FOREWORD (PRIVATE LAW)

The Rt. Hon. Lord Briggs of Westbourne
Justice of the Supreme Court of the United Kingdom

When I became a High Court Judge nearly 20 years ago, my new boss, Sir Andrew Morritt VC, sought to encourage me on day one by saying: "You will never get too upset by being overruled by the Court of Appeal if you take care not to get too excited when you are upheld". That wise advice sustained me all my time in the Chancery Division and then in the Court of Appeal. It is tempting, although wrong, to think that it has no application when you reach the highest court, from which there is no appeal. It is wrong because, however free you may then be from judicial excoriation from on high, you never escape from that final, unanswerable judgment in the court of academic writing and opinion. It is final because there is no continuing process of appeal by which you might get rehabilitated. It is unanswerable, because serving judges have to exercise restraint if they venture into academic debate.

But that is how it should be. Our precious common law is often described as judge-made, no doubt to set it apart from the statutory law made in Parliament and from code-based systems in other countries. But the phrase judge-made arrogates far too much of the process, and the credit, to judges. The truth is that the common law is developed and kept relevant to modern society's needs, by a collegiate partnership between judges, advocates and academic commentators. Sometimes the academics go first, until a suitable case comes along which enables

the advocates and judges to catch up. Sometimes the academics look on while the judges and advocates do their hurried best, and then emerge from their cloisters to lambast them for getting it all hopelessly wrong. Either way their input is hugely welcome, increasingly so to judges. And every now and again a distinguished academic becomes a judge in the highest court.

This edition contains, in its private law section, four splendid articles which fully and fearlessly uphold that tradition. We have three which, with varying degrees of disapproval, mercilessly review recent attempts by the Supreme Court to sort out or bring up to date troublesome areas in the common law (including equity for that purpose).

In *Starting Afresh: Reformulating and Reconceptualising the Law of Estoppel*, Joel Horsman looks for the elusive unifying principle behind all kinds of equitable estoppel and, in particular, suggests a mediated outcome to the contest between expectation and detriment in proprietary estoppel recently fought over in the Supreme Court in *Guest v Guest*.

Unlawful Means Unchained: Causing Loss by Unlawful Means and the Problematic Dealing Requirement is a trenchant expression by Alexander Pitlarge of principled regret that the Supreme Court recently affirmed the dealing requirement as a condition for a claim in the tort of causing loss by unlawful means, in *Health Secretary v Servier Laboratories Ltd*.

In *Reopening Old Wounds: What the McCulloch Decision Means for Patient Autonomy,* August Chen Zirui expresses in forthright terms how much of an unprincipled inroad into patient autonomy

in choosing treatment was made by the Supreme Court in *McCulloch v Forth Valley Health Board*, by its pragmatic application of the *Bolam* test to the extent of a doctor's duty to explain alternative treatment options to a sick patient.

In sharp contrast Nathan Oliver literally blasts off into outer space to deal with rights of property and sovereignty on the moon, in *Past as Prologue: Roman Law and the Interpretation of International Space Law Governing the Use of the Moon and Other Celestial Bodies*. Goodness knows when and where a court will have the opportunity to catch up with the far-sighted thinking expressed, based incidentally upon concepts drawn from Roman rather than common law, in the interpretation and development of the international jurisprudence originating in the Outer Space Treaty.

Readers really will have to suspend their disbelief that these beautifully written, deeply researched and confidently presented articles emanate from undergraduates. Even if one may not always agree with all their conclusions, each of them displays an impressive mastery of their subject, a clarity of thought and a vigour of expression which is a delight to read. I warmly recommend all of them, in each case for a seriously thought-provoking and enjoyable read, from authors who I confidently expect to travel far and fly high in the law.