ("a bright young thing") who is retained for a year on the way to fame and fortune in academia or the practising profession.

### **The Equity Tradition in NSW**

25. The Court has a strong and vibrant Equity tradition, serviced by a Bar which includes barristers who identify as members of an Equity Bar, although few limit themselves to Equity practice. Commonly, in NSW barristers identify themselves by reference to more than one practice area. An "Equity-

Commercial-Administrative Law” characterisation of legal practice is a not uncommon example.

26. There is no consensus as to why NSW developed a strong Equity tradition at about the same time as other jurisdictions were moving towards what became known as a *Judicature Act* system of court administration.
27. My theory is that the historical origins of NSW’s strong Equity tradition lie, firstly, in the political struggle for NSW’s colonists to secure a right to trial by jury in a society that began as a penal colony (David Neal, *The Rule of Law in a Penal Colony: Law and Power in Early New South Wales* (CUP 1991)); secondly, in the Equity jurisdiction’s role as a counter balance to trial by jury, the quintessential common law procedure of decision making; thirdly, in the development and sustenance of an identifiable, specialist Equity Bar; and, fourthly, in the emphasis given to Equity jurisprudence as a separate field of study by the Law School of the University of Sydney, for many years (especially between 1890-1971) the dominant source of legal education in NSW, with a close teaching connection with the practising bar. Personalities also played a role, as Leeming J A recounted in “The Primary Judge in Equity” (2016) 90 ALJ 783.
28. When first established, the jurisdiction of the Supreme Court of New South Wales was defined by attribution to it, as a single entity, of the several jurisdictions of the English Courts of Common Law (King’s Bench, Common Pleas and Exchequer); the English Lord Chancellor (as a repository of Equity, Infancy and Lunacy jurisdiction); and an English ecclesiastical court, limited to the probate jurisdiction: *New South Wales Act, 1823* (Imp); *Third Charter of Justice, 1823*.

29. When that jurisdiction was confirmed by the *Australian Courts Act, 1828* (Imp), s 24 of that Act fixed 25 July 1828 as the date upon which the Colony of NSW received English law so far as applicable to local conditions: a legislative version of the principle governing the reception of English law by a settled colony as described by Blackstone's *Commentaries on the Laws of England*, Volume 1, pages 106-107.
30. The *New South Wales Act*, the *Third Charter of Justice* and the *Australian Courts Act* provided a foundational template for NSW's substantive and adjectival law.
31. The jurisdiction of the Supreme Court acquired upon proclamation of the *Third Charter of Justice* in 1824, and confirmed by the *Australian Courts Act* in 1828, continues in the Court as now constituted by the *Supreme Court Act 1970* NSW: s22. That jurisdiction is often described as the Court's "inherent jurisdiction", although that description is sometimes given also to jurisdiction conferred by section 23 of the *Supreme Court Act 1970*.
32. Section 23 (based on a New Zealand model) provides that "[the] Court shall have all jurisdiction which may be necessary for the administration of justice in New South Wales." This provides, if need be, an escape from technical, procedural constraints which might be thought to attend a definition of the Court's jurisdiction by reference to 19<sup>th</sup> century English courts: *Re AAA; Report on a Protected Person's Attainment of the Age of Majority* [2016] NSWSC 805 at [21] – [27]. The full implications of section 23 remain to be determined.



33. Although the Court was established with practically all the jurisdiction of English courts vested in the one institution, locals found it convenient to administer justice in NSW through arrangements for the separate administration of the Court's several jurisdictions. To a modern mindset that appears to have invited undue procedural rigidity (including dismissal of proceedings commenced in the wrong "court"); but the same modern mindset often lives with the jurisdictional rigidity of a court system which accepts separate Federal and State courts and depends on a myriad of statutory tribunals to perform work once performed by judges. In dispute resolution, the journey can be just as important as the destination. A dispute resolved on jurisdictional grounds might nevertheless be resolved.
34. For most of the 20<sup>th</sup> Century, the Court's procedures were governed by the *Common Law Procedure Act 1899* NSW and the *Equity Act 1901* NSW, each a consolidation of earlier legislation.
35. They were repealed, and replaced by a *Judicature Act* system of court administration, upon commencement of the *Supreme Court Act* on 1 July 1972.
36. Whether by coincidence, or by necessary connection, steps successfully taken (in the 1960s) towards the introduction of a *Judicature Act* system included the restriction of a civil litigant's entitlement in Common Law proceedings to trial by jury.
37. In NSW legal history, the rise and fall of trial by jury in the conduct of Common Law proceedings may be as important as any other factor in explaining the course of Equity jurisprudence leading to adoption of a *Judicature Act* system.

## **Embrace of Case Management Procedures**

38. Almost immediately upon the formal adoption of a *Judicature Act* system, the Court's administration began to evolve towards a case management system for the conduct of civil proceedings.
39. Trial by jury was largely abolished in civil proceedings, replaced by judges sitting alone: J. J. Spigelman, "Truth and the Law" (2011) 85 *Australian Law Journal* 746 at 751 – 752. The preparation of a case for a trial, or final hearing, was increasingly controlled by the Court through directions hearings. "Alternative" dispute resolution procedures were promoted as a precursor to the introduction of compulsory mediations as standard fare. The concept of a "trial" as an adversarial contest, with oral evidence adduced with comparatively little (if any) notice, on an appointed day, gave way to a managed decision-making process in which (after a mediation process) evidence at a final hearing is generally adduced by affidavit, or on witness statements, earlier served. Trial by ambush has been replaced with death by paper.
40. Case management theory was fully embraced with enactment of the *Civil Procedure Act 2005 NSW* and the *Uniform Civil Procedure Rules 2005 NSW*.

## **The Probate and Protective Jurisdictions of the Court**

41. The long association of the Probate and Protective business of the Supreme Court with the Court's Equity judges lends encouragement to those who imagine that the Court's Probate and Protective jurisdictions are a subset of its Equity jurisdiction. Familiarity with the business of the Probate and Protective Lists suggests otherwise.

42. The Probate jurisdiction of the Supreme Court was, until 1890, known as the Court's Ecclesiastical jurisdiction. The Court's Lunacy jurisdiction bore that name until rebadged as Protective jurisdiction in 1958. The Wardship or Infancy jurisdiction of the Court has long been known, separately from the Lunacy jurisdiction, as the Court's *parens patriae* jurisdiction despite use of that label in some quarters (e.g., Chitty, *A Treatise on the Law of the Prerogatives of the Crown*, 1820, Chapter 9) to describe both the Lunacy jurisdiction and Infancy jurisdiction derived from the Crown.
43. The State of NSW's Probate work is undertaken exclusively by the Supreme Court. Subject to the Court's inherent and appellate jurisdictions, much of the State's "protective" work (especially as concerns the appointment of financial managers and guardians and the review of enduring powers of attorney) is performed by the Guardianship Division of the NSW Civil and Administrative Tribunal ("NCAT"), a statutory tribunal; and much of the State's "infancy" work is performed by the Children's Court of NSW, a specialist statutory court over which a judge of the District Court of NSW presides as President.
44. Close familiarity with the Court's Probate and Protective jurisdictions engenders scepticism about discussions of modern jurisprudence, or legal history, predicated upon a simple, binary distinction between "Law" and "Equity".
45. Particularly in a modern setting, with a need for problem solving that transcends history's jurisdictional boundaries, there is often a need to distinguish between Common Law "rules"; Equitable "principles"; and the separate but closely aligned, expressly purposive jurisdictions governing the

administration of a deceased estate and the management (of the person and estate) of a person incapable of managing his or her own affairs.

46. Key judgments of the High Court of Australia demonstrate a familiarity with English legal history not now common with Australian lawyers.
47. The Probate jurisdiction has idiosyncratic features which include action-based “issue” pleadings reminiscent of old style Common Law pleadings, and a special need for discovery-type procedures in search of wills and in investigation of their validity: *Re Estates Booker-Pain and Soulos* [2019] NSWSC 671.
48. A key case in Probate practice is *Osborne v Smith* (1960) 105 CLR 153 at 158-159. There the High Court gave expression to a “well-established principle” derived from the English ecclesiastical courts that a person interested in the outcome of probate proceedings who, with notice of the proceedings, does not apply to intervene in them is bound by the result. This principle provides a foundation for a grant of probate in solemn form: *Estate Kouvakas; Lucas v Kanakas* [2014] NSWSC 786 at [236]-[249].
49. As the High Court has recognised, the Protective jurisdiction takes its cue from a need to do what is for the benefit of an incapable person: *Secretary, Department of Health and Community Services v JWB and SMB (Marion’s Case)* (1992) 175 CLR 218 at 258 – 259, citing the Canadian Supreme Court in *Re Eve* [1986] 2 SCR 388 at 407 – 417; 31 DLR (4<sup>th</sup>) 1 at 14 – 21 and Lord Eldon’s judgment in *Wellesley v Duke of Beaufort* (1827) 2 Russ 1 at 20; 38 ER 236 at 243.

50. Much of the “legal history” in *Re Eve*, and the general approach to the Protective (Lunacy) jurisdiction current in NSW, draws heavily on H.S. Theobald, *The Law Relating to Lunacy* (London, 1924): *W v H* [2014] NSWSC 1696 at [29] – [34]. This text is a significant, but not generally recognized, example how the writer of a respected text (even a common practice book) can influence exposition of the law for more than several generations of lawyers. Out of print is not necessarily out of mind.
51. The office of those appointed to manage the affairs (“the person” and “the estate”) of an incapable person is as idiosyncratic as any found in Probate law and practice: *Ability One Financial Management Pty Ltd v JB by his Tutor AB* [2014] NSWSC 245; *Re Managed Estates Remuneration Orders* [2014] NSWSC 383; *IR v AR* [2015] NSWSC 1187.
52. A person appointed to such an office has the obligations of a fiduciary. However, as the High Court has recognised, an office holder’s liability to account for funds entrusted to his or her care for the maintenance and support of an incapable person is not that of a trustee, but depends on whether he or she has substantially fulfilled the purpose for which funds have been entrusted: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 420-423.
53. Simplistically, in days gone by: (a) a “Common Law mindset” has been directed mainly to a determination of competing claims of right; (b) “Equity’s mindset” has been governed by a concern for enforcement of rights and duties, restraint of unconscionable conduct and the management of property; (c) Probate law and practice has been governed by the Probate jurisdiction’s purpose of giving effect to duly expressed testamentary intentions, and

administration of a deceased estate, to ensure that beneficiaries get what is due to them; and (d) an exercise of Protective jurisdiction has been directed solely to the protection of an individual who is, or may be, incapable of taking care of himself or herself.

54. In practice, each type of jurisdiction has been driven by its own idiosyncratic imperatives, and a distinctive culture which needs both to be recognised and viewed in a perspective broader than itself.
55. In a modern legal environment, (with the abolition of civil jury trials, the embrace of case management practices and the ubiquity of broad discretionary, statutory remedies in a managed society, in a welfare state) lawyers have had to reinvent themselves, compelled to think across traditional jurisdictional boundaries and practice stereotypes. On one view, all law is now a variant of “administrative law” because of a need to accommodate legislative regulatory regimes. That is true of experience of the Probate and Protective jurisdictions.

### **A Shift in Paradigm: Death as a Process, Not Simply an Event**

56. In legal perspective, there has been a profound shift in how we view “death”, so often now preceded by incapacity for self-management: G.C. Lindsay, “*A Province of Modern Equity: Management of life, death and estate administration*” (2016) 43 *Australian Bar Review* 9. In the eyes of the modern law, death is now, more than formerly, less an *event* and more a *process* that may commence before, and extend beyond, a *physical* death.
57. The process can begin when, in anticipation of incapacity, a person executes not only a will but also an “enduring power of attorney” and an “enduring

guardianship” appointment, statutory inventions for an extension of the authority of an agent beyond mental incapacity of a principal.

58. With the onset of incapacity for self-management those “enduring” instruments take on a life of their own. Trusted members of family not uncommonly anticipate their presumed entitlements to inheritance in purported performance of the functions of an enduring attorney. By the time equity intervenes to order that accounts be taken little property remains available to remedy breaches of fiduciary obligations. Whatever lawyers might say about the operation of fiduciary law, many lay people view an enduring power of attorney as a licence to effect an early succession to property without regard to any consideration governing the administration of Law, Equity, Probate law or the Protective jurisdiction.
59. The legal process of “death” may not conclude until, after a physical death, there is no longer a practical prospect of a grant of family provision relief.
60. In the meantime, the law focuses much attention on management (administration) of an estate. A legal practitioner advising a client must master the Protective, Probate and Family Provision jurisdictions – looking forward and back – and keep a wary eye on possible breaches of fiduciary duty. An overview of the Court’s several heads of jurisdiction is required: e.g., *Smith v Smith* [2017] NSWSC 482.
61. A need both to recognise the imperatives of historical forms of jurisdiction, and to adapt them to contemporary problem solving, is illustrated by the difficulty of characterisation of comparatively recent statutory constructs that have become common place in Australian society, as well as elsewhere.

62. One of those constructs is the concept of an “enduring” power of attorney. Another is a court-authorized (“statutory”) will for a person who lacks testamentary capacity.
63. A statutory will invites reflection on the Court’s Probate, Protective and Family Provision jurisdictions without neatly fitting into any one or more of them: *Re K’s Statutory Will* (2017) 96 NSWLR 69; [2017] NSWSC 1211; *Re MP’s Statutory Will* [2019] NSWSC 331; *Re MP’s Statutory Will (No 2)* [2019] NSWSC 491 (appeal pending).

### **Development of Australian Law**

64. Although the legal systems of Australia and England share a common heritage, and although (until about 1963) Australian lawyers embraced English jurisprudence in a manner which today seems unduly uncritical, the severance of colonial ties on 3 March 1986 (with the commencement of the Imperial and Commonwealth *Australia Acts, 1986*) highlighted a need for a fresh assessment of Australian law and practice as an independent national system of law.
65. A study of Australian legal history (in combination, still, with an understanding of English legal history) is an indispensable element of any such process of reassessment.
66. English legal history’s paradigm of centralisation of government functions in the Crown, coupled with delegations of those functions over time, and its story of compromise of jurisdictional conflicts between competing “delegates” of the Crown (if not also those between Church and State), remain powerful tools for understanding of current law. That is true even in a legal system far across



the world which has long adapted to local conditions and continues to flirt with republican sentiment.

### **THE STUDY OF LEGAL HISTORY AS AN AID TO UNDERSTANDING HOW JUSTICE IS ADMINISTERED**

67. A study of legal history highlights institutional imperatives for the development, and effective administration, of a system of law based (as is the Common Law Tradition) on precedential reasoning.
68. A study of legal history suggests at least five “preconditions” for the existence of a “doctrine” of precedent in a Common Law system:
- a) Establishment of a system of courts in a constitutional setting, with decision making procedures that are known, open and orderly.
  - b) A shared commitment to the rule of law in the community served by participants in the process leading to court judgments.
  - c) A practice amongst judges of delivering reasons for their judgments.
  - d) The availability of reports of judgments, if not other classes of legal literature.
  - e) A cohort of lawyers professionally trained to serve as intermediaries between judges who pronounce judgment and litigants who seek or suffer their judgments.
69. A similar picture begins to emerge from the very first pages of the 5<sup>th</sup> (2019) edition of Sir John Baker’s *An Introduction to English Legal History*.
70. An attempt at analysis of the development of Australian law in these terms can be found in G.C. Lindsay, “Building a Nation: The Doctrine of Precedent in Australian Legal History”, chapter 11 in volume 1 of J.T. Gleeson, J.A.

Watson and R.C.A. Higgins (eds), *Historical Foundations of Australian Law* (Federation Press, Sydney, 2013).

71. A study of legal history provides opportunities to examine how concepts and principles of “law” may change if routine procedures for the resolution of disputes or the language of “law” change.
72. Two “legal history” insights come to mind. First, the idea that rules of substantive law are secreted in the interstices of rules of procedure: Maine, *Dissertations on Early Law and Custom* (1883). Secondly, the idea (which I associate with Milsom) that a course of common decisions can give rise to expectations, customs and, in due course, “law.”
73. If the introduction of a *Judicature Act* system, or earlier procedural developments, have influenced evolution of the law, will the widespread adoption of case management practices do so (and, if so, how)?
74. The concept of a once-for-all “trial” on an appointed day has been displaced by quasi-administrative decision-making spread over a succession of directions hearings. Young lawyers struggle to obtain advocacy experience in cases increasingly resolved in compulsory mediations. One might reasonably speculate that all this must affect perceptions of “law”, as “law” follows “practice”.

#### **WHAT IS “EQUITY” BEYOND ENGLISH LEGAL HISTORY?**

75. A challenge for Australian lawyers (likely to be met by carrying on in disregard of it) is whether (and, if so, how) the Equity jurisdiction of our Supreme Courts can be defined otherwise than by reference to English legal history. If the Equity jurisdiction is to serve some purpose as a means of moderating “law”,

or maintaining standards, in a particular community, it must speak to the particular community it serves. There is thus no reason why “Equity” should be the same across boundaries or time, though broad principles and technique might remain common.

76. Most modern equity texts (including, as a prime early example, FW Maitland’s classic, *Equity: A Course of Lectures* (Cambridge University Press, 1909), Lecture 1) embrace the idea that “equity jurisdiction” cannot be defined at all – certainly not exhaustively – but can only described by reference to an account of its historical origins in the English legal system. Meagher, Gummow and Lehane’s *Equity: Doctrines and Remedies* (5<sup>th</sup> ed, 2015) follows that pattern in its introductory chapter.
77. Earlier generations than ours generally adopted, or accommodated, Aristotle’s definition of equity in their own exposition of the subject. See, for example, *Story Commentaries on Equity Jurisprudence* (1st English edition), London, 1884), Chapter 1, paragraph [3]. Sometimes, as did Blackstone in his *Commentaries on the Laws of England* (1st edition, 1765-1769), Volume 1, pages 61-62), this was done through a citation of Grotius (*De Aequitate*) who, himself, adopted Aristotle.
78. There is much about modern “Equity” reminiscent of Aristotle’s classic definition of “equity”, coupled with his description of “prudence (practical wisdom)”, in *The Nicomachean Ethics*.
79. Aristotle (in Book V Chapter 10) described the essential character of equity as being a rectification of law insofar as the law is defective on account of its generality: “... when the law states a general rule, and a case arises under

this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances”.

80. In speaking of “prudence”, or “practical wisdom”, as a virtue (Book VI Chapter 5) Aristotle spoke of a “prudent” person as one able to deliberate rightly about what is good and advantageous, conducive to a good life, calculated successfully with a view to some serious end.
81. Aristotle might not supply a ready answer to the question for Australians, “What is ‘Equity’ beyond English Legal History?” but he might usefully be recalled to service as the English Lord Chancellor and others fade in local memory.
82. Perhaps all we need is to be reminded of the breadth of the treatment of “Equity” in C. K. Allen, *Law in the Making* (7<sup>th</sup> ed, OUP, 1963), reclaiming the author as an (Anglo) Australian.

## **LAW AS CONVERSATION**

83. Law and the study of legal history, for me in my role as the Probate and Protective List Judge in the Equity Division of the Supreme Court of NSW, involve a large element of *conversation* between the Court, lawyers (barristers, solicitors, academics) and the lay community, including self-represented litigants.
84. In part, that is because there is a large, active constituency, often pursuing an interest in “Elder Law”, in contemporary Australian Society. In part, it is

because there have been large social changes affecting an aging population. In part, it is because the legal profession has a felt need to promote educational programs about the Probate and Protective jurisdictions in an era in which comparatively few lawyers have studied them at university.

85. The traditional stereotype of a judge as a stern (or hapless) arbiter of competing claims of right is overly simplistic in jurisdictions in which management functions of the Court are transparent. In that environment, a judge's role transcends adjudication of disputes. It requires engagement with the community: listening, learning, teaching, identifying problems and attempting to solve them.
86. The idea that there is a single, universal definition of "law" (let alone "legal history") is difficult to sustain in every context; even for a single person, let alone for several.
87. Perspective can be important. For some people, "law" is a command. For others, it is a custom or a norm. For some, it is an embodiment of institutional policy of those (such as parliaments, courts, police) who administer "law".
88. Lawyers engaged in its administration, may think of law in terms of what it "is" whereas others speak of it as it "ought to be".
89. However it be defined (assuming it can be defined), "law" is a common incident of "community". Robinson Crusoe had no need of it when living alone, in isolation. If and when our sense of "community" changes, our perception of "law" may also change, as may our approach to historical narratives about "law".

90. A graphic demonstration of this in an Australian context might be found in how Australians thought of their island continent before the seminal (native title) judgment of the High Court of Australia in *Mabo v Queensland [No 2]* (1992) 175 CLR 1, and how they think about it now.
91. It was a lot easier, before *Mabo*, to conceptualise Australia as a country with large “unoccupied territory”. Since *Mabo*, Australians have a greater consciousness of a country fully occupied by their indigenous compatriots as “traditional owners” of the land. A changing sense of community facilitated the *Mabo* judgment. That judgment, in turn, altered our sense of community.
92. Though a judgment by a court of *law*, part of the controversy generated by *Mabo* was a reflection of different perspectives of Australian *history*, past, present and prospective. How “history” is told is not merely a question of what happened, or may have happened, in the past. Every bit as important is how the “past” is seen in the present. Perceptions change over time. This is true of “legal history” no less than other forms of “history”.
93. Lawyers and historians often share a common interest in the past, its investigation and analysis. Much of the work of a judge, aided by other lawyers, is akin to that of an historian: an enquiry into past events as an aid to understanding the present. However, lawyers and historians just as often occupy different worlds.
94. Lawyers trained in “the Common Law tradition” imagine that their judgments are based on “facts”, but they see “facts” through a prism defined by a process of litigation in which a dispute (driven by desired outcomes rather than free inquiry) is made the subject of adjudication, not in the interests of

“truth” *per se* but in the due administration of “justice”. Sometimes, what a judge is *not* told is as significant as what the judge *is* told, or more so.

95. Historians are no less driven by their own purposes in their selection of “facts” and in their presentation of themes. Not uncommonly they endeavour to construct a narrative within a pre-conceived paradigm, or parameters defined by available primary records, however uninhibited their factual investigations may seem to be.
96. Historians should be wary, as practising lawyers can be, in acceptance of a judge’s statement of facts as objectively, “historically” correct. Formal findings of fact can rarely rise above evidence adduced by interested, adversarial parties.
97. Lawyers should be equally wary in acceptance of an historian’s description of the law. Unless they are exceptional, historians who venture into legal analysis are likely to be waylaid by more familiar influences – sociology, politics or the like – dressed up as “law”. In a world of change, academic lawyers are sometimes ahead of, and at other times behind, developments in their analyses of law and legal practice. “Legal Practice” can change quickly to meet exigencies of management of the court’s business.
98. Nobody is perfect, but most of us can find opportunities for improvement in conversation within our respective disciplines and across interdisciplinary boundaries.

### **EXAMPLES OF LEGAL HISTORY AS AN AID TO DECISION MAKING**

99. Drawing on personal experience of a judge’s life, the study of legal history has assisted me, I trust:

- a) to examine different types of jurisdiction exercised by the Supreme Court of NSW with a view to identifying the purpose served by each type of jurisdictions, and functional similarities between old law and new;
- b) to understand why (particularly since enactment of the *Australia Acts* of 1986) divergence between English and Australian law can be explained in terms of different institutional structures and imperatives, sometimes long forgotten; and
- c) to see that much judicial decision making (particularly since the practical abolition of jury trials in civil proceedings) has as a common core “management of people, property and relationships” rather than adjudication of competing claims of right; a “right” may never rise higher than discretionary procedures ostensibly appointed for its vindication.

100. In management of the Supreme Court’s Probate List, I have turned to legal history (including, especially, legal texts) in exploring for myself what is sometimes an elusive distinction between a “common form” and a “solemn form” of grant of probate: *Estate Kouvakas; Lucas v Kanakas* [2014] NSWSC 786.

101. In *Re Estate Gowing* [2014] NSWSC 247, I turned to legal history in an endeavour to understand obscure “tests” for the assessment of an executor’s “commission” when, in practice, the object is simply to allow remuneration which is “just and reasonable”.



102. In management of the Court's Protective List, I have found the jurisprudential approach of Lord Eldon (with its emphasis on a functional approach to capacity for self-management) more congenial than what appears to me to be a more rule-based formulation of the "inherent jurisdiction" rediscovered by English courts as a means of dealing with cases of "vulnerable people" (*In re F (Mental Health patient): Sterilisation* [1990] 2 AC; *Masterman-Lister v Brutton & Co (Nos 1 and 2)* [2003] 1 WLR 1511 at [70]; *In re L (Vulnerable Adults with Capacity: Court's jurisdiction (No 2))* [2012] 3 WLR 1439 at [55], approving *In Re SA (Vulnerable Adult with Capacity: Marriage)* [2005] EWHC 2942 (FAN); [2006] 1 FLR 867). Lord Eldon's contribution to the Protective jurisdiction appears to have been ignored by legal historians, and current day English lawyers.
103. In an endeavour to discover/construct a workable approach to the making of an "indigenous estate distribution order" (varying the general statutory regime for distribution of an intestate estate so as to give due recognition to "the laws, customs, traditions and practices of the indigenous community or group to which the intestate belonged") I was greatly assisted by contemplation of Henry Maine's reflections on the law of succession (*Ancient Law*, 1861, Chapter 5) and the introductory chapter of W.S. Holdsworth and C.W. Vickers, *The Law of Succession: Testamentary and Intestate* (Oxford, 1899): *Re Estate Wilson, deceased* (2017) 93 NSWLR 119; [2017] NSWSC 1; *Re Estate Jerrard, deceased* (2018) 97 NSWLR 1106; [2018] NSWSC 781.
104. In explaining why NSW and English law differs about whether a court has (equitable) jurisdiction over a charitable gift absent a trust, I was assisted by an historical review of the constitutional arrangements in England concerning

an exercise of jurisdiction by the Lord Chancellor and the constitutional arrangements in NSW arising from a description of the Court's jurisdiction by reference to the *office* of Lord Chancellor: *Estate Polykarpou; Re a charity* [2016] NSWSC 409 at [117] et seq.

105. In coming to grips with the Court's need for executive assistance in exercise of its Probate and Protective jurisdictions, I have been intrigued by glimpses of the staff of English judges of old in their exercise of these jurisdictions.
106. In many respects (now and, I suspect, then) the work of an experienced Probate Registrar is more important than that of a Probate Judge: the judge may deal with hundreds of cases in a year, a Probate Registrar is responsible for thousands. Practitioners commonly seek the Registrar's informal guidance about problems of practice and procedure.
107. The Supreme Court no longer has a "Master in Lunacy" (for a time restyled "Protective Commissioner"); but the statutory successor of that office (The NSW Trustee) is indispensable to an efficient despatch of business in the Protective List, and in the work of the Guardianship Division of NCAT. The NSW Trustee is also a source of practical, informal guidance for practitioners.
108. Some things never change. A study of legal history aids an appreciation of judicial and administrative functions in the administration of justice. Any "doctrine of the separation of powers" has practical limits.

### **SO, WHY STUDY LEGAL HISTORY?**

109. There are many reasons for study of legal history, not necessarily consistent one with the other.

110. For devotees, the prime reason may be that the study of legal history is fascinating fun.
111. While it is not appealing to all mindsets (and it can be hard work for those who bear the burden of original research), legal history can be highly influential. Policy makers, including judges of our ultimate appellate courts, might not themselves be legal historians; but their decision-making can be and, I suspect, often is guided by the results of legal history research.
112. The study of legal history encourages a spirit of inquiry about the nature and purpose of law which, by diminishing dependence on purely rule-based reasoning, preserves and promotes freedom of the individual living in a community served by law.
113. A study of legal history can affect how we see, and solve, problems.
114. A study of legal history, in combination with a flexible approach to principles of precedent (consistent with a hierarchical appeal structure) facilitates evolutionary development of the law, in service of community, with subtle changes in emphasis or direction as communal assumptions change.
115. In a democratic society it is important to allow the general law to evolve in this way lest it is captured by a reduction of law to written declarations, in a managed society, amenable to control by regulatory authorities (public or private) not governed by an imperative that justice be done, and seen to be done, between parties in dispute.
116. Part of the function of a study of Australian legal history is to alert us all to a need to construct, and deconstruct, paradigms of thought; to help us to know about, and to understand, differences in perspective; and, importantly, to aid

development of a faculty to recognise patterns of thought bearing upon statements of law and the administration of justice in a modern setting.

117. A study of legal history provides opportunities to think about (and to analyse) the nature, content, implementation and practical effect of “law” that might not be conveniently, or as creatively, imagined by abstract jurisprudence.
118. It provides an important corrective for lawyers whose natural focus is upon abstract debate about “rules”, “exceptions” and “principles” conceived as having fields of operation independent of their application to particular “facts”.
119. It provides an important corrective for lawyers who succumb to a natural tendency to perceive the law as having always been what it is presently perceived to be – a tendency of mind reinforced by a vocation which requires recognition, and accommodation, of vested interests throughout the community in all its dimensions.
120. It invites consideration of whether (and, if so, to what extent) “rules”, “exceptions” and “principles” – commonly applied and consequentially assumed to be immutable – might, more correctly, be characterised as current “practice” rather than “law”; rules of convenience, if they be “rules” at all.
121. It focuses attention on legal *procedure*, often ignored, overlooked or treated with disdain by academic commentators, and senior practising lawyers, who long ago lifted their vision above mundane, mechanical tasks associated with knowledge of rules of court, court process, the conduct of litigation and the enforcement of judgments. What comes first – remedy or right? Is there a meaningful distinction between “substantive” and “adjectival” law? When does

legal “practice” become “law”? Can “law” be modified if characterized as mere “practice”?

122. What is “legal history”, but a field of study in which comparisons may be made over time as well as space, with close examination of (if not agreement about) “facts” and the means of organising them as a source of knowledge, and as an aid to decision making, present and future?
123. The study of legal history, by its examination of problem solving over time (and space), helps to distinguish between what is, and is not, essential to the functioning and management of a legal system.
124. The study of legal history encourages a critical examination of “current law”, and it may provide confidence in decision making about whether (and, if so, what) traditional features of legal reasoning, language and culture can be dispensed with or modernised (e.g., latin tags for special grants of administration in probate proceedings, analogous to but generally not compared with the appointment of a receiver and manager, with powers expressly defined, upon an exercise of equitable or statutory jurisdiction).
125. Practising lawyers tend to advance arguments in conventional, archaic legal language even after it fails to communicate its essential meaning to the current generation, legally qualified or not. A study of legal history can expose meaning and encourage rational reasoning in a modern setting.
126. A study of legal history provides opportunities to see beyond legal rules, to assess the effects of their application in practice, to contemplate purposes served by them and to judge their effectiveness when measured against those purposes.

127. A study of legal history provides insights into legal practice and procedures attending the identification and solution of problems and methods and merits of decision making models (e.g., the rise and fall of jury trials; the nature and role of “equity” across time and space; the rise of “administrative law” as a separate field of study; and case management theory).

## **CONCLUSION**

128. If “legal history” is not taught as a separate field of study in universities (as I suspect continues to be the case in more than a few Australian universities), it should be.

129. A study of legal history can inform understanding of law, and legal practice, across the broad spectrum of what qualifies as “law”.

130. A study of legal history encourages a spirit of enquiry which looks to the purpose(s) served by law in a free society, an important safeguard for everybody.

**18 July 2019**

**GCL**

[This paper is a lightly revised version of a paper delivered at the British Legal History Conference at St. Andrews, Scotland, on 12 July 2019.]

Arising from a conference hosted by the Centre for Legal History, the volume, as well as an important introduction by the editor, contains the following chapters: The Imperial Chamber Court and the Development of the Law in the Holy Roman Empire, Peter Oestmann. The Parliament of Paris and the Making of the Law at the beginning of the Eighteenth Century, Isabelle Storez-Brancourt. The Scottish focus is on Aberdeen, and most of the British writers have a current or past link with the city's University. Aberdeen is particularly important as a major Scottish town with extensive northern European trading links; moreover, it has one of the best medieval city archives in Europe. Europe's largest legal IT event, The British Legal Technology Forum returns to London on Tuesday, 6th July 2021. Following on from the sold out success of the 2020, 2019, 2018, 2017, 2016 & 2015 events, "The British Legal Technology Forum 2021" is expected to reach full capacity weeks in advance. The event will offer delegates 4 presentation stages and access to over 100 leading exhibitors over two floors. In addition, the 2021 event will provide visitors with full catering as well as a Champagne Bar, Gin Bar and Ale House which all offer complimentary refreshments during the event. While the conference theme "Law and Constitutional Change" has been chosen in the context outlined above, this is without any intention to restrict the scope of the conference papers to Anglo-Irish history. The theme will be interpreted in all its historical breadth, examining from any historical perspective the relationship between law and law-making on the one hand and, on the other, the shaping of constitutional principles and the disruption or maintenance of constitutional balance. Conference Web-Site: <https://www.qub.ac.uk/sites/BLH-Conference-2021/CallforPapers/>. Opportunities Digest Greetings Legal Historians! Welcome to Boston! Famously nicknamed "the hub of the solar system" by Oliver Wendell Holmes, Boston has served over the centuries. November 20, 2019. Symposium on Legal Archives. What are the archives of law? On Thursday, November 21, immediately before the main conference begins, the American Society for Legal History (with the support of the Harvard University Law School) is hosting the Johnson Program for First Book Authors, which provides advice and support to scholars working toward the publication of their first books in legal history.