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EDITORIAL POLICY

law&history is a fully refereed journal of original research and contribution to scholarship that is published twice a year. The Editors welcome submissions on any law and history-related topic but are particularly keen to publish material on Australia, New Zealand and the Pacific and expect to receive papers presented at the annual Australian and New Zealand Law and History Society Conference for consideration.

At all times, the Journal will maintain the highest standards of academic integrity. Articles undergo a rigorous double-blind reviewing process.

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Editorial

With this issue of the journal, we introduce both new talented scholars and also recognise major scholarship in law and history, our intellectual community. This is our third issue as Editors, but it represents our new work during the past year to commission pieces from historians and to create new spaces for inquiry and commentary in our *law&history* journal.

Clare Davidson's article was awarded the Sir Francis Forbes Society Prize for Australian Legal History in 2025. This prize is awarded following the editors' assessment of submissions by early career research presentations at the annual conference of the Australian and New Zealand Law and History Society (ANZLHS). Davidson's article, 'Feudalism, land law and F.W. Maitland's analytical medievalism', showcases a novel contribution to the scholarly literature which will interest the judiciary and the broader law academy. We congratulate Davidson on her fine piece of scholarship that is the centre piece of this issue of the journal.

Two other submissions to the prize were Highly Commended, as noted on our Society's website. One of those was also submitted as a publication for this issue, and we are delighted to include it: Imran Ahmed's 'Promises Unkept: Minority Rights and the Ambiguity of Pakistan's Early Constitutional Vision, 1947-54'.

A major research article included in this issue by Paul Babie titled the 'Origin Myth of Torrens and Trusts' provides a detailed examination of the 'brief and curious life' of five provisions concerning the registration of trusts in the original South Australian *Real Property Act* (1857-1858). In the mid-nineteenth-century, South Australia led the world by enacting the first legislation providing for a system of registering title to land ('Torrens title'). The Torrens system that was enacted excluded trusts and other equitable interests from the register, and Babie notes that their exclusion has been regarded as 'one of the most important principles' of our land registration system. Babie's jurisprudential historiography is highly significant for its detailed investigation of (repealed) provisions which were largely unknown, but which are of profound importance. The original legislative intention to extend registration to trusts invites a critical reassessment of an apparently accepted tenet that trusts should fall outside the system as well as the principles for determining registrable interests.

Sophie Grcev makes an important scholarly contribution to the discussion of early New South Wales case law via her detailed analysis of *R v Murrell* (1836). Her article combines doctrinal analysis and archival research to examine how judicial rivalry, particularly between Justice Burton and Justice Dowling, shaped the case's reasoning and legacy, arguing that the decision cannot be fully understood through doctrine alone but must be read against the politics of the early New South Wales bench.

Our issue also includes several book reviews, a bumper crop this time: with thanks to our outgoing Book Reviews Editor, Professor Kristyn Harman, who has worked hard to maintain a strength in book reviewing for the journal. We acknowledge her excellent work for the journal over the past few years. These reviews cover titles on the history of vagrancy in Australia and New Zealand, a history of English law, the legal profession and colonialism, and the circulation of geographical knowledge as seen through laws of copyright. These book titles have appeared with international and Australian-based publishers and together signal the scholarly strengths in our field.

Thank you to our research assistant, Daniel Rowney (School of Law and Justice, University of Newcastle), for his work and support to produce this issue of the journal, and to Peter Prince, for his additional assistance with reviewing submissions and some copy editing. We hope you enjoy this new issue of the journal. We look forward to sharing research, exhibition reviews, book reviews and special sections and themes in the future.

Editors: Professor Catharine Coleborne, University of Newcastle and Associate Professor Sonali Walpola, Australian National University

Associate Editor: Dr Peter Prince

June 2026

Feudalism as Comparative Jurisprudence: F. W. Maitland and Medievalism in Australian Land Law

Clare Davidson

Nineteenth-century legal practitioners across the British Empire reasoned with ideas of premodern England, including feudalism, Anglo-Saxons and the Norman Conquest. This article analyses the practice of legal medievalism in colonial Australia in conversation with the work of Cambridge legal historian Frederic William Maitland (1850–1906). Along the way, it suggests a small typesetting error in his and Frederick Pollock's (1845–1937) two-volume The History of English Law before the Time of Edward I, *first published in 1895. Maitland developed a new way of understanding premodern English law that helps characterise how it had previously been taken up in imperial contexts. His analysis of feudalism as a post-medieval mode of comparative jurisprudence helps explain the significance of legal records and political debates about feudal orders across the British Empire and especially in the Australian colonies. In Australia, legal practitioners and politicians instrumentalised the concept of 'feudalism' when debating its significance as the foundation of property and social relations in newly settled communities. Drawing on Maitland, this article considers the development and legacy of 'feudal' land law from the colonies of Australia to the early twenty-first century and argues that legal medievalism in historical and modern Australian law warrants further investigation as a distinct historical practice.*

Keywords: Jurisprudence; colonial; legal medievalism; Australia; Feudalism

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The written decisions of Australian judges often evoke English contexts and sources from the turn of the last millennium. References to medieval England in case law and legal discourse have not previously been interpreted as evidence of a distinct practice, and questions may be asked about whether it is necessary to do so now. Very few legal issues turn on the judicial analysis of premodern English sources and contexts, which appear in judgments for a variety of reasons and are often cited by way of precedent.

This article considers some theoretical and historical issues raised by references to and about the English Middle Ages in legal discourse and case law through a selective historical analysis of 'feudal' land law. High legal authorities have recognised that historical narratives that continue to be told through case law may represent: 'myth expressed as normative tradition' rather than empirical knowledge about the past.[1] Recognising the outdated, sometimes explicitly fictional nature of historical narratives told across legal practice and discourse is, of course, not new. It does not follow that such historical narratives or related legal practices have any special significance when referring to the Middle Ages. Evidence to show the cultural and legal significance of medievalism in Australian jurisprudence, which also reveals its ideological stakes, can be found in some of the historical developments that contextualised judicial references to 'feudalism' in the nineteenth-century British Empire.

The work of Cambridge legal historian Frederic William Maitland (1850–1906) provides a fulcrum for understanding the historical and theoretical significance of English feudalism. While disparaging characterisations of antiquarianism were nothing new for law reformers, Maitland critiqued medievalism in legal reasoning from an internal or doctrinal perspective. Maitland's empiricism emphasised the particular over the general to help untangle historical legal facts from fictions, marking a challenge to 'orthodox' legal histories from earlier in the nineteenth century. His history of 'feudal' law, which suggested it was primarily an invention of eighteenth and nineteenth-century jurists, provides a foil for the historical narratives of feudal orders employed in the courts of colonial Australia.

While Maitland is now one of the most regularly cited historians in decisions of the High Court of Australia (HCA),[2] so too are historical narratives, such as

1 W. M. C. Gummow, 'Law and the Use of History,' in *Constituting Law Legal Argument and Social Values*, ed. Justin T Gleeson, Ruth C A Higgins (Sydney: Federation Press, 2011).

2 Warren Swain, 'The Use and Misuse of Legal History in the High Court of Australia,' in S. McKibben, J. Patrick, and M. Harmes ed., *The Impact of Law's History: The Past is Prologue* (New York: Palgrave Macmillan, 2022), 179–200, 185–6.

the doctrine of tenure, which are drawn from early colonial cases. Feudalism is a useful case study to consider the practice of legal medievalism more broadly because of the continuous application of the doctrine of tenure and related reference to 'feudal laws' in Australian law. Apart from the significant conceptual overlap between 'medieval' and 'feudal' as adjectives, the highly political status of the doctrine in relation to Native Title has produced earlier legal analysis to help address the problem. The aim of the present work is not to devalue the judicial use of legal history, but to recontextualise one of the most familiar narratives in Australian legal history and situate it alongside authoritative doctrinal research.[3]

The doctrine of tenure was mythologised in colonial courts in the mid-nineteenth century. In Australia, English jurists looked to eleventh-century England and the Norman conquest as a precedent to establish the nature of the Crown's title to hold land and rights to control resources. Judicial decisions to instate 'feudal' laws in the colonies was a new legal mode of landholding, not the revival of a historical practice.[4] Discussions of feudal legal orders in Australia reflected contemporaneous knowledge of legal history, but were also contextualised by broader colonial concerns: including the reserve powers of the Crown and their lawful exercise in Australia; private property rights in land and resources; and liberal ideologies in settler society. This article first turns to the changing significance of periodisation for legal and political history in the nineteenth century to explain how English medievalism influenced colonial jurists. It then examines the utility of feudal mythologies in colonial law and culture, showing how medievalism was instrumentalised in colonial courts and politics. Historical contexts were used to frame arguments, make analogies, explain rules, and justify decisions. This practice created a relatively stable vision of medieval England that continues to form the bulwark of 'orthodox' legal history in Australia. The final section explains how Maitland's analysis of feudalism as a mode of comparative jurisprudence provides a model for engaging with legal medievalism. At the end of the nineteenth

3 On the political uses of history, see Priya Satia, *Time's Monster* (Cambridge and London: Harvard University Press, 2020).

4 Building on Andrew Buck's analysis in *The Making of Australian Property Law* (Sydney: Federation Press, 2006).

century, Maitland's work provided a historical and theoretical framework for understanding how judicial references to medieval England overlaid a new history onto Country. These references ignored local laws and customs and helped legitimise violence and other forms of discrimination. Incidentally, this reading of Maitland suggests a small amendment to the typesetting of his and Frederick Pollock's two-volume *The History of English Law before the Time of Edward I*, which was first published in 1895 but remains authoritative in Australian courts.

Legal Medievalism and Legal History

The medieval period has sustained less attention as a source—both real and imagined—of imperial concepts than Ancient Rome.[5] This gap aligns with the traditional characterisation of the Middle Ages as a lull in European civilisation, which begins in the year 500 with the fall of the Roman Empire in the West, and ends around 1500 with the expansion of new transatlantic empires. The supposed disintegration of imperial authority around 500 has long been associated with the beginning of a period of reduced ideological significance for later periods. Italian humanists characterised the Middle Ages as a time of decline and cultural deficiency following the 'loss' of classical knowledge.[6] The eighteenth and nineteenth centuries gave rise to a widespread cultural and political interest in historical nativism: the imagining of a segregated European past that bolstered the shared linguistic and ethnic heritage of national communities.[7] This is not to imply that individuals in earlier centuries were not concerned with the interpretation and debate of events and sources from the years between 500 and 1500. These were a continuous

5 For instance, see Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860-1900* (Princeton: Princeton University Press, 2007).

6 Fred C. Robinson, 'Medieval, the Middle Ages,' *Speculum* 59, no. 4 (1984): 745–756; Theodor E. Mommsen, 'Petrarch's Conception of the "Dark Ages,"' *Speculum* 17 (1942): 226–42.

7 Patrick J. Geary, *The Myth of Nations: The Medieval Origins of Europe* (Princeton: Princeton University Press, 2010); Haruko Momma, *From Philology to English Studies: Language and Culture in the Nineteenth Century* (Cambridge: Cambridge University Press, 2012); Kathleen Davis and Nadia Altschul, ed. *Medievalisms in the Postcolonial World: The Idea of "the Middle Ages" Outside Europe* (Johns Hopkins University Press, 2010).

touchstone in English law and society, as political leaders and notable jurists, from Edward Coke (1552–1634) to Matthew Hale (1609–1676), turned to ‘ancient’ sources to consider the authority of laws and institutions, influencing systems of governance and justifying certain political orders.[8] But views of the past inevitably change. Debaters of ancient custom and time before written memory in the sixteenth century imagined a different ‘premodernity’ to the medieval world that was expanded in populist and academic modes in the nineteenth century.[9] In the later period, historical world shaping revised and redeployed earlier debates.

For colonial jurists, medieval England was not only the amorphous birthplace of ancient customs and their derivation. It was a stable measure of continuity and change, and a temporal setting to displace fraught political issues of inequality, territorial expansion, and governance. In the colonies of Australia, judges and other legal practitioners framed the authority of legal decisions through their proximity or distance from the ancient past. This practice altered the significance of medieval England as an origin for ‘Anglo-Saxon’ people and the common law and its institutions.

Colonial judges constructed long historical genealogies when assessing which laws were in force in Australia. This included laws related to different areas, such as procedure, property, crime, and contract. The ramifications of such questions were at times so seismic that judges explicitly withheld judgment and passed the matter to legislators.

For example, in the Supreme Court of NSW’s determination about bigamy in *Regina v Roberts* (1850), Chief Justice Stephen and Therry JJ declined to consider whether the: ‘ancient Marriage Law of England’ was in force in the colony after noting the issue’s high stakes. Stephen CJ listed the number of historical authorities he had consulted and observed that: ‘every parent, every

8 J.G.A. Pocock, *The Ancient Constitution & Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge: Cambridge University Press, 1987 [1957]).

9 On the development of ‘ancient custom,’ see Ada Maria Kuskowski, ‘The Time of Custom and the Medieval Myth of Ancient Customary Law,’ *Speculum* 99, 1 (2024): 143–182.

lover of decency and order, may well tremble' if the 'ancient' law was not in force.[10] In contrast, Dickinson J held it was in force, providing a sweeping and idiosyncratic account of the history and nature of law from an imperial perspective. He opined that: 'the customary and statute law of England comprise a body of instituted law peculiar to that country, and that the common law of England is the law of nature, which is universal to all mankind'.[11] This colonial vision exemplifies the universalising of reason and dehistoricising of the common law. For Dickinson J, the true 'common law' transcended time and place, so that: 'this portion of the law of England must therefore now be and always must have been that of all mankind— the same in ancient Rome and Athens, in modern London and in Sydney'.[12] His judgment turns on the tripartite vision of history as ancient, medieval, and modern, with the substance of the historical analysis concerning the medieval. In relation to marriage, he holds that the content of the common law was partially revealed through their foil: recently discovered ancient 'Saxon' ordinances that reflected the social context of eleventh-century England—laws that were contingent, not universal— 'as arbitrary as the enactments from Magna Charta' to modern needs.[13] Dickinson J considered how gaps in historical knowledge about the development of laws impacted their classification:

> If, when a statute is made in one century and lost in the next, so much of it as is remembered shall be therefore classed with the common law, it by no means follows that when the memorial […] is recovered, its provisions shall be esteemed as a portion of the common law.[14]

Dickinson J's analysis of the common law of marriage was not orthodox, if such a thing existed in Sydney by 1850, but his engagement with the

10 *Regina v Roberts* (1850) 1 Legge 544, 549.

11 Ibid, 564.

12 Ibid, 565–6.

13 Ibid, 567.

14 Ibid, 567.

discovery of old English legal records speaks to a wider imperial effort to discover, translate, and make use of medieval texts.[15]

Outside of legal settings, historical research has shown how nineteenth-century medievalism tended to justify imperialism, helping narrate racialized cultural identities and frame ideas of progress and western civilisation.[16]

Scholars have characterised the high imperial reception and reconstruction of the Middle Ages as ideological, shaped by the prevailing concerns and social and cultural hierarchies of the nineteenth century. It is incontrovertible that historical knowledge is contingent and shaped by context. The enduring power of nineteenth-century historiography that charts the fall and rise of western civilisation is ubiquitous, but the scope of its legal significance is not clear.[17] Historians have demonstrated some of the ways that legal practitioners and administrators instrumentalised medieval history in the Australian

[15] Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time* (Philadelphia: University of Pennsylvania Press, 2008); Kathleen Biddick, *The Shock of Medievalism* (Durham: Duke University Press, 1998).

[16] Duncan Bell, *Dreamworlds of Race: Empire and the Utopian Destiny of Anglo-America* (Princeton: Princeton University Press, 2020); Helen Young, 'A Decolonizing Medieval Studies? Temporality and Sovereignty,' *English Language Notes* 58, 2 (2020): 50–63; Helen Young and Kavita Mudan Finn, *Global Medievalism* (Cambridge: Cambridge University Press, 2022); Louise D'Arcens, *World Medievalism: The Middle Ages in Modern Textual Culture* (Oxford: Oxford University Press, 2021); Louise D'Arcens, 'Medievalism: From Nationalist and Colonial Past to Global Future,' *Parergon* 36, 2 (2019): 179–18; Jenna Mead, 'Medievalism on Country,' in *The Global South and Literature*, ed. Russell West-Pavlov (Cambridge: Cambridge University Press, 2018), 264–306; Louise D'Arcens, Andrew Lynch, and Stephanie Trigg, 'Medievalism, Nationalism, Colonialism: Introduction,' *Australian Literary Studies* 26 (2011): 1–5; Louise D'Arcens, *Old Songs in the Timeless Land: Medievalism in Australian literature 1840–1910* (Perth: University of Western Australia Press, 2012); Stephanie Trigg, 'Parliamentary Medievalism: The Australian Magna Carta as Secular Relic,' *Australian Literary Studies* 26 (2011): 21–35; Transnationally: Adam Miyashiro, 'Our Deeper Past: Race, Settler Colonialism, and Medieval Heritage Politics,' *Literature Compass* 16, 9–10 (2019): 1–11; Mary Rambaran-Olm, 'A Wrinkle in Medieval Time: Ironing out Issues Regarding Race, Temporality, and the Early English,' *New Literary History* 52.3/4 (2021): 385–406.

[17] For example, Jenna Mead suggests the medieval can operate as a 'metonym' for legal and institutional authority in contemporary Australian society, in Mead, 'Medievalism on Country,' 294.

colonies, but the force of historicism is nowhere more hidden than within the relatively insular body of ideas that concern doctrinal legal historians.[18] The potential significance of medievalism in this context includes cultural and political impacts, but also legal, because statements about medieval law made in nineteenth-century courts continue to be referenced in modern Australian decisions.

Three years before *Regina v Roberts*, the same court issued a unified decision in a matter with a far longer afterlife, *Attorney-General (NSW) v Brown* (1847). Stephen CJ made an analogy between James Cook's 1770 annexation of the east coast of Australia for George III, King of Great Britain and Ireland, and William the Conqueror's status in late eleventh-century England as a 'feudal' overlord. Stephen CJ acknowledged it was anachronistic that the feudal system could be the basis of Crown grants and settler property relations, since he accepted that land law in England had not been 'feudal' for centuries. He also observed that it was a legal fiction that all property was originally held by William I before being granted. This understanding reflects a matter of no small distinction: that the feudal policy had been adopted constitutionally during William's reign, rather than imposed from above, as noted in later additions in the early eighteenth century of *Bacon's Abridgment*.[19] The view that a 'parliament' had consented to tenure for the good of the people, intending nothing to be 'precarious or illiberal' about the English law of feuds, was also found in William Blackstone's (1723–1780) *Commentaries on the Laws of England*, and Martin Wright's (1691–1767) *Introduction to the Law of*

18 Clare Davidson, 'Cultivation and commodification: regulating gendered status and settler colonial title to land,' *Australian Historical Studies* 56, 2 (2025): 1–18, 15; Gareth Knapman, 'Feudalism and Indigenous Sovereignty: The Batman Treaty and James Brooke's Sarawak Regime,' *Australian Historical Studies* 54, 3 (2023): 554–573; Andrew Buck, '"This Remnant of Feudalism": Primogeniture and Political Culture in Colonial New South Wales, with Some Canadian Comparisons,' in John P. S. McLaren, A. R. Buck, and Nancy E. Wright, ed. *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: University of British Columbia Press, 2004), 190–206.

19 The judgment cites *Bacon's Abridgment*, probably the 7th edition: Mathew Bacon, *A New Abridgment of the Law* […], ed. Charles Edward Dodd and Henry Gwillim (London: 1832). See *Prerog*. B. and a marginal note that references Charles Yorke, *Some Considerations on the Law of Forfeiture, for High Treason* […] (London: J. and J. Rivington, 1748 [1754]), 55–62.

Tenures, published in 1730.[20] This explains why Stephen CJ regarded that the Crown's universal occupancy of the: 'newly discovered land' of New South Wales (NSW) was not merely a fiction.[21] Unlike what was thought to have occurred during the Norman conquest, he did not recognise the possibility of land legally being held other than by a grant in which specific rights were dictated by the Crown.

In 1992, the High Court of Australia drew on *Attorney-General (NSW) v Brown* to revise the legal operation of the doctrine of tenure. In his judgment in *Mabo (No. 2)*, Brennan J held that the doctrine was derived from 'feudal origins' and: 'could not be overturned without fracturing the skeleton which gives our land law its shape and consistency'.[22]

The landmark decision accommodated the existence of Native Title by limiting the 'universal' nature of the title held by the Crown. Blackstone was drawn on to help account for the 'traditional belief' held by colonial judges that: 'some time after the Norman Conquest, the King either owned beneficially and granted, or otherwise became the Paramount Lord of, all land in the Kingdom'.[23] Brennan J cited Blackstone to explain that by the time he wrote in the eighteenth century, it had become: 'a fundamental maxim, and necessary principle (though in reality a mere fiction) of our English tenures, "that the king is the universal lord and original proprietor of all the lands in his kingdom" [...].'

20 John W. Cairns and Grant McLeod, 'Thomas Craig, Sir Martin Wrights, and Sir William Blackstone: The English Discovery of Feudalism,' *Journal of legal History* 21 (2000): 54–66.

21 *Attorney-General (NSW) v Brown* (1847) 1 Legge 312, 318; Buck, *The Making of Australian Property Law*.

22 *Mabo v Queensland (No 2) [Mabo (No. 2)]* (1992) 175 CLR 1 [47].

23 For his antecedents on the feudal system and more generally, Michael Lobban, 'Rationalising the Common Law: Blackstone and His Predecessors,' in Anthony Page and Wilfrid Prest, ed. *Blackstone and His Critics* (London: Bloomsbury, 2018), 1–22, 14–20.

Given this, it was:

> [N]ot surprising that the fiction that land granted by the Crown had been beneficially owned by the Crown was translated to the colonies and that Crown grants should be seen as the foundation of the doctrine of tenure which is an essential principle of our land law.[24]

The fictionality of English feudalism for Blackstone was the idea that original proprietorship had been forcefully taken, not willingly given, and because of this, also the idea that English land law was essentially illiberal. In the colony of NSW, Stephen CJ did not think it was a fiction that the Crown 'beneficially owned' the land to which it made grants. His judgment was to become an authoritative expression of the history of settler property law, consolidating a way of organising rights to land and controlling Country that failed to recognise existing right holders and rendered them outside legal history.[25]

It is not surprising that the mid-nineteenth-century Supreme Court of NSW imported historical narratives about feudal rights and relationships into Australian land law. 'Medieval' concepts and authorities were commonly referred to in histories of the common law. While earlier critics worried about legal antiquarianism and irrationality, it was not until the final decades of the nineteenth-century that concern was raised about the fundamental misunderstanding of medieval history in legal settings. In an article written in 1879, while he was still a practising lawyer, Maitland described how, if the ordinary man were to consult Blackstone, he:

> [S]traightaway finds himself in the Middle Ages, or, what is far worse, in a theory of the Middle Ages, concocted by the lawyers of the last century. He has to learn a new language, and to acquire wholly new habits of thinking about the most ordinary transactions.[26]

24 *Mabo (No. 2)*, [50].

25 On colonial appropriation and racial regimes of property, see Brenna Bhandar, *Colonial Lives of Property: Law, Land and Racial Regimes of Property* (Durham: Duke University Press, 2018).

26 Frederic Maitland, 'The Law of Real Property' (1879) in H.A.L. Fisher, ed. *The Collected*

In 1888, in his inaugural lecture as the Downing Professor of English Laws, Maitland further detailed what he saw as the obfuscation of knowledge about the medieval past by legal practitioners. He joked that an oversaturation of pseudo-historical concepts and genealogies gave the appearance that English lawyers were: 'a race of medievalists'.[27] Maitland explained that the medieval facade of legal discourse in fact impaired historical understanding. Although it was: 'quite impossible to write the simplest book about our land-law without speaking of the *De Donis* and the *Quia Emptores*', lawyers were not actually required to be familiar with such late thirteenth-century statutes to master legal reasoning, but only with their modern judicial construction. Essentially, nineteenth-century lawyers did not need: 'a knowledge of medieval law as it was in the Middle Ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts'.[28] Maitland's late nineteenth-century analysis of the different purposes for which legal practitioners and historical researchers interpret sources remains influential. He delineated historical and legal analysis by pointing out that when lawyers interpret sources, they are concerned with a different field of reference than past contexts: 'What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better'.[29] While Maitland's goal in 1888 was to carve out a space for the history of law, he also brought attention to the interpretation of legal principles as a consistent and reasoned practice based on the unity of decisions over time.

Maitland's account helps explain one reason for the continued recourse to 'orthodox' histories in modern Australian decisions: the insular authority of older medieval narratives. Eighteenth-century ideas of feudalism stand out as one example. In legal analysis, authoritative interpretations of discrete

Papers of Frederic William Maitland, vol. one (Cambridge: Cambridge University Press, 1911), 162–201.

27 Frederic Maitland, 'Why the history of English law is not written?,' in *The Collected Papers*, 480–49, 490–1.

28 Ibid.

29 Ibid.

rules are abstracted from historical sources in a way that determines their present and future application. In judgments, this formal mode of analysis can be interlaced with a discussion of the historical development of rules and the contexts in which they were previously applied.[30] Some narratives about the past, like the so-called feudal origins of the doctrine of tenure, have validity because they convey a consistent authority. A 'traditional belief' about the past can be employed as an analytical tool, becoming a normative myth that works as: 'a rhetorical device to render past reality into a form useful to legally principled resolution of present conflicts'.[31] In addition to this use, premodern contexts and sources can be drawn on in judgments to contextualise the development or application of a rule or principle, or in rare circumstances, as the legal source of a rule. These different legitimate uses—and the alternate modes of legal and historical analysis that ought to define them—are not regularly or clearly distinguished in judicial reasoning. There is a risk that the relatively distinct judicial tasks of identifying sources and principles of law and considering or explaining historical contexts are compromised through recourse to obsolete ideas of the past that influenced the decisions of colonial jurists, such as feudalism.

There is a substantial disconnect between judicial representation of the past in the nineteenth century and the current state of historical knowledge about medieval law and society. Yet very old doctrinal history has rarely been reviewed for its accuracy; more often, criticism concerns antiquarianism or anachronism. In 1987, Henry Reynolds remarked that Australian jurists had chosen to: 'keep Australian law in the straightjacket forged by the eleventh- and twelfth-century legal armourers'.[32] Similarly, in 2006, Andrew Buck argued that: 'the feudal system had a greater force in New South Wales than even in England'.[33] These are rhetorically powerful characterisations because of the conceptual relationship between feudalism and injustice, but fail

30 For discussion in relation to the Magna Carta, see *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 (Priestly JA).

31 *The Wik Peoples v State of Queensland & Ors [Wik]* (1996) 187 CLR 1, 105 (Gummow J).

32 Henry Reynolds, *The Law of the Land* (Camberwell: Penguin, 2003 [1987]) at 53.

33 Buck, *The Making of Australian Property Law*, 10.

to engage with the nineteenth-century novelty of feudal land law. The decision in *Attorney-General (NSW) v Brown* was shaped by local circumstances in colonial Australia, not English land law, at a time when, in Maitland's estimation, the history of English law was not yet known. As such, it does not accurately represent eleventh-century England, but an inaccurate idea of the Middle Ages from the middle of the nineteenth century. Along with two eighteenth-century abridgments, Stephen CJ derived his understanding of eleventh-century land law from editorial notes in a nineteenth-century edition of a seventeenth-century commentary on a fifteenth-century treatise.[34] Such 'invented traditions' of the legal profession are hard to trace because they refer to specialist sources and techniques and are: 'partly invented, partly evolved in private groups […], or informally over a long period of time', as Eric Hobsbawm observed.[35] His diagnosis accurately reflects the difficulty of understanding the significance of 'feudalism' in Australian legal history. The concept's meaning has been refracted through different geographic and temporal contexts and modes of determining historical and legal authority. In Australian law, the authority of the 'doctrine of tenure' that was initially rationalised as a matter of historical fact is now recognised as a matter of consistency. The 'skeleton' of Australian land law is a narrative about the past that provides a pattern for analogical reasoning. This does not mean the doctrine ought to be imbued with historical authority outside of its legitimate legal scope. Nor that its significance and potential issues with its continued use as an historical legal fiction should not be contextualised. Might references to the doctrine of tenure, along with other judicial constructions of medieval England, fossilise colonial ideas of time and place in Australian law? The answer, as well as the legal and cultural stakes of the question, depends in part on the characterisation of colonial ideas of time and place.

34 *Attorney-General (NSW) v Brown* (1847) Stephen CJ citing a note in Edward Coke, *The first part of the institutes of the laws of England; or, A commentary upon Littleton: not the name of the author only, but of the law itself* […] *Including also the notes of Lord Chief Justice Hale and Lord Chancellor Nottingham,* revised, corrected, with further additions of notes, references, and proper tables, by Francis Hargrave and Charles Butler.

35 Eric Hobsbawm, 'Introduction: Inventing Traditions' in Eric Hobsbawm and Terence Ranger, ed. *The Invention of Tradition* (New York: Cambridge University Press, 2012), 2–3.

Real feudal property in colonial Australia

Having briefly introduced the conceptual genealogy of legal medievalism, this section turns to its expression in colonial land law and legal discourse. In England during the first decades of the nineteenth century, legal practitioners and commentators viewed various laws related to the transfer of rights in land as illogical, inefficient and overly complex. A series of commissions and reforms in the 1830s targeted issues relating to prescription, limitation, dower, fines and recoveries, and inheritance. A.W.B. Simpson explained that the law of landed property, formed centuries earlier in feudal conditions, harboured many ghosts of the past, and this was one reason why: 'the disease [of extreme complexity] was there particularly gross'.[36] Legal developments in the early 1800s sought to 'preserve the spirit and analogies of existing institutions' and merely to abolish 'anachronisms'.[37]

Reformist discourse could include an explicitly ethnic dynamic, in which complexities and inequalities in land law were foreign impositions on native 'Anglo-Saxon' customs. In 1826, Chancery barrister James Humphrey (1768–1830) published *Observations on the Actual State of the Laws of Real Property*, in which he influentially explained how the Normans, a: 'proverbially litigious race', 'overwhelmed our landed property with feudal tenures, and their burdensome privileges' having passed over 'the simple rules of ownership under the Anglo-Saxon dynasty, as they may be collected from the relics of their laws, and their extant charters'.[38]

For Humphrey, such laws served the dead, not the living: '*le mort saisit le vif*, say the feudal jurists'.[39] His initial plan for the entire existing law of real property to be replaced with comprehensive and systematic legislation sustained praise as well as broad opposition, but was later curtailed and, for the most

36 A.W.B. Simpson, *A History of Land Law* (Oxford: Oxford University Press, 1986), 270.

37 A.W.B. Simpson, *A History of Land Law*, 275; citing the first Real Property Commissioners' report (1829).

38 James Humphrey, *Observations on the Actual State of the Laws of Real Property,* 2nd ed. (John Murray: London, 1827), 4.

39 Ibid, 3.

part, extended beyond the scope of the reforms.[40] From England, colonial entrepreneurs anticipated how new jurisdictions with abundant potential land holdings might provide opportunities for legal innovation outside the limitations of the existing system.[41]

In Australia, historically-oriented attacks on the law of real property were radically displaced and filtered through various means of receiving and developing law in the colonies. Legal practitioners and politicians instrumentalised the idea of feudalism, and related ideas of medieval history, including the Norman conquest and Anglo-Saxonism, to debate the function of British law and the merits of potential reform. Recourse to premodern traditions projected social and political issues into the ancient past in public as well as juridical settings, and coincided with increased political accountability in matters of governance as well as a consolidation of the Crown's power.[42] The way that political opinions were shaped through representations of medieval history is suggested in the campaigns surrounding the Real Property Acts, the first of which, in 1858, was one of the earliest laws passed by the new legislature of South Australia (SA). Within the political campaign, the proposed new system of title to land by registration was framed as more liberal and fairer than the feudal system imposed by the Normans, which favoured elite interests and secret dealings. This characterisation was influenced by the eighteenth-century continental historical understanding of feudalism, in which it was fitted to explain aristocratic privileges and the repression of liberty.[43]

In the English tradition, feudalism tended to be associated with autocratic rule. The nineteenth-century: 'habit of presenting "feudalism" and "the nation" as opposite and antagonistic concepts' reflected earlier concerns with

40 J. Stuart Anderson, 'Property Rights in Land: Reforming the Heritage,' in William Cornish, et al. ed., *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford: Oxford University Press, 2010), 47–78, 50–1.

41 Davidson, 'Cultivation and commodification.'

42 Paul Finn, *Law and Government in Colonial Australia* (Melbourne: Oxford University Press, 1987), 13.

43 Susan Reynolds, *Fiefs and Vassals: The Medieval Evidence Reinterpreted* (Oxford: Clarendon Press, 1996), 9.

constitutionalism, and increasingly, political representation, as a check on the powers of the Crown.[44] The political ideology of the ancient constitution had for centuries been theorised as a set of earlier customs and institutions that survived the Norman conquest.[45] Like the 'ancient law of marriage' discussed above, the reception of 'feudal' law and its checks depended on its constructed historical relationship to the common law—the 'birthright' of British subjects in the Australian colonies.

The decision in *Attorney-General (NSW) v Brown* secured the 'original proprietorship' and control of the Crown over land in the colony, holding that the Queen was in possession and could make and defend grants that reserved certain rights associated with 'ownership'. The Supreme Court of NSW rejected the argument 'boldly asserted' by the defendant that the Queen had sovereignty and *dominium directum* without having beneficial ownership or possession, thus compromising the validity of the Crown's grant and legal standing. Stephen CJ explained that the court did not consider itself compelled to consider a variety of topics that had been introduced to explain this line of reasoning, but: 'which were indeed of too popular a character, merely, to justify further notice by us'.[46] He referenced their recent decision in *Hatfield v Alford* (1846), an appeal related to the validity of a grant made in 1831 by the Crown of rights to land for which another party claimed a presumption of legal title through bare possession since 1821. There, Stephen CJ had explained that the court required no evidence for the fact that 'the Crown was the legal owner of all land in the Colony at the time of its first settlement in 1788'.[47] The Crown 'could not, after all, in effect, be made to prove its title; since that title rests, in this Colony, on matter of judicial cognizance'.[48] For Dickinson J, the fact of the Crown grant in 1831 was a kind of proof, creating a presumption that the Crown held title.[49]

44 Pocock, *The Ancient Constitution*, 244–5.

45 Ibid, 42.

46 *Attorney-General (NSW) v Brown* (1847), 316.

47 *Hatfield v Alford* (1846) 1 Legge 330, 336.

48 Ibid, 337.

49 Ibid, 340–1.

Decided the year before *Attorney-General (NSW) v Brown*, this case explains the real 'essential principle' upheld in *Mabo (No. 2)*. Rather than the ambiguous 'doctrine of tenure', the 'skeleton' of Australian land law that was upheld is the principle that the Crown cannot have given what it did not have the right to give. As Brennan J reasoned in 1992: 'titles acquired under the accepted land law cannot be disturbed'.[50] In the nineteenth century, the novelty of the Crown's annexation of title produced: 'the peculiar character of titles in New South Wales, which are all derived from the Crown, and at periods of which the longest is comparatively recent, and necessarily within sixty years'.[51] Judicial cognizance of this fact created fewer rights for settlers than in England, where, the Crown may have been obliged to provide evidence for its title against Alford's earlier claim of possession, and titles could be established through prolonged use. The essential reduction in the ways in which property rights could be created is apparent in the Privy Council decision of *Cooper v Stuart* (1889), which enforced the specifically Australian powers of the Crown against British subjects at the same time as it dismissed the existence of Aboriginal laws.[52] In 1847, Stephen CJ had already rejected the principle that rights to land not created by the Crown could follow the: 'occupation of the ancient owners (that is, of the aboriginal inhabitants [...]).'[53]

Although the report on *Attorney-General (NSW) v Brown* explains the judges did not consider themselves bound to address populist arguments, they did provide more reasoning for the presumption that the Crown had title to make valid grants than the decision in *Hatfield v Alford* the previous year. Justification was not only found through the historical analogy with William I's conquest of England in 1066, but also, the good of the nation. Stephen CJ reasoned that the lands of the colony may be: 'the patrimony of the nation' but the sovereign was its representative, the 'executive authority' through 'whom the

50 *Mabo (No. 2)*, [49], [52]; see discussion in Ulla Secher, 'The doctrine of tenure in Australia post-Mabo: replacing the "feudal fiction" with the "mere radical title fiction"-part 2,' *Australian Property Law Journal*, 13 (2) (2006): 140–178, 145–6.

51 *Hatfield v Alford* (1846), 337.

52 *Cooper v Stuart* (1889) LR 14 App Cas 286.

53 *Attorney-General (NSW) v Brown* (1847), 324.

nation acts, and in whom for such purposes its power resides'.[54] Stephen CJ retrofitted this view into medieval history, but also explained that as a character of the Crown it depended on: 'no feudal notions or principle'. It was clear that: 'the title to lands in this colony is in the Crown; equally on constitutional principles, as by the adaption of the feudal fiction'.[55] In this way, the Supreme Court proposed that just as the original 'fiction' of feudal tenure was understood to be: 'for the good of the people' in eleventh-century England, the reality of feudal tenure in the nineteenth-century British Empire was for the good of the people in the colony of NSW.[56] The original 'fiction' of feudal tenure was that it was not constitutional, so in reality, Stephen CJ's alternate reasons were the same.

The year that *Attorney-General (NSW) v Brown* was decided in NSW, the Supreme Court of South Australia, under the sole purview of Charles Cooper J, marked its tenth year of operation. The new settlement in SA was not to become self-governing for another decade. The unchecked powers of governors in the early days of the province of SA warranted Alex Castles and Michael Harris to liken the governors to 'medieval monarchs' in autocratic 'mini-sovereigns'.[57] They note, however, that the governors were ultimately servants to officials, subject to: 'overriding directions of successive British governments and the all-powerful supervision of the imperial parliament'.[58] In addition, the variety of agents who represented the 'Crown' allowed responsibility for unpopular opinions to be displaced from the person of the Queen. In 1845: 'An Act to amend an Act', entitled: 'An Act for regulating the Sale of Waste Land belonging to the Crown in the Australian Colonies', which expressly permitted the Queen and her agents to reserve minerals and charge royalties, was not passed by Parliament in Westminster. In Adelaide, this was seen as imperial interference and a 'breach of that public faith under which

54 Ibid.

55 Ibid.

56 Ibid, 318.

57 Alex C. Castles and Michael C. Harris, *Lawmakers and wayward whigs: government and law in South Australia, 1836-1986* (Adelaide: Wakefield Press, 1987), 37.

58 Ibid, 37–41.

most of the colonists emigrated to South Australia', namely: 'the perfect tenure under which the waste lands' had been purchased, the: 'superior tenure of the land' which was: 'sold in fee-simple and wholly without reserve'.[59]

Representatives of the colonists sought to petition the Queen—addressing her separately to the Colonial Secretary responsible for the proposed amendment—also requesting that:

> Your Majesty will further most graciously withhold your sanction to any reservation of minerals out of the waste lands of the province to be hereafter sold, or to the imposition of royalties thereon, and to any alterations in the mode of leasing or otherwise granting temporary possession of the unsold land, until that subject shall receive the previous sanction of the Legislative Council of the province.

In fact, the Colonial Secretary delegated the decision to the governor of SA, Frederick Robe, who in March 1846 released regulations for: 'a seignorage or royalty' of one-fifteenth on minerals, which were strenuously opposed and resisted.[60] Their legality was argued before Cooper J in the Supreme Court of South Australia in *The Queen v Paxton and Others* (1848). The case for the Crown's right to reserve minerals in land grants referred to those in neighbouring colonies, such as those being tested in NSW.

Public perceptions of sovereignty and the rule of law in Adelaide are indicated by a satirical poem attributed to the author 'Rusticus', published in the *South Australian* in July, the same month as the hearing. The poet describes coming across some bushmen bearing: 'the stamp of ancient sages' who were debating the law in a battered shed. One gentleman: 'most loyal to beloved England's Crown,' tells the others: 'That "Acts" were useless in any ways / Prerogative as strong as in the Conqueror's days'. He is supported by another speaker, who also upheld prerogative with Russian force:

59 'The Royalty Imposition' (10 August 1848). *South Australian Gazette and Mining Journal*, 1. Retrieved 26 September 2025, from <http://nla.gov.au/nla.news-article195936391>.

60 Ibid, 2; Ralph M. Hague, *Hague's History of the Law in South Australia 1837–1867, Volume One* (Adelaide: The University of Adelaide Press, 2005), 168–71.

Poor Freedom or her shadow quite denied:
Vowed they were dead and buried too, of course.
He said a purchaser had no resource,
That though the Queen consented to an Act
If afterwards she felt a slight remorse,
Her fairy feet might trample the compact,
For Right Divine still reigns, and feudal law's intact.[61]

The 'Bushman' poet warns against those who defend the Queen's power, equating the feudal law with the arbitrary enactment of the royal prerogative. Yet reported accounts of the royalty case suggest that colonists separated loyalty to the Queen, and a belief that she aligned herself with their best interests, from faith in the actions of her imperial and colonial agents deemed responsible for the attempt to abrogate the colony's foundational charter, the 'Magna Charta' of SA.[62] In the Supreme Court, Cooper J found for the defendants—the proprietors of Adelaide Mine who refused to pay royalties—but expressed relief that the matter would be appealed before the Privy Council.[63] Such was the excitement when the regulations were found to be invalid that a public meeting of unprecedented scale took place, reportedly followed by a celebration with free drinks that illuminated Adelaide, before the colonists retired to bed by midnight.[64]

The legal rehabilitation of a 'constitutional' feudal order in *Attorney-General (NSW) v Brown*, which drew on English historical understanding of medieval history, was at relative odds with a populist sense of 'feudalism' influenced by French liberalism. Since the eighteenth century, French historians related feudalism to the jurisdictional power of the nobility over peasants rather than a strong central authority, to account for oppressive contemporary social

61 'A Bushman's Report of an Equity Case' (18 July 1848), *South Australian*, Retrieved 29 May 2024, from <http://nla.gov.au/nla.news-article71611866>.

62 'The Royalty Imposition,' 4.

63 The regulations were in fact abandoned by a new Governor before an appeal was heard. Hague, *Hague's History*, 171.

64 'The Royalty Imposition,' 3.

inequalities.[65] This concept of feudalism, also characteristic of German historical interest, was carried to the colonies of Australia and deployed by landholders and politicians, who negotiated liberal ideologies and loyalty to Queen Victoria. This was achieved through criticising her agents as well as privileges identified as the cause of social inequality in England. These polemical histories of feudal law characterised popular attitudes to the 'Crown' in Australia, the rights and responsibilities of which were split between the Queen and agents, whose integrity could be doubted. The dispossession of Aboriginal and Torres Strait Islander land rights was incidental to these legal and political debates about feudal rights and relationships. Unlike the consent of Anglo-Saxon lords, the consent of the land's 'ancient owners' was not deemed requisite for constitutional order and legitimate governance. The Supreme Court held that because Indigenous peoples lived: 'without certain habitation and without laws [they] were never in the situation of a conquered people'.[66] The Norman Conquest provided a historical analogy for the Crown's rights in Australia, but the sovereignty of the Crown and the reception of laws purportedly followed the eighteenth-century international law of settlement, not conquest. Like imperial constructions of feudal tenure, this legal fiction—which anachronistically endures past the rejection of *terra nullius*—is part of the normative historical matter, the colonial temporality, of jurisdictional power in Australia.[67]

Maitland's 'essay on comparative jurisprudence'

How might Maitland's late nineteenth and early twentieth-century analysis of feudalism provide a foundation for understanding the significance of medievalism in Australian law? He conceived of feudalism as a type of historical construction that was abused in legal and political discourse: a word that

65 Reynolds, *Fiefs and Vassals*, 9.

66 *MacDonald v Levy* (1833) 1 Legge 39, 45.

67 On jurisdictional temporality, see Natasha Wheatley, 'Legal Pluralism as Temporal Pluralism: Historical Rights, Legal Vitalism, and Non-Synchronous Sovereignty,' in Dan Edelstein, Stefanos Geroulanos, and Natasha Wheatley, ed. *Power and Time: Temporalities in Conflict and the Making of History* (Chicago: University of Chicago Press, 2020), 53–79.

could: 'cover a multitude of ignorances'.[68] Maitland perceived that a medieval lawyer concerned with land rights in post-Conquest England would have found the principle that the King: 'owns and possesses every inch of land' a 'useless dogma'.[69] He questioned modern use of the term in 1879 writing that: 'we are so accustomed to see all the ages jumbled together in our nineteenth century law that nothing surprises us, and any semblance of explanation which may be offered for existing institutions is accepted as satisfactory'. Undercutting the historical basis of a purported connection between feudalism and primogeniture he wrote that: 'we are used to an unreasonable law of real property, and we find no difficulty in believing that what is unreasonable now was unreasonable always, "feudalism" of course, being a particular form of unreasonableness not too rashly defined'.[70] Maitland drew attention to the unworkable ambiguity of feudalism as a historical concept by explaining the great diversity of temporal and regional modes of legal and social organisation that it was said to characterise. His notorious dislike of the term 'feudalism' aside, Maitland's analysis provides a framework for understanding its significance in historical and modern legal discourse, as well as the use of medievalism more broadly.[71]

In nineteenth-century legal historical writing, 'feudalism' could be used to describe multiple different ideas. In his lectures, Maitland explained that the phrase has:

> become for us so large and vague that it is quite possible to maintain that of all countries England was the most, or for the matter of that

68 Maitland, 'The Law of Real Property,' 162–201.

69 Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I*, vol. 2, 2nd ed. (Cambridge: Cambridge University Press, 1898), 114; Pollock assessed his contribution to the work as 1:60. John Hudson, ed. *The History of English Law: Centenary Essays on "Pollock and Maitland"* (OUP/ British Academy, 1996), ix.

70 Maitland, 'The Law of Real Property,' 162–201.

71 It was characterised as one of his 'enemies' in S.F.C. Milsom, 'Pollock and Maitland': a Lawyer's Retrospect,' in *The History of English Law,* 243–259, 246.

> the least, feudalized; that William the Conqueror introduced, or for the matter of that suppressed, the feudal system.[72]

The concept was not only pan-European, but it was also ahistorical, flattening legal developments across centuries of change:

> The impossible task, that has been set before the word 'feudalism' is that of making a single idea represent a very large piece of the world's history, represent the France, Italy, Germany, England, of every century from the eighth or ninth to the fourteenth or fifteenth.[73]

Attention to specific contexts and localised uses justified Maitland's claim that 'feudalism' was not a comprehensive or coherent system of land law, but a way of thinking about legal history at its most influential in the eighteenth century.[74] This was the same period in which the concept of the 'medieval' emerged: 'as a means of legitimising sovereignty and conquest'.[75] The flattening of time and place achieved by 'feudalism' explains how it has come to be synonymous with the society of medieval Europe, connecting to the politics of periodisation discussed in the first section.

Aside from the misuse and ambiguity of 'feudalism', in a more focused English context, Maitland was concerned with the implications of privileging fiefs and a hierarchical relationship between lord and vassal as the most characteristic feature of medieval property law.[76] He explained why he thought feudalism

72 Frederic Maitland, *The Constitutional History of England*, ed. H.A.L. Fisher (1908), 142–3.

73 Frederick Pollock and Frederic Maitland, *The History of English Law Before the Time of Edward I*, vol. 1 (Cambridge: Cambridge University Press, 1895).

74 This view has largely been upheld by later historians, see Otto Brunner, 'Feudalism: The History of a Concept,' in *Lordship and Community in Medieval Europe*, ed. Fredrich Cheyette (Huntington, NY: Robert E. Krieger, 1968), 32–56; Elizabeth A.R. Brown, 'The Tyranny of a Construct: Feudalism and Historians of Medieval Europe,' *American Historical Review* 79 (1974): 1963–88; Reynolds, *Fiefs and Vassals.*

75 Davis, *Periodization and Sovereignty*.

76 Milsom, 'Pollock and Maitland,' 246.

was an ‘unfortunate word’ in this more analytical sense in *The History of English Law Before the Time of Edward I*, published in 1895:

> In the first place it draws our attention to but one element in a very complex state of society and that element not the most distinctive; it draws our attention only to the prevalence of dependent and derivative land tenure. This however may well exist in an age which cannot be called feudal in any tolerable sense. What is characteristic of ‘the feudal period’ is not the relationship between letter and hirer, or between lender and borrower of land, but the relationship between lord and man, or between lord and vassal, or rather it is the union of these two relationships.[77]

Maitland is a celebrated stylist as well as a historian, but the last sentence here is not his finest explanation. In fact, it makes little sense at all. What is a union between the anomalously linked pairings of ‘lord and man’ and ‘lord and vassal’, and how are letting and hiring, and lending and borrowing relevant? Letting and hiring are broader Old and Middle English terms not generally employed by Maitland to describe or analyse the predominantly Latin and French sources of medieval English land law.[78] In addition, he notes that leaseholds, the possession of land for a determinate period, were not common in the early centuries of the second millennium.[79] A revision to the second edition of the *History of English Law*, published in 1903, was not well considered. It makes the passage worse by removing the ‘relationship’ between ‘lord and man’ so that it reads: ‘What is characteristic of “the feudal period” is […] the relationship between lord and vassal, or rather it is the union of these two relationships’.[80] The likely cause of the confusion demonstrates Maitland’s own almost use of feudalism as a mode of comparative jurisprudence.

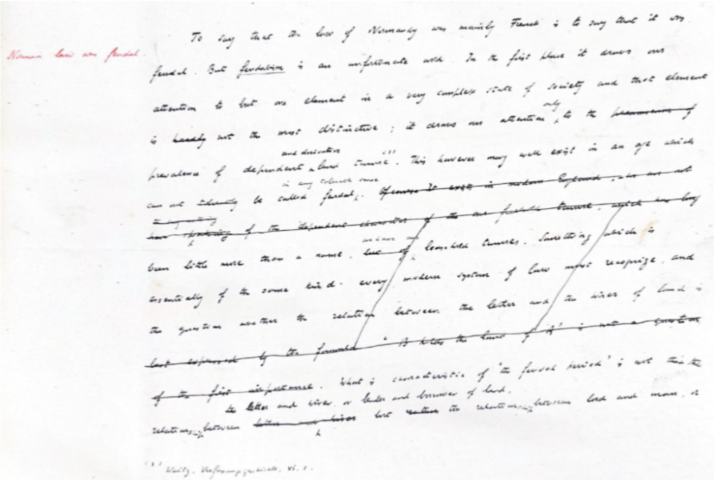
77 Pollock and Maitland, *History of English Law*, 1:44.

78 Pollock and Maitland, *History of English Law*, 1: 59.

79 Pollock and Maitland, *History of English Law*, 2:111–4.

80 Pollock and Maitland, *History of English Law* (1906), 2nd ed. 1:67.

The final typesetter's copy of the manuscript shows that he made a late redaction before sending the work to press. [81]


Norman law was feudal

To say that the law of Normandy was mainly French is to say that it was feudal. But feudalism is an unfortunate word. In the first place it draws our attention to but one element in a very complex state of society and that element is ~~hardly~~ not the most distinctive; it draws our attention only to the ~~[illegible]~~ prevalence of dependent and derivative land tenure. This however may well exist in an age which can not ~~[illegible]~~ be called feudal in any tolerable sense. ~~Of course it exists in modern England [illegible]~~ [illegible]

[illegible]

‘Norman law was feudal,’ printer's sheet for *History of English Law* (1895)

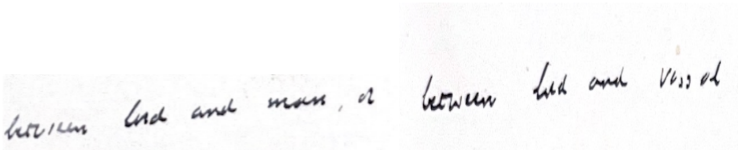
Maitland removed a comparison he drew between the medieval system of property law called feudalism and the law of leaseholds in late nineteenth-century England. The original manuscript gave an example of how: ‘dependent and derivative land tenure’ could exist in an age that could not: ‘be called feudal in any tolerable sense’.

> Of course, it exists in modern England—we are not here thinking of the dependent character of our freehold tenure, which has long been little more than a name, but of leasehold tenures. Something which is essentially of the same kind every modern system of law must recognise, and the question whether the relation between the letter and

[81] Frederic William Maitland: Papers, GBR/0012/MS Add.6987. Cambridge University Library, 8.

the hirer of land is best expressed by the formula ‘B holds the land of A’ is not a question of the first importance.

This additional lost context makes sense of Maitland’s reference to lending and borrowing and the feudal relationship. The final words on the page are not entirely legible but suggest the final sentence in the standard printed work should be: ‘What is characteristic of ‘the feudal period’ is […] the relationship between land and man, or [next page] between lord and vassal, or rather it is the union of these two relationships’.



‘Land or lord?,’ printer’s sheet for *History of English Law* (1895)

Substituting ‘land’ for ‘lord’ here makes sense of Maitland’s point that medieval land law encompassed something more than a contractual relationship between two persons. It aligns with Milsom’s interpretation of Maitland’s argument about why ‘feudalism’ is not a historically illuminating concept:

> For him the personal relationship between lord and man was never more than an add-on extra to a system turning on abstract relationships between man and land. To say that a man owns or possesses the land is to make a statement to which no lord can be relevant […].[82]

The correction makes clear Maitland’s sense of the proprietary nature of land law in medieval England, which turned on the relationship between ‘land and man’ together with that of lord and vassal. For Maitland, the characteristic

82 Milsom, ‘Pollock and Maitland,’ 246.

feature of this law was not '*tenere terram* [to hold land] but *tenere terram de x* [to hold land from a feudal superior]'.[83] In this way, he drew attention to the relationships between persons that constituted the basis of medieval English property rights.

The political significance of comparisons between medieval feudalism and later legal systems is evoked in the aside on leaseholds that was removed from *The History of English Law*. While Maitland sought to demonstrate that in England, it could be said 'feudalism is mere property law', when he wrote, the so-called 'land question' was pressing, and critics of 'landlordism' did indeed make comparisons with 'feudal' times.[84] The intended effect of his comparison was tarnished by the ideological significance of feudalism; rather than making medieval law appear modern, it risked making modern law medieval. To an extent, this ideological significance may reside in the concept of 'tenure' itself, if, like feudalism, it impairs historical understanding. In medieval England, Susan Reynolds notes: 'free property was, of course, dependent on the government and the common law, but no more than all property is subject to the government and law under which it exists'.[85] In this context, she suggested, the tendency to refer to legal interests in land as 'tenure' rather than 'property' is essentially unhelpful. Reynolds discounts the historical reality of medieval feudalism. She nonetheless considers the comparative historical utility of various identifiable models, holding that the Marxist version, which refers to an entire social system and means of production, is generally the most stable. But what about in legal analysis and discourse? In England, Maitland explained, feudalism was first employed as: 'an early essay in comparative jurisprudence' by seventeenth-century antiquarian Henry Spellman, who used it to relate historical English laws to European equivalents.[86] References to 'feudal' principles and 'feudalism' are always essentially

83 Pollock and Maitland, *History of English Law*, 1:234.

84 Pollock and Maitland, *The History of English Law*, 214.

85 Susan Reynolds, 'Tenure and property in medieval England,' *Historical Research* 88 (2015): 563–576, 563.

86 Maitland, *The Constitutional History of England*, 142–3; He draws on the same idea in 'Why the history of English law is not written?,' 489; On Selden's influence, see Davis, *Periodization and Sovereignty*, chapter three.

comparative and must be considered in relation to multiple temporal, geographic, and practical contexts, as well as the specific circumstances of their use.

While Stephen CJ's court in the mid-nineteenth century did not express much concern with the significance of feudal law and medieval conquest in relation to the rights of Indigenous peoples, this has become a common context for its judicial reference since the 1990s. An example of the comparative significance of feudalism in Australian land law can be seen in *Fortescue Metals Group v Warrie* (2019), a decision of the full Federal Court of Australia.[87] The Court recognised that, since 1860—the date the Crown annexed the Pilbara region of Western Australia—Yindjibarndi laws and customs had maintained possessory rights to land for the Yindjibarndi people.[88] Fortescue Metals, the appellant, argued that inappropriate legal meaning had been given to Yindjibarndi law and custom because it was only a belief. In the Federal Court, Jagot and Mortimer JJ explained that the word 'belief' did not diminish the significance of Yindjibarndi law and custom, referring to nineteenth-century histories of medieval land law as an example of how 'beliefs' also underlie Anglo-Australian law.[89] The joint judgment drew on Brennan J's account of the Norman Conquest in *Mabo (No 2)*. This had extended the historical analysis in *Attorney-General (NSW) v Brown*, for instance, referencing a textbook written by an English lawyer in 1875 that explained that William I succeeded the rights of Anglo-Saxon kings and: 'acquired by operation of law the land of those who had resisted his conquest and a vast quantity of land was deemed to have been forfeited or surrendered to [him] and regranted by him'.[90] In *Warrie*, as in *Mabo (No. 2)*, the legitimacy of Yindjibarndi law was made commensurable by a medieval fiction — the conquest myth of eleventh-century England refracted through nineteenth-century sources. Maitland's analysis of medievalism exposes this type of conflation between legal authority and historical evidence. In such contexts, a distinction must be made between

87 *Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People* [2019] FCAFC 177.

88 Ibid, [298].

89 Ibid, [304].

90 *Mabo (No. 2)*, [49]; citing Kenelm Edward Digby, *An introduction to the history of the law of real property, with original authorities* (Oxford: Clarendon Press, 1875), 34.

empirical history—such as the Yindjibarndi law and custom evidenced in court—and 'orthodox' historical narratives. The distinction can be made invisible through referencing practices, whether the latter are referred to as beliefs, legal fictions, or principles (such as: 'a rhetorical device to render past reality into a form useful to legally principled resolution of present conflicts').[91] The discussion in *Warrie* offers an example of how 'feudalism' now functions as a mode of comparative jurisprudence—not between various European jurisdictions, as for Spelman or Maitland, but between the sources and authority of Anglo-Australian and Indigenous laws. Through 'feudalism', the legal construction of 'medieval England' is empowered to displace customs and laws of Country, simultaneously legitimising origin myths of settler sovereignty and circumscribing Indigenous laws, even in their recognition, with an imported temporality.

Conclusion

A survey of High Court references has shown that in recent decades there has been an increasing turn to the classics of English legal history, which range from the twelfth-century *Tractatus de Legibus et Consuetudinibus Regni Angliae* (known as Glanvill), to the thirteenth-century *De Legibus et Consuetudinibus Angliae* (known as Bracton), and works by Littleton, Hale, Blackstone, Pollock and Maitland, and Holdsworth.[92] The significance of the High Court's turn to these types of historical sources is unclear, since they may be referenced alongside more recent legal histories or be drawn on for legal principles.[93] The use of doctrinal history has: 'enjoyed a long and perhaps almost uncritical adoption in the Australian courtroom,' as Tanya Josev observes.[94]

91 Gummow J's formulation in *Wik* (1996), 105.

92 Swain, 'The Use and Misuse of Legal History,' 198–9.

93 For work on this topic in the US context that became available after this essay was accepted for publication, see Allison Orr Larsen and Thomas McSweeney, 'Medieval Treatises and the Judicial Search for a Useable Past,' *Stanford Law Review* 79 (forthcoming 2027).

94 Tanya Josev, 'Australian Historians and Historiography in the Courtroom: How Matters Stand Now,' *Melbourne University Law Review* 43, 3 (2020): 1069–1099, 1071.

What may be a substantial disconnect between current research into medieval doctrinal history and the 'orthodox' narratives circulated within case law and legal discourse is cause for concern, given the politics of social hierarchy, progress, and imperial sovereignty generally embedded in older historical writing. The trend toward medieval England is more remarkable given the apparent judicial reluctance to refer to works about Australian history in modern courts.[95]

The ideological and analytical significance of medieval England as a concept in law has been widely overlooked. Instead, medieval England has been treated as a static site from which to measure continuity and change, and the development of a distinctly Australian legal system. The medievalism practised by Stephen CJ in *Attorney-General (NSW) v Brown* is one of reconstruction: he determines that a very old precedent in a faraway place ought to structure the legal present and future of a different place. This is a different type of medievalism from the abstract historical narrative in later decisions, like *Mabo (No. 2)*, in which the narrative is known to be inaccurate but continues to be retold and referenced with the ambiguous disclaimer that it is a legal fiction. The legitimacy of this use turns on the ahistoricism of legal reasoning as an analytical practice; it is a narrative about the past that provides a pattern for analogical reasoning, and at this level, it does not matter whether it is fact or fiction. Yet even when lapses between legal fiction and historical reality do not directly impact legal reasoning, they may nonetheless affect the quality of justice and character of legal authority. In such instances, they no longer serve their rhetorical purpose and should be abandoned.

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95 Josev, 'Australian Historians.'

Promises Unkept: Minority Rights and the Ambiguity of Pakistan's Early Constitutional Vision, 1947-54

Imran Ahmed

Born from Muslim nationalism, Pakistan's early constitutional efforts grappled with defining the state's Islamic character while addressing the aspirations and concerns of its non-Muslim minorities. But balancing the promise of equal citizenship for all, regardless of religion, with the political and ideological push for an Islamic identity, created tensions that would shape Pakistan's early constitutional debates. These tensions not only defined the country's approach to governance but also sowed the seeds for the marginalisation of minorities and the eventual discontent that would lead to significant political and social upheavals in the years to come. This article argues that minority rights were sacrificed at the altar of ideological priorities during Pakistan's early constitution-making. It highlights how the pursuit of a singular Islamic identity came at the expense of addressing the pluralistic realities of Pakistan's population. Moreover, the reliance on religion to suppress provincial identities alienated minorities, roused sectarianism, and entrenched patterns of marginalisation. By sidelining minority voices, early constitution-making normalised exclusionary practices that eroded the democratic and pluralistic fabric of the state.

'Pakistan, which symbolises the aspirations of a nation that found itself in a minority in the Indian Subcontinent, cannot be unmindful of the minorities within its own borders.'

Muhammad Ali Jinnah, February 1948.

Keywords: Minority Rights; Constitutionalism; Citizenship; Pakistan Constituent Assembly; Nation-Building

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Introduction

On 15 August 1947, Pakistan was born from the tumultuous end of British colonial rule in India[1] and out of the violent upheavals of partition.[2] Conceived as a refuge for South Asia's Muslims, Pakistan emerged as a patchwork of diverse regions, languages, ethnicities, and religious communities, and represented a novel and ambitious experiment in state formation, with its identity tied to the complex relationship between religion and politics in colonial India.[3] The paradox of Pakistan's identity lay in its focus on Islam as the basis for the state while simultaneously aspiring to provide equal rights to all its citizens, regardless of their religious affiliations. This tension stemmed from the very nature of the Pakistan movement: rather than being a popular, grassroots movement, the demand for Pakistan was driven mostly by a group of elite Muslim families from India's Muslim minority provinces, who felt threatened economically by the Hindu majority,[4] rather than by religious differences.[5]

However, the party that created Pakistan, the All-India Muslim League, was led by Muhammad Ali Jinnah, who had emerged as the principal political spokesman of Muslim interests in late colonial India and who later became Pakistan's

1 The *Indian Independence Act 1947* (Imp) established two independent Dominions, India and Pakistan, on 15 August 1947.

2 Historian Sarah Ansari explains that partition was not a singular event but an extended process that continued for years and posed significant challenges to nation-building. She writes: 'Pakistan may have come into existence at the stroke of midnight on 14/15 August 1947, but as a state created from scratch, it remained a 'work in progress' long after its founding moment.' Sarah Ansari, 'Pakistan's 1951 Census: State-Building in Post-Partition Sindh', *South Asia: Journal of South Asian Studies* 39, no. 4 (2016): 822.

3 Willem van Schendel, *A History of Bangladesh* (Cambridge: Cambridge University Press, 2009), 107.

4 British rule, intentionally or unintentionally, favoured Hindu upper castes over Muslim elites, as Hindus adapted more easily to British education, dominated lower civil service ranks, and benefitted from representative institutions that highlighted their numerical advantage. Anatol Lieven, *Pakistan: A Hard Country* (London: Penguin Books, 2012), 50.

5 Adeel Khan, 'Ethnicity, Islam and National Identity in Pakistan', *South Asia: Journal of South Asian Studies* 22, sup. 1 (1999): 167–68.

first Governor-General and presided over the early sessions of the Constituent Assembly. The League framed the call for Pakistan around the two-nation theory, which posited that Muslims and Hindus were distinct nations with irreconcilable differences in culture, religion, and social practices.[6] The founders of Pakistan were as ambiguous about the political framework of the new state after its creation as they had been secretive about it prior to partition.[7] 'Jinnah', as historian Ayesha Jalal puts it: 'needed a demand that was specifically ambiguous and imprecise to command general respect, and something specifically Muslim though unspecific in every other respect.'[8] The regions that would eventually form Pakistan – West Punjab, Sindh, Baluchistan, and East Bengal – were majority-Muslim areas but were not the initial strongholds of the Pakistan Movement. Support for Pakistan surged only in the 1946 provincial elections, and even then, it reflected pragmatic concerns.[9]

While Jinnah described Pakistan in varied and often vague terms, particularly on matters relating to Islam, he consistently reassured minorities that their

6 In 1944, Jinnah argued: 'We maintain and hold that Muslims and Hindus are two major nations by any definition or test of a nation. We are a nation of a hundred million, and what is more, we are a nation with our own distinctive culture and civilization, language and literature.' Jamil-ud-Din Ahmad, *Historic Documents of the Muslim Freedom Movement* (Lahore: Publishers United Ltd, 1970), 453.

7 Howard Brasted and Adeel Khan, 'Pakistan, the BJP, and the Politics of Identity', *South Asia: Journal of South Asian Studies* 25, no. 3 (2002): 367. Leonard Binder writes: 'Sometimes the leaders of the Muslim League admitted that the Islamic spirit of Pakistan was yet to reveal itself. More often, however, they spoke as if they knew exactly what sort of state was required by the prescripts of Islam. … The fact is, though, that neither the politicians nor the 'ulama' had any definite plan when independence suddenly came upon them.' Leonard Binder, *Religion and Politics in Pakistan* (Berkeley: University of California Press, 1961), 4-5. The term 'ulama' refers to the community of Islamic religious scholars trained usually in the interpretation of Islamic law and theology.

8 Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defence* (Lahore: Vanguard Books, 1991), 17.

9 They: 'had joined the Pakistan movement not necessarily because they were sold on the concept of a united Muslim state, but because they saw Pakistan as the stepping-stone for regional and ethnic expression.' Brasted and Khan, 'Pakistan, the BJP, and the Politics of Identity', 368.

rights and protections would be safeguarded. At the moment of independence, Pakistan encompassed two geographically and culturally distinct wings,[10] separated by over a thousand kilometres of Indian territory.[11] Although West Pakistan was geographically larger, East Pakistan, now Bangladesh, was more densely populated. The first national census of Pakistan, conducted in February 1951, recorded a total population of about 76 million, with some 42 million in East Pakistan and roughly 34 million in West Pakistan.[12] With 56 per cent of the population residing in the eastern wing, East Pakistan held a significant demographic majority compared to the western wing. Of the total population, approximately 85.9 per cent were recorded as Muslim (97.1 per cent in West Pakistan and 76.8 per cent in East Pakistan).[13] That left a sizeable 14.1 per cent of the population, or about 11 million people, as religious minorities, with caste Hindus making up 5.7 per cent, Scheduled Castes 7.2 per cent, Christians 0.7 per cent, and others 0.5 per cent.[14] Non-

[10] Surinder Singh explains the difference and its consequences: 'The people of this area differ widely, in temperament, dress, manners, customs etc. from the people of West Pakistan. These differences are not confined to culture alone but often indicate a clash of basic interests.' Surinder Singh, 'The Constitutional Problems of Pakistan', *Indian Journal of Political Science* 17 (1956): 51.

[11] Pakistan's early struggle to reconcile its national identity with the unique identities of its princely states was compounded by a lack of clear policy towards their integration. Concerns over issues like the influx of refugees and boundary disputes left little focus on how to incorporate states such as Kalat, Dir, and Swat, which introduced diverse customs, governance systems, and political dynamics into the state-building process. Yaqoob Khan Bangash, *A Princely Affair: The Accession and Integration of the Princely States of Pakistan, 1947–1955* (Oxford: Oxford University Press, 2015), 7–9, 101; Elisabeth Leake, 'The Great Game Anew: US Cold-War Policy and Pakistan's North-West Frontier, 1947–65', *The International History Review* 35, no. 4 (2013): 797.

[12] *Census of Pakistan, 1951, Vol. 1: Pakistan, Report & Tables* (Karachi: Manager of Publications, Government of Pakistan, 1954), <https://censusindia.gov.in/nada/index.php/catalog/31888/download/35069/1368_1951_REP.pdf> (last accessed 25 May 2026).

[13] In the aftermath of partition, violence and displacement forced millions to migrate, with Muslims fleeing to Pakistan and Sikhs and Hindus moving to India. This mass migration caused immense hardship and challenges and led to changes in the country's demographic and cultural landscape. Muslim refugees in Pakistan came to be known as 'Muhajirs'.

[14] *Census of Pakistan, 1951.*

Muslims made up just under 3 per cent of West Pakistan's population,[15] compared to 23 per cent in the eastern wing.[16] With over 32 distinct mother tongues and numerous dialects often unintelligible to speakers of related main languages, the 1951 Census noted that one of Pakistan's major challenges was the absence of a single language common to the entire population.[17]

This complex demographic reality posed a profound challenge: how to reconcile the state's founding narrative of Muslim nationalism with the pluralistic realities of its population. This tension was not unique to Pakistan. Across the decolonising world, nascent states wrestled with questions of inclusivity and belonging while striving to articulate cohesive national identities.[18] What distinguishes Pakistan's case is the centrality of religion to its creation and early political discourse. Would Pakistan be a theocracy, a secular democracy, or a hybrid of the two?[19] What rights would be accorded to its non-Muslim citizens in a state ostensibly established to safeguard Muslims? These unresolved questions would dominate Pakistan's constitutional deliberations in its formative years.

The first Constituent Assembly of Pakistan, which convened from 1947 to

15 Minorities in the western wing included Punjabi and Goan Christians, along with Scheduled Caste Hindus from Sindh.

16 Ian Talbot notes that the differing proportions of minority populations in the two wings inevitably shaped their respective approaches to the issue of Islamisation of the state. Ian Talbot, *Pakistan: A Modern History*, Expanded and updated edition (London: C. Hurst, 1998), 24.

17 The nine main languages listed on the Census Slip were Arabic, Urdu, Persian, Bengali, Pashto, Punjabi, English, Sindhi, and Baluchi.

18 In India, the post-independence period similarly involved complex debates over the inclusion of diverse religious, ethnic, and linguistic groups in the newly formed nation-state, with similar struggles to balance unity and diversity. Rochana Bajpai, *Debating Difference: Group Rights and Liberal Democracy in India* (Oxford: Oxford University Press, 2011).

19 As Binder put it: 'Islamic government, Islamic state, and Islamic constitution were the slogans of the last years of empire and the first of independence; but no one was quite sure what they meant.' Binder, *Religion and Politics in Pakistan*, 4–5.

1954, emerged as the theatre for debates about the country's national character and the status of its minorities. While the Assembly was tasked with framing a constitution for the new state, this process was fraught with difficulties in reconciling fundamental tensions between the ideals of democratic inclusion and the Muslim nationalism that justified Pakistan's founding. On the one hand, the leaders of Pakistan emphasised the principles of equality, justice, and inclusion, echoing the modern ideals that informed global constitutional thought at the time.[20] On the other hand, the country's founding narrative, rooted in Muslim nationalism, often clashed with these universalist aspirations.

By keeping the national vision deliberately undefined, Jinnah sought to unify disparate groups under a shared but vague national identity, postponing contentious debates about the state's ultimate character. However, his untimely death in September 1948 meant that the critical task of defining Pakistan's identity and addressing competing provincial and ideological interests fell to his successors. By avoiding a clear articulation of the state's identity, the leadership leaned on Islam to prioritise centralised control and the suppression of regional aspirations, particularly those of East Bengal. This strategy came at a significant cost. The collateral consequence of this strategy was the marginalisation of minority rights, as the undefined national identity and focus on centralisation left little room to address the protections and concerns of non-Muslim citizens.

This early marginalisation was not an isolated consequence of state-building but a foundational precedent that shaped future policies. Over time, the exclusion of minorities from Pakistan's constitutional vision became entrenched within legal and political structures. This reinforced their status as outsiders in the national framework.

[20] The Indian Constituent Assembly, for example, drew on diverse constitutional traditions, including those of the US, Canada, Switzerland, Australia, and Ireland, while also being influenced by international debates on human rights following World War II. India's first Prime Minister Jawaharlal Nehru cited inspirations such as the Philadelphia Convention, the French Revolution, and the Russian Revolution, and the framing of the Indian Objectives Resolution reflected ideas from the American Declaration of Independence, the French Declaration of the Rights of Man, and the Irish Constitution. Javed Majeed, 'A Nation on the Move: The Indian Constitution, Life Writing and Cosmopolitanism', *Life Writing* 13, no. 2 (2016): 240–41.

The existing scholarship on religious minorities in Pakistan has had a specific focus on developments after the 1970s, particularly after the introduction of the Islamisation program used to reshape state institutions, laws, and social norms around narrow and often contested interpretations of orthodox Sunni Islam under General Zia ul Haq.[21] This body of work examines the subsequent rise of religious extremism,[22] the institutionalisation of sectarian divisions,[23] and the legal and social marginalisation of non-Muslims through constitutional amendments, judicial rulings, and state-sanctioned exclusionary practices.[24]

Indeed, the entrenchment of religious nationalism in state structures that ensued during and after Zia's authoritarian rule have notably led to increasing restrictions on religious minorities, from legal exclusions to targeted violence. This literature has shown that blasphemy laws drafted under his regime have become a tool to silence, intimidate, and prosecute non-Muslims,[25] while economic and social discrimination has further deepened their exclusion from the national fabric.[26]

21 Some exceptions to this general trend in the scholarship include Faisal Devji's work which examines the origins and conceptualisation of the category of 'minority', Faisal Devji, 'Changing Places: Religion and Minority in Pakistan', *South Asia: Journal of South Asian Studies* 43, no. 1 (2020): 169–76.

22 Zahid Shahab Ahmed and Musharaf Zahoor, 'Impacts of the "War on Terror" on the (De)Humanization of Christians in Pakistan: A Critical Discourse Analysis of Media Reporting', *Islam and Christian–Muslim Relations* 31, no. 1 (2020): 85–103.

23 Eamon Murphy, *Islam and Sectarian Violence in Pakistan: The Terror Within* (London: Routledge, 2018).

24 Shaun Gregory, 'Under the Shadow of Islam: The Plight of the Christian Minority in Pakistan', *Contemporary South Asia* 20, no. 2 (2012): 195–212.

25 Farahnaz Ispahani, 'Constitutional Issues and the Treatment of Pakistan's Religious Minorities', *Asian Affairs* 49, no. 2 (2018): 222–37; Osama Siddique and Zahra Hayat, 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications', *Minnesota Journal of International Law* 17 (2008): 303; Raza Rumi, 'Unpacking the Blasphemy Laws of Pakistan', *Asian Affairs* 49, no. 2 (2018): 319–39.

26 Tariq Rahman, 'Pakistan's Policies and Practices Towards the Religious Minorities', *South Asian History and Culture* 3, no. 2 (2012): 302–15; Syeda Quratulain Masood, '"I Am Born on the Land of Pakistan. I Am Pakistani.": Terric Nationalism

Broader political histories of Pakistan tend to focus on the country's complex and often tumultuous relationship with constitutionalism, democracy, and authoritarian rule. In this framework, the present-day marginalisation and persecution of minorities are viewed as a corollary of broader struggles for power, influence, and control over the state and its identity. These struggles have played out between civilian governments, the military and security apparatus, and non-state Islamist actors, all operating within a regional geopolitical landscape marked by instability, conflict, and the legacy of proxy wars between global superpowers.[27]

Constitutional histories, on the other hand, whether written in Pakistan's formative years or in more recent studies, have sought to map the complex legal and constitutional efforts, innovations, and interruptions that have shaped the country's trajectory. With Pakistan frequently in a state of political crisis – often teetering on the brink of civil war – these histories examine how constitutional developments have unfolded in a nation that has spent a significant portion of its existence under authoritarian rule. They also grapple with the enduring challenge of defining Pakistan's Islamic identity within its legal and political framework. Minority rights often feature as a peripheral issue in constitutional histories because these accounts primarily focus on the structural and institutional crises that have shaped Pakistan's legal and

Among Hindu Pakistanis', *Ethnic and Racial Studies* 46, no. 15 (2023): 3360; Sadia Saeed, 'Pakistani Nationalism and the State Marginalization of the Ahmadiyya Community in Pakistan', *Studies in Ethnicity and Nationalism* 7, no. 3 (2007): 132–52.

27 Husain Haqqani, *Pakistan: Between Mosque and Military* (Washington, DC: Carnegie Endowment for International Peace, 2010); Aqil Shah, *The Army and Democracy: Military Politics in Pakistan* (Cambridge: Harvard University Press, 2014); Ayesha Jalal, *The Struggle for Pakistan: A Muslim Homeland and Global Politics* (Cambridge: Harvard University Press, 2014); Farahnaz Ispahani, *Purifying the Land of the Pure: A History of Pakistan's Religious Minorities* (New York: Oxford University Press, 2017); Iftikhar Malik, *Pakistan: Democracy, Terrorism, and the Building of a Nation* (London: New Holland, 2010); Ilhan Niaz, *The Culture of Power and Governance of Pakistan: 1947–2008* (London: Oxford University Press, 2011), Ishtiaq Ahmed, *Pakistan: The Garrison State: Origins, Evolution, Consequences 1947-2011* (Oxford and New York: Oxford University Press, 2013); and Maleeha Lodhi, *Pakistan Beyond the "Crisis State"* (New York: Columbia University Press, 2012).

political trajectory.[28]

While all of these studies highlight important aspects of contemporary discrimination, they often overlook how exclusionary practices were embedded within Pakistan's constitutional framework from the outset. The early years of constitution-making institutionalised a vision of the state that prioritised Islamic identity over democratic inclusivity. The Objectives Resolution of 1949 formalised the Islamic orientation of the state while offering vague assurances of minority protections.[29] This set a precedent for their gradual exclusion from political and legal structures. The ideological push to define Pakistan through Islamic principles affected legal and political structures in ways that limited minority participation. While constitutional documents acknowledged religious freedom, legal frameworks prioritised Islamic values, creating an uneven application of rights. Language and provincial autonomy became central issues, as efforts to impose a centralised Islamic identity disproportionately affected non-Muslim and non-Urdu-speaking communities. These measures reinforced exclusionary patterns that continued beyond the early constitutional period.

This article demonstrates that the marginalisation of minorities was not an unintended consequence of later political shifts but a structural feature of Pakistan's constitutional formation. The discussion on minority rights was shaped by the need to balance ideological commitments with governance challenges. Rather than ensuring full inclusion, draft constitutional provisions reflected the political imperatives of the time, which prioritised national unity through an Islamic framework. These decisions left a lasting impact on Pakistan's legal and political structures, shaping the trajectory of minority rights in the decades that followed.

28 Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2009); Sadaf Aziz, *The Constitution of Pakistan: A Contextual Analysis* (Oxford: Hart Publishing, 2018); Safdar Mahmood, *Constitutional Foundations of Pakistan* (Lahore: Jang Publishers, 1990); Paula R. Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 2002); Mohammad Waseem, 'Judging Democracy in Pakistan: Conflict Between the Executive and Judiciary', *Contemporary South Asia* 20, no. 1 (2012): 19–31; Alan Gledhill, *Pakistan: The Development of Its Laws and Constitution* (London: Stevens & Sons, 1957).

29 The full text of the Resolution can be found in Constituent Assembly of Pakistan, *Debates, Official Report*, vol. V (7–12 March 1949), 1–2.

This article examines the specific impact of these ideological conflicts on constitutional protections for minorities. Analysing provisions – or their absence – codified in early legal documents, it explores their implications for minority rights. Drawing on legislation, Constituent Assembly debates, committee reports, and submissions to constitution-making sub-committees, the study places particular emphasis on the Objectives Resolution of 1949. While this foundational document declared Pakistan's sovereignty rooted in Islamic principles, it also promised minority protections, yet its ambiguous language had profound consequences for legal interpretations and policies in the decades that followed. It not only shaped the constitutional framework of the time but also set a precedent for the continued marginalisation of minorities in Pakistan's legal and political landscape.

The Fragile Foundations of Minority Rights in Pakistan

Soon after the Lahore Resolution was adopted at the general session of the Muslim League in 1940, marking the formal demand for a separate Muslim state,[30] Jinnah emphasised in a press conference that the division of India would place a serious obligation on the majority communities in each region to ensure the safety and security of minorities and to build their trust and confidence.[31] In his address to the All-India Muslim League's Annual Session in Madras in April 1941, Jinnah emphasised that no government could succeed without ensuring a sense of security and confidence among minorities. He asserted that any government engaging in unjust, unfair, or tyrannical treatment of minorities was doomed to fail, stating: 'The acid test of success of any government of a representative character is that the minorities must feel that they will have fair play and justice.'[32]

30 'The Muslim League's Lahore Resolution', Anthony Moses writes: 'was an exercise in studied ambiguity in order to assuage Muslim-majority provinces that wanted to guard their autonomy from a strong central government. The resolution mentioned neither partition nor Pakistan'. Anthony Dirks Moses, *The Problems of Genocide: Permanent Security and the Language of Transgression* (Cambridge: Cambridge University Press, 2021), 372.

31 Moses, *The Problems of Genocide*, 373.

32 Directorate of Electronic Media & Publications, *Quaid-i-Azam Mohammad Ali Jinnah: The Leader of a Nation* (Government of Pakistan, 2021), 62,

Under the backdrop of escalating communal unrest and partition-related violence, Jinnah made repeated reassurances towards minorities, emphasising that they would be equal citizens in Pakistan with full freedom to practice their religion and contribute to the nation's development without fear of discrimination or exclusion. In 1946, Jinnah declared: 'In Pakistan areas the minorities will enjoy the fullest security of life, property and honour just as the Musalmans themselves, nay even greater.'[33] On 14 July 1947, just a month before independence, Jinnah, the Governor-General-designate of Pakistan, addressed questions about the 'minority problem' during a press conference in New Delhi. He assured:

> Minorities, to whichever community they may belong, will be safeguarded. Their religion, faith or belief will be secure. There will be no interference of any kind with their freedom of worship. They will have their protection with regard to their religion, faith, their life and their culture. They will be, in all respects, the citizens of Pakistan without any distinction of caste and creed.

When asked whether Pakistan would be a secular or theocratic state, Jinnah deflected, calling the question 'absurd.'[34]

The establishment of the Constituent Assembly marked a critical juncture in Pakistan's journey toward defining its national identity and addressing the promises made to its minorities. As the Assembly began its work, it inherited the colonial legal framework established under the *Indian Independence Act*

<https://epwing.gov.pk/SiteImage/Misc/files/Coffee%20Table%20Quaid%20Book%20final.pdf.>

33 Sherwani, 'Quaid-i-Azam and the Minorities', 183.

34 Pressed further on whether non-Muslims would be granted full citizenship, he asserted: 'When you talk of democracy, I am afraid you have not studied Islam. We learned democracy thirteen centuries ago.' This exchange reflected Jinnah's attempts to reassure minorities of their rights while framing Pakistan's democratic ideals within an Islamic context, though it left the precise nature of the state open to interpretation. M. Rafique Afzal, *Selected Speeches and Statements of the Quaid-i-Azam Mohammad Ali Jinnah [1911-34 and 1947-48]* (Lahore: Research Society of Pakistan, 1973), 420–23.

1947 (Imp), which empowered the Constituent Assembly to frame the constitution and to function as the federal legislature while operating under a modified version of the *Government of India Act 1935* (Imp). The 1935 Act established the constitutional structure within which late colonial politics operated. Pakistan also inherited the weight of expectations stemming from Jinnah's repeated assurances of equality and justice for all citizens.[35] These expectations were articulated during the session to congratulate Jinnah on his election as President of the Assembly. Kiran Sankar Roy, a Hindu member of the Pakistan National Congress, directly addressed Jinnah's leadership, stating:

> Sir, you have been a great leader of the Muslims. Time has now come for you to take up the leadership of the State which includes not only Muslims, but Hindus and other Communities. We invite you to that leadership and will not fail to support you.'[36]

Roy's statement, delivered amidst rising anxieties over the treatment of minorities in the new state, reflected both an appeal for inclusivity and a challenge to realise the vision of equality Jinnah had promised. Yet, the task of translating these ideals into concrete constitutional provisions proved to be fraught with challenges. The composition of the Assembly presented problems and complexities of political representation. The Assembly initially comprised sixty-nine members drawn from the provincial legislatures that had been elected in the 1946 elections under the *Government of India Act* 1935. These members were therefore chosen through the existing provincial assemblies rather than by direct popular vote. In addition to these members, representatives were later added, including delegates representing the migrant population, the princely states, and other territories incorporated into the new country.[37] The Assembly was dominated by the Muslim

[35] Jinnah further famously affirmed the secular orientation of the state: 'You are free; you are free to go to your temples, you are free to go to your mosques or to any other places of worship in this State of Pakistan. You may belong to any religion or caste or creed-that has nothing to do with the business of the State.' Constituent Assembly of Pakistan, *Debates*, Monday, 11 August 1947, 20.

[36] Constituent Assembly of Pakistan, *Debates*, 11 August 1947, 13–14.

[37] Aziz, *The Constitution of Pakistan*, 31.

League with fifty-nine members, while the only opposition, the Pakistan National Congress, was composed primarily of East Bengal's Hindu representatives, many of whom were formerly members of the Indian National Congress.[38]

Not all members of the League were Muslim, such as Jogendra Nath Mandal, a Dalit leader from Bengal who aligned with the League believing it would address the concerns of marginalised communities. Mandal was appointed the first chairman of the Constituent Assembly and later served as Pakistan's minister for law and labour.[39] But with most minority voices confined to East Bengal and represented through the opposition Pakistan National Congress, their ability to influence the state's constitutional vision was significantly curtailed. This concentration not only marginalised minority perspectives but also deepened the divide between East and West Pakistan in the Assembly's deliberations. Moreover, the initial group of minority representatives, being exclusively Hindu, did not account for the broader spectrum of religious and cultural minorities within Pakistan.

The establishment of the *Committee on Fundamental Rights of Citizens and Minorities of Pakistan* was an important step in recognising these challenges. Prime Minister Liaquat Ali Khan, introducing the Resolution for the Committee, stated: 'The object of giving this power is to be able to give representation to those minorities that are not represented in this House, and such other interests which it may be necessary to place on this Committee.'[40] The Resolution was adopted without discussion and established a Committee comprising the President and fifteen members to advise the Constituent Assembly on fundamental rights of citizens and matters related to minorities. The President was empowered to nominate up to seven additional members, who did not need to be members of the Assembly.

38 Herbert Feldman, *A Constitution for Pakistan* (London: Oxford University Press, 1955), 10. The number of seats in the Assembly was later increased to 74 when the states of Bahawalpur, Khairpur, Baluchistan, and the tribal areas were granted additional representation upon their accession to Pakistan.

39 Ghazal Asif, 'Jogendranath Mandal and the Politics of Dalit Recognition in Pakistan', *South Asia: Journal of South Asian Studies* 43, no. 1 (2020): 119.

40 Constituent Assembly of Pakistan, *Debates*, Tuesday, 12 August 1947, 35.

Despite this aspiration for inclusivity, there were underlying questions about whether minorities could fully integrate into a state whose identity was deeply tied to its Muslim majority. Jinnah had earlier stated in June 1947: 'It applies to any minority anywhere in the world. You cannot have a minority which is disloyal and plays the role of sabotaging the State. That minority, of course, becomes intolerable in any State.'[41] Following the establishment of the Committee, law minister Jogendra Nath Mandal echoed this sentiment, asserting:

> The protection, safeguards, and privileges given by the State to the people of the minority communities devolve on them the responsibility to be loyal and faithful to the State. Unless minority people are loyal and faithful to the State, there is little justification for safeguards and even demands for them.[42]

Mandal also urged minorities to change their outlook and foster trust among communities, emphasising that distrust, enmity, and hatred must give way to friendship and cooperation.

These remarks reflect a conditional approach to minority rights, where inclusion was framed as contingent on loyalty and alignment with the State's ideological vision. Protections for minorities were not seen as inherent but rather as privileges subject to scrutiny and dependent on perceived allegiance. This perspective placed the burden on minorities to demonstrate their commitment to the nation and tied their rights to expectations of assimilation and trust-building instead of embracing inclusivity as an unqualified principle of governance. However, this distrust was mutual, as minorities, too, questioned whether Pakistan's leadership would uphold a secular and equitable vision for the State. Roy articulated this uncertainty, stating:

> Sir, if the Pakistan which you have in your mind means a secular democratic State, a State which will make no difference between a citizen and a citizen, which will deal fairly with all irrespective of caste,

[41] Afzal, *Selected Speeches and Statements*, 421.

[42] *The Civil & Military Gazette*, Wednesday, 13 August 1947, 4.

> creed or community, I assure you that you shall have our utmost co-operation.[43]

Roy's remarks highlight the cautious optimism of minority leaders, who sought assurances that the state would genuinely commit to treating all citizens equally, irrespective of their identity. It also reveals how mutual suspicion complicated efforts to build a cohesive and inclusive nation. Indeed, the focus on Pakistan's Islamic identity was a recurring concern throughout the early debates. As the Assembly struggled to balance the principles of Islamic identity with the need for minority protections, the challenge lay not only in recognising minority rights in principle but in ensuring that these rights were meaningfully reflected in the state's evolving legal and political structure. This concern was further emphasised by Kiran Roy, who stated:

> We shall expect the rights and privileges of the minority guaranteed in the constitution, guaranteed not only in the Constitution but actually respected in the day-to-day working of the Government. When I say that, Sir, I realise that mere guarantee in the Constitution is not enough.[44]

These hopes, however, were soon dashed: 'In the very nature of things', Jinnah assured an audience of members of a deputation of the Quetta Parsi Community in June 1948, 'it will take eighteen months to two years before the new Constitution is ready'.[45] But on September 11, 1948, Jinnah died, and with him, the unifying vision and authoritative leadership that had provided direction to the nascent state. His death left a vacuum in Pakistan's political landscape and intensified uncertainties about the future direction of the constitution-making process and the challenges of nation-building.

In the aftermath of Jinnah's death, the Assembly passed a condolence motion, honouring his legacy and pledging to continue his mission. Prime Minister

43 Constituent Assembly of Pakistan, *Debates*, Monday, 11 August 1947, 13.

44 Constituent Assembly of Pakistan, *Debates*, Monday, 11 August 1947, 13.

45 *Quaid-i-Azam Mohammad Ali Jinnah: Speeches and Statements as Governor General of Pakistan 1947–48* (Islamabad: Government of Pakistan, 1989), 262.

Liaquat Ali Khan, addressing the Assembly, assured minorities of the government's commitment to upholding Jinnah's promises, declaring:

> The Quaid-i-Azam was the greatest friend that any minority could have ... so long as the present Government is in power, it shall regard it as its sacred duty to fulfil those promises and see that justice is done to the minorities.[46]

Other League members echoed this sentiment, with Maulana Mohammad Akram Khan affirming: 'We would and we should always keep in mind the assurances given by Quaid-i-Azam to the minorities and the declarations made by him regarding them,'[47] while Maulana Shabbir Ahmad Osmani asserted: 'Everyone knows that the minorities of Pakistan as compared with those of other countries have no worries whatsoever.'[48]

While these comments emphasised a collective commitment to Jinnah's vision, the challenge of turning these assurances into concrete protections for minorities remained unresolved. Sris Chandra Chattopadhyaya,[49] the leader of the opposition, addressed these concerns, stating:

> As regards the minorities, I had a long discussion with him (Jinnah). I do not consider myself as a member of the minority community. I consider myself as one of seven crores of the citizens of Pakistan. (Hear, hear.) But there is still the question of minorities.[50]

46 Constituent Assembly of Pakistan, *Debates*, 14 December 1948, 3.

47 Constituent Assembly of Pakistan, *Debates*, 14 December 1948, 7.

48 Constituent Assembly of Pakistan, *Debates*, 14 December 1948, 6.

49 Sris Chandra Chattopadhyaya was a Hindu member of the Pakistan National Congress and the leader of the opposition in Pakistan's first Constituent Assembly. A staunch advocate of coexistence, he chose to remain in Pakistan after Partition, declaring: 'We shall stay ... and show to the world that the Muslims and Hindus can live in the same place, quietly and peacefully ... with equal status ... as one nation.' Asad Rahim Khan, 'The Two Partitions: Polemics, Purges and Pakistan's First Opposition Party', *Dawn*, 17 December 2024, <https://www.dawn.com/news/1852072> (last accessed 25 May 2026).

50 Constituent Assembly of Pakistan, *Debates, Official Report*, vol. IV (14 December 1948 – 6 January 1949)

In framing himself as a citizen of Pakistan rather than a minority, Chattopadhyaya, a Hindu, emphasised the aspiration for a unified national identity. At the same time, his remark acknowledged the systemic challenges that minorities continued to face in achieving true inclusion.

For the Muslim League, Jinnah's death marked the loss of its most powerful figure, whose vision and authority had kept political rivals at bay, provided a unifying force within the party, and compensated for its lack of grassroots footing and support across the country. 'So long as Jinnah was alive', Leonard Binder writes:

> the question of Bengali domination, or even a general provincial revolt against central authority, could not arise. This was not only owing to the popularity of the Governor-General and the extraordinary powers he wielded with the widest consent, but also to the initial dependence of both Punjab and East Bengal upon the federal government.[51]

While Jinnah leaned on Islam to unify a diverse population and political groups behind the cause of Pakistan, after his death, however, the Muslim League increasingly leaned on Islam not just as a unifying force but as a defining feature of the state's identity. This shift became particularly apparent with the passage of the Objectives Resolution in March 1949, which framed the future constitutional foundations of Pakistan in explicitly, though opaque, Islamic terms.

Minority Anxieties and Constitutional Fault Lines

Entitled *Motion re: Aims and Objects of the Constitution*, the Objectives Resolution was introduced in the Constituent Assembly of Pakistan on the 7th of March 1949 by Prime Minister Liaquat Ali Khan. The Resolution laid out the foundational principles for Pakistan's future constitution and proclaimed the ideological vision for the new state. After several days of debate, it was adopted by the Assembly on the 12th of March 1949.[52] The Resolution

51 Binder, *Religion and Politics in Pakistan*, 129.

52 Constituent Assembly of Pakistan, *Debates, Official Report*, vol. V (7–12 March 1949),

declared: 'sovereignty over the entire universe belongs to God Almighty alone and the authority which He has delegated to the State of Pakistan through its people for being exercised within the limits prescribed by Him is a sacred trust.' It further emphasised that: 'the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed.' Additionally, it provided that: 'Muslims shall be enabled to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the Holy Quran and the Sunnah.'

As it declared that sovereignty belonged to God and tied the legitimacy of the state, its purpose, and the foundational principles of its politics and governance to Islamic principles, the Objectives Resolution established a framework deeply rooted in Islamic values. This approach raised questions about how these ideals, though broad, ambiguous and contested,[53] would align with the inclusivity and rights of minority communities in Pakistan. This shift, in other words, was not merely symbolic but carried profound implications for their role and status. The lack of clarity on how Islamic principles would coexist with Jinnah's promised equality heightened fears that the framework could, and inevitably would, marginalise non-Muslims. Prem Hari Barma warned: 'We must not proceed with the work of framing the constitution in such a way as may cause apprehension, distrust or anything of the kind to any section of the people.'[54] His remarks emphasised the need for the Resolution to be inclusive and representative of all communities in Pakistan, cautioning that it risked alienating minority groups if it appeared to prioritise one religion over others.

Sris Chandra Chattopadhyaya voiced similar concerns, stating: 'What I hear in

1–2.

53 Historian Charles Adams writes: 'The Objectives Resolution changed nothing of substance in Pakistan; it did little more than give vague expression to a desire for an Islamic order, and it left unclear and indefinite far more than it specified.' Charles Adams, 'Mawdudi and the Islamic State', in *Voices of Resurgent Islam*, ed. John L. Esposito (Oxford: Oxford University Press, 1983), 109.

54 Constituent Assembly of Pakistan, *Debates*, 7 March 1949, 8.

this Resolution [is] not the voice of the great creator of Pakistan.'[55] He argued that the Resolution deviated from Jinnah's vision of a pluralistic state that guaranteed equal rights for all citizens, regardless of their faith. Chattopadhyaya's words reflected a fear that the Resolution's emphasis on Islam would redefine Pakistan's identity in a way that excluded minorities from full participation in the nation. Bhupendra Kumar Datta expressed even stronger apprehensions, declaring:

> This land, we have fought and suffered for its liberation from foreign yoke. We shall resent it for generations that under this clause "as enunciated by Islam" you condemned us forever to an inferior status and prevented for all time to come Pakistan from growing up into a country of a well-knit, homogenous people.[56]

Datta's address to the Assembly stressed the depth of anxiety among minorities, who felt that the Resolution might institutionalise their subordination within the state: 'without a legitimate right to share power, the minorities will taste neither democracy, nor freedom, nor equality, nor social justice. They may merely be tolerated. Will they not under those circumstances labour perpetually under a sense of frustration?'[57]

Although the Resolution included assurances of religious freedom, such as the provision that: 'adequate provision shall be made for the minorities freely to profess and practise their religions and develop their cultures,' it did not clarify how these guarantees would be upheld in practice, particularly within a framework that placed Islamic principles at the centre of governance. Indeed, despite the Resolution's promises of safeguards, Chattopadhyaya expressed deep scepticism about their enforceability, declaring:

> the words "equal rights as enunciated by Islam" are—I do not use any other word—a camouflage. It is only a hoax to us, the non-Muslims.

55 Constituent Assembly of Pakistan, *Debates*, 12 March 1949, 93.

56 Constituent Assembly of Pakistan, *Debates*, 9 March 1949, 27.

57 Constituent Assembly of Pakistan, *Debates*, 9 March 1949, 28.

> There cannot be equal rights as enunciated by Islam. ... It cuts at the root of equal rights.[58]

Birat Chandra Mandal argued that basing a constitution on religious principles was unprecedented and warned of the long-term consequences of prioritising Islamic principles in governance, cautioning: 'The result of all this will be that they will realise afterwards that they have committed a serious blunder and the year 1949 will be reckoned as one of the bad years in the history of the world'.[59] Advocating for a secular state, Mandal maintained: 'The State has got no religion. Individuals might have religion, but the State has got no religion.'[60] Referring to the clause about the state exercising its powers through chosen representatives, Raj Kumar Chakraverty criticised the Resolution for its lack of clarity on how democratic representation would function and proposed an amendment to address this ambiguity. The intertwining of religion and politics, he insisted, should remain a personal matter:

> It is a matter private to one's self and if we drag in religion or some other force or power in our every-day life, it may lead to endless complications and difficulties in our mundane affairs and we do not know where we shall drift.[61]

These critiques highlighted a profound disconnect between the Resolution's stated commitments and the fears of exclusion it provoked. Furthermore, minority representatives expressed frustration at their exclusion from the deliberative process on such a significant and symbolic document. Chattopadhyaya criticised the lack of a dedicated House Committee to examine the Resolution and noted that it was introduced with little prior notice, as it had not been included in the circulated agenda papers. This lack of time to review its provisions, according to Chattopadhyaya, exemplified the marginalisation of non-Muslim members in the Assembly's proceedings. For minorities, this

58 Constituent Assembly of Pakistan, *Debates*, 12 March 1949, 90-91.

59 Constituent Assembly of Pakistan, *Debates*, 9 March 1949, 49.

60 Constituent Assembly of Pakistan, *Debates,* 9 March 1949, 49.

61 Constituent Assembly of Pakistan, *Debates*, 9 March 1949, 38.

exclusion was not merely procedural but emblematic of a deeper sidelining of their perspectives in shaping the ideological and constitutional future of Pakistan. This absence of meaningful engagement further eroded their confidence in the Assembly's commitment to creating an inclusive and equitable state.

The passage of the Objectives Resolution set in motion a series of complexities that would shape Pakistan's constitutional development in the years to come. For members of East Pakistan, many of them Hindu, legal scholar Sadaf Aziz notes, that in embedding a religious principle in the constitutional framework signified: 'a clear betrayal of promises made to the Bengalis in particular about the realisation of Pakistan as a multi-faith and secular state.'[62] Indeed, the Muslim League Parliamentary Party conducted its initial assessment of the Objectives Resolution in the 'utmost secrecy'.[63] This suggests the contentious nature of the Resolution, apprehension among its proponents about potential opposition, particularly from minority representatives, the fraught dynamics within the Assembly and the widening gulf between the Muslim-majority and non-Muslim minorities.

While minorities may have been the Resolution's obvious losers, its specific target arguably was to counter provincialism, particularly the political assertions of Bengalis. The Bengalis, the largest ethnic group in the country, accounted for a clear majority of Pakistan's population. They sought to redefine what it meant to be 'Pakistani' by shifting focus from religion to ethnicity.[64] Central to this debate was the status of the Bengali language. In 1948, Dhirendra Nath Datta, a member of the Constituent Assembly, moved a motion on 25 February proposing that Bengali, spoken by 44 million people in East Bengal, be recognised alongside English as a language for conducting Assembly proceedings. Datta highlighted the practical challenges faced by Bengali speakers, who were unable to comprehend official documents in Urdu, and argued that Bengali deserved recognition as a state language given its

62 Aziz, *The Constitution of Pakistan*, 40.

63 Binder, *Religion and Politics in Pakistan*, 142.

64 Farzana Shaikh, *Making Sense of Pakistan* (London: Hurst & Company, 2009), 52.

majority status in Pakistan. Urdu, though favoured by the governing elite, was spoken by less than four per cent of the population, and therefore could not legitimately claim to represent the national identity.[65] The tensions surrounding this issue exposed deep divisions over how to define Pakistan's majority and, by corollary, to identify who were the country's minorities. Datta, a prominent Bengali leader in the Assembly, argued:

> I know, Sir, that Bengalee is a Provincial language, but, so far our State is concerned, it is the language of the majority of the people of the State. So although it is a Provincial language but, as it is a language of the majority of the people of the State and it stands on a different footing therefore. Out of six crores and ninety lakhs of people inhabiting this State, 4 crores and 40 lakhs of people speak the Bengalee language. So, Sir, what should be the State language of the State? The State language of the State should be the language which is used by the majority of the people of the State, and for that, Sir, I consider that Bengalee language is a lingua franca of our State.[66]

Liaquat Ali Khan rejected this argument. He asserted that Pakistan's identity was rooted in religion rather than regional demographics. He maintained that Urdu, not Bengali, was the unifying force for the country and represented the Muslim nation as a whole:

> He [Dhirendra Nath Datta] should realise that Pakistan has been created because of the demand of a hundred million Muslims in this subcontinent and the language of a hundred million Muslims is Urdu and, therefore, it is wrong for him now to try and create the situation that as the majority of the people of Pakistan belongs to one part of Pakistan, therefore the language which is spoken there should become the State language of Pakistan. Pakistan is a Muslim State and it must

65 This demand for linguistic recognition reflected a broader power struggle between the Bengali middle class, who sought representation proportional to their demographic strength, and the Urdu-speaking migrant (muhajir) elite, who feared that recognising Bengali as a national language would diminish their influence in education and government employment. Shaikh, *Making Sense of Pakistan*, 52.

66 Constituent Assembly of Pakistan, *Debates*, 25 February 1948, 15.

> have as its lingua franca the language of the Muslim nation.[67]

For Khan, religion defined the majority-minority dynamic in Pakistan and in his reasoning, Urdu was intrinsically more 'Muslim'[68] than Bengali. Khan warned that challenging this assumption would: 'create a rift between the people of Pakistan' and 'take away from the Mussalmans that unifying force that brings them together.'[69] Alhaj Muhammad Hashim Gazder shared Khan's concerns and suggested that the *motion* had sinister aims to breakup Pakistan. He argued that recognising Bengali alongside Urdu would undermine national unity and believed that a shared language was essential to maintaining Pakistan's internal cohesion.[70] Ghazanfar Ali Khan similarly stressed the need for one national language and described Pakistan as a single state rather than a collection of provinces. For Ghazanfar, Urdu symbolised the Muslim culture and civilisation that underpinned Pakistan's identity and should remain the state language.[71]

The Objectives Resolution marked a deliberate attempt to diminish the political significance of ethnic and cultural identities within Pakistan. By framing the nation's identity through a lens of religion, the Resolution sought to redefine divisions in Pakistan not along linguistic, cultural, or ethnic lines, but rather between Muslims and non-Muslims.[72] This shift was intended to

67 Constituent Assembly of Pakistan, *Debates*, 25 February 1948, 17. Later on 24 March 1948, Jinnah maintained that Urdu was acceptable because it was not the language of any of the provinces. In other words, it was supra-ethnic. Philip Oldenburg, 'A Place Insufficiently Imagined: Language, Belief, and the Pakistan Crisis of 1971', *The Journal of Asian Studies* 44, no. 4 (1985): 716–17.

68 Datta argued that: 'Urdu is not the language of any of the Provinces constituting the Dominion of Pakistan. It is the language of the upper few of Western Pakistan. This opposition to the amendment proves an effort, a determined effort on the part of the upper few of Western Pakistan at dominating the State of Pakistan'. Constituent Assembly of Pakistan, *Debates*, 25 February 1948, 18.

69 Constituent Assembly of Pakistan, *Debates*, 25 February 1948, 17.

70 Constituent Assembly of Pakistan, *Debates*, 25 February 1948, 21-22.

71 Constituent Assembly of Pakistan, *Debates*, 25 February 1948, 18-20.

72 This view was well received amongst influential Islamists like Maulana Abul Ala Mawdudi and ulama (traditionalist Islamic scholars) like Shabbir Ahmad Osmani.

consolidate a singular national identity rooted in Islam, yet it simultaneously alienated minority communities and sidelined ethnic groups like the Bengalis, whose cultural and linguistic distinctiveness accounted for a majority of the population. Ironically, rather than settle the question of Pakistan's Islamic identity, what followed was an intensified scrutiny of who qualified as a genuine Muslim and contestation over what it meant for an Islamic Pakistan to have an Islamic constitution.

In the years that followed, neither question found adequate resolve, and debates over Pakistan's Islamic identity and the status of its minorities continued unsettled and contested.

Provincial Discontent, Sectarian Rifts

To address the challenge of framing an Islamic constitution, an advisory board was established to provide guidance on how Islamic principles could be incorporated into the governance of the state. This process was initiated through the Basic Principles Committee, which was formed following the adoption of the Objectives Resolution, to draft the country's first constitution.[73] The Board of Talimat-i-Islamia[74] was created in mid-April, 1949, under the Committee's leadership and it brought together a panel of reputed Islamic scholars to address the complexities of aligning the Resolution's substance with the needs of modern state governance. The Board included notable members such as Maulana Saiyid Sulaiman Nadvi, an eminent scholar of Islamic history; Mufti Muhammad Shafi, a prominent religious scholar; and Dr. M. Hamidullah, an internationally recognised expert on Islamic law.

Despite the varied expertise of its members, the Board's recommendations[75]

[73] The Basic Principles Committee was formed on March 12, 1949, comprising 24 members with the authority to co-opt up to ten additional members, regardless of their membership in the Constituent Assembly. To facilitate its work, the Committee established three sub-committees: the Sub-Committee on Federal and Provincial Constitution and Distribution of Powers, the Sub-Committee on Franchise, and the Sub-Committee on the Judiciary.

[74] Talimat-i-Islamia translates roughly to Islamic teachings.

[75] The Board's reports have been reproduced as appendices in Binder, *Religion and*

were effectively ignored by the Constituent Assembly, as they failed to provide a cohesive or practicable framework for integrating Islamic principles into a modern constitutional structure. Nor did it offer a workable legislative or institutional model that could reconcile the theoretical aspects of Islamic governance with the operational needs of a modern state.[76] For instance: 'legislation in an Islamic State', the Board's initial report to the Assembly wrote: 'is a limited activity in so far as the function of an Islamic State, based as it is on the idea of the sovereignty of Allah, is primarily to execute whatever has been ordained by Allah.'[77] Moreover, the Board's focus on strict Islamic adherence did not adequately address the constitutional protection of minority rights or the balance between Islamic governance and inclusivity.[78] Not surprisingly, the first draft constitution, prepared by the Basic Principles Committee and adopted by the Assembly in 1950, had little to say on Islam[79] beyond including the Objectives Resolution as its preamble[80] and mandating that all Muslims study the Quran.[81] The remainder of the draft closely resembled the 1935 Act.[82]

Politics in Pakistan, 383–429.

76 Said Arjomand, 'Religion and Constitutionalism in Western History and in Modern Iran and Pakistan,' in *Political Dimensions of Religion*, ed. Said Amir Arjomand (Albany: State University of New York Press, 1993), 86.

77 Binder, *Religion and Politics in Pakistan*, 396.

78 Binder, *Religion and Politics in Pakistan*, 268–76.

79 The first draft constitution noted in its introduction that a Special Committee of the Sub-Committee on Federal and Provincial Constitutions held discussions with the Board, and their report and recommendations were considered by the Sub-Committee.

80 Article 1 stated that the Objectives Resolution should be incorporated in the Constitution as a directive principle of state policy, subject to the provision that this will not prejudice the incorporation of fundamental rights in the Constitution at the proper place.

81 Article 2 stated that steps should be taken in many spheres of governmental activities to enable the Muslims, as laid down in the Objectives Resolution, to order their lives in accordance with the Holy Quran and the Sunna.

82 Kalim Bahadur, *The Jama'at-i-Islami of Pakistan: Political Thought and Political Action* (Lahore: Progressive Books, 1978), 61.

The lack of provisions to meaningfully integrate Islamic principles into governance not only alienated the ulama but also exposed deeper tensions within the Assembly. The ulama criticised the draft for it lacked provisions to fulfil the essential requirements of Islam and contained elements that contradicted both Islamic principles as well as the Objectives Resolution.[83] The first draft constitution also faced strong opposition in East Pakistan for its approach to ethnic and provincial matters. The main issues were the equal representation for all units in the upper house, which reduced East Pakistan's majority population to one-fifth, and the decision to designate Urdu as the sole state language. Ironically, while Islam was repeatedly invoked to justify contentious measures like disregarding the Bengali majority and imposing Urdu as the national language, the first draft constitution barely featured Islam in its provisions. This contradiction suggests that the central aim was always to neutralise Bengali dominance and identity, with Islam serving as a convenient tool to achieve that purpose. When the Board's recommendations proposed a markedly different vision of the state rooted in Islamic principles, they were promptly discarded in favour of a colonial inspired framework that retained centralisation and suppressed regional identities.

These shortcomings in the Board's recommendations, along with the Assembly's preference for a constitutional framework that prioritised centralisation over inclusivity, mirrored broader struggles within the constitution-making process, particularly when it came to addressing minority rights and fundamental freedoms. While the Board focused on aligning governance with Islamic principles, the Committee on Fundamental Rights of Citizens of Pakistan and on Matters Relating to Minorities attempted to codify protections for minority groups. The Report of the Committee, adopted on 6th of October 1950, faced several challenges, and elicited significant debate in the Constituent Assembly.[84] The Report sought to define fundamental rights and provide protections for minority groups, including political, economic, religious,

83 Binder, *Religion and Politics in Pakistan*, 210.

84 *Report of the Committee on Fundamental Rights of Citizens of Pakistan and on Matters Relating to Minorities* (as adopted by the Constituent Assembly of Pakistan on the 6th October 1950).

educational, and cultural safeguards. However, it encountered criticism for being insufficiently comprehensive and for failing to adequately address key concerns such as joint versus separate electorates for minorities.

Members such as Mian Iftikharuddin criticised the report as being miserly and argued that it offered less than the commitments made in the Objectives Resolution.[85] Delays in finalising recommendations, partly due to unresolved issues around separate or joint electorates for minorities, further weakened the impact of the report. When presented to the Assembly, the report was met with demands for the inclusion of additional rights, including equal opportunity, work, and health.[86]

While the first draft constitution made scant reference to Islam, provoking dissatisfaction among those advocating for a more explicitly Islamic identity for the state, by contrast, the second draft incorporated Islamic provisions, but these were highly contentious and deepened divisions within the Assembly.[87] Additionally, a new proposal for parity between the Eastern and Western wings of the country with regards to the formula of representation within the central legislature, as well as silence on the issue of a national language, drew criticism, opposition and further undermined the draft's ability to address or resolve key areas of constitutional tensions.[88]

The unresolved tensions in the second draft constitution reflected deeper uncertainties about the state's identity. These ambiguities not only exacerbated divisions within the Assembly but also spilled into broader societal conflicts, fuelled unrest, and provoked sectarian challenges. The growing instability

85 Zafarullah Khan, *Consistent Parliamentary Cord: Fundamental Rights of the Citizens of Pakistan* (Islamabad: Senate of Pakistan, 2016), 37.

86 Khan, *Consistent Parliamentary Cord*, 37.

87 The draft proposed mechanisms for ensuring legislation aligned with Islamic principles, such as granting a board of Islamic law experts the authority to review laws for their conformity to the Quran and Sunnah. However, this provision was criticised for its limited scope and the lack of safeguards to ensure the independence or representative nature of the board members.

88 Khan, *Constitutional and Political History of Pakistan*, 68–71.

found a sharp expression in the anti-Ahmadi agitation of 1953, a movement that brought to the fore the unresolved question of who qualified as a true Muslim, and therefore a true 'Pakistani', in an Islamic Pakistan. The agitation demanded that Ahmadis be officially declared non-Muslims and removed from key positions of power, including the office of Pakistan's first foreign minister, Zafarullah Khan who had in fact been a staunch proponent of the Objectives Resolution. The unrest culminated in violent riots, leading to martial law in Lahore and the appointment of a judicial inquiry commission to investigate the causes of the disturbances.

The subsequent Report, authored by Justices Muhammad Munir and M. R. Kayani, provided a scathing critique of the anti-Ahmadi agitation and highlighted the profound difficulties in defining Pakistan's Islamic identity. The Report noted the glaring lack of consensus among religious scholars on the definition of a Muslim and warned that such ambiguities risked plunging the country into sectarian conflict:

> Keeping in view the several definitions given by the ulama, need we make any comment except that no two learned divines are agreed on this fundamental. If we attempt our own definition as each learned divine has done and that definition differs from that given by all others, we unanimously go out of the fold of Islam. And if we adopt the definition given by any one of the ulama, we remain Muslims according to the view of that alim but kafirs [infidels] according to the definition of every one else.[89]

The Commission warned that incorporating theological principles into the governance of a diverse society could lead to further marginalisation and exclusion, particularly for minority groups:

> If the State is to be based on a particular interpretation of religion, it will inevitably result in the disqualification and disenfranchisement of other groups and create a situation where sectarian strife

89 Muhammad Munir, *Report of the Court of Inquiry Constituted Under Punjab Act II of 1954 to Enquire into the Punjab Disturbances of 1953* (Lahore: Government Printing Press, 1954), 218, <https://archive.org/details/munir-inquiry-report-1954> (last accessed 25 May 2026).

becomes unavoidable.[90]

The anti-Ahmadi agitation reveals the profound repercussions of constitution-making in Pakistan after the Objectives Resolution, particularly the consequences of intertwining religion and state without a clear consensus or framework. The Objectives Resolution set the foundation for an Islamic state and constitution but left critical ambiguities that exacerbated divisions within the Assembly and broader society. The anti-Ahmadi agitation shows how these unresolved questions of religious identity could spiral into violence, deepen sectarian rifts, and challenge the legitimacy of the state. It also highlights the dangers of using religion as a political tool while failing to provide inclusive protections for all citizens. The agitation and its aftermath, moreover, were a stark reminder that the unresolved contradictions in Pakistan's constitutional vision threatened not only minority rights but also the very fabric of national unity.

The anti-Ahmadi agitation not only exposed the dangers of intertwining religion with governance but also underscored the broader failure of the Muslim League to address the complex realities of a diverse and divided nation. This inability to reconcile religious, regional, and political tensions came to a head in East Pakistan's March 1954 provincial elections, where the Muslim League's defeat marked a decisive rejection of its leadership and its approach to constitution-making. The election results revealed that non-Muslims in the province overwhelmingly shifted their support to the United Front, a Bengali regional coalition, which delivered the decisive blow to the League in the elections.[91] This loss revealed widespread dissatisfaction in East Pakistan, where the Muslim League's unresponsiveness to the region's political and economic demands, including calls for greater autonomy and equitable representation, deepened discontent. Simultaneously, frustration in West Pakistan over the party's failure to address governance and representation issues also intensified opposition. The electoral defeat and growing discontent in both wings of the country intensified distrust between regions and further delayed the

90 Munir, *Report of the Court of Inquiry*, 221.

91 Shaikh, *Making Sense of Pakistan*, 71.

already fraught constitution-making process.[92]

The third draft constitution, which laid an emphasis on Pakistan's Islamic identity,[93] and the final *Report of the Committee on Fundamental Rights of Citizens of Pakistan and Matters Relating to Minorities*[94] marked attempts to address Pakistan's constitutional contradictions while striving for a compromise among competing interests.[95] But these too fell short in providing assurances of an inclusive state. The report on fundamental rights sought to provide safeguards for minorities, including protections for their language, script, and culture, as well as guarantees against discrimination in education and religious affairs. Sardar Abdur Rab Nishtar, presenting the report, emphasised that it contained three parts: safeguards for minority communities, additional fundamental rights, and directive principles of state policy.[96] But

92 'With mounting opposition in both the Wings', Safdar Mahmood writes: 'the Muslim League's efforts to proceed with constitution-making only added to bitterness, suspicion and distrust.' Mahmood, *Constitutional Foundations of Pakistan*, 19.

93 *Report of the Basic Principles Committee* (as adopted by the Constituent Assembly of Pakistan on 6 October 1954).

94 *Report of the Committee on Fundamental Rights of Citizens of Pakistan and on Matters Relating to Minorities* (as adopted by the Constituent Assembly of Pakistan on 7 September 1954).

95 The third draft included mechanisms for judicial review to ensure legislation aligned with Islamic principles as a step toward bridging the political divide between secular politicians within the Assembly and the ulama operating outside of it. Article 4, for instance, stated that no legislature should enact any law which is repugnant to the Holy Quran and Sunnah. Article 6 states that the Supreme Court alone should have jurisdiction for determining whether or not a particular law is repugnant to the Holy Quran and Sunnah. Article 7 states that every citizen of Pakistan should have the right to challenge the validity of the legislation on the ground of such repugnancy. These inclusions sought some balance between what featured in the second draft and the ulama's critique of this draft. In the *Ulema's Amendments to the Basic Principles Committee's Report (11-18 January 1953)*, the ulama took issue with Article 3 of the second draft constitution which stated that no legislature should enact any law which is repugnant to the Holy Quran and the Sunnah, stating: 'We fail to understand why the very same method which has been adopted to check legislation in contravention of the various provisions of the constitution, i.e. empowering the Supreme Court to interpret constitution should not be adopted in regard to the provisions of section 3 as well.'

96 Constituent Assembly of Pakistan, *Debates*, 19 August 1954, 265.

these assurances rang hollow for many minority representatives, who saw them as largely symbolic rather than substantive. Dhirendra Nath Datta voiced his deep frustration, stating:

> We are telling the world that we will have a Minister for Minority Affairs, but I must tell this House and through this House the whole world that as a matter of fact, protection has not been given to minorities here; political rights have been denied to them.[97]

His remarks reflected the widespread disillusionment among non-Muslim representatives, who viewed the constitutional process as an exclusionary exercise that reinforced rather than alleviated their marginalisation.

Indeed, the Committee's preference for separate electorates over joint electorates was a key point of contention, with minority representatives arguing that it entrenched political segregation rather than fostering equal citizenship. While the Committee framed separate electorates as a safeguard for minorities, many saw them as a means of isolating non-Muslims from the political mainstream and preventing their meaningful participation in governance. Datta criticised this decision, stating:

> We want that the Pakistanis should be one. We should not think in terms of Hindus and Muslims, in terms of Bengalis, Sindhis and Punjabis, etc., but we should think in terms of Pakistan. That is our attitude. That has been denied.[98]

Datta added that the system of separate electorates deliberately fragmented the minority community by dividing Hindus into Scheduled Castes and non-Scheduled Castes, a strategy reminiscent of British colonial policies of divide and rule. He protested: 'Unfortunately in this House the members of the majority community are anxious to divide the Hindus, as the British used to do. They have divided the Hindus into Scheduled Castes, and Hindus other than

[97] Constituent Assembly of Pakistan, *Debates*, 19 August 1954, 267.

[98] Constituent Assembly of Pakistan, *Debates*, 19 August 1954, 267.

Scheduled Castes.'[99] This artificial division, he insisted, undermined the collective political strength of minorities and ensured that they remained weak and politically irrelevant.

Similarly, Seth Sukhdev, another minority Assembly member, dismissed the report's provisions as meaningless in practice, declaring: 'No doubt it is a valuable report, but a report valuable only in print. In practice, it has no value.'[100] He pointed to the state's failure to safeguard minority places of worship, citing the occupation of Hindu temples and cremation grounds in Karachi as evidence of the disconnect between constitutional promises and lived realities. Such criticisms reflected the broader sentiment amongst minority Assembly members that the constitutional framework privileged the majority while offering minorities little beyond rhetorical concessions. As Sukhdev lamented: 'we the minorities do not require any special rights; we are satisfied with the rights that are being given to every other citizen of Pakistan. We do not want grace. We want only justice.'[101]

On October 24, 1954, Governor-General Ghulam Muhammad dissolved the Assembly of Pakistan, citing that the constitution-making process had broken down and that the Assembly had lost the confidence of the public.[102] This dissolution of the Assembly rendered all efforts to craft the country's first constitutional compact moot, and left Pakistan mired in a state of legal crisis and constitutional ambiguity.[103] The dissolution was later challenged by the Assembly's Speaker, Maulvi Tamizuddin Khan, in the Sindh High Court. Although the High Court ruled in favour of the dismissed Assembly, the Federal Court later overturned the decision on appeal and for all purposes, validated the Governor-General's actions.

99 Constituent Assembly of Pakistan, *Debates*, 19 August 1954, 266.

100 Constituent Assembly of Pakistan, *Debates*, 19 August 1954, 286.

101 Constituent Assembly of Pakistan, *Debates*, 19 August 1954, 286.

102 Feldman, *A Constitution for Pakistan*, 64.

103 Safdar Mahmood writes: 'All previous attempts at preparing the Constitution and the entire spade-work done in this connection were brought to naught by a sweep of the pen of the highest executive authority in the country.' Mahmood, *Constitutional Foundations of Pakistan*, 19.

Concluding Remarks

Pakistan's early constitutional journey was shaped by a fundamental tension between the ideological imperatives of Muslim nationalism and the pluralistic realities of its population. This article has demonstrated how the prioritisation of an Islamic identity over democratic inclusivity led to the systematic marginalisation of minorities. While the Objectives Resolution of 1949 sought to articulate a framework for Pakistan's future constitution, its ambiguities entrenched exclusions rather than resolving them. By framing the state's legitimacy in explicitly Islamic terms, it established a precedent that subordinated minority rights to ideological considerations, and institutionalised inequities that persisted throughout Pakistan's early constitutional and political development.

This failure to resolve Pakistan's constitutional contradictions deepened divisions between Muslims and non-Muslims, between religious and regional identities, and between ideological aspirations and governance realities. Efforts to centralise authority in the name of Islamic unity alienated East Pakistan, while the unresolved question of religious identity exacerbated sectarian conflicts, as seen in the anti-Ahmadi agitation of 1953. The dissolution of the Constituent Assembly in 1954 marked the ultimate breakdown of a constitutional process that had failed to balance inclusivity with the ideological foundations of the state.

By sidelining minority voices and suppressing regional concerns, Pakistan's early constitution-making normalised exclusionary practices that undermined its democratic foundations. The persistent ambiguity over the state's Islamic identity and its impact on citizenship rights left an enduring legacy, shaped future constitutional crises, and reinforced patterns of legal and political marginalisation. Rather than fostering unity, Pakistan's early constitutional trajectory institutionalised unresolved tensions that continue to shape its political (mis)fortunes and tear at its social fabric.

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The Origin Myth of Torrens and Trusts

The Brief and Curious Life of Sections 56 to 60 of the South Australian *Real Property Act 1857-58*

P. T. Babie[*]

The Real Property Act 1857-58 *(SA), the first legislation in the world to create a system of land title by registration, contained ss 56 to 60, five curious provisions which allowed for the registration of trusts. This runs counter to the origin story of Torrens Title, and the long and widely accepted principle that equitable interests such as trusts are strictly excluded from the register book. Why were ss 56 to 60 in that first piece of legislation and, more intriguingly, why were these sections removed only five months after coming into force? This article traces the story of these forgotten provisions, from enactment to repeal. What this account reveals is that, far from the origin story we think we know, the notion that the exclusion of trusts from the register book formed an established policy from the beginning is really an origin myth.*

Keywords: Torrens Title; Registration of Trusts; Equity and Torrens Title; *Real Property Act 1857-58* (SA)

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Introduction

The origin story of title by registration in Australia is well-known: Robert Torrens introduced a Bill in 1857 that in 1858 became the *Real Property Act 1857-58* (SA) ('RPA 1857-58').[1] The Act established the first system in the world of land title by registration—any proprietary interest in land, to have effect, requires registration, and so recording, in a register book. But how well do we really know that origin story? This article explores that part of the story that tells us that Torrens system philosophy and principle, from the moment the system came into existence, excludes from the register book any estates or interests that exist in equity. Equitable interests, according to the story, gain their existence solely from the instrument which creates them, and not from registration; they are excluded from gaining validity or enforcement from the Torrens system of registration. To the extent that they continue to exist in the Torrens system at all, they can be protected only by a caveat or by an express statutory exception to the indefeasibility of title which registration confers.[2]

Equity's greatest innovation was the trust—it allowed for the splitting of legal and equitable title and, through that innovation known only to those systems deriving their existence from English law, created the modern law of real property. The Torrens policy of exclusion stands implacably against any recognition of the trust on the register. Today, the trust's exclusion: 'has become one of the most important principles of the Torrens system: subject to very limited exceptions…the Registrar must not make any entry or recording in the Register of any notice of trust, whether express, implied or constructive.'[3] High Court Justices Rich and Evatt stated the widespread judicial

1 *Real Property Act 1857-58* 21 Vict. c. 15 (1857-58) (SA).

2 Brendan Edgeworth, *Butt's Land Law* (Sydney: Thomson Reuters, 7th ed, 2017), [4.70]. And see Brian Hunter, 'Equity and the Torrens System,' *Adelaide Law Review* 2, No. 2 (1964): 208; Les A. McCrimmon, 'Protection of Equitable Interests under the Torrens System: Polishing the Mirror of Title,' *Monash University Law Review* 20, No. 2 (1994): 300; Rohan Havelock, 'Reconciling Equitable Claims with Torrens Title,' *Sydney Law Review* 41, No. 4 (2019): 455.

3 Douglas J. Whalan, *The Torrens System in Australia* (Sydney: Law Book Company, 1982), 120.

acceptance of the principle in 1934:

> the declared policy of the system is to keep trusts off the Register…. The Register was not to present a picture of legal ownership trammelled by all sorts of equitable rights in others, which those who dealt with the registered proprietor must take into account.[4]

But if the origin story is accurate, how can we explain five curious provisions found in the RPA 1857-58?[5] Those five provisions appear, on any plain reading, not only to allow, but to mandate the registration of trusts, to provide for their existence on the register. If the policy of exclusion was always there, how do those provisions come to be found in the origin document? More intriguingly, the story does not end with the enactment of the RPA 1857-58; that Act is not the legislation commonly treated as the first Torrens title legislation in the world. Rather, the Act which holds that status is a consolidation of the RPA 1857-58 and the *Real Property Law Amendment Act 1858* (SA) (RPLAA 1858),[6] enacted on 24 December 1858.[7] And that amending legislation repealed those provisions only five months after the RPA 1857-58 came into effect. So accepted is the standard origin story, that it is hardly known that the RPA 1857-58 ever existed. While most point to the RPLAA 1858 as the origin document, it is in fact the earlier, RPA 1857-58, which contains the earliest Torrens policy.[8]

This article, which contains three parts, suggests preliminary answers to two questions: first, why were ss 56-60 included in the RPA 1857-58? Second,

4 *Wolfson v The Registrar-General of New South Wales* (1934) 51 CLR 300, 308 (Rich and Evatt JJ).

5 *Real Property Act 1857-58* 21 Vict. c. 15 (1857-58) (SA), ss 56-60.

6 *Real Property Law Amendment Act 1858* 22 Vict. c. 16 (SA).

7 The two Acts were issued as a consolidation in the *Real Property Act 1860* 24 Vict. c. 11 (SA).

8 Robert T. J. Stein, 'Torrens Title —A Case for the Registration of Trusts in New South Wales,' *Sydney Law Review* 9, No. 3 (1980–82): 605, 629, citing Douglas J. Whalan, 'Partial Restoration of the Integrity of the Torrens System Register: Notation of Trusts and Land Use Planning and Control,' *New Zealand Universities Law Review* [1970] 4: 1, 17. See also Whalan, *The Torrens System in Australia*, 122.

why were they removed five months later? The first part sets out the relevant legislative provisions. The second part of the article traces the story from the enactment of the RPA 1857-58 through to the repeal of ss 56-60 in the RPLAA 1858. Finally, the article offers preliminary conclusions, which, apart from anything else, tell us that far from the origin story we think we know, the notion that the exclusion of trusts from the register formed an established policy from the beginning is really an origin myth.

Sections 56 to 60 of the *Real Property Act 1858* (SA) and the *Real Property Law Amendment Act 1858* (SA)

The relevant provisions are not models of economy of drafting; even edited to include only those matters relating to the registration of trusts leaves lengthy sections. Thus, ss 56 to 60 of the RPA 1857-58 provide:

> 56. Whenever it is intended to…invest [an] estate or interest in trust, the proprietor shall execute…a bill of trust, in form of the Schedule hereto annexed marked F, or as near thereto as circumstances will permit, which…bill of trust…shall set forth the nature of the…estate or interest…intended to be encumbered or invested in trust;…..bill of trust, together with the grant, certificate of title, lease, or other instrument, evidencing the title of the encumbrancee to the estate or interest in such land intended to be encumbered or vested in trust **shall be produced to the Registrar-General, who shall enter the particulars of such bill of encumbrance or bill of trust in the register book,** and shall endorse upon the…instrument, as aforesaid, a memorandum stating the date and hour of such production to him, for the purpose of such record being made, the date of the…bill of trust,…and the names and descriptions of the parties for whose benefit the same is created, or for whose uses such land is vested in trust, together with the names and descriptions of the trustees, if any, appointed, and upon such entry being made in the register book the estate or interest set forth in such…bill of trust shall become subject to and liable for the payment of such sums of money, dower, annuity, or other encumbrance in accordance with the conditions and limitations and subject to the covenants set forth in such bill…of trust, or which are hereinafter declared to be implied in any such instrument or as the case may be, **such estate or**

interest shall become vested in the trustees named in such bill of trust, subject to such conditions and trusts as aforesaid.

57. The Registrar-General, on the production of…any bill of trust executed under the provisions of this Act, with a receipt for the amount of the…trust money, endorsed thereon, duly signed and attested, or upon the receipt of proof to his satisfaction that the occurrence of the circumstances under which the amount of such…trust could become chargeable against such land, in accordance with the conditions, limitations, and restrictions prescribed in such…bill of trust has ceased to be possible, **shall make an entry in the register book to the effect that such encumbrance or trust has been discharged, or has lapsed**, stating the day and hour in which entry is made, and upon such entry being made, the interest, if any, which passed…to the trustees under such bill of trust, shall vest in the same person or persons in whom the same would, having regard to intervening acts and circumstances, if any, have vested, if no such…bill of trust had ever been executed or made, and **the Registrar-General shall thereupon cancel such…bill of trust, and shall also endorse** on the grant, certificate of title, lease, or other instrument, constituting or evidencing the title of the encumbrancer to the estate or interest in the land referred to in such bill of encumbrance, **a memorandum stating that such encumbrance had been discharged,** and the date on which such entry of discharge had been made in the register book.

58. **Every bill…of trust, shall be entered by the Registrar-General in the register book** in the order of time in which the same is produced to him for that purpose; and the Registrar-General shall record by memorandum on such bill…of trust, that the same has been so entered by him, stating the day and hour of such entry, and shall certify such memorandum by signing the same and affixing his seal thereto, and every **such bill…of trust, so certified, shall be received in all Courts of Justice as sufficient evidence that the estate and interest therein described had been so…vested in trust**…and of all other particulars therein contained.

59. If more than one…bill…of trust, be registered in respect to or affecting the same estate or interest in any land under the operation of this

> Act, the…trustees, shall, notwithstanding any express, implied, or constructive notice, **be entitled to priority one over the other according to the date at which each instrument is recorded** in the register books, and not according to the date of each instrument itself.
>
> 60. When any estate or interest in land under the operation of this Act shall by…bill of trust be transferred to any person or body corporate to the use of, or in trust for any other person, **the whole legal ownership of such estate or interest shall vest in the person or body corporate to whom the same shall be so immediately and directly transferred;** subject, however, to a trust for the benefit of such other person. Every limitation which before the passing of this Act might have been made by way of shifting, springing, or executory use, shall hereafter be made by transfer, in manner hereinbefore provided, without the intervention of uses, but not otherwise.[9]

These provisions, as I have edited them, reveal that trusts could be registered and so become part of the register book. Section 3 defined a 'Bill of Trust' as: 'the instrument creating such encumbrance or assignment executed by the person having estate or interest or interest in land under the operation of this Act in form of one or other of the Schedules hereto annexed, marked…F'. Form F contained the form for use in creating and registering a 'Bill of Trust'.

The RPLAA 1858, ss 2 and 3, repealed ss 56-60 of the RPA 1857-58:

> 2. From and after the commencement of this Act certain portions of the said Act, No. 15 of 21st Victoria, being the sections or parts of sections specified or recited as follows, shall be and are hereby repealed, that is to say—the sections numbered 14, 15, 16, 17, 24, 27, 29, 31, 33, 34, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 63, 66, 68, 69, 70, 72, 73, 77, 84, 86, 88, 91, 92, 93, 94, 95, 96, 97, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 115, 118, 122; part of section numbered 3, as follows, that is to say—the words "or Bill of

9 Emphasis added.

> Trust;"…and also the schedules to the said Act marked respectively E, F, K, N, J and T.
>
> 3. The enacting sections of this Act, numbered 4 to 93 inclusive, and also sections numbered 95 and 96, shall be read as forming [sic] portion of the said Act, and shall have the same force and effect that would be given to them had they been embodied in the said Act at the passing thereof, and the sections hereby repealed, omitted therefrom.

In place of ss 56-60, the RPLAA 1858 substituted new ss 45 to 47:

> 45. Whenever the registered proprietor of any land, under the operation of this Act, or of any estate or interest in such land, is desirous of vesting the said land, estate, or interest in any trustees, it shall be lawful for such proprietor to execute an instrument in form of the Schedule hereto annexed marked K, or as near thereto as circumstances will permit, nominating trustees of the said land, estate, or interest; and every such nomination of trustees shall contain an accurate statement of the estate or interest intended to be vested in any trustees, and such description as is given in the grant or certificate of title of the land in which such estate or interest is held, or such other description as may be necessary to identify such land, and shall be attested by a witness; **and every nomination of trustees so executed, together with the grant or certificate of title of such land, or as the case may be, the lease or other instrument** proving the title of the registered proprietor to such land, estate, or interest, **shall be produced to the Registrar-General who shall enter in the register-book**, the date of the nomination of trustees, and the date of its production, the name, residence, and description of the person nominating the trustees, and the names, residences, and descriptions of the persons who are nominated trustees, and such other particulars as the Registrar-General may deem necessary; and shall endorse on such nomination of trustees, and also on the grant, certificate of title, lease, or other instrument evidencing title to the estate, or interest intended to vested in the said trustees…the fact of such entry having been made, with the date and hour thereof, and shall sign each such end-

orsement, and shall affix his seal to such nomination of trustees, and **upon such entry being made by the Registrar-General, the land, or the estate, or interest therein, as set forth and limited in such nomination of trustees, shall pass to and vest in the said trustees.**

46. The trusts which are intended to be declared of any land, estate, or interest vested in trustees as hereinbefore mentioned, may be declared either by a Schedule to the aforesaid instrument effecting such nomination of trustees, or by any separate instrument or deed. Whenever the said trusts are declared by a separate instrument or deed, the same may include as well, land under the operation of this Act, as land which is not under the operation of this Act, provided that the description of the several parcels of land contained in such separate instrument or deed shall sufficiently distinguish the land which is under the operation of this Act, from the land which is not under the operation of this Act; and **whenever such trusts are declared by a separate instrument a duplicate or attested copy of such instrument shall be deposited with the Registrar-General for the purpose of safe custody and reference; but such duplicate or attested copy shall not be registered.**

47. **Whenever land, under the operation of this Act, shall be settled, or shall become vested in trustees upon any trust, whether express, implied, or constructive, the Registrar-General shall not make any entry of the said trusts in the register-book**; and the trustees, after the entry in the register-book of the nomination of trustees, in manner hereinbefore provided, shall, notwithstanding any trust affecting the said land, be entitled to sell, transfer, mortgage, or otherwise deal with the said land in the like manner as if the said trustees had been the beneficial owners of the said land; and in case the fee simple of such land be settled or vested in trust, such trustees shall be entitled to receive a certificate of title for the same.[10]

Reading both Acts together, ss 45-47 become ss 72-74 in the consolidated Act envisaged by s 3 of the RPLAA 1858; a consolidation, though, was not enacted

[10] Emphasis added.

until 1860.[11] as the *Real Property Act 1860* (SA), itself replaced by a number of amending statutes, before being consolidated in the legislation that forms the current South Australian Torrens statute, the *Real Property Act 1886* (SA) - itself also amended many times since. But for present purposes, I am not interested in that post-1858 history. Rather, I am interested in why ss 56-60 came to be found in the RPA 1857-58 and why they were removed by the RPLAA 1858.

The Registration of Trusts

English Real Property Law for a New Land

European settlement of South Australia began in the 1830s pursuant to the *South Australia Act 1834* (SA), which contained authority for the Crown to grant land to settlers: 'vaguely divided between the Colonial Office and a Board of Colonisation Commissioners.'[12] As Douglas Pike wrote, the province was a land job[13]—between the 1830s and the 1850s:

[11] In 1859, the Governor, Sir Richard Graves MacDonnell wrote that: 'I apprehend, therefore, that the enclosed [Act to Amend the *Real Property Act*] itself in its present form is destined to but a brief existence; and I already perceive an immediate necessity for some amendments even in it, as it refers frequently to schedules which are not annexed to it, though it is true they are annexed to the original Act; but in section 48 it refers to Schedule F, supposed to be a misprint for K, but which makes the reference entirely inapplicable to the subject matter. … These palpable signs of the haste with which the Act was prepared and passed through Parliament, will probably necessitate the introduction of a short Bill next Session to amend the two existing Acts; and I hope that, in the subsequent Session of 1860, I may, if still here, have the pleasure of transmitting such an amended and consolidated Real Property Act, as may fitly embody and adopt the most important principles recommended by the English Real Property Law Commissioners and the simplest practice of Foreign Tribunals, so as to meet the exigencies and suit the wishes of this Colony.': His Excellency Sir Richard Graves MacDonnell, C.B., to The Right Honourable Sir E. B. Lytton, Bart., M.P., Her Majesty's Principal Secretary of State for the Colonies, Despatch No. 291, Government House, Adelaide, 17 January 1859, in Parliament of South Australia Printed Papers, No. 93, 22 June 1859, 1-2.

[12] Douglas Pike, 'Introduction of the Real Property Act in South Australia,' *Adelaide Law Review* 1, No. 2 (1961): 169, 171.

[13] Pike, 'Introduction of the Real Property Act in South Australia,' 169.

> over 1,756,000 acres had been alienated, though many of the choicest sites were owned by absentees, whose relations, dependants and agents used and leased their lots under an infinite arrangement of contracts and agreements.[14]

Moreover:

> preliminary purchasers knew next to nothing of the territory. Few of them had any intention of leaving England, and made their investments to enable the venture to colonisation to be started. Their emigrating poor relations and agents, empowered to select their sections, were over-eager to pick the eyes out of the country.[15]

As a settled territory of the British Crown, South Australia received the common law of real property, which controlled Crown grants of land and the conveyancing of that land when it changed hands.[16] The complexity of that regime combined with the absenteeism and inexperience of land speculators meant that lawyers were the only people capable of understanding it and, so, of effecting conveyances. This proved lucrative—conveyancing lawyers in the province could:

> make £100,000 a year from arranging transfers, mortgages and leases. And though fees were not extortionate, it was admitted that the usual cost of conveyancing was three to five per cent of the value of the land, and of mortgaging from ten per cent upwards. Involved titles were known to have cost as much as £39 for land worth £20.[17]

14 Pike, 'Introduction of the Real Property Act in South Australia,' 169.

15 Pike, 'Introduction of the Real Property Act in South Australia,' 171.

16 Alex C. Castles, 'The Reception and Status of English Law in Australia,' *Adelaide Law Review* 2, No. 1 (1963): 1, 2-5.

17 Pike, 'Introduction of the Real Property Act in South Australia,' 172-3.

Much of the difficulty emanated from the chaotic nature of both the system of Crown grants to settlers and of the conveyance of those titles to successors in title.[18]

While this attenuated account of settlement and of Crown grants tells us as much as we need to know to understand the later reforms introduced in the RPA 1857-58, an understanding of the broader sweep of the law's development over time allows us to see what was actually happening as a result of the system of Crown grants and the imposition of the English law of real property. Viewed that way, what the attenuated account told by most historians until comparatively recently leaves out of the story is the deliberate dispossession of South Australia's Indigenous peoples[19] and the role played by dower and coverture in denying the rights of women to property in land.[20] Complicit in this process, the Torrens system would come to provide the commodity logic of abstraction (itself an inherent dimension of English real property law) that: 'subtended new property logics…accompanied by a racial logic of abstraction that rendered the land of the [Indigenous inhabitants] vacant and ripe for appropriation.'[21] In telling this story, then, and before turning directly to the strange history of ss 56-60, we must acknowledge the treatment of Australia's Indigenous peoples and of women at the hands of the colonial system of land grants and its use of the English law of real property.

18 Pike, 'Introduction of the Real Property Act in South Australia,' 173-5; Stanley Robinson, 'Equity and Systems of Title to Land by Registration' (PhD diss., Monash University, 1973), 3-10.

19 See Human Rights and Equal Opportunity Commission, *Bringing them Home: Final Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Canberra, Commonwealth of Australia, 1997), ch 8; Geoffrey H. Manning, *The Betrayal of Aborigines in Colonial South Australia – Collected Essays* (undated) <https://geoffmanning.info/wp-content/uploads/2019/11/Betrayal-of-Aborigines-in-SA-Colonial-History.pdf>.

20 See Andrew J. Cowie, 'A History of Married Women's Real Property Rights,' *Australian Journal of Gender and Law* 1 (2009): 6; A. R. Buck, '"A Blot on the Certificate"': Dower and Women's Property Rights in Colonial New South Wales,' *Australian Journal of Law and Society* 4 (1987): 87.

21 Brenna Bhandar, 'Title by Registration: Instituting Modern Property Law and Creating Racial Value in the Settler Colony,' *Journal of Law and Society* 42, No. 2 (2015): 253, 253.

This, too, is background to the story of Torrens title. Women obtained some redress with the enactment of the *Married Women's Property Act 1882* (UK), adopted in each of the Australian colonies throughout the late 19th century.[22] For Indigenous Australians, any recognition of the system of law denied by the acquisition of sovereignty would only come, to a limited extent, much later, through the High Court's recognition of native title in 1992[23] and, in South Australia, even more recently in that court's decisions in *Commonwealth v Yunupingu*[24] and *Stuart v South Australia*.[25] Both of these historic wrongs, while not directly implicated in the story of ss 56-60, constitute the background to the introduction of the Torrens system in South Australia.[26]

By the middle of the 19th century, then, South Australian reformers took aim at the chaos and complexity of the received land law.[27] But reform was never

22 See Cowie, 'A History of Married Women's Real Property Rights', 6.

23 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

24 *Commonwealth v Yunupingu* [2025] HCA 6.

25 *Stuart v South Australia* [2025] HCA 12.

26 While there is no direct evidence to suggest it, some comments during the debates on both of the Acts with which this article deals could be taken to suggest that removing the possibility for the registration of trusts may have been motivated by a concern to prevent settlements of land that would benefit women from having the protection of the indefeasibility of title. See my conclusions in Part IV: while the effect of removing ss 56-60 may have been detrimental to women that was not, at least expressly, the reason for their removal, although, it cannot be ruled out as an underlying, if unstated, reason. See also, e.g., Great Britain, *Report of the Commissioners appointed to consider the subject of the Registration of Title with reference to the Sale and Transfer of Land*, British Sessional Papers, Vol XXI (1857), 8-9; James Edward Hogg, *The Australian Torrens System: Being a treatise on the system of land transfer and registration of title now in operation in the six states of the Commonwealth of Australia, the Colony of New Zealand, and Fiji and British New Guinea: Including the text of the Torrens statutes and ordinances in the nine territories, and references to other statutes relating to land, and an historical account of the growth of the system* (London: William Clowes and Sons, Limited, 1905) 14-22; South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 208 (Richard Hanson, Attorney-General).

27 For a complete history, see Greg Taylor, *The Law of the Land: The Advent of the Torrens System in Canada* (Toronto: Osgoode Society for Canadian Legal History by University of Toronto Press, 2008) 3-30.

a uniquely South Australian pursuit.[28] Calls for a system of land title registration can already be found in England perhaps as early as the reign of Henry VIII. Still, the novel conditions in South Australia—the fact that it was a land job dominated by absentee owners—meant that it proved especially fertile ground for the transplantation of English reform proposals.[29] Indeed, the third *Report of the English Real Property Commissioners*, dated 15 May 1857, which contained the outlines of a system of land title registration,[30] arrived in South Australia about the same time that Robert Torrens was beginning to consider the system which today bears his name. That Report was known to the parliamentarians who would debate the Bill Torrens would subsequently draft.[31]

Others recount the process leading to the enactment of the RPA 1857-58 and of the ongoing and, it seems, irresolvable debate over whether its origins lie largely with Robert Torrens or with the German lawyer, Ulrich Hübbe, who was also resident in South Australia at the time of the reforms, or, indeed, with other critics of the existing land law.[32] We need not traverse that ground again here; as Greg Taylor writes:

28 Robinson, 'Equity and Systems of Title to Land by Registration', 11-3.

29 Taylor, *The Law of the Land*, 18-20; Pike, 'Introduction of the Real Property Act in South Australia,' 173-9.

30 Great Britain, *Report of the Commissioners*, 245, a detailed account of which is found in Hogg, *The Australian Torrens System*, 14-22. And see Douglas J. Whalan, 'The Origins of the Torrens System and Its Introduction Into New Zealand' in *The New Zealand Torrens System Centennial Essays, Written to commemorate the hundredth anniversary of the passing of the Land Transfer Act 1870* ed. G. W. Hinde (Auckland: Butterworths, 1971) 1-31, 1-3, and the sources cited at n 12.

31 See South Australia, *Parliamentary Debates*, Council, 7 January 1858, col 736 (Anthony Forster).

32 See Taylor, *The Law of the Land*, 18-30; Greg Taylor, 'The Torrens System – Definitely Not German,' *Adelaide Law Review* 30 (2009): 195, 199; Greg Taylor, 'Is the Torrens System German?,' *The Journal of Legal History* 29, No. 2 (2008): 253, 253-4; P Moerlin Fox, 'The Story Behind the Torrens System,' *Australian Law Journal* 23 (1950): 489; Horst K Lücke, 'Ulrich Hübbe and the Torrens System: Hübbe's German background, his life in Australia and his contribution to the creation of the Torrens system,' *Adelaide Law Review* 30 (2009): 213; Whalan, 'The Origins of the Torrens System,' 5-12; Hogg, *The Australian Torrens System*, 1-36.

> it would be absurd to look for the first inventor of the idea of a register of titles as an abstract idea, unconnected with any detail, and to award to that person the prize for inventing the South Australian system. … Torrens's great contribution was that he converted the vague idea of title by registration into a practical proposition that was a real step forward in the law, made a version of it which appeared to justify the trouble and cost attendant upon its introduction, and persuaded the public of its usefulness.[33]

Instead, my concern remains the narrower question of the registrability of trusts found in the RPA 1857-58.

Law reform became a central focus of South Australia's first Parliament.[34] Robert Torrens joined the members sent to the lower house, the Assembly, following the first election in 1857. And once there, Torrens joined forces with others seeking land law reform. Douglas Pike writes of that election: 'land titles reform became one of the dominant issues…; Torrens stood and, almost entirely because of his espousal of such reform, topped the poll.'[35] Torrens had already published an outline of a Bill for overhauling the English law of real property on 17 October 1856,[36] and an extended summary of the provisions of a revised version of that outline in April 1857.[37] Of the process that produced those early drafts, 'virtually all we know about the development of the system until the introduction of the bill into Parliament is what can be gleaned from public sources such as parliamentary debates and newspaper reports. Even that is not very much.'[38] So what do we know about the treatment of trusts, and especially of ss 56-60 of the eventual RPA 1857-58?

33 Taylor, *The Law of the Land*, 19.

34 Pike, 'Introduction of the Real Property Act in South Australia,' 179.

35 Whalan, 'The Origins of the Torrens System,' 4 (citation omitted).

36 Robinson, 'Equity and Systems of Title to Land by Registration', 13-7.

37 Taylor, *The Law of the Land*, 21, n 10; Robinson, 'Equity and Systems of Title to Land by Registration', 13-7; Whalan, 'The Origins of the Torrens System,' 3-4.

38 Taylor, *The Law of the Land*, 21.

Enactment: **Real Property Act 1857-58 *(SA)***

The most that James Edward Hogg, one of the earliest historians of the Torrens system, can say about ss 56-60 is that 'some of the provisions relating to uses and trusts are worthy of notice', citing them without further comment.[39] Still, while scant, some evidence exists which points to the reasons for the inclusion of those provisions. Consider, first, Torrens's attitude towards equity.

(a) Robert Torrens and Equity

Robert Torrens hated equity.[40] In 1859, in terms redolent of Charles Dickens's *Bleak House*,[41] Torrens wrote:

39 Hogg, *The Australian Torrens System*, 25-6.

40 Robert Torrens's views about the English law of real property, conveyancing, and the reforms introduced by his Bill are found in a number of sources, all of which are essentially the same, modified slightly for the audience, be it for a public speech, for the legal profession and conveyancers, or for other parliamentarians: See *Speeches of Robert R. Torrens, explanatory of his measure for reform of the law of real property: to which is appended copy of the Bill, as passed by the House of Assembly of South Australia* (Adelaide, 1857); Robert R Torrens, *The South Australian System of Conveyancing by Registration of Title, with Instructions for the Guidance of Parties Dealing, Illustrated by Copies of the Books and Forms in Use in the Land Titles Office, to Which Is Added, the South Australian Real Property Act, as Amended in the Sessions of 1858, with a Copious Index by Henry Gawler, Esq., Barrister, Solicitor of the Lands Titles Commissioners* (Adelaide: Register and Observer General Printing Offices, 1859); Robert R Torrens, *A handy book on the Real Property Act of South Australia: containing a succinct account of that measure, compiled from authentic documents with full information and examples for the guidance of persons dealing; also, an index to the Act* (Adelaide: Advertiser and Chronicle, 1862); South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 203-4 (Robert R, Torrens); South Australia, *Parliamentary Debates*, Assembly, 11 November 1857, col 647-9 (Robert R. Torrens).

41 Charles Dickens, *Bleak House* (London: Penguin, 2012 [1853]), 3-9. Indeed, Torrens himself said that: 'the history of Bleak House was not all imaginary; many such cases were occurring daily, and would continue to occur if legislation did not interpose and amend a system so fraught with evils': South Australia, *Parliamentary Debates*, Assembly, 11 November 1857, col 647-9 (Robert R. Torrens).

> Twenty-two years have now elapsed since my attention was painfully drawn to the grievous injury and injustice inflicted under the English Law of Real Property by the misery and ruin which fell upon a relation and dear friend who was drawn into the maelstrom of the Court of Chancery, and I then resolved some day to strike a blow at that iniquitous institution [equity].[42]

The story involved:

> a friend [who] had purchased a piece of land near Brighton from a lawyer of undoubted ability; before that it had belonged to Judge Cooper, and previously to Mr. Gwnne [sic], another most respectable solicitor. Yet after all, although he had paid £15 to have the title examined, it was found that title to ten acres out of the parcel of land was invalid – worth nothing, after having passed through the hands of three eminent lawyers, including one of the Judges of the land.[43]

For Torrens, the Court of Chancery, and its system of equity:

> constitutes a monstrous feature in our system of jurisprudence, and one not recognisable in any part of the world except Great Britain and certain of her colonies, into which it has been introduced in ignorance, or through infatuated adhesion to ancient institutions.[44]

And, in Torrens's telling of the story, the English Parliament and Henry VIII sought to control the "use", an institution enforced by the Court of Chancery, through enactment of the *Statute of Uses* in 1536.[45] Rather than having the intended effect—to abolish the use—the *Statute:*

42 Torrens, *The South Australian System of Conveyancing by Registration of Title*, v-vi. The story to which Torrens refers is recounted in South Australia, *Parliamentary Debates*, Assembly, 11 November 1857, col 647-9 (Robert R. Torrens).

43 Robinson, 'Equity and Systems of Title to Land by Registration', 16, citing Speech of Torrens in Salisbury, SA, *South Australian Register*, 1 June 1857.

44 Torrens, *The South Australian System of Conveyancing by Registration of Title*, 2.

45 *Statute of Uses*, 27 Hen. 8, c. 10 (UK).

> was adroitly availed by the conveyancers for purposes never contemplated by its authors, namely, to substitute a system of private or secret conveyancing for the enfeoffing by delivery of corporeal possession of the land in presence of neighbours and witnesses which had prevailed up to that time.[46]

Put together, the use and the *Statute* produced the modern trust. For Torrens, though, this process produced an insidious outcome: secret conveyancing. That, for Torrens, was the evil of equity and the *Statute of Uses* and so, he: 'resolved…to strike a blow at that iniquitous institution'.[47] South Australian colonists: 'require[d] something less costly, something less artificial, something which we may handle with more freedom and rapidity.'[48]

Given that antipathy, we might expect to find that the Bill Torrens introduced in June 1857 would target equity and trusts for exclusion from his system—certainly, the origin story we think we know suggests that we will find that if only we look. But look as we might, that is not what we find. But to do that we need to trace that story through not one Bill, but three, all introduced in 1857: Torrens first Bill, followed by a rival Bill of the Attorney-General, Richard Hanson, and then a third Bill, which was Torrens's revised Bill, substituted for his original Bill prior to the Assembly reading that Bill a second time, and before it was considered in Committee. And along the way, Ulrich Hübbe enters the twisting tale.

(b) June 1857: Robert Torrens's First Bill

On 2 June 1857, Torrens sought leave to introduce his private members Bill, *An Act to simplify the Laws relating to the Transfer and Encumbrance of Real Property, and to the Registration of Titles*;[49] two days later, he introduced it in

46 Torrens, *The South Australian System of Conveyancing by Registration of Title*, 3.

47 Torrens, *The South Australian System of Conveyancing by Registration of Title*, vi.

48 Torrens, *The South Australian System of Conveyancing by Registration of Title*, 4.

49 South Australia, *Parliamentary Debates*, Assembly, 2 June 1857, col 187 (George Marsden Waterhouse); South Australia, *Parliamentary Debates*, Assembly, 2 June 1857, col 187 (Boyle Travers Finniss, Chief Secretary and Premier). See also Taylor, *The Law of the*

the House of Assembly.[50] While this, Torrens's First Bill, differed in a number of respects to the final enacted version in the RPA 1857-58, that is not the case concerning ss 56-60. With minor differences, none of which affect their overall tenor concerning registration, s 38 of Torrens's First Bill mirrors s 56 of the RPA 1857-58, s 39 contains the same language found in s 57; s 40, following the addition of provisions relating to endorsing a Bill of trust with a memorandum of the time of its recording, becomes s 58. Sections 41 and 42 are identical to ss 59 and 60, respectively. In short, ss 38-42 of Torrens's First Bill contain the very provisions which would become ss 56-60 of the RPA 1857-58.

So where did ss 38-42 of Torrens's First Bill come from? Commentators suggest two sources that may have informed the Bill as a whole—the third *Report of the English Real Property Commissioners* and the *Merchant Shipping Act 1854* (Imp). Perhaps the source of ss 38-42 are found there. Torrens himself disclaimed any reliance on the *Report of the English Real Property Commissioners*. Whalan, however, argues that while Torrens's: 'bill had gone through several drafts before the Report became available,…contrary to Torrens' [sic] statement, the timing is such that almost certainly some of the ideas for vital aspects of the final measure came from it.'[51] But the *Report* itself demonstrates concern for ensuring secrecy, expressing a: 'fear [in registration] of unnecessary and uncalled-for disclosures.' Indeed, the Commissioners wrote:

> no man likes to make his private affairs public; and one man has no right to pry into the affairs of another, except for some object, in which the latter has given him an interest. Now the only legitimate object of making public or giving notoriety to any title-deeds is to prevent frauds in the transfer of property by ensuring notice to

Land, 20, 24-5; Whalan, 'The Origins of the Torrens System,' 4-5; Pike, 'Introduction of the Real Property Act in South Australia,' 180-2.

50 *Transfer of Property Bill* (SA), Bill 10, 1857; South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 201-10 (Robert R. Torrens).

51 Whalan, 'The Origins of the Torrens System,' 7, citing Torrens, *The South Australian System of Conveyancing by Registration of Title*, v-viii.

> future contractors of all transactions which are to affect them. For that purpose, however, there can be no need of disclosing the whole internal history of the title for an indefinite period. Why are the trusts which affect an estate in land to be more divulged than the trusts which affect stock or railway debentures? Why are settlements and family arrangements, which are intended to preserve property in families, to be more liable to exposure in the one case than they are in the other? These and similar questions have often been asked, but they have never received a satisfactory answer.[52]

For that reason, the Commissioners concluded that:

> Trusts cannot, consistently with the objects to be attained by registration of title, bind or affect the ownership of a registered purchaser, unless such interests are of his own creation; but they may be allowed to confer a right against the land whilst in the possession of the owner who created the trusts, or in that of his representatives, or volunteers claiming under him.[53]

It hardly seems likely, then, that the Commissioners would countenance allowing trusts, with their protection of secrecy in settlements of land, to be registrable interests in their own right. The *Report* therefore seems an unlikely source for ss 38-42.

Unlike the *Report*, Torrens admitted to reliance upon the *Merchant Shipping Act 1854* (Imp):[54] 'claim[ing] that he "perceive[ed] [sic] that…[his] object might be attained by applying to land the principles which regulate the transfer of shipping property."'[55] Greg Taylor writes that:

52 Great Britain, *Report of the Commissioners*, 8-9, para XX.

53 Great Britain, *Report of the Commissioners*, 19, para L, and see also 24, para LXXI. And see Hogg, *The Australian Torrens Systems*, 18.

54 South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 205 (Robert R. Torrens); Robinson, 'Equity and Systems of Title to Land by Registration', 3, 30-2; Taylor, 'The Torrens System – Definitely Not German,' 199; Taylor, 'Is the Torrens System German?,' 253-4; Moerlin Fox, 'The Story Behind the Torrens System,' 492.

55 Whalan, 'The Origins of the Torrens System,' 5, citing Torrens, *The South Australian*

> all but a very few of the clauses of the [F]irst [Bill] owed their origin to the *Merchant Shipping Act 1854*, although as the draft developed the clauses taken from the Act of 1854 were gradually supplemented by others taken from a wider range of sources.[56]

Most notably, the First Bill took inspiration from Part II of the *Merchant Shipping Act*, entitled 'Register'.[57] So, surely ss 38-42 must be found in that earlier legislation, right? Consider s 43:

> No Notice of any Trust, express, implied, or constructive, shall be entered in the Register Book, or receivable by the Registrar; and, subject to any Rights and Powers appearing by the Register Book to be vested in any other Party, the registered Owner of any Ship or Share therein shall have Power absolutely to dispose in manner herein-after mentioned of such Ship or Share, and to give effectual Receipts for any Money paid or advanced by way of Consideration.

The provision could not be clearer: trusts are excluded from the register. As Whalan writes:

> Despite his antagonism towards the influences of equitable doctrines and his avowed dependence upon the law of shipping, ss. 56-58 of the *Real Property Act 1857-1858* contained provisions permitting the registration of trusts notwithstanding that s. 43 of the *Merchant Shipping Act 1854* (Imperial) contained a prohibition on the entry of trusts on the register.[58]

System of Conveyancing by Registration of Title, vi.

56 Taylor, *The Law of the Land*, 22.

57 *Merchant Shipping Act 1854* 17 & 18 Vict. c. 104 (UK).

58 Whalan, 'The Origins of the Torrens System,' 5.

And Whalan concludes 'that this shows that other influences were at work as well.'[59] But if such interests were at work in the case of trusts, what – or whose – were they?

While there was general support in the Assembly for the Bill—and while: 'a number of people gave magnificent assistance in its formulation and several influences…shaped its form'[60]—only two members said anything about trusts when Torren's introduced his First Bill: Torrens himself,[61] and Richard Hanson, the Attorney-General.[62] The former recounted the Preamble to the Bill, which remained unchanged through to enactment,[63] describing the evils which he sought to remedy—that the existing English law of real property was: 'complex and cumbrous, ruinously expensive, uncertain and perplexing, and specially unsuited to the requirements of the community.' More to the point, Torrens argued, conveyancing lawyers: 'live by [the] perpetuation' of the English law, and while they may not have 'sordid motives', 'their thoughts, so long accustomed to run in grooves, it requires a painful effort to draw out from the deep worn tracks.'[64] Torrens found particularly egregious: 'the statute of uses, [which drew] the distinction between legal and equitable estates, and [created] the ingenious fictions which obscure and complicate this branch of law.' For Torrens, while there may have been a historical need for the devices and evasions developed by lawyers using the *Statute of Uses*, whatever need might have existed disappeared along with the conditions

59 Whalan, 'The Origins of the Torrens System,' 5.

60 Whalan, *The Torrens System in Australia*, 7-8, noting that Ulrich Hübbe, W. H. Burford, Anthony Forster, and, probably, R. B. Andrews played roles in the genesis of the First Bill.

61 South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 201-6 (Robert R. Torrens).

62 South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 208 (Robert R. Torrens).

63 *Real Property Act 1857-58* 21 Vict. c. 15 (1857-58) (SA), Preamble.

64 South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 201-2 (Robert R. Torrens).

which created it.[65] The heart of Torrens's speech, and his argument for the system of land registration which he was proposing, lay in reforming:

> the system of retrospective or derivative title[,]…the grand source of complication, uncertainty, and expense, attending the existing practice. Whenever real estate is transferred, the history of the property has to be traced back to the original grant from the Crown, through all the intermediate hands, every mortgage deed, release, conveyance, ***settlement***, must be produced and carefully examined, to see that there are no outstanding equities affecting the title. This renders conveyancing a laborious and costly process; but if after the labour has been expended and the cost incurred, the fruits of it could be secured and held available for future occasions, we should not have so much to complain of. The grievance is, that the labour and outlay has to be repeated again and again each time the property is dealt with. … each transaction adding to the labour and cost of the subsequent one and increasing the risk and uncertainty. … Heavy as are the certain costs of conveyancing, the contingent risks of expensive costs in law and equity inherent in the system of derivative titles is probably much more burdensome to the land owner.[66]

What vexed Torrens most, and what he sought to replace, was the onerous and burdensome task of tracing a title back to a Crown grant in order to ascertain that one who purported to be an owner of land, was, in fact, the owner of that land. This Torrens called the 'system of retrospective or derivative title', and its vagaries and the chaos it created, as we have seen, were particularly acute in South Australia's early years.[67]

Torrens suggests that settlements—trusts—contribute to the chaos of the system. What Torrens sought to remedy, then, was the system which required lawyers steeped in the minutiae of English real property law to

65 South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 203-4 (Robert R. Torrens).

66 South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 203-4 (Robert R. Torrens) (emphasis added).

67 Pike, 'Introduction of the Real Property Act in South Australia,' 173-5.

examine retrospective or derivate title of a vendor, which title might include among its sources one or more settlements, or trusts. And, of course, the clever application of the *Statute of Uses* by those lawyers, already well-established in the grooves of deep worn tracks, would allow a predecessor in title who held such an interest to conceal it from the attention of even the most attentive purchaser, even with the assistance of a lawyer. But aside from this rather innocuous reference to settlements, there is nothing else in Torrens's speech which would explain why, if trusts were part of the evil, ss 38-42 of the First Bill would allow for their registration.

While the available evidence provides little additional indication of Torrens's intention in proposing ss 38-42, we can see two tantalising glimpses of what he might have been thinking, although neither is contemporaneous with the events themselves. The first comes from a letter Torrens wrote to the Chief Secretary four years before introducing his First Bill, in 1853, concerning proposed amendments to the South Australian system of registration of land deeds. The *Registration of Deeds Act 1841* (SA).[68] was a seminal piece of legislation, the first of its kind to establish an office for the registration of deeds and other instruments related to land in order to prevent fraud and provide certainty of title. This system, while not a system of title by registration, clearly served as an important precursor to Torrens's proposal for such a system in 1857. Torrens, who in 1853 was Registrar-General of Deeds for South Australia, proposed amendments to the deeds registration system,[69] writing to Boyle Travers Finniss, the Colonial Secretary, to explain that:

> The object of Registration is to ensure disclosure of title thereby facilitating the Transfer of property and rendering fraud by concealment difficult if not impossible. The present system of Registration falls short of this object in that it fails to afford reasonable assurance

68 *Registration of Deeds Act* 5 Vict., c. 8 (1841-2). This legislation was amended by the *Registration of Deeds Amendment Act* 6 Vict., c. 12 (1842-3) and the *Registration of Deeds Amendment Act* 15 Vict., c. 19 (1852).

69 The proposed amendments were enacted in the *Registration of Deeds Amendment Act* 16 Vict., c. 22 (1853).

> that the true state of a title may be ascertained by a person using care and diligence in making searches.[70]

To the extent that equity and the trust facilitated such secrecy, it impeded, in Torrens's view, the ability for purchasers and others dealing in land from understanding the true state of title. If that was so in 1853, it seems unlikely that Torrens's view would have changed in 1856 and 1857 when he was drafting his First Bill for a system of title by registration. The obvious remedy was to ensure that any interests that might allow for secrecy should be brought into the light, and registration would make that possible.

The second possible glimpse into Torrens's mind came in 1864, six years after ss 56-60 had been repealed. By then Torrens was back in England, and he had been invited to give a lecture on 1 February in Dublin, Ireland, to outline the possible application to Irish law of his system of title by registration.[71] In that speech, Torrens quoted with approval the words of Henry Gawler, then the South Australian Examiner of Titles, who said:

> Under the Torrens act…a settlement [of a trust] would be effected by the settlor conveying to the trustees by memorandum of transfer or in a separate deed, and the trustees would receive a "declaration of title." Now in what respect would the *cestuique* trusts [beneficiaries] in this case be in a worse position than they would have been under the old system? … But *cestuique* trusts under the Torrens Act, so far from being in a worse position than they would have been under the old system, are actually in a better position than they would have been under the old system, because they, or any person on their behalf, may enter a caveat, and so prevent any improper dealing by the trustees.
>
> …

70 State Records of South Australia GRG 59/6/1841-1865/2 March 1853.

71 Robert R. Torrens, *Lecture on Dealings with Land by Registration of Title as Proposed to be Applied to Ireland* (Dublin: Hodges, Smith, & Co., 1864).

> The only difference, in fact, between a settlement of land under the Torrens system and of land under the old system, is, that in the former case no estate would pass or become vested until the settlement was registered; but, so soon as registered, the settlement, would have exactly the same effect; estates and interests would vest or be divested, exactly as under the old system.[72]

There is no indication in either of these glimpses of the purpose behind the inclusion of ss 38-42 in the First Bill, or for their removal from the RPA 1857-58; but what we do find is that there is, far from a desire to eliminate equity altogether from the operation of title by registration, a clear recognition of the role it would continue to play in a system of title by registration. And so, while there is little contemporaneous evidence for why Torrens included ss 38-42 in the First Bill, or why they were removed in 1858, at least in 1853, and still in 1864, he appears to provide at least some indication of his thought: the only way to remedy the evils occasioned by the complexity created by trusts and their potential for fraud and secrecy was to allow for their registration.

When Torrens introduced the First Bill in the House of Assembly, the only other person to say anything about it at all was the Attorney-General, Richard Hanson; no great supporter, he said:

> if the system of registration only proposed to deal with what lawyers called legal estate, he thought it could be easily adopted. But he apprehended that it would not apply to trusts. A person might wish to settle property for the benefit of his children. He might wish the estate to go to one for the purpose of raising money for the benefit of the others—a mode of disposition which, if not restrained by law, might become common in the country.[73]

What does Hanson mean by 'would not'? Given that Torrens's First Bill contained provision for the registration of trusts, that would tend to suggest that

72 Torrens, *Lecture on Dealings*, 16-7.

73 South Australia, *Parliamentary Debates*, Assembly, 4 June 1857, col 208 (Richard Hanson, Attorney-General).

such provision was, in Hanson's view, problematic. Yet, aside from this equivocal statement, and some limited opposition from other members to the Bill as a whole,[74] neither Hanson nor anyone else in the Assembly says anything further concerning trusts.

The First Bill gained broad public support,[75] although at least one member of the public wrote to the editor of the *South Australian Register* that the:

> endeavour to retain all the old forms of ownership; the great variety of estates and interests which may be held in land, and at the same time to introduce a register of title, every entry on which is to be conclusive where the transfer is for valuable consideration [would] result in greater 'losses' and more 'perplexity' than have hitherto been known [and, as such] it cannot be adopted with propriety unless accompanied by a general abolition of all estates and interests in land whatever, except only the fee-simple and leases… Nobody could then be wronged by being deprived of any estate or interest in it:…In short, the register of title should relate only to the fee-simple.[76]

For that reason, in order to eliminate injustice and fraud, the opinion writer concludes: 'no trusts whatever should be allowed to appear on the register, nor should any transferee of the land be affected by any notice he may have had of them.'[77] A lone voice, but one that spoke to the same evils that Torrens addressed in his first reading speech: the need to reduce complexity and the opportunity for injustice.

But none of what we see in the parliamentary debate around the First Bill or the public reaction to it tells us anything about the rationale for including ss

74 See J. H. Fisher, *The Real Property Act, as Passed by the Parliament of South Australia, Session 1857–8: with Analytical and Critical Notes* (Adelaide, 1858).

75 *South Australian Register*, 3 January 1858, 3. And see 'The Real Property Act,' *Proceedings of the Royal Geographical Society of Australasia (South Australian Branch)* 32 (1930-1931): 109-12, citing a statement given by Ulrich Hübbe in 1884.

76 *South Australian Register*, 3 January 1858, 3.

77 *South Australian Register*, 3 January 1858, 3.

38-42. In September 1857, Torrens became the third Premier of South Australia and, although the Ministry lasted almost a month, the First Bill made no progress.[78] In November 1857, however, Torrens, no longer Premier, turned again to his reform Bill. And, quite aside from the complexity of retrospective or derivative titles, the complexity of the story of Torrens and trusts was about to increase.

(c) November 1857: Robert Torrens's Second (Revised) Bill and Richard Hanson's Rival Bill

On 18 November 1857, Torrens substituted a revised Bill, adding 38 clauses contained in a document entitled 'Additional Clauses to Mr. Torrens's Real Property Bill' appended to the Committee copy of the First Bill. The Committee of the Assembly considered this Second Bill between 11 November and 10 December 1857.[79] The effect of adding those 38 clauses, when read together with the First Bill, meant that ss 38-42 shifted position, becoming ss 51-55; following the Committee's amendments, they became ss 54-58; and, finally, by the time the Assembly read the Bill a third time and passed it on 15 December,[80] those sections had taken their final position as ss 56-60.[81] And, more importantly, in this Second Bill, the minor differences in wording between ss 38-42 of the First Bill and ss 56-60 of the RPA 1857-58 were gone—the new clauses added by Torrens gave ss 56-60 their final form. Yet Torrens says nothing at all about those provisions, either at the time he substitutes the Second Bill or in his short third reading speech on 15 December 1857.[82]

78 Whalan, 'The Origins of the Torrens System,' 4.

79 South Australia, *Parliamentary Debates*, Assembly, 11 November 1857, col 647-9 (Robert R. Torrens).

80 South Australia, *Parliamentary Debates*, Assembly, 15 December 1857, col 706 (Robert R. Torrens).

81 South Australia, *Parliamentary Debates*, Assembly, 15 December 1857, col 706 (Robert R. Torrens).

82 South Australia, *Parliamentary Debates*, Assembly, 15 December 1857, col 706 (Robert R. Torrens).

So disaffected was he with Torrens's proposed reforms that, the day before Torrens submitted his Second Bill, Richard Hanson introduced his own rival Bill in the Assembly.[83] While Hanson's Bill was read a second time, sent to Committee—which considered it along with Torrens's Second Bill—read a third time and passed by the Assembly, it was never sent to the upper chamber, the Legislative Council.[84] Some commentators suggest that Torrens made some use of Hanson's Bill[85] in drafting his Second Bill.[86] But if that is true of Hanson's Bill as a whole, it is not the case as concerns ss 51-55 (ss 56-60 of the Act). While its stated objective was similar to Torrens's Bills, Hanson's Bill sought to address the stated evils of the English real property law by a different means.[87]

Although there is no direct evidence of the fact, it is possible that in drafting his rival Bill Hanson relied, at least in part, upon the provisions of the New Zealand *Land Registration Ordinance 1841* (NZ).[88] The rival Bill contained 87

83 *Real Property Law Consolidation Bill* (SA), Bill 31, 1857. And see Pike, 'Introduction of the Real Property Act in South Australia,' 183; Whalan, 'The Origins of the Torrens System,' 3.

84 *Real Property Law Consolidation Bill* (SA), Bill 31, 1857; South Australia, *Parliamentary Debates*, Assembly, 17 November 1857, col 658 (Richard Hanson, Attorney-General); South Australia, *Parliamentary Debates*, Assembly, 27 November 1857, col 677 (Richard Hanson, Attorney-General). See Taylor, 'Cancel that hamburger (the Torrens System was not German),' *Australian Property Law Journal* 23 (2015): 167, 177.

85 Taylor, 'Cancel that hamburger,' 177, n 44, where Taylor writes: 'Numerous references might be given for this proposition [that Torrens relied on parts of Hanson's rival Bill], but a letter from Torrens himself dated 30 November 1857 is reprinted in the *Advertiser*, 13 November 1891, 5, in which Torrens says that he has: 'adopted all the essential parts of the Hanson measure'.', also citing Robinson, 'Equity and Systems of Title to Land by Registration', 38–42.

86 South Australia, *Parliamentary Debates*, Assembly, 11 November 1857, col 647-649 (Robert R. Torrens). And see Robinson, 'Equity and Systems of Title to Land by Registration', 38-42.

87 *Real Property Law Consolidation Bill* (SA), Bill 31, 1857, Preamble.

88 While there is no direct evidence that Hanson relied on the *Land Registration Ordinance 1841* (NZ), he was resident in New Zealand at the time that the *Deeds Ordinance 1841* (NZ) was drafted and enacted as *An Ordinance to provide for the Registration of Deeds and Instruments affecting Real Property*, 5 Vict. c. 9 (1841). Richard Hanson, then

clauses, divided into six divisions: the first dealing with the succession of land of intestates; the second with words implied in conveyances; the third with simplifying conveyancing; the fourth with recording of deeds; the fifth containing miscellaneous provisions; and the sixth with definitions. And while the Bill, in Division IV, provided for the office of a recorder, who would record deeds, and that the effect of such recording would bar any adverse or prior estates or interests,[89] it did not establish a system of title by registration, at least not in the same way as did Torrens's Bills. And, indeed, if Hanson had relied upon the New Zealand *Land Registration Ordinance 1841* (NZ), that would have been a misguided attempt to provide: 'an adequate system of titles records',[90] for it was already known as early as 1856 that that system 'had proved unsatisfactory', leading to 'local modifications or substitutions…in Auckland,…Otago, and Taranaki.'[91]

More importantly, though, while it did provide for their creation by deed, Hanson's Bill made no provision whatsoever for the recording of trusts. And, in any case, because such provision was already present in Torrens's First

a lawyer, took up a post as sub-agent for the purchase of lands with the New Zealand Company on 2 August 1839, and arrived in what would become Wellington on 3 January 1840. He would remain there until August 1846, when he took up residence in Adelaide. During that brief time, Hanson held positions in almost every station of public life: businessman, land acquisition agent for the New Zealand Company, Crown Prosecutor, editor of the *New Zealand Colonist and Port Nicholson Advertiser* (which he founded), candidate for the first election of the Wellington city council, and, finally, Crown Solicitor: Greg Taylor, *Sir Richard Hanson* (Alexandria, N.S.W.: Federation Press, 2013) 47-99. While that certainly would have placed him at the centre of any public discussion surrounding the drafting and enactment of the *Land Registration Ordinance 1841* (NZ), there appears to be no evidence that he had any role in that drafting. Nonetheless, some of the provisions of Hanson's *Real Property Law Consolidation Bill* (SA), Bill 31, 1857, are similar to those found in the 1841 New Zealand legislation. Sections 41-48 of the former, which deal with the Office of the Recorder and the effect of registration of deeds, are similar to ss 1-5 and 17-36 of the latter. And, of course, there is the obvious similarity that both documents establish a system of deeds registration without affecting the underlying substance of the system of English real property: the creation, in the Torrens bills, of a system of title by registration.

89 *Real Property Law Consolidation Bill* (SA), Bill 31, 1857, ss 44-45.

90 Whalan, 'The Origins of the Torrens System', 12.

91 Whalan, 'The Origins of the Torrens System', 12 (internal citations omitted).

Bill, presumably before Hanson's Bill was drafted and introduced, there could be nothing in that latter Bill which would have influenced either the original form of Torrens's trust registration provisions—clauses 38-42 of Torrens's First Bill—or their minor amendment and repositioning in Torrens's Second Bill, which became ss 56-60 of the RPA 1857-58.[92] Hansons's Bill, then, sheds no light on the reason for the inclusion of ss 56-60 of the RPA 1857-58.

By the time Torrens's Second Bill was introduced in the Legislative Council, on 22 December 1857,[93] the trust registration provisions were in their final form and position, as ss 56-60. The Second Bill's progress in the Council was rapid. Following introduction, it was read a second time on 6 January 1858 and sent to Committee,[94] which made no changes to ss 56-60.[95] The Bill was read a third time and passed on 26 January 1858,[96] and given Royal Assent on 27 January 1858;[97] it came into force as RPA 1857-58 on 1 July 1858.

While there is nothing in the Council debates prior to passage that alludes to the purpose of the trust registration provisions, in reporting on the Act to the Chief Secretary, Boyle Travers Finniss, and recommending that Royal Assent be given, Hanson, seemingly now a reluctant convert to Torrens's system, wrote that some provisions of the Act were: 'in some respects objectionable'. He noted that he had: 'already in Executive Council concurred in recommending that this Act should receive Royal Assent, although I am not insensible to

92 See Robinson, 'Equity and Systems of Title to Land by Registration', 38-42.

93 South Australia, *Parliamentary Debates*, Council, 22 December 1857, col 715-6 (William Younghusband, Chief Secretary).

94 South Australia, *Parliamentary Debates*, Council, 6 January 1858, col 730-1 (Anthony Forster).

95 South Australia, *Parliamentary Debates*, Council, 22 December 1857, col 715-6 (William Younghusband, Chief Secretary); South Australia, *Parliamentary Debates*, Council, 6 January 1858, col 730-1 (Anthony Forster); South Australia, *Parliamentary Debates*, Council, 26 January 1858, col 782-4.

96 South Australia, *Parliamentary Debates*, Council, 26 January 1858, col 782-4.

97 South Australia, *Parliamentary Debates*, Council, 27 January 1858, col 794; the Act came into force as the *Real Property Act 1857-58* 21 Vict. c. 15 (1857-58) (SA) on 1 July 1858.

the many objectionable provisions which it contains.' One of those 'objectionable provisions'? Trusts. Hanson continued, reiterating the criticisms he made when Torrens had introduced the First Bill in 1857:

> With regard also to the provisions relating to…Bills of Trust I think these will be found to impair the usefulness of the measure. The State is concerned that there should be security and simplicity of title to land; but it is also concerned that there should be the utmost power of dealing with land consistent with this. The provisions to which I am now adverting violate as it seems to me both of these principles. In the first place, by means of these trusts appearing upon the Registry there is a great risk lest the simplicity and security of the title should be affected, since Courts of Equity will always assert their right to control dealings with land affected by trusts so appearing, and in the second place the owner of the land is restrained from settling or dealing with it excepting through these instruments.[98]

Hanson, while supporting Royal Assent, foreshadows the concerns that will be raised again as reasons for the repeal of ss 56-60 in the RPLAA 1858: complexity of the register book as a consequence of the great many trusts that will appear there. And, notably, the very thing Torrens sought to banish—the secrecy that settlements under a trust would *allow* for a settlor. Rather than a vice, Hanson saw this as a virtue. But these are reasons for either allowing or not the registration of trusts. Hanson's comments tell us nothing about why ss 56-60 were there in the first place.

And aside from these sparse comments of Torrens and Hanson, there is nothing in the passage of the RPA 1857-58 that provides any further clues as to the reasons for the insertion of ss 56-60. A third protagonist, however, was present in South Australia at the time of the Bill's passage, and whose involvement may shed at least some light on those reasons: Ulrich Hübbe.

98 State Records of South Australia GRG 1/6/4/10 February 1858.

(d) Ulrich Hübbe

Speaking in 1884, 26 years after the enactment of the RPA 1857-58, Ulrich Hübbe suggested that while he, Hübbe, drafted Torrens's Second Bill, it was Torrens who: 'piloted [it] through the House of Assembly and [that] it was taken through the Legislative Council successfully'.[99] Torrens himself says nothing about Hübbe's professed involvement in what *Hansard* referred to as a 'voluminous' second reading speech.[100] Academic commentary remains divided. Greg Taylor, for instance, argues that: 'whatever Hübbe's input was, it was relatively modest. Contemporaries of the two men reflected this by not mentioning Hübbe at all, while ceaselessly lauding Torrens for his great invention and the persistence he showed in having it accepted.'[101] Stanley Robinson, on the other hand, writes that:

> the contribution of Hübbe to the principles of the [RPA 1857-58] must be valued as to content, far greater than that of Torrens. Hübbe's provisions for regulating equities were necessary for the success of the Act if it were to cure the conveyancing evils found in South Australia at that time. In contrast the provisions of the Shipping Act were inadequate to achieve this. Something more was needed. And, the need was satisfied by Hübbe.[102]

But we know that ss 38-42 were already in Torrens's First Bill and, even if Hübbe had some role in the drafting of the Second Bill,[103] that could not have been in relation to ss 51-55 of that Bill, given that those provisions are virtually identical to ss 38-42. And of course we know that ss 56-60 as passed by

99 'The Real Property Act,' *Proceedings of the Royal Geographical Society of Australasia*, 112, citing a statement given by Ulrich Hübbe in 1884.

100 See South Australia, *Parliamentary Debates*, Assembly, 11 November 1857, col 647-649 (Robert R. Torrens).

101 Taylor, *The Law of the Land*, 29.

102 Robinson, 'Equity and Systems of Title to Land by Registration', 113.

103 See Robinson, 'Equity and Systems of Title to Land by Registration', 44-52.

the Assembly following the third reading on 15 December 1857 are identical to those that passed the Council.[104]

In fact, quite apart from suggesting that he drafted them, Hübbe's writings actually point to the fact that provision for the registration of trusts was already found in Torrens's First Bill.[105] Hübbe makes it clear that the:

> object [of Torrens's First Bill] appears to be the assurance of *any* kind of property in immoveables, whether *absolute entailed* [Hübbe footnotes this to mean fees simple], &c., or for *life*…, or *terms of years*…, including also any kind of *uses* and *trusts*.'[106]

The 'assurance' of title was to be achieved by: 'REGISTRATION OF OWNERSHIP *by deposit of* DUPLICATE of *land grant*…or of *Certificate of Title*…or of *Lease*…, any of these, either directly or in trust…, in every case of a transfer.'[107] The Bill also contemplated registration: 'of every charge or encumbrance whatsoever that may take place to affect the land.'[108] Hübbe concluded that the Bill provided that:

104 South Australia, *Parliamentary Debates*, Council, 19 January 1858, col 762-3 (Committee), noting 'trifling amendments' to ss 50-64, which, on closer inspection, are very minor changes to ss 52, and 64(2) (it was significantly shortened) and (3) (it was deleted entirely); South Australia, *Parliamentary Debates*, Council, 20 January 1858, col 764-7 (Committee); South Australia, *Parliamentary Debates*, Council, 21 January 1858, col 771-4 (Committee); South Australia, *Parliamentary Debates*, Assembly, 21 January 1858, col 774 (Robert R. Torrens); South Australia, *Parliamentary Debates*, Council, 22 January 1858, col 778-80 (Committee).

105 Consolidated in Ulrich Hübbe, *The voice of reason and history brought to bear against the present absurd and expensive method of transferring and encumbering immoveable property with some comments on the reformatory measures proposed in the opening speech of the Governor-in-Chief, and the Bill recently introduced by the Hon. R. R. Torrens, Esq, into the House of Assembly* (Adelaide: David Gall, 1857); 'The Real Property Act,' *Proceedings of the Royal Geographical Society of Australasia*, 112, citing a statement given by Ulrich Hübbe in 1884.

106 Hübbe, *The voice of reason*, 79 (emphasis in the original).

107 Hübbe, *The voice of reason*, 80 (emphasis in the original).

108 Hübbe, *The voice of reason*, 80.

> to carry out this method, the Registrar-General is to keep a Register Book, in which he must enter duplicates of all grants and all certificates (issued after commencement of Act) and he is required to open in the register book a separate account, a page for each grant or certificate of title, and on this page shall record from time to time, records of all sales, transfers, mortgages, releases, &c., affecting such property. The history of a particular property will thus be always ascertainable by an examination of one or more consecutive pages of the register.[109]

And, finally, Hübbe reviews the Form for a 'Bill of Trust' contained in Torrens's Bill which became Schedule F of the RPA 1857-58 and the process of registration for such settlements.[110] Clearly, then, according to Hübbe, all estates and interests of any kind, seemingly both legal and equitable, and certainly trusts, were to be registrable interests in Torrens's First Bill, before Hübbe himself suggests he had any involvement. What Hübbe's writings reveal is that Torrens included the trust registration provisions in the First Bill. But what that does not reveal is why Torrens made such provision in the first place.

Following the giving of Royal Assent to the RPA 1857-58 on 27 January, questions arose as to the constitutionality of s 35, which provided for an assurance fund to secure the guarantee of title created by the legislation.[111] As a consequence, on 11 February, the Governor, Sir Richard Graves MacDonnell, forwarded the Act to the Secretary of State for the Colonies, Henry Labouchere, along with, among other documents, correspondence from Richard Hanson explaining the operation of the RPA 1857-58.[112] On 10 May 1858, the Prime

109 Hübbe, *The voice of reason*, 80.

110 Hübbe, *The voice of reason*, 91-2.

111 His Excellency Sir Richard Graves MacDonnell, C.B., to The Right Honourable H. Labouchere, Her Majesty's Principal Secretary of State for the Colonies, Despatch No. 221, Government House, Adelaide, 11 February 1858, in Parliament of South Australia Printed Papers, No. 51, 14 September 1858.

112 His Excellency Sir Richard Graves MacDonnell, C.B., to The Right Honourable H. Labouchere, Her Majesty's Principal Secretary of State for the Colonies, Despatch No. 221, Government House, Adelaide, 11 February 1858, in Parliament of South Australia

Minister, Edward Smith-Stanley, replied: 'that I have laid this Act before the Queen, and that it will be left to its operation. It will rest with your Government to consider how far it may be expedient to reenact, in an unquestionable form, the 35th clause of the Act.'[113] As a consequence, the RPA 1857-58 would come into force on 1 July. What is important, though, is found in Hanson's commentary on ss 56-60:

> With regard also to the provisions relating to…bills of trust, I think these will be found to impair the usefulness of the measure. The State is concerned that there should be security and simplicity of title to land; but it is also concerned that there should be the utmost power of dealing with land consistent with this. The provisions to which I am now adverting, violate, as it seems to me, both of these principles. In the first place, by means of these trusts appearing upon the register, there is a great risk lest the simplicity and security of the title should be affected, since Courts of Equity will always assert their right to control dealings with land affected by trusts so appearing; and, in the second place, the owner of land is restrained from settling or dealing with it, excepting through these instruments.[114]

Less than a month after being enacted, cracks were already beginning to appear in the operation of ss 56-60, with controversy already swirling around the treatment of trusts under the new Act. As we will see, by the time the RPA 1857-58 came into force on 1 July, those cracks became fissures. Sections 56-60 had hardly come into existence before their brief life was cut short by the RPLAA 1858. If it is difficult to explain why the RPA 1857-58 contained those provisions, perhaps we can at least explain why they were abolished with such haste.

Printed Papers, No. 51, 14 September 1858.

113 The Right Honourable Lord Stanley to His Excellency Sir Richard Graves MacDonnell, C.B., Despatch No. 15, Downing-street, 10 May 1858, in Parliament of South Australia Printed Papers, No. 51, 14 September 1858.

114 His Excellency Sir Richard Graves MacDonnell, C.B., to The Right Honourable H. Labouchere, Her Majesty's Principal Secretary of State for the Colonies, Despatch No. 221, Government House, Adelaide, 11 February 1858, in Parliament of South Australia Printed Papers, No. 51, 14 September 1858, 3, Enclosure 2.

Repeal: Real Property Law Amendment Act 1858 *(SA)*

The RPA 1857-58 created posts for two Lands Titles Commissioners, persons who were not legal practitioners, who, with the Registrar-General, were empowered to: 'investigat[e] and deal with claims for the bringing of land under the…Act'. The Commissioners had the power to appoint two solicitors to advise them in their investigations.[115] Robert Torrens, the first Registrar-General of the system that came to bear his name, submitted the first two reports of the Lands Titles Commissioners to the House of Assembly in 1858.[116] The reports of the solicitors to the Commissioners were also submitted to the House.[117] The Commissioners' reports contain the only available data as to the extent to which the community made use of the RPA 1857-58 for the registration of trusts. From 1 July to 14 December, of 134 conveyances, 80 were transfers, 53 mortgages, one was for a lease, and there were no transactions involving encumbrances or trusts.[118] And from 25 December 1858 to 31 July 1859, of 1,590 total conveyances, only 17 were for trusts or settlements.[119]

115 *Real Property Act 1857-58* 21 Vict. c. 15 (1857-58) (SA), ss 10-12.

116 South Australia, *Parliamentary Debates*, Assembly, 12 January 1858, col 750 (Richard Hanson, Attorney-General); South Australia, *Parliamentary Debates*, Assembly, 26 November 1858, col 688-9 (Thomas Reynolds); South Australia, *Parliamentary Debates*, Assembly, 16 December 1858, col 873 (Richard Hanson, Attorney-General); South Australia, Parliamentary Paper No. 157, Assembly, 17 August 1859, R. R. Torrens, Registrar-General and W. Bacon Carter, Deputy Registrar-General, Returns Showing Weekly Transactions in the General Registry and Lands Titles Registration Offices, from the 25th December, 1858, to 30th July, 1859; and 1st January, 1859, to 31st July, 1859, respectively; South Australia, Parliamentary Paper No. 161, Assembly, 14 December 1858, South Australia, Lands Titles Registration Office Returns.

117 An undated letter in the State Records of South Australia reads: 'That there be laid on the table of this House copies of all reports made by the Solicitors to the Lands Titles Commissioners to the Registrar General, and of all correspondence between the Solicitors and the Registrar General relative to the amendment of the Real Property Act of 1857-8, and in reference generally to the Laws relating to the Transfer of Real Property, and also a Report from such Solicitors giving generally and particularly their opinion on such Act. GX/0D/0000/1192/0B.

118 South Australia, Parliamentary Paper No. 161, 1 and 4; South Australia, *Parliamentary Debates*, Assembly, col 916 (Samuel Davenport).

119 South Australia, Parliamentary Paper No. 157, 1-3, 3.

Put simply, while the data shows, as Douglas Pike writes, an 'immense public faith in the Act', that confidence did not, it seems, extend to the registration of trusts. As a result:

> the Lands Titles Commissioners admitted [the Act's] imperfections. Within five months they drafted an amending Bill which was steered through the Assembly by Hanson with as much zeal as he had shown in opposing the previous measure. He explained that unanticipated difficulties had arisen over trusts and absentee owners through the non-legal phraseology of the original Act; as the law of the land it should be freed from defect.[120]

Both the Commissioners and their Solicitors also made recommendations concerning amendment of the RPA 1857-58.[121] And with respect to trusts, Torrens wrote in his first report to the Assembly that: 'causes which have operated to retard the general adoption of the Act, as far as such causes are known', included 'the provisions of the Act [that] are found to be insufficient to carry out the system of settling estates, or vesting them in trust, upon the principle laid down in the 60th section of the Act.'[122] And so Torrens reported that he was submitting proposed amendments to the Assembly that would provide that while trust deeds could be deposited with the Registrar-General, who was to enter those particulars in the register book,[123] 'such deed shall not be registered, neither shall the Registrar-General be bound to take any cognizance, of it when giving effect to dealings by the trustees.'[124]

120 Pike, 'Introduction of the Real Property Act in South Australia,' 183. See South Australia, Parliamentary Debates, Assembly, 26 November 1858, col 688-9 (Thomas Reynolds).

121 Undated Letter, State Records of South Australia, GX/0D/0000/1192/0B.

122 South Australia, Parliamentary Paper No. 161, 1 and 4, para. 54.

123 South Australia, Parliamentary Paper No. 161, 1 and 4, paras. 55-60.

124 South Australia, Parliamentary Paper No. 161, 1 and 4, para. 60.

On 9 December 1858, the Attorney-General, Richard Hanson, introduced the amending Bill to which Torrens referred in his report.[125] In his first reading speech, Hanson explained that following the passage of the RPA 1857-58:

> unforeseen and unanticipated difficulties [had been] found to arise; that some things were omitted; that some were provided for in a way not most convenient or most expedient; and that other matters would be found to require amendment in other ways.[126]

Amendments, then, would ensure the successful working of the Act and remove the objections of the legal profession and so secure their cooperation in carrying out the RPA 1857-58.[127]

The amending Bill, *An Act to Amend the Real Property Act*, contained three sets of core provisions, each of which bear directly on the short life of ss 56-60: first, s 2 repealed 79 sections of the RPA 1857-58, including ss 56-60; second, s 3 required that the RPA 1857-58 and the amending Bill, once enacted, were to be read together; and, having repealed ss 56-60, the amending Bill substituted ss 44-46 as replacements. Torrens wrote an explanatory memorandum on the effect of the amending Bill:

> Sections 45 to 52, relating to trusts and settlements, supply the chief deficiency in the previous Act, by giving effect to the principle laid down in the 60th Section, viz. "that the whole legal ownership shall vest in trustees." These clauses are based upon the recommendation contained in the report of the English Real Property Law Commissioners, and are in accordance with opinions expressed by the Attorney-General.[128]

125 *Real Property Act Amendment Bill* (SA), Bill 21, 1858; South Australia, *Parliamentary Debates*, Assembly, 9 December 1858, col 804 (Richard Hanson, Attorney-General).

126 South Australia, *Parliamentary Debates*, Assembly, 9 December 1858, col 804 (Richard Hanson, Attorney-General).

127 South Australia, *Parliamentary Debates*, Assembly, 9 December 1858, col 804 (Richard Hanson, Attorney-General).

128 His Excellency Sir Richard Graves MacDonnell, C.B., to The Right Honourable H. Labouchere, Her Majesty's Principal Secretary of State for the Colonies, Despatch No.

This can only mean that the amending Bill adopted the original position of the English Real Property Law Commissioners, which was that trusts should not be registrable. This is a significant departure from the RPA 1857-58, and seems to conflict with Torrens's own description of the amending Bill, which, he says:

> proposes amendments in the greater portion of the clauses of the [RPA 1857-58], but these amendments are for the most part upon questions of phraseology and technical points, designed more clearly to express and with more certainty to give effect to, the intention of the Legislature, as indicated in the measure of the previous Session. No new principle is introduced in the present Bill, neither has it been deemed advisable to abandon or modify any one of the principles established by the previous Act.[129]

Yet ss 44-46 are certainly not mere changes in phraseology. By 1862, four years after the enactment of the RPLAA 1858, Torrens would summarise the effect of the repeal of ss 56-60 and their replacement with ss 44-46 this way:

> No notice of trusts can be entered on the register, but a proprietor desiring to settle his estate through the instrumentality of trustees, may deposit in the registry for safe custody and reference any instrument declaratory of trusts executed by the Trustees to whom he transfers the property, and by caveat prohibit the registration of any dealing, except in accordance therewith, or with the sanction of the Supreme Court.[130]

291, Government House, Adelaide, 12 January 1859, in Parliament of South Australia Printed Papers, No. 93, 22 June 1859, 2-3, 2, Enclosure No. 4, Robert R Torrens.

129 His Excellency Sir Richard Graves MacDonnell, C.B., to The Right Honourable H. Labouchere, Her Majesty's Principal Secretary of State for the Colonies, Despatch No. 291, Government House, Adelaide, 12 January 1859, in Parliament of South Australia Printed Papers, No. 93, 22 June 1859, 2-3, 2, Enclosure No. 4, Robert R Torrens.

130 Torrens, *A handy book on the Real Property Act of South Australia*, 9-10.

This seems to mirror almost directly what Torrens had written in his report to the Assembly on 14 December 1858: that the particulars of trusts could be noted, but not registered. But Torrens adds nothing, in 1862, justifying or giving the reasons for this radical shift in position; he simply issues this bare statement of fact as to the status of the non-registrability of trusts in the RPLAA 1858, and as they stood, by that time, in the *Real Property Act 1860* (SA).

Some members of the Assembly expressed concern with the method of amendment contained in ss 2 and 3 of the amending Bill—repealing 79 provisions of the RPA 1857-58 and requiring that the two Acts be read in conjunction, rather than simply repealing the earlier Act and replacing it with an entirely new one.[131] Those concerns notwithstanding, following some minor adjustments, the Bill made its way through Committee and passage in both Houses to become the final ss 2, 3, and 45-47 (the original ss 44-46, which moved slightly due to changes made to other provisions earlier in the Bill) of the RPLAA 1858. The significant point to note about these provisions is that aside from the movement of ss 44-46 to ss 45-47, the only change in the text of ss 2, 3, or 44-46 was a Committee of the Assembly amendment removing a large portion of s 3 which related to the way in which the two Acts were to be read together. None of the changes had any effect whatsoever on the treatment of the registration of trusts. Indeed, during debate on the second reading, Hanson said that:

> A large proportion of the alterations which were proposed were matters of detail—hardly one could be called a matter of principle except those to which he had referred, and thus embodied in the clauses which proposed to do away with the ***old form of bills of trust***. The opinion upon this point which he had frequently expressed had met with the approval of the Lands Titles Commissioners. The Government saw the inconvenience of fettering a person as to the way in which he should settle his land in trust, and proposed that the

131 See South Australia, *Parliamentary Debates*, Assembly, 9 December 1858, col 804-5 (Richard Hanson, Attorney-General); South Australia, *Parliamentary Debates*, Assembly, 14 December 1858, col 839-43 (Thomas Reynolds, Lavington Glyde, William Henville Burford, Henry Strangways, John Henry Barrow); South Australia, *Parliamentary Debates*, Council, 21 December 1858, col 911-6 (John Morphett, William Scott, Charles Hervey Bagot, Henry Ayers).

> trustees should be indicated upon the title, so that security to the persons who were ultimately entitled to the property would be provided for, whilst the proprietor would be able to select the trust in any way he pleased without being fettered by the ***forms of the old Act***. He believed that this was a wise amendment, and that it would do more than anything else to free the Act from the objections entertained towards it by members of the profession and others who prided themselves upon an Englishman's privileges of settling his property any way he pleased, so long as he did not controvert any principle of public policy.[132]

This seems to be an extension of Hanson's argument made during the passage of the RPA 1857-58, that trusts should be registrable, and given that provision was made for that in the Act, the emphasised words can only be referring to Form F, to be used for creating and registering a 'Bill of Trust' pursuant to ss 56-60. If that is right, then Hanson's comment is nothing more than an attempt to provide flexibility as to the way in which trusts could be registered. It sheds, perhaps, some light on how ss 56-60 came to be in the RPA 1857-58, but not as to why the registration of trusts was ultimately removed by the RPLAA 1857.

The only other comment made during the second reading debate in the Assembly was Henry Strangways's cryptic statement that:

> there was a new principle in it, and a very important one, which affected a large class of persons, viz., that portion relating to trusts. This would greatly affect trustees under marriage settlements. Under the new Bill the trustees were the bona fide holders of the property, and no protection was given to the owners. Yet the Attorney-General said there was no new principle involved.[133]

132 South Australia, *Parliamentary Debates*, Assembly, 14 December 1858, col 839 (Richard Hanson, Attorney-General).

133 South Australia, *Parliamentary Debates*, Assembly, 14 December 1858, col 841 (Henry Strangways).

It is not clear whether Strangways is referring in the first sentence to the RPA 1857-58, although, assuming that he was, then perhaps the second and third sentences were arguments in favour of removing that 'new principle', namely, the registration of trusts in ss 56-60. But given the ambiguity, and even if that is what was meant, it seems safest to place little reliance on this comment as evidence for the reasons behind removal of ss 56-60.

It is worth noting a point which becomes significant in my conclusion: no one, at any stage, suggested that equity and equitable interests, including trusts, were to be entirely abolished simply because they were not registrable. As we have seen, Hanson wrote that: 'Courts of Equity will always assert their right to control dealings with land affected by trusts so appearing.'[134] No one seemed to suggest that Hanson was wrong about that. But more importantly, the legislation itself makes this clear, in at least three ways. First, there was, even in the RPA 1857-58, an exception to indefeasibility of title[135] for fraud, an equitable concept,[136] which the RPLAA 1858 retained.[137] Second, even having removed the possibility for their registration, the RPLAA 1858

134 State Records of South Australia GRG 1/6/4/10 February 1858.

135 An interesting reference, but one peripheral to my project, is found in Hanson's letter. Douglas J Whalan has written about the fact that the concept of indefeasibility is not one that found definition, or even a place, in the earliest Torrens legislation. He writes: 'The word "indefeasible" was used only in the shoulder note to s. 39 of the original South Australian Real Property Act 1857-1858 [note 15: as printed at the back of R. R. Torrens, The South Australian System of Conveyancing by Registration of Title (1859) 11. It is wrongly spelt "indefeasable" there.']: Whalan, *The Torrens System in Australia*, 296, n 15. Yet, Hanson, then the Attorney-General, wrote to the Chief Secretary in early 1858 that the RPA 1857-58 'introduces an entirely new system of conveyancing. It provides with regard to all property that may be brought under it that it shall not be affected either at law or in equity by any conveyance or instrument which is not in accordance with the provisions of the Act, and that the title or interest shown by the Certificate of Registry shall be absolutely evidenced by the production of the certificate, *so that such certificate really confers an indefeasible title*.' State Records of South Australia GRG 1/6/4/10 February 1858 (emphasis added). It seems, then, that the concept of indefeasibility of title was understood from the beginning.

136 *Real Property Act 1857-58* 21 Vict. c. 15 (1857-58) (SA), ss 35, 92-95, 120.

137 The *Real Property Law Amendment Act 1858* 22 Vict. c. 16 (1858) (SA) retained ss 35 and 120 of the RPA 1857-58 and added new ss 78-80, 84 to replace the repealed ss 92-95.

nonetheless permitted trusts to be deposited with the Registrar-General.[138] And, finally, s 61 of the RPLAA 1858 provided, where land subject to a mortgage was held by trustees:

> that nothing herein contained shall prevent a Court of Equity from giving effect to any trusts affecting the said debt, sum of money, annuity, or damages, in case the transferee shall hold the same as a trustee for any other person.

There is clearly no suggestion, then, that even by eliminating the potential for their registration equitable interests and trusts would no longer exist or be enforceable against land brought under the Torrens system. Quite the contrary. And so, if Torrens had sought to destroy equity as a component of conveyancing in a system of title by registration, he either did a bad job of it, or he never intended that outcome. The latter conclusion seems, given everything we have seen here, the more defensible of the two.

But what we do not have, in the debates, the committee consideration, the documentary and archival record, or in the RPLAA 1858 itself, and even taking account of the fact it made provision for the operation of trusts in respect of Torrens land, is anything whatsoever that sheds any light on why ss 56-60 were repealed. Indeed: 'after debates of little more than an hour, the Bill passed both houses and received the Governor's assent on Christmas eve, 1858.'[139]

138 *Real Property Law Amendment Act 1858* 22 Vict. c. 16 (1858) (SA), s 46.

139 Pike, 'Introduction of the Real Property Act in South Australia,' 183; South Australia, *Parliamentary Debates*, Assembly, 9 December 1858, col 804-5 (Richard Hanson, Attorney-General); South Australia, *Parliamentary Debates*, Assembly, 14 December 1858, col 837-45 (Thomas Reynolds, Lavington Glyde, William Henville Burford, Henry Strangways, John Henry Barrow); South Australia, *Parliamentary Debates*, Assembly, 16 December 1858, col 875 (Richard Hanson, Attorney-General); South Australia, *Parliamentary Debates*, Council, 16 December 1858, col 871 (William Younghusband, Chief Secretary); South Australia, *Parliamentary Debates*, Council, 21 December 1858, col 911-6 (John Morphett, William Scott, Charles Hervey Bagot, Henry Ayers); South Australia, *Parliamentary Debates*, Council, 22 December 1858, col 925 (William Younghusband, Chief Secretary); South Australia, *Parliamentary Debates*, Council, 24 December 1858, col 945 (Royal Assent).

Conclusion: The Origin Myth

We know Torrens drafted ss 38-42 (ss 56-60) into his First Bill in 1857, making possible the registration of trusts in his new system of title by registration. We also know that those provisions were repealed five months after they came into force. But we cannot draw definitive conclusions from the available evidence as to either the reasons for the inclusion of ss 56-60 in the RPA 1857-58 or as to the rationale for their repeal less than five months later. Still, it is possible to suggest a reason for why the provisions were included, and for why they were removed.

First, while it is true that Torrens hated equity, the evidence suggests that the reason for the inclusion of ss 56-60 related not to that antipathy, but to an attempt to combat the potential for secret conveyancing made possible by trusts. The key to this conclusion lies in Torrens's proposed amendments to the system of deeds registration in 1853 in his speech introducing the First Bill on 2 June 1857, in which he stated the first and leading principle of the system he proposed: to abolish what he called retrospective or derivative titles,[140] and in his speech given in Dublin in 1864. Torrens's concern was not with equity and trusts per se, but with the onerous process of investigation of title. It was known then, as it is today, that the possible existence of trusts and the doctrine of notice represents a trap for the unwary purchaser or third party seeking to deal with land. Ulrich Hübbe expressed it this way:

> In modern practice general experience has shown that the inconvenience, delay, and expense occasioned to parties interested under trusts, by the rules of equity, which make the trust a burden on the land, far outweigh the benefit of a protection against the occasional deviation of the trustees in those cases where the operation of the rule is excluded.
>
> The efforts of conveyancers in this respect frequently fail, from the extreme difficulty, in some cases, of excluding the doctrine of equity as to constructive notice.[141]

[140] South Australia, Parliamentary Debates, Assembly, 4 June 1857, col 204 (Robert R. Torrens).

[141] Hübbe, *The voice of reason*, 93 (emphasis removed).

Equity injects an added layer of difficulty into the duties of those investigating the chain of title; even an experienced conveyancing lawyer could be caught out, as was Torrens's unfortunate friend, in the fraught investigation of a chain of title. But Torrens directed his ire at secrecy—and the difficulty of investigating a chain of title meant that equity and trusts could effectively be kept a secret, hidden in the shadows cast by prolix and lengthy title chains, until it was too late, when the equitable doctrine of notice would allow those estates and interests to jump from the shadows to impeach the legal title. Torrens, then, saw registration as a means of eliminating the inherent flaws of title investigation, which had the potential to allow equitable estates and interests, either through inadvertence or through subterfuge, to be shrouded from a potential purchaser or other person dealing with the land.

A solution was no doubt necessary, but that solution, at least in 1857, was not to *exclude* equity and trusts from the register—that would, unless equity was abolished altogether, have the effect of driving equity and trusts only further and deeper into the shadows already cast by the complex and cumbrous evils of derivative or retrospective titles. The only way to provide at least *some* protection against secrecy would be to ensure that the register was a perfect reflection—mirror image—of the state of title at the time of a search; and the only way to ensure *that* would be to require the registration, and so placement on the register book, of *all* estates and interests, both legal and equitable, including trusts—registered, and so there for all to see. The solution, far from abolishing or excluding equity and trusts from the register, was to *include* them *on* the register, for all to see, allowing the light cast by the register book to dispel the shadows. The primary principle, for Torrens, was publicity of tenures.[142] For Torrens, real property law reform should, above all, eschew secrecy in favour of publicity of all tenures that might affect land. How else to ensure that the tragedy which had befallen his friend be avoided? The reason for ss 56-60, then, was that registration would ensure Torrens's first priority: the publicity of *all* tenures, including trusts!

[142] Robinson, 'Equity and Systems of Title to Land by Registration', 14, citing Robert R. Torrens, *South Australian Register*, 29 April 1857; Robert R. Torrens, *Adelaide Observer*, 2 May 1857.

Our mistake, of course, is that we allow our contemporary knowledge of the policy of exclusion to colour our interpretation of the origin story. So we read back into Torrens's words what we want to see there. And what we want to see there is the policy of exclusion. Indeed, we even think we see that policy in Torrens's harsh words about equity—what he called: 'that iniquitous institution'. But if we allow ourselves to be seduced by the origin story, we miss Torrens's true concern, his real 'grievance', as he himself called it, with the English law of real property; and that grievance was secrecy, not equity. And that concern led him to include trusts on the register.

The concern for the protection to be afforded trusts has never abated—it remains with us today.[143] Why then, given the clear benefits of driving trusts out from the shadows of title investigation and the equitable doctrine of notice, were ss 56-60 removed? Again, the evidence is thin, but this much can be deduced: ss 56-60 were removed in an effort to combat complexity of the register, a principle which came to prevail over the concern with secrecy.[144] That concern is perhaps best summarised by Ulrich Hübbe, who argued that:

> as there is a tendency in the present state of society to increase both the number and the complexity of [the various purposes for which a trust could be created], they are a great and growing cause of the length of abstracts and the complexity of titles.[145]

And, he continues: 'if all the deeds connected with these arrangements were brought on the register, it is clear that in many cases registered titles would

143 See P. T. Babie, Peter D. Burdon, and Michail S. Ivanov, 'Modernising the Torrens System in South Australia: Reform Challenges and Opportunities in the *Real Property Act 1886* (SA),' *Australian Property Law Journal* 32, No. 1 (2025): 227; P. T. Babie, Peter D. Burdon, Michail S. Ivanov, and Neeru Shrestha, *Torrens in the Twenty-First Century: Modernising the Real Property Act 1886 (SA) – Final Report* (Adelaide: Adelaide Law School, 2025).

144 It is possible that the long list of provisions repealed by s 2 of the *Real Property Law Amendment Act 1858* (SA) were related to one another in the sense that they created greater complexity in the register book.

145 Hübbe, *The voice of reason*, 91.

become most voluminous and embarrassing.'[146] Writing in 1884, Hübbe stated that the: 'objects of registration' were 'publicity and speciality as the safeguards for the honesty and certainty of dealings',[147] which would overcome the difficulties of the English land law and, more specifically, the *Statute of Uses*: 'the only service to which [it] is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible.'[148]

In other words, allowing for the registration of every estate and interest, legal and equitable, including trusts, would be little advance over the system being replaced, other than to place all relevant information in one place. Something had to be omitted, and the policy decision was taken to omit the trust. Of course, the evidence for this conclusion is even more tenuous than that for the inclusion of ss 56-60 in the first place. Still, it seems plausible in what we have seen in the debates of the 1858 amending Bill, that there were 'difficulties' which were hindering the operation of the Act. It seems plausible that those difficulties related to the complexity that would ensue from the inclusion of trusts on the register. And so, the concern with preventing secrecy lost in a direct showdown with complexity of the register. But even be that as it may, the 1858 amendments did not make any attempt to abolish equity and trusts. Indeed, the possibility of their deposit with the Registrar-General and of their enforcement by Courts of Equity makes this clear. The vexation was complexity, not equity.

Still, the evidence, for any of these conclusions, is thin—and so it may always remain a mystery as to why ss 56-60 were included, and as to why they were repealed almost as soon as they came into force. We know that they were there, but we do not know with certainty why, or why they were removed. Nonetheless, the story, incomplete though it is, may reveal that what we think we know about the Torrens origin story and the policy of exclusion of trusts from the register might really be a myth.

146 Hübbe, *The voice of reason*, 93.

147 'The Real Property Act,' *Proceedings of the Royal Geographical Society of Australasia*, 111, citing a statement given by Ulrich Hübbe in 1884.

148 Hübbe, *The voice of reason*, 93, citing generally Sir William Blackstone.

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Rivalries on the Bench: How Did the Judicial Power Struggle Between Justices Burton and Dowling Influence the Outcome of *R v Murrell* (1836)?

Sophie Grcev

This article reinterprets R v Murrell *(1836) by examining how judicial rivalry, particularly between Justice Burton and Justice Dowling, shaped the case's reasoning and legacy. Its purpose is to show that the decision cannot be fully understood through doctrine alone but must be read against the politics of the early New South Wales bench. Using a combination of doctrinal analysis and archival research, the study draws on judges' letters, and colonial correspondence sourced from the UK National Archives and NSW State Archives. The findings reveal that Burton and Dowling's competing claims to authority influenced how principles of sovereignty and jurisdiction were articulated, with each judge using legal reasoning to reinforce their own institutional standing. The article argues that this rivalry contributed directly to the framing of Aboriginal legal exclusion in Murrell. The study's originality lies in foregrounding personal judicial conflict as a key factor in colonial legal development, offering a new lens for understanding this foundational case.*

Key words: Sovereignty; Aboriginal Australians; Judicial Rivalry; Colonial Law; Liberty.

Introduction

In December 1835, a murder on a road between Richmond and Windsor in New South Wales (NSW) triggered a legal turning point. Four months later, in April 1836, the case, *R v Murrell*,[1] was heard before the Supreme Court of NSW, comprising of Chief Justice Francis Forbes, Justice James Dowling and Justice William Westbrooke Burton. The Supreme Court delivered a landmark ruling,

[1] Bruce Kercher, *'R v Ballard, R v Murrell and R v Bonjon'* 3 *Australian Indigenous Law Reporter* (1998): 410.

determining that Aboriginal people were subject to English law even in cases involving violence solely between Aboriginal parties. Delivering the unanimous decision, Justice Burton declared that: 'the aboriginal natives of this Colony are amenable to the laws of the Colony for offences committed within it against the persons of each other and against the peace of our Lord the King.'[2]

Murrell became the foundational authority for the principle that Australia recognises only one unified body of law, derived from English legal tradition. In doing so, *Murrell* thereby overturned *R v Ballard*,[3] where the Court had previously refrained from intervening in disputes between Aboriginal individuals operating under their own customary law.

Secondary literature has concentrated on the legal significance and enduring influence of *Murrell*. Rather than safeguarding their rights, Kercher articulates that the result of *Murrell* was to subjugate Aboriginal people to the legal system as defendants, serving as a mechanism of control, stripping Aboriginal people of their liberties.[4] Benton concurs, noting that *Murrell* redefined Aboriginal people as legal subjects, erasing their separate legal identity.[5] Ford further argues that the legal obliteration of Aboriginal law became a defining feature of 'settler statehood' with *Murrell* marking the 'juridical death' of Aboriginal people, 'affirming English common law as the sole law of the Australian continent.'[6]

2 Ibid.

3 Ibid. *Ballard* was heard before Chief Justice Forbes and Justice Dowling.

4 Bruce Kercher, 'An Unruly Child: A history of law in Australia' (1st edn, Routledge, 1995) 12. Kercher explains that: 'far from the law protecting [the aboriginal people], it usually victimised them. Its main impact was to coerce them into obeying a law that they had not agreed to observe and which they often knew nothing about.'

5 Lauren Benton, 'Law and Colonial Cultures: Legal Regimes in World History,' *1400–1900* (1st edn, Cambridge University Press 2001) 184. On the other hand, Kercher states that 'Contrary to a common misconception, the case [Murrell] is not authority for the proposition that all Indigenous people in New South Wales were automatically British subjects'. See Kercher, '*R v Ballard, R v Murrell and R v Bonjon,*' 410.

6 Lisa Ford, 'Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836' (1st edn, Harvard University Press 2010) 1, 198.

However, key questions remain unanswered: why did Chief Justice Forbes and Justice Dowling depart from their earlier reasoning in *Ballard*? Furthermore, why was *Murrell* prosecuted at all, given the precedent set in *Ballard*?[7] Rizzetti explicitly draws attention to the timing of the judgment, noting that it was delivered on the final day of Chief Justice Forbes' tenure, just before his departure on sick leave and eventual retirement. 'This was no longer his battle.'[8] Meanwhile, Justices Dowling and Burton were vying for the temporary position of Chief Justice. However, Rizzetti stops short of exploring this point further.

This article builds on Rizzetti's observation by offering a reinterpretation of *Murrell* that foregrounds the significance of its timing and the shifting power dynamics within the Supreme Court of NSW. The judgment came at a transitional moment in the court's leadership, as Forbes prepared to depart the colony. Consequently, Dowling and Burton became engaged in a contest for the Chief Justice role. This rivalry is evidenced in handwritten correspondence preserved in the National Archives, with Dowling asserting his seniority based on twelve years of service in NSW, while Burton advanced his claim by appealing to both chronological seniority and 'broader imperial expertise' gained at the Cape of Good Hope.[9]

While common law decisions are often treated as detached from their historical contexts, the archival material underscores the importance of understanding legal judgments as products of their time, influenced by the personalities, rivalries and institutional pressures behind the bench. When these factors are critically analysed, it becomes more persuasive to view *Murrell* not merely as a legal decision, but as one deeply embedded

7 Bruce Kercher, 'Recognition of indigenous legal autonomy in New South Wales', *Indigenous Law Bulletin*, vol. 4, no. 13, (1998):7-9.

8 Janine Rizzetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law' (2010) Paper given at the Australian and New Zealand Law and History Society Conference (ANZLHS) 1 10, available at: <https://classic.austlii.edu.au/au/journals/ANZLawHisteJl/2011/5.pdf> accessed February 2, 2025.

9 The National Archives of the UK (TNA): CO 201/247, 270-321.

in the dynamics of judicial rivalry.

As Kercher underscores, judges: 'do not create the law in a vacuum, despite what many of them would have us believe.'[10] Judges shape the law based on their own morals, interests and the historical context in which they operate. Consequently: 'law becomes not merely a system of rules to be observed, but a world in which we live,'[11] as broader social and political narratives intersect in the courtroom. Thus, *Murrell* cannot be understood in isolation from the colonial and political dynamics at play. Legal precedents, such as those established in *Murrell*, must be examined within the broader context of judicial power struggles, ambition and colonial politics. By understanding law as embedded within these historical narratives, a more thorough understanding of its development emerges, particularly within colonial legal history.

This article first sets the historical stage by examining the transplantation of English law to New South Wales, the legal ambiguity surrounding the status of Aboriginal people, and the early role of the Supreme Court. It then turns to *Murrell* itself, tracing how the case emerged, why it mattered, and how it overturned earlier assumptions established in *Ballard*. The discussion then shifts to the primary sources, revealing the judicial rivalry between Dowling and Burton that has been largely overlooked in existing scholarship. Building on this, the article analyses how this rivalry shaped the reasoning in *Murrell*, from Burton's assertive articulation of jurisdiction to Dowling's quieter but equally significant acceptance. The article concludes by considering the broader implications of *Murrell*, including immediate colonial reactions and the case's evolving interpretation within modern legal history.

While this article does not claim to have addressed every possible angle, the primary and secondary research presented provides strong support for the thesis that the judicial power struggle surrounding the timing of *Murrell* must be recognised as a critical factor that directly influenced the outcome of the

10 Kercher, '*R v Ballard, R v Murrell and R v Bonjon,*' 21.

11 Robert Cover, Martha Minow, Michael Ryan, and Austin Sarat, '*Narrative, Violence, and the Law: The Essays of Robert Cover*' (University of Michigan Press 1995), 95-96.

case. *Murrell* did not merely reinforce settler sovereignty by subordinating

Indigenous jurisdiction,[12] but actively served as a vehicle for Burton and Dowling to assert dominance in their rivalry for judicial authority. This article hopes to encourage further exploration into how internal court dynamics and broader colonial politics shaped the development of legal principles in Australia.

Historical Context

Transplantation of English Law to NSW

The British introduced English Law to Australia upon their arrival at Sydney Cove in 1788, implementing it in NSW through a two-stage process. The first stage occurred with the landing of the First Fleet, when English law was automatically imposed under the common law doctrine that settlers carried their legal system with them to new territories.[13] British officials classified NSW as a 'settled' colony, following Blackstone's categorisation, which applied to territories deemed uninhabited or unowned ('terra nullius').[14] The presumption that the land was unoccupied reinforced colonial narratives that denied the rights, systems and sovereignty of Aboriginal people.[15]

The second stage came with formal legislation. The *Australian Courts Act 1828*[16] formally declared that all laws and statutes in force in England would apply in

[12] Ford, 'Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836.'

[13] Victor Windeyer, 'A Birthright and Inheritance: The Establishment of the Rule of Law in Australia,' *Tasmania University Law Review* 1 (1961): 635, 662.

[14] William Blackstone, 'Commentaries on the Laws of England,' (vol. 1, 9th edn, 1783, reprint Garland Publishing, New York, 1978), 108–109. Under this doctrine, English law was said to apply only so far as it was suited to local circumstances.

[15] Julie Cassidy, 'The Significance of a Colonial Acquisition: The Conquered/Settled Distinction,' paper delivered to *Law in History Conference*, La Trobe University, 1988).

[16] *The Australian Courts Act 1828* (9 Geo. IV, c. 83).

the administration of justice in the courts of NSW. This Act ensured that English common and statute law, as they stood in 1828, formed the foundation of the colonial legal system. Through these two stages, English law was transplanted into the colony. However, its application to Aboriginal people remained ambiguous.

Legal Status of Aboriginal People

The legal status of Aboriginal people for the first fifty years of the colony was ambiguous and largely determined by royal decree rather than formal legislation.[17] The first Governor of NSW, Arthur Phillip, was instructed from the Colonial Office in London to protect the colony from Aboriginal attacks while also urging him to establish friendly relations with Aboriginal people.[18] However, Phillip was to allocate land to the colonists, with no mention of the rights of its original occupants.

As a result, the colonial government struggled to maintain order amid a palpable fear of Aboriginal resistance to land dispossession, enacting martial law.[19] With white settlement expanding, Aboriginal people were systematically displaced from their land, often responding with force, leading to brutal massacres of Aboriginal communities.[20] The violent conflicts between Aboriginal people and

17 Mark Finnane, 'The Limits of Jurisdiction: Law, Governance, and Indigenous Peoples in Colonized Australia,' (2010), in: Shaunnagh Dorsett, Ian Hunter, (eds) *Law and Politics in British Colonial Thought*. Palgrave Studies in Cultural and Intellectual History. (New York: Palgrave Macmillan), 149, 152.

18 TNA: CO 201/1, 20 April 1787, Instructions to Governor Phillip. Governor Phillip was directed to 'open an intercourse with the natives' and encourage his subjects to live in peace and kindness with them: '*if any of our subjects shall wantonly destroy them [the aboriginal people],' they* were to be' brought to punishment according to the degree of the offence.'

19 Royal Commission Into Aboriginal Deaths In Custody 1991, National Report Volume 2, para 10.3.17. In 1797, Governor Hunter deemed Aboriginal people a threat and dispatched armed parties to 'pacify' them. By 1816, Governor Macquarie had issued a proclamation resembling martial law, banning meetings of Aboriginal people. Such measures and declarations reflect the intense anxiety of the colonial government regarding conflict over land rights and the Aboriginal resistance.

20 Reynolds highlights this devastating trend, noting that the Aboriginal population in Australia plummeted from 300,000 to just 50,000 in the first 100 years of European

settlers, raised crucial legal questions about whether both groups could be held accountable for murder and assault.[21] By 1836 when *Murrell* was heard, it had long been accepted that the murder of an Aboriginal person by a white settler constituted a crime under colonial law, a principle established as early as 1799 in *R v Powell*[22] and confirmed by the execution of a white offender in *R v Kirby* in 1820.[23] The converse principle, that Aboriginal defendants could be held criminally liable for the killing of white settlers, was recognised by 1816 in *R v Mow-watty*.[24] However, it remained unclear whether Aboriginal people could be prosecuted for violence within their own communities, where both the victim and the accused were Aboriginal. Such violence posed a unique challenge, as Aboriginal customary law often sanctioned certain forms of inter se violence, complicating its classification and treatment under British criminal law.

The Role of the Supreme Court

In 1828, the Supreme Court of NSW,[25] advised the Attorney General that English law cannot intervene and apply in the context of inter se Aboriginal conflicts. This principle was articulated in *Ballard*, a case heard before Chief Justice Forbes and Justice Dowling, involving a tribal killing between Aboriginal individuals near Sydney.

occupation. It is estimated that at least 20,000 Aboriginal people were killed by white settlers, a figure ten times larger than whites killed by Aboriginal individuals. Henry Reynolds, 'The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia' (1998) Penguin, Ringwood, 122–123.

21 Kercher, *'R v Ballard, R v Murrell and R v Bonjon,'* 6-7. As Kercher notes, this: 'smokescreen of legal confusion...concealed a persistent pattern of killings along the frontiers of the Australian colonies.'

22 *R v Powell and Drs* (1799) NSW Sel Cas (Kercher) 209.

23 *R v Kirby and Thompson* (1820) NSW Sel Cas (Kercher) 661.

24 *R v Mow-watty and Bioorah*, 1816: Kercher Reports, 563.

25 The NSW Supreme Court was established in 1824 following Lord Bigge's Report of the Commissioner of inquiry into the state of the colony of New South Wales (1822), (CO 201/116). Also available at: <https://nla.gov.au/nla.obj-728220532>.

Forbes made it clear that acts of violence between settlers and Aboriginal people would be subject to English law. However, he maintained that:

> it has been the policy of the Judges, & I assume of the Government, in like manner with other Colonies, not to enter into or interfere with any cause of dispute or quarrel between the aboriginal natives.[26]

He further affirmed that: 'British laws have not been applied to the aboriginal natives in transactions solely between themselves, whether of contract, tort, or crime.'[27] Forbes questioned the practicality and fairness of imposing British law, given that Aboriginal people were unfamiliar with British laws, customs and language.[28] Drawing on parallels with Indigenous nations in North America, Forbes concluded that Aboriginal peoples: 'make laws for themselves, which are preserved inviolate and are rigidly acted upon.' Imposing British law in such circumstances, he reasoned, would be 'as incompatible as [it would be] impolitic.' Dowling echoed this sentiment, explicitly stating that English law will only apply where there is consent by Aboriginal people.[29]

Forbes and Dowling concluded that the Supreme Court lacked jurisdiction to adjudicate disputes between Aboriginal individuals governed by their own customary law. However, seven years later, the Supreme Court, consisting of Forbes, Dowling and Burton, diverged from their decision in *Ballard,* establishing in *Murrell* that Aboriginal people *were* amenable to English Law.

R v Murrell

Two aboriginal men, Jack Congo Murrell and George Bummary, murdered two

26 *Ballard* in Kercher, *'R v Ballard, R v Murrell and R v Bonjon.'*

27 Ibid.

28 Forbes questioned: how could 'this beneficent principle be acted upon?' Ibid.

29 Dowling said that: 'until the aboriginal natives of this country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human or divine, which ought to justify us in interfering with their institutions.'

other aboriginal men. Murrell was charged and stood trial before the Supreme Court of NSW in 1836. Murrell's counsel, Stephen, argued by way of demurrer[30] that the Supreme Court had no jurisdiction to try the case as Aboriginal people had their own customs and laws which governed relations between them.[31] Unlike white settlers, Aboriginal people were not afforded any protection by English law.[32] Therefore, Aboriginal people were not amenable to English law.

Stephen attempted to assert that Australia operated under a plurality of laws: English law and Aboriginal law. This was not a revolutionary argument and had been recognised by both Forbes and Dowling in *Ballard.* As established above, Forbes asserted that Aboriginal people 'make laws for themselves,' and Dowling concurred stating that he knew of 'no reason, human or divine' to interfere with their institutions.[33]

However, seven years later, the Supreme Court unanimously rejected Stephen's arguments in *Murrell*, establishing that Aboriginal people were amenable to English Law. The sole judgment was written and delivered by Burton who spoke: 'without a backward look at the earlier case'[34] of *Ballard.* While acknowledging that Aboriginal people were 'entitled to be regarded by Civilized nations as a free and independent people,' Burton believed at the time

30 Miscellaneous Correspondence Relating to Aborigines (MCRA), State Records of NSW 5/1161, 188-9.

31 Ibid. Stephen argued that these practices existed: 'from time immemorial, practised and recognized amongst them, and not by the laws or statutes of Great Britain.' These practices continued even after British occupation.

32 Benton, 'Law and Colonial Cultures: Legal Regimes in World History, 1400–1900,' 185. Benton emphasises that Aboriginal people could not give witness statements in Court, could not claim civil rights nor recovery or compensation of the land which was taken from them.

33 *Murrell* in Kercher, *'R v Ballard, R v Murrell and R v Bonjon.'*

34 Paul McHugh, 'Aboriginal Sovereignty and Status in the 'Empire(s) of Uniformity', *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination'* (online edn, Oxford, 2004):117-214.

of British settlement, Aboriginal people could not be recognised as governed by their own laws.[35]

Burton continued to establish that the NSW colony had been for many years in possession of the British Empire and British law gave the NSW Supreme Court jurisdiction to try all crimes committed within the territory. As this case concerned an act of violence committed within the territory of NSW, and the court made no distinction as to the protection afforded to subjects or aliens living in the colony, the court had jurisdiction to try Murrell. Burton asserted that the: 'difficulties and inconveniences and hardships' that may result to Aboriginal people by being amenable to English law could be overcome by the exercise of the royal prerogative of mercy.[36] Murrell was subsequently acquitted by the jury.

The decision confirmed that there was only one law on the Australian continent: English Law. In turn, the positioning of Aboriginal people in *Ballard* as 'half inside English law and half outside'[37] was reversed as Britain held sovereignty over the physical area of the Australian colonies and now legal jurisdiction over both white settlers and Aboriginal people.

Judicial Rivalry and the Contest for Chief Justice

Several key questions arise: Why did Forbes and Dowling change their minds from *Ballard*?[38] Why was *Ballard* overturned?[39] Furthermore, why was the main judgment in *Murrell* delivered by Burton, rather than by the more senior

35 *Murrell* in Kercher, *'R v Ballard, R v Murrell and R v Bonjon.'* Burton articulated that: 'the various tribes had not attained…to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many sovereign states governed by laws of their own.'

36 Ibid.

37 Bruce Kercher, 'Colonial Settlement to Colony', in P. Cane, L. Ford, and M. McMillan (eds.) *The Cambridge Legal History of Australia* (Cambridge Cambridge University Press, 2022), 87, 107.

38 Rizzette, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law,' 10.

39 Kercher, *'R v Ballard, R v Murrell and R v Bonjon.'*

members of the bench? These questions expose the deeper complexities underlying the case.

Colonial judgments must be understood as products of the intellectual and social environment in which the judges operated. As trained barristers of the British Empire, they were expected to apply English legal principles to the newly formed penal colony of NSW. This required adherence to the 'family resemblance' of English law, adapting to local colonial conditions and, when necessary, being prepared to: 'take a new code, wherever the old one won't suit.'[40]

However, as discussed in the introduction, judges do not interpret or create law in isolation. Particularly in colonial contexts, judicial impartiality was often compromised. While judges in such environments could produce 'detached and balanced' judgments, as McLaren highlights, many decisions were inevitably shaped by: 'judicial sentiment...and by the political nature of appointments to the bench.'[41] Judicial appointments were made at the pleasure of colonial administrators and judges who engaged in politically controversial activity risked dismissal for bringing the administration of justice into disrepute.[42]

When these considerations are viewed alongside the archival material, a complex picture emerges. *Murrell* functioned as a battleground for the personal and professional competition between Dowling and Burton and must be viewed through the lens of judicial rivalry, political manoeuvring and career frustrations.

40 Charles Hubert Currey, 'Sir Francis Forbes (1784-1841)' in *Australian Dictionary of Biography* Vol I (Melbourne University Press, 1966), <http://adb.anu.edu.au/biography/forbes-sir-francis-2052>.

41 John McLaren, Shaunnagh Dorsett and Ian Hunter, 'The Uses of the Rule of Law in British Colonial Societies in the Nineteenth Century', *Law and Politics in British Colonial Thought* (Palgrave Macmillan US 2010), 84.

42 Ibid, 73.

The Burton-Dowling Conflict: Judicial Ambition and Colonial Precedent

This section examines the judicial rivalry between Burton and Dowling, uncovering their competing professional ambitions and personal frustrations. Tension escalated in 1835 when Forbes announced his temporary leave to England, creating a leadership vacuum in the Supreme Court of NSW.[43] This vacancy ignited a contest for judicial seniority, a matter fraught with uncertainty due to the lack of clear colonial precedent.

Governor of NSW, Richard Bourke, wrote to Lord Glenelg, Secretary of State for the Colonies, outlining the situation and enclosing letters from Burton and Dowling that set out their competing claims for Chief Justice.[44] Burton claimed seniority on the grounds of his broader colonial judicial experience, citing his previous tenure in the Cape of Good Hope. He argued that his imperial expertise rendered him the more suitable candidate for the role. In contrast, Dowling asserted his right to the position based on his longer service in NSW. A closer examination of Burton and Dowling's correspondences is essential to fully assess the implications of the judicial rivalry on *Murrell.*

Burton's Claim: Seniority Through Imperial Service

Appealing to Lord Glenelg, Burton expressed significant frustration at the potential appointment of Dowling as Acting Chief Justice: 'My prospects are materially affected, I request your considerate attention to the circumstances which have led to my disappointment.'[45]

Burton's claim rested on two key principles: chronological seniority and broader imperial expertise. To substantiate his claim, he meticulously outlined his judicial career, emphasising that he began his colonial judicial duties in the Cape of Good Hope before Dowling.[46] Although Burton was later trans-

43 TNA: CO 201/247, 3 October 1835, Bourke to Glenelg, 270-274.

44 Ibid

45 TNA: CO 201/247, 2 September 1835, Burton to Glenelg, 282-291.

46 Ibid, 283-4. Burton evidenced that he was first nominated as an imperial judge by Earl

ferred to the NSW Supreme Court in 1832, he maintained that his initial commission preceded Dowling's. Drawing an analogy to English legal tradition, he argued that judicial seniority should be preserved when a judge transfers between courts, just as it would be in England. To reinforce this claim, Burton cited the *New South Wales Act*[47] which mandated the application of English

laws in the administration of justice. By invoking this statutory provision, Burton asserted that the English principle of judicial seniority should extend to the colony, strengthening his claim over Dowling.

However, recognising that Dowling could still be deemed the senior judge as he: 'was my senior at the Bench in England before either of us accepted a judicial appointment,'[48] Burton strategically introduced an alternative argument. He contended that seniority alone should not be the decisive factor in appointing a temporary Chief Justice and that Governor Bourke should consider: 'superior fitness for the office itself.'[49] In doing so, Burton subtly cautioned against a rigid adherence to seniority. He warned that a junior may have: 'greater zeal or capacity for public usefulness' or that the senior judge 'might not be fitted for the office at all.'[50] While he refrained from explicitly questioning Dowling's competence, his words implied that he considered himself the more suitable candidate. Burton reinforced his claim by emphasising his 'zeal and usefulness' in public service, which had been recognised by the Governor.[51] Therefore, Burton's claim

Bathurst in March 1827 and had assumed office at the Cape of Good Hope by January 1828. In contrast, Dowling was nominated in May 1827 and did not commence judicial duties in New South Wales until February 1828.

47 Ibid, 285. Statute 9 Geo 4 c 83 states 'All laws and statutes in force within the realm of England at the time of the passing of this Act shall be applied in the administration of justice in the Courts of New South Wales.'

48 Ibid, 283.

49 Ibid, 287. Burton urged that: 'The time and only criterion upon which in any case it can be safe and proper to proceed in such a selection is that of <u>superior fitness for the office itself</u> – and I at once admit that if such were the ground of his Excellency's selection, I should have no reason to complain.'

50 Ibid, 287.

51 Ibid, 287.

rested on two interrelated grounds of his longer overall tenure as a colonial judge and his superior qualifications for the role.

Dowling's Response: Authority Through Royal Appointment

Unlike Burton who relied on English judicial convention, Dowling directly appealed to the colonial framework of governance by relying on explicit royal authority. Dowling's appointment was made with the intention that he was to: 'take rank in the Supreme Court next to the Chief Justice.'[52] As a result, Dowling effectively circumvents Burton's reliance on English legal tradition. This claim is particularly significant because it highlights a fundamental flaw in Burton's reasoning. While Burton attempts to transplant English judicial principles into a colonial context, Dowling correctly recognises that judicial appointments in the colonies were ultimately shaped by executive discretion rather than rigid legal precedent.[53]

This notion is strengthened by Dowling's assertion that colonial courts operate as distinct legal entities, rather than as extensions of the English judiciary. This is a powerful rebuttal, dismantling Burton's claim that his earlier appointment in the Cape of Good Hope should grant him precedence in NSW.[54] This argument is practically compelling as it prevents a scenario in which judges from smaller colonies could claim seniority over those in more significant jurisdictions simply by virtue of prior service.

Furthermore, in rebutting Burton's claim, Dowling exposes Burton's opportunistic nature. He points out that Burton had: 'silently acquiesced in the post of juniority and has now agitated the question, only on the expected departure of the Chief Justice for Europe on leave of absence.'[55] This delay suggests that Burton's

52 TNA: CO 201/247, 8 August 1835, Dowling to Glenelg, 307-10.

53 McLaren, Dorsett and Hunter, 'The Uses of the Rule of Law in British Colonial Societies in the Nineteenth Century.' McLaren correctly recognises that judicial appointments were made at the pleasure of colonial administrators.

54 TNA: CO 201/247, 2 October 1835, Dowling to Glenelg, 319.

55 Ibid, 317.

motivations were driven by personal ambition. Dowling's argument is particularly persuasive as it raises the question: if Burton truly believed in his seniority, why had he not contested the issue earlier? This rhetorical strategy not only undermines Burton's credibility but also reinforces Dowling's position as the more consistent and principled candidate.

Finally, Dowling's closing remarks strategically reinforce his loyalty to imperial governance. His assurance that he will: 'remain loyal and committed to the administration of justice,'[56] regardless of the outcome, is a calculated move that casts him as a dutiful and impartial servant of the Crown. In contrast, Burton's appeal appears self-serving, as it hinges on personal advancement rather than institutional stability. By striking a balance between respect for authority and a firm assertion of his legal position, Dowling ultimately presents himself as aligned with imperial governance and a dutiful candidate.

Legal Precedent or Executive Discretion? The Response of Forbes and the Law Officers

Without established legal precedent, Governor Bourke sought advice from Chief Justice Forbes and the law officers, Solicitor General Plunkett and Attorney General Kinchela. Forbes expressed reluctance to offer a decisive opinion, noting that he was unaware of any prior case resolving judicial precedence in the colonies.[57] In his view, a judge's transfer from one colony to another did not equate to a reassignment between courts in England. Therefore, he concluded that the question of seniority in NSW should only be determined by the Crown. Similarly, the law officers were unable to provide Bourke with any conclusive legal precedent governing colonial judicial seniority.[58]

56 Ibid, 321.

57 TNA: CO 210/250, 19 August 1835, Forbes to Bourke, 290. Forbes explained that in England, judges' seniority was determined by the dates of their commissions. However, he distinguished the colonial judiciary from its English counterpart, arguing that judicial authority and rank were specific to the colony in which a judge was appointed.

58 TNA: CO 201/247, 22 August 1835, Plunkett and Kinchela to Bourke, 311-14.

Governor Bourke's Decision: Practicality Over Precedent

Faced with two conflicting claims and lacking clear legal guidance, Governor Bourke ultimately ruled in favour of Dowling. He justified his decision by pointing to Dowling's uncontested tenure on the bench, arguing that it entitled him to the benefits naturally expected from the rank he held.[59]

Bourke's decision was not based on strict legal precedent but on pragmatic considerations, namely, the avoidance of administrative disruption: 'I reasonably expected that I should thus have avoided many jealousies and embarrassments.'[60]

However, Bourke acknowledged that Burton would have been a strong candidate for Chief Justice had the vacancy been permanent, even suggesting that he would have supported his appointment in such a case.[61] Burton was: 'admittedly qualified to fill that office in any colony where English law is administered,' however, Bourke expressed 'extreme regret' at Burton's decision to challenge Dowling, subtly implying that his response was imprudent given that he had previously accepted Dowling as his senior.[62]

Consequently, Bourke affirmed Dowling's seniority, a decision with which Lord Glenelg concurred. Although Glenelg noted that: 'I do not however think that Mr Burton's acquiescence in the lowest place on the bench ought to prejudice any right which he may protest to false precedence of

59 TNA: CO 201/247, 3 October 1835, Bourke to Glenelg, 272.

60 Ibid, 271.

61 Ibid, 273. Bourke wrote: 'I will add that had the vacancy about to be made by Chief Justice Forbes been permanent instead of temporary, I should not have hesitated the moment to name Mr. Burton to fill it.'

62 Ibid, 273. Bourke's remark: 'the want of judgment which I am compelled to admit is but too apparent,' serves as a pointed critique, suggesting that while Burton was a capable jurist, his decision to contest the matter was inappropriate, given that he had previously accepted Dowling's seniority.

his colleague,' he ultimately rejected Burton's claim that judges should retain their seniority when transferred between colonies.[63]

There is no common judicial framework linking judges across colonies such as NSW, Malta, or Jamaica. Consequently: 'the supposed analogy is therefore fallacious.'[64]

Bourke's decision, as the Governor, underscores the extent to which judicial advancement in the colony was shaped not only by legal merit but also by administrative discretion. Moreover, the claims put forward by Burton and Dowling reveal the personal ambition, frustrations and internal politics that characterised judicial appointments in colonial NSW.

The Impact of Judicial Rivalry on *R v Murrell*

The correspondences above shed light on the tension within the colonial judiciary at the time of *Murrell*. The professional rivalry and personal frustrations not only shaped the dynamics of the Supreme Court but also influenced judicial decision-making.

Forbes had initially planned to take leave in 1835 but postponed his departure by a year.[65] The delay stemmed from the unresolved question of seniority within the court, as Forbes feared that: 'some unhappy disappointment might occur to impede the business of the court' if he left before the issue was settled.[66] However, by early 1836, Forbes' health no longer permitted

63 Ibid, 275. Glenelg clarified that unlike the judges in Westminster Hall who function as a unified judicial body with shared duties and occasions, colonial judges operate entirely independently from one another.

64 Ibid, 279.

65 TNA: CO 201/248, 2 November 1835, Bourke to Glenelg, 6. Consequently, Lord Glenelg accepted Forbes' leave on 14 April 1836, TNA: CO 201/248, Glenelg to Bourke 7-8.

66 TNA: CO 201/248, 1 December 1835, Bourke to Glenelg, 178-9.

him to remain in NSW and he proposed to take his leave in April.[67] His departure was confirmed, and his final day on the bench, coincidentally, was 11 April 1836, the same day *Murrell* was decided.

Forbes' departure created a leadership vacuum in the Supreme Court. As he had feared, this institutional instability impeded the court's functioning and, crucially, shaped the context in which the judgment in *Murrell* was delivered.

For Burton, *Murrell* was a response to his frustrations with his position in the legal hierarchy of the NSW Supreme Court, a critique of his colleagues' previous decision in *Ballard* and an attempt to assert himself as the superior jurist. Meanwhile, Dowling's acquiescence, although silent, was a strategic attempt to avoid public disagreement on the bench and a calculated move to reinforce his legitimacy as the proposed acting Chief Justice. Thus, *Murrell* must be understood not merely as a legal decision but as a strategic move within the larger judicial power struggle for the position of Chief Justice.

Burton's Critique of his Judicial Rivals and Personal Frustrations

There is compelling evidence that Burton's judgment in *Murrell* was not only a legal interpretation but also a deliberate assertion of his judicial authority, driven by a mixture of personal frustrations and professional aspirations.

Burton's Disappointment, Personal Frustrations and Professional Aspirations

Burton's broader disappointment with the colonial judiciary amplified his frustration with the Governor's decision to appoint Dowling, a move he saw as both professionally and personally demoralising. This dissatisfaction with the state of the colonial legal system is well-documented in Burton's correspondences. He had privately expressed the abhorrence to his brother Edmund: 'In Court there is such filth and looseness

67 TNA: CO 201/253, 2 April 1836, Bourke to Glenelg, 9.

of proceedings and want of all order and all convenience that I am disgusted.'[68] Burton further criticised the Supreme Court's: 'disorder and irregularity' and its departure from fundamental principles of English law.[69] Burton condemned what he saw as a deeply flawed legal environment, describing the conduct of the court's practitioners as 'disgraceful' and denouncing 'the most horrid, barefaced and unpunished perjury,' where convicts and individuals of 'the lowest character' were frequently used as witnesses by 'evil men.' His insistence on maintaining judicial dignity had earned him 'enemies' among those whose: 'unbridled conduct' had, in his view, brought the court into disrepute.[70]

Having long prided himself on his strict adherence to legal principle and judicial discipline, Burton viewed Dowling's promotion as an undeserved endorsement of the very 'disorder and irregularity' he had long condemned. Consequently, Burton saw his career reach a deadlock, leaving him with limited prospects for advancement or recognition. In Burton's view, his seniority and merit had not been adequately rewarded leaving his: 'prospects in this Colony entirely changed.'[71] Financial considerations further compounded his dissatisfaction as his judicial career had not provided the stability he had anticipated.[72] Burton believed that being promoted to Chief Justice would: 'make up for my losses at the Cape and enable me to pay all I owe,'[73] indicating that his claim for seniority was not just about professional prestige but

68 *The Australian Bar Gazette*, 'The Letters of Sir William Westbrook Burton' [1964] *AUBarGaz* 35, Burton to Edmund, 29 November 1833, 18. available at: <https://classic.austlii.edu.au/au/journals/AUBarGaz/1964/35.pdf> and <https://classic.austlii.edu.au/au/journals/AUBarGaz/1965/10.pdf> accessed March 12, 2026.

69 TNA: CO 201/250, 2 September 1835, Burton to Hay, 295.

70 Ibid, 296.

71 TNA: CO 201/247, 2 September 1835, Burton to Glenelg, 287.

72 Ibid, 288. Burton claimed that he was: 'considerably worse in worldly means' than when he first accepted his appointment in 1827 in the Cape of Good Hope.

73 *The Australian Bar Gazette*, 'The Letters of Sir William Westbrook Burton,' 18 January 1834, Burton to Edmund, 18.

also about establishing financial security.

Remaining in the colony offered neither career advancement nor economic stability, leading to Burton's conditional resignation: 'I can therefore only tender my resignation upon the condition that some other provision can be made for me.'[74] Burton's conditional resignation was not merely an expression of frustration; it was also a form of protest. It was an attempt to force the colonial authorities to reconsider his professional standing and status within the

judicial system. By implying that the colony would lose a judge of his calibre, he positioned himself as an indispensable figure whose departure would be a significant loss. Burton's belief that his current position did not reflect his professional abilities is evident in his statement: 'I shall be perfectly satisfied with a Chief Justice in any colony where the official involvement shall not be inferior to my present situation.'[75] This was both an assertion of his worth and a pragmatic response to the professional barriers he faced in NSW. At a time when judicial careers were shaped by seniority and patronage, if Burton felt blocked in one jurisdiction, seeking advancement elsewhere may have appeared to be his only viable option.

Burton - The Superior Jurist

Given this context of disappointment, personal frustrations and professional aspirations, Burton's sole judgment in *Murrell* can be viewed as more than just an articulation of legal doctrine. It was an opportunity to reinforce his judicial skills and distinguish himself from his peers, enhancing his standing in the eyes of British authority to facilitate his long-sought promotion.

As previously established, in his appeal to Lord Glenelg, Burton argued that appointments should be based on 'superior fitness for the office,' citing his zeal and public service as proof of his qualifications, cautioning

[74] Ibid.

[75] Ibid.

that seniority alone should not determine suitability.[76] Burton openly criticised Dowling, describing him as: 'a hard working industrious man - not a bright man or of a high order at the Bar, nor fit for a Chief Justice.'[77] Although Governor Bourke had appointed Dowling as Acting Chief Justice, he privately admitted to Burton that, had the role been permanent, Burton would have been recommended.[78] Thus, *Murrell* created the ideal platform for Burton to demonstrate his capabilities as a jurist and strengthen his case for promotion over Dowling in the eyes of British officials.

Simultaneously, Burton's judgment in *Murrell* can be viewed as part of a broader strategy to bolster his judicial reputation, thereby facilitating a potential move to another jurisdiction where he could secure a Chief Justice appointment. His criteria for such a position were notably stringent.[79] At a time when judicial careers were shaped by seniority, patronage and reputation, Burton's focus on English-speaking colonies with legal systems akin to NSW was a calculated effort to maximise his chances for future career advancement. To achieve this, he needed to demonstrate intellectual rigor and legal orthodoxy in a manner that would capture the attention of British authorities. By delivering the sole judgment in *Murrell*, a decision that reaffirmed the unqualified supremacy of English law over Aboriginal people, Burton seized the opportunity to showcase his legal acumen and position himself as a capable candidate for future advancement in the British Empire.

[76] See above, Section IV(B), *Burton's Claim: Seniority Through Imperial Service*.

[77] *The Australian Bar Gazette*, 'The Letters of Sir William Westbrook Burton,' 18.

[78] Burton knew of Bourke's approval if the position was permanent: TNA: CO 201/247, 28 July 1835, Burton to Bourke, 294-99.

[79] 'It will not be in my power to accept an appointment in a colony situated in a higher latitude than 50 degrees north, or on the coast of Africa, except the Cape of Good Hope; on any part of the West Indies to the Southward of the Island of Jamaica, or in any of the Colonies where the pleadings and the proceedings of the court are in any other language than English, or in any of the Australian colonies but this; with these exceptions, I shall be perfectly satisfied with a Chief Justice in any colony'. TNA: CO 201/247, 2 September 1835, Burton to Glenelg, 289-90.

Burton began his judgment by stating: 'Inasmuch as the Court is unanimous...I do not consider it necessary to state at large, the reasons upon which I have founded my individual opinion.'[80] However, it is noteworthy that Burton had initially prepared a thirty-four-page judgment to deliver in *Murrell*.[81] This suggests that he may have anticipated being in the minority, given Forbes and Dowling's previous position in *Ballard,* seeking to pre-emptively defend his stance.[82] However, the sheer length and depth of his thirty-four-page judgment indicates a more calculated intention. Rather than retreating in the face of potential opposition, Burton sought to leave a lasting impression by crafting an extensive legal rationale. His prepared judgment was likely intended for a wider audience, including the Colonial Office and legal scholars in England, and would be recorded in the colony's legal history, regardless of whether his peers endorsed it. This suggests that Burton's decision was not merely a response to the case at hand but part of a broader effort to assert his authority as the superior jurist on the bench.

Burton sought to distinguish himself from his peers on the bench by relying on authoritative legal texts such as Vattel's *Treatise on the Law of Nations*[83] and Blackstone's *Commentaries on the Laws of England*[84] to support his judgment in *Murrell*. Unlike Forbes and Dowling, who did not reference these foundational texts in *Ballard*, Burton drew heavily on them to argue for the absolute supremacy of British law in the colony. By grounding his decision in these respected works, he not only reinforced the legitimacy of his interpretation but also positioned himself as the judge with the most extensive legal foundation. Burton's reliance on

80 *Murrell* in Kercher, *'R v Ballard, R v Murrell and R v Bonjon.'*

81 MCRA, State Records of New South Wales, 5/1161: 210.

82 Bruce Kercher, 'Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts', *Colonialism and the Modern World* (1st edn, Routledge 2002) 100, 110.

83 Emer De Vattel and Joseph Chitty, 'The law of nations; or, Principles of the law of nature, applied to the conduct and affairs of nations and sovereigns' (Philadelphia, T. & J. W. Johnson, 1844).

84 Blackstone, 'Commentaries on the Laws of England.'

Vattel and Blackstone would have particularly appealed to British authorities because it provided a legal rationale for classifying NSW as a settled colony. By arguing that Aboriginal people had no property or dominion over land due to their failure to cultivate it, Burton's reasoning aligned with and legitimised the government's colonial project, effectively serving as what Ford describes as: 'a fundamental endorsement of territoriality.'[85] His thorough citation of these sources implicitly suggests that Forbes and Dowling in *Ballard* insufficiently grounded their decision.

Given his frustration and ambition to establish himself as the preeminent jurist in the NSW Supreme Court, it is unsurprising that Burton effectively overturned *Ballard* in *Murrell*. While he did not explicitly acknowledge *Ballard*, his reasoning systematically dismantled its core argument by asserting the absolute nature of British sovereignty. Although Burton conceded that Aboriginal people might be: 'entitled to be regarded by Civilised nations as a free and independent people,'[86] he ultimately denied their sovereignty, arguing that their lack of a centralised government and legal system meant they could not be: 'recognised as so many sovereign states governed by laws of their own.'[87] This directly contradicted *Ballard*, where Forbes and Dowling had acknowledged Aboriginal customary law as distinct from the colonial legal system. By rejecting his peers' earlier judgment, Burton not only reaffirmed British legal supremacy over Aboriginal people but also positioned his own ruling as the authoritative legal precedent on the matter. Burton framed his decision in *Murrell* as an incontrovertible legal principle: Aboriginal people were subject to British law, regardless of their own legal traditions or customs.

Burton's strict adherence to English law was not limited to *Murrell*, but the consistency of his approach across multiple areas strengthens the argument that he leveraged this rigidity to further his career ambitions. For

[85] Ford, 'Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836,' 202.

[86] *Murrell* in *'R v Ballard, R v Murrell and R v Bonjon.'*

[87] Ibid.

example, in *Macdonald v Levy* (1833),[88] despite evidence that higher interest rates were commonly charged in NSW, Burton held that such local practices could not override English usury law, which limited interest to five per cent. Similarly, in *R v Maloney* (1836),[89] John Maloney was charged with bigamy for marrying a second woman while still married to his first wife, whose 1829 marriage in Sydney had been solemnised by a Catholic priest in a private house. Decided on the very same day as *Murrell,* Burton, in the minority, maintained that the English *Marriage Act*[90] applied in full force in NSW and rejected arguments that local conditions, such as the lack of Anglican parishes or licensed churches, could modify its operation. Under Burton's reasoning, Catholic marriages conducted outside the Act's requirements were legally void, regardless of their widespread acceptance or the significant consequences this entailed for marital status and the legitimacy of children from these marriages. These cases illustrate that Burton's uncompromising application of English law was a defining feature of his judicial philosophy. In *Murrell*, this consistent strictness provided both the legal justification and authority he needed to overturn *Ballard* and present himself as the most capable candidate for Chief Justice, showing that his professional ambitions and legal orthodoxy were mutually reinforcing rather than contradictory.

By overturning *Ballard*, Burton reinforced his claims to Lord Glenelg and Governor Bourke regarding his superior fitness for the Chief Justice role, demonstrating his legal expertise, zeal and the usefulness of his public services. Simultaneously, his ruling served as a subtle critique of Forbes and Dowling's previous judgment and the lack of firm legal reasoning in *Ballard* since: 'the law of England is the law of the land.'[91] By affirming the supremacy of British law, Burton indirectly sent a pointed message to colonial authorities, making it clear that his judicial peers had erred in *Ballard*. This, in turn, strengthened his argument that he was the most

88 *Macdonald v Levy* (1833) 1 Legge 39.

89 *R v Maloney* [1836] NSWSupC 24 (11 February 1836).

90 *The Marriage Act 1823* (4 Geo. 4 c. 76).

91 Ibid.

capable candidate for the Chief Justice position.

Judicial Consensus or Strategic Positioning?

The view that *Murrell* served as an opportunity for Burton to assert his judicial skills and distinguish himself from his peers is not without challenge. After all, the decision was unanimous, with both Forbes and Dowling concurring. On this basis, *Murrell* may be interpreted not as an individualistic display of legal authority or ambition, but rather as an expression of judicial consensus affirming British sovereignty over Aboriginal people.

However, as questioned above, why did Burton, rather than the more senior Forbes and Dowling, deliver the sole written judgment. While Forbes and Dowling formally concurred, their silence may not indicate full endorsement of Burton's reasoning. Rather, it may reflect a deliberate choice to preserve judicial unity and avoid exposing internal divisions at a moment of institutional instability.

Kercher suggests that Forbes may have acquiesced in *Murrell* as a matter of pragmatism.[92] Having previously endorsed a stance of judicial restraint and non-interference in *Ballard* regarding inter se Aboriginal conflicts, Forbes' silence in *Murrell* may be attributed to both his declining health and the political pressures he faced. Forbes had been accused of having 'Yankee tendencies'[93] by certain colonial officials and had endured significant criticism from the conservative media outlet, the Sydney Herald.[94] His final day on the bench may have influenced his decision

92 Kercher, 'Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts,' 112.

93 Currey, 'Sir Francis Forbes (1784-1841),' 5. Forbes was labelled as having 'Yankee tendencies' which was a term that had strong negative connotations. Citing American jurisprudence was seen as inappropriate for a British judge who should be adhering to British legal traditions.

94 See *Sydney Herald*, 30 May and 14 April 1836. In the weeks leading up to his departure, the Sydney Herald intensified its criticism, publishing a satirical address supposedly written by convicts and emancipists mocking Forbes. The *Herald* continued its attacks even after his departure, declaring: 'we hope he has taken his

to avoid dissent,[95] as: 'this was no longer his battle,'[96] opting instead to allow Burton to take the lead.

Similarly, Dowling's agreement with Burton may have been a strategic move to reinforce his judicial standing rather than a wholehearted endorsement of Burton's reasoning. As the judge next in line for the Chief Justice role, Dowling had little to gain from openly opposing Burton in such a significant ruling. Aligning himself with Burton ensured that he did not appear weak or indecisive, particularly as his own position in the court hierarchy was still being solidified. This will be established below.

Thus, while *Murrell* was a unanimous decision, this does not preclude the possibility that Burton leveraged the case to assert his judicial superiority. By delivering the sole judgment and overturning *Ballard*, Burton not only reinforced his own legal reasoning and reputation with colonial authorities, but also subtly critiqued Forbes and Dowling's earlier approach. Even if his peers agreed with the outcome, their silence may have been a matter of strategy rather than complete alignment with Burton's rationale.

Dowling's Strategic Agreement

In *Murrell*, Dowling appears almost invisible, making no substantive comment. As Kercher highlights, Dowling: 'apparently merely agreed'[97] with Burton's reasoning, raising the question: why did he, having previously supported judicial non-intervention in Aboriginal inter se disputes in *Ballard*, refrain from delivering his own judgment? In *Ballard*, Dowling

departure from these shores forever as Chief Justice and Legislator combined in one person,' and deriding him as a champion of criminals (*Sydney Herald*, 28 April 1836).

95 Kercher 'Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts,' 110.

96 Rizzetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law,' 10.

97 Kercher, 'Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts,' 109.

had explicitly argued that the court should not impose British law on Aboriginal people unless they had consented, asserting that: 'I know of no reason human or divine, which ought to justify us in interfering with their institutions.'[98] Yet in *Murrell*, this principle was decisively rejected. While Forbes' change in position may be explained by his health and external political pressures, Dowling's shift warrants a closer examination and must be understood in the context of judicial politics and career insecurity.

One possibility is that his perspective evolved over time as *Ballard* was decided seven years prior to *Murrell*. Alternatively, Kercher suggests that Dowling may have been persuaded by Burton's reasoning.[99] However, these explanations overlook the broader political and institutional factors at play. Given the ongoing dispute over judicial seniority and tensions within the colonial judiciary, Dowling's silence in *Murrell* can be understood as a strategic move to avoid conflict and consolidate his position, rather than an organic shift in legal reasoning.

At the time of *Murrell*, Forbes was preparing to take leave, and while Dowling had been promised the role of Acting Chief Justice, his appointment was not yet secure, being officially confirmed only after *Murrell* was decided.[100] Dowling was also aware that Burton had challenged his seniority, arguing that his prior service in the Cape of Good Hope made him the more qualified and fit candidate. Dowling responded firmly, stating he: 'denied [Burton's] correctness and expressed his intention to oppose it in the last.'[101]

Dowling's correspondence to Lord Glenelg underscores his awareness of his precarious position. He highlighted his: 'eight years - anxious and

98 *Kercher, 'R v Ballard, R v Murrell and R v Bonjon.'*

99 Kercher, 'Native Title in the Shadows: The Origins of the Myth of Terra Nullius in Early New South Wales Courts,' 112.

100 TNA: CO 201/253, 12 April 1836, Bourke to Glenelg, 33-5.

101 TNA: CO 201/250, 11 August 1835, Leay (Colonial Secretary's Office) to Burton, 288.

laborious years' of service in NSW and emphasised his credentials, noting that he had been: 'recommended by Lord Goderich as a fit and proper person to fill the office' based on 'certificates of fitness.'[102] Dowling lamented his anxieties and the sacrifices of serving as a colonial judge in: 'this remote colony' with many 'peculiar elements.'[103] His appeal to Glenelg suggests that he was acutely aware of the political stakes surrounding his appointment to Chief Justice and the need to present himself as a stabilising figure within the judiciary.

Given this context, Dowling's silence in *Murrell* appears less an endorsement of Burton's reasoning and more a calculated decision to avoid judicial conflict at a crucial moment in his career. Rather than engage in robust legal reasoning, Dowling's silence may reflect a strategic effort to consolidate his judicial legitimacy without risking alienation from influential colonial authorities, particularly given his precarious position as Acting Chief Justice. With no formal guarantee of permanent appointment, he remained vulnerable to shifts in colonial decision-making regarding the court's leadership.

Had Dowling truly agreed with Burton, and not just strategically acquiesced, one would expect greater consistency in his judicial approach in cases involving Aboriginal defendants. Four years after *Murrell*, in 1840, Dowling presided over the trial of an Aboriginal man for murdering a white settler, stating: 'as between the Aborigines themselves, the Courts have never interfered, for obvious reasons.'[104] This statement echoes his reasoning in *Ballard* where he insisted that consent was a necessary

[102] TNA: CO 201/247, 2 October 1835, Dowling to Glenleg, 321.

[103] Ibid, 322.

[104] *R v Billy* [1840] NSWSupC 78. Reported in the *Sydney Herald*, 9 November 1840. Dowling explicitly acknowledged the profound inequities inherent in applying British criminal law to Aboriginal defendants, describing the trial as "one-sided" and emphasising that Billy was being treated as a British subject by a legal fiction, despite being ignorant of English law, language, and customs. Dowling highlighted the absence of Aboriginal peers on the jury and the exclusion of Aboriginal evidence, while nonetheless directing the jury to determine whether the elements of murder had been made out under English law. The jury returned a verdict of guilty.

precondition for imposing British law, suggesting that his views on Aboriginal inter se violence had not significantly shifted, despite his alignment with Burton in *Murrell.* Consequently, this remark raises significant questions about the extent to which his concurrence in *Murrell* reflected genuine legal conviction versus strategic judicial manoeuvring. By 1840, Dowling's position was secure and firmly established within the judiciary, as he had been appointed permanent Chief Justice in 1837, upon Forbes' retirement. His authority could no longer be questioned. It is possible that, with this security, he felt less compelled to align himself with Burton's rigid interpretation of British sovereignty over Aboriginal people.

The fact that Dowling reaffirmed the principle established in *Ballard* just four years after *Murrell* suggests that his silence in *Murrell* was driven less by an evolving legal perspective and more by judicial pragmatism. His decision appears to have been a calculated act of self-preservation, shaped by the political and institutional pressures of 1836.

Broader Implications

For the Judiciary

On the day *Murrell* was read, Forbes left for England, and just six days later, Dowling was formally appointed Acting Chief Justice.[105] Burton's hopes of securing the Chief Justiceship were ruined when Dowling's appointment was made permanent following Forbes' official retirement in 1837.[106]

Although Bourke had indicated that had the vacancy left by Forbes been for a permanent Chief Justiceship, he would not have hesitated to nominate Burton,[107] this recommendation did not reach Lord Glenelg until

105 TNA: CO 201/253, 12 April 1836, Bourke to Glenelg, 33-5.

106 TNA: CO 202/36, 5 May 1837, Lord Glenelg to Forbes, 2.

107 TNA: CO 201/247, 3 October 1835, Bourke to Glenelg, 273.

June 1836. By that time, Glenelg had already assumed the position was temporary, therefore, he did not give Bourke's suggestion significant weight. Upon learning this, Glenelg initially proposed remedying the situation by appointing Dowling as Chief Justice of Van Diemen's Land to make room for Burton on the NSW bench.[108] However, after further correspondences, Glenelg ultimately felt 'bound' to uphold his initial decision and confirmed Dowling as permanent Chief Justice of NSW in August 1837.[109]

For Burton, this marked a turning point. He was convinced that he had an adversary within the Colonial Office actively working against his promotion and became deeply disillusioned with public service: 'the last two years have thoroughly disgusted me with the Public Service and I shall be glad to escape from it.'[110] Consequently, Burton took leave in 1839, returning to England in 1841 and consequently transferring to Madras in 1844 where he was appointed Chief Justice. Ironically, had he remained in NSW, he would have succeeded Dowling, who passed away later that year.[111]

Despite Burton's disappointment and professional frustrations with his progression on the NSW Supreme Court bench, his judgment in *Murrell* achieved its intended legacy, shaping Australian legal discourse for decades to come.

Significance For Contemporaries - Parliamentary Committees and R v Bonjon

Burton's judgment attracted the attention of the Colonial Authorities,

[108] TNA: CO 202/36, 6 June 1837, Glenelg to Dowling, 111.

[109] TNA: CO 202/36, 8 August 1837, Stephen to Dowling, 292.

[110] *The Australian Bar Gazette* (64), 28 December 1837, Burton to Edmund, 20.

[111] Kenneth Allars, 'Burton, Sir William Westbrooke (1794–1888)', (1st edn, Australian Dictionary of Biography, 1966). Available online at: <https://adb.anu.edu.au/biography/burton-sir-william-westbrooke-1857/text2159>.

however, its implications for Aboriginal people remained a source of debate. As Ford and Roberts observe, *Murrell* was: 'one of several contradictory legal milestones in this decade.'[112] The legal status of Aboriginal people continued to be a subject of discussion in both parliamentary committees in London and colonial courts across Australia.

In the following year, the House of Commons Select Committee on Aborigines, driven by humanitarian parliamentarians advocating for Aboriginal rights, released its 1837 report which asserted that: 'the native inhabitants of any land have an incontrovertible right to their own soil.'[113] While this acknowledgment of Aboriginal land rights was significant, it did not reflect the official stance of the British government, who continued to actively pursue policies of land dispossession. In practice, the Committee had little impact on colonial administration. In fact, at the time of writing the judgment for *Murrell*, Burton was aware of the Committee's position but rendered a decision in direct opposition to its findings.[114]

However, in 1841, relying on the findings of the Parliamentary Committee, Judge Willis of the Port Phillip District (now known as Victoria) refused to follow *Murrell* in *R v Bonjon*.[115] In an extensive 8,000-word judgment, delivered over three hours, Willis explicitly rejected the reasoning in *Murrell*, stating: 'I do not consider myself bound by the opinion of either Mr Chief Justice Forbes, Mr Justice Burton or Mr Chief Justice

112 Lisa Ford and David Andrew Roberts, 'Settlement and Dispossession', (2022) in P. Cane, L. Ford, and M. McMillan (eds.) The Cambridge Legal History of Australia. Cambridge: Cambridge University Press, 309.

113 Report from the Select Committee on Aborigines (British Settlements) (1837) 5.

114 At the time that Burton was writing his *Murrell* decision, the House of Commons' Committee, though it did not issue its report until 1837, was already deliberating over the legal status of Aboriginal peoples, reaching a conclusion that stood in contrast to Burton's position. Burton would have been aware of the Committee's ongoing work, as evidenced by the civil court libel case of *Threlkeld v Lang*, where Burton himself was involved in discussions regarding the Committee's investigations (*Sydney Herald*, 28 March 1836).

115 Kercher, '*R v Ballard, R v Murrell and R v Bonjon*.'

Dowling in the present case.' He argued that NSW had not been acquired through conquest or treaty, nor was it *terra nullius*, and thus Aboriginal people retained sovereignty and the right to their own laws and customs.

Willis' divergence from *Murrell* may reflect a broader realisation that the case had not resolved the question of jurisdiction over Aboriginal people as definitively as Burton claimed. As established above, even Dowling himself, in 1840, acknowledged that: 'the Courts have never interfered in inter se Aboriginal conflict.'[116]

Nonetheless, Willis' decision was heavily criticised. Colonial administrators considered *Murrell* to be binding precedent. Dowling, in particular, denounced Willis' approach, advising Governor Gipps that *Murrell* had settled the matter and that no legislative clarification was necessary.[117] Gipps accepted this position and Lord Stanley subsequently reinforced it stating that until *Murrell* was overruled by appeal: 'it must be held to be the Law of the Colony.'[118] Consequently, Willis faced professional repercussions as the Judicial Committee of the Privy Council heard the challenge for his removal, reflecting the significant political weight attached in adhering to *Murrell*.[119] Colonial authorities placed considerable emphasis on the case, not only because it was decided by the full bench of the Supreme Court of NSW, but also because *Bonjon* was a single-judge decision from a lower court in Port Phillip. Had *Bonjon* been appealed, it would likely have been overturned by the Sydney court.[120]

Moreover, as Selth notes, Willis' motivations were not necessarily rooted

116 *Sydney Herald*, 9 November 1840.

117 Historical Records of Australia (HRA), 8 January 1842 (Enclosure 2), Dowling to Gipps, 653. See also Rizzetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law,' 18.

118 HRA, 2 July 1842, Despatch 144, Stanley to Gipps, 133. See also Rizzetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law,' 18-9.

119 Rizzetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law,' 18.

120 Ibid.

in sympathy for Aboriginal people but stemmed from: 'a desire to show his superiority over his Sydney judicial brothers,' coupled with ambition and spite, particularly toward Dowling.[121] While a detailed examination of Willis' personal ambitions lies beyond the scope of this article, *Bonjon* underscores the broader pattern of judicial conduct in the colonial context where legal decisions were shaped not only by doctrinal considerations but also by ambition, rivalry and the inherently political nature of judicial appointments.[122]

Nonetheless, colonial authorities reinforced *Murrell* as the authoritative precedent, confirming that Aboriginal people were subject to British law and dismissing any alternative interpretations, such as those put forward by Willis in *Bonjon*.

Sparking a Wave of Secondary Literature and Modern Interpretations

Despite Willis' extensive 8,000-word judgment in *Bonjon*, it was reported only in the Port Phillip newspapers, not in Sydney.[123] In contrast, *Murrell* attracted significant media coverage from major Sydney newspapers, including *The Sydney Herald*[124] and *The Sydney Gazette*.[125]

Interestingly, *Murrell* was not formally reported until 1896, sixty years

121 Phillip Selth, 'Judge John Walpole Willis (1793-1877)', (2017) *NSWBarAssocNews* 55; [2017] (Spring) *Bar News: Journal of the NSW Bar Association* 62, available at: <https://nswbar.asn.au/docs/webdocs/BN_Spring17_e.pdf. 63, 64>. Selth notes that there were: 'shouting match[es] in the judges' robing room' between Dowling and Willis who could not work together with Dowling happy that Willis was far away in Port Phillip: 'where I pray he may stick and that I may never see his face again.'

122 McLaren, Dorsett and Hunter, 'The Uses of the Rule of Law in British Colonial Societies in the Nineteenth Century', 84.

123 *Port Phillip Patriot*, 20 September 1841, 1. See also Rizzetti, 'Judge Willis, Bonjon and the Recognition of Aboriginal Law,' 6.

124 *Sydney Herald*, 8 February 1836, 18 April 1836, 5 and 16 May 1836.

125 *Sydney Gazette*, 23 February 1836 and 12 April 1836.

after the decision, when Gordon Legge included it in his reports, relying on the contemporary newspaper accounts to compile what he deemed the Supreme Court's most significant cases.[126] Legge ensured *Murrell* became the authoritative precedent cited to confirm that Australian courts had jurisdiction over Aboriginal people well into the 20th century.[127]

However, in 1999, Kercher's *Colonial Case Law Project*[128] rediscovered cases heard by the Supreme Court that addressed whether Aboriginal people were subject to English law, including *Ballard* and *Bonjon*, reintroducing scholars to these long-forgotten decisions. Kercher also updated and republished *Murrell*, revealing omissions in the earlier newspaper-based version by Legge, most notably, Burton's conclusion that Aboriginal groups were not sovereign states.[129] This comprehensive publication reinvigorated academic interest in Australia's colonial legal history, sparking a wave of secondary literature and offering: 'more grist for historians' mills.'[130]

Nonetheless, the legal interpretation in *Murrell* has had significant and lasting consequences for Aboriginal people, underpinning the assertion of British colonial sovereignty, catalysing the: 'juridical death of Indigenous people.'[131] As one of the most cited cases in Australian law, *Murrell* continues to shape contemporary legal discourse. Even in 2013, the

126 *R v Murrell* and Bummaree (1836) 1 Legge 72; [1836] NSWSupC 35.

127 *Murrell* was reaffirmed and cited by Rath J in *R v Wedge* (1976) 1 NSWLR 581, 586–7. In 1996, in the High Court of Australia, Justice Gummow said that *Murrell* had clarified position of Aboriginal people in regard to the criminal law in *Wik Peoples v. State of Queensland* (1996) 187 CLR 1.

128 Bruce Kercher, 'Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project', *Law and History Review*, vol. 18, no. 3, (2000).

129 Kercher, '*R v Ballard, R v Murrell and R v Bonjon.'*

130 Shaunnagh Dorsett, 'Plural Legal Orders: Concept and Practice', (2022) in P. Cane, L. Ford, and M. McMillan (eds.) *The Cambridge Legal History of Australia*. Cambridge: Cambridge University Press, 25.

131 Ford, 'Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788–1836,' 198.

Federal Court of Australia cited *Murrell* in *Walker v State of South Australia (No 2)*, where Justice Mansfield relied on it to affirm that Aboriginal 'Ramindjeri law does not constitute the law of Australia.'[132] *Murrell* is also routinely referenced in property law courses to illustrate the legal landscape prior to the recognition of native title in *Mabo*.[133] In this way, Burton has ultimately achieved his intended legacy by shaping the trajectory of Australian legal doctrine for generations to come.

Conclusion

Murrell cannot be fully understood in isolation from the political and institutional dynamics at play within the judiciary at the time. This article has advanced the proposition that *Murrell* was a decision deeply embroiled in judicial conflict and personal ambition. Drawing on the primary sources, it has been argued that Justice Burton's judgment in *Murrell* was not simply a matter of legal reasoning but a manifestation of his dissatisfaction with his subordinate position in the Supreme Court hierarchy, an indirect critique of his colleagues' prior decision in *Ballard* and an effort to assert his authority as the superior jurist. Conversely, Justice Dowling's silence can be read as a strategic move aimed at avoiding public division on the bench while subtly reinforcing his own legitimacy as the proposed Acting Chief Justice.

Thus, this article has demonstrated that common law decisions, especially in colonial NSW, are products of their specific historical context, shaped by the personalities, rivalries and institutional dynamics within the judiciary. It is hoped that this encourages further exploration into how internal court dynamics and colonial governance shaped the

132 *Walker v State of South Australia (No 2)* [2013] FCA 700 at [57].

133 *Mabo v Queensland [No. 2]* [1992] HCA 23; (1992) 175 CLR 1. The Court acknowledged that Indigenous Australians held land rights before British settlement in 1788, with those rights stemming from a pre-existing connection to the land. It found that these rights, known as native title, remain valid wherever they have not been legally extinguished. In response, the *Native Title Act 1993* (Cth) was introduced to give legislative effect to the decision and provide a legal process for Indigenous communities to seek formal recognition of their native title.

development of legal principles in Australia.

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BOOK REVIEWS

Katherine Biber, *The Last Outlaws: The Crimes of Jimmy & Joe Governor and the Birth of Modern Australia* (Sydney: Scribner, Simon & Schuster, 2025) Pp. 324 ISBN 9781761631665, AUD 36.99.

Throughout the nineteenth-century, Aboriginal people appeared in colonial courts almost exclusively as victims or perpetrators of crime. From 1799 onwards it was clear that it was a crime (in law at least) to kill Aboriginal people, just as it was for them to kill colonists. Formally, there was equal treatment. In practice, things were very different. There was much less colonial panic about violence against Indigenous people than there was about Aboriginal killing of white people. Indigenous people were much more likely to be killed than to kill, not that the balance of criminal cases suggests that. One other great injustice was that colonial civil law said almost nothing about the loss of their right to culture, their sovereignty, their attachment to country, and even the possibility of their rights as workers.

Katherine Biber's excellent book, *The Last Outlaws*, examines the final important nineteenth-century criminal case against Aborigines: the chase, capture and killing of Joe and Jimmy Governor and of their accomplice Jack Underwood. The story is very well known, including the murders of mainly women and children at remote country houses. It is the basis of Thomas Keneally's *The Chant of Jimmy Blacksmith* and the movie on which the novel is based. What does Biber offer to the analysis of such famous events?

This book is a legal history, emphasising written law, and its administration, and contemporary debates about its suitability for a new nation. In the outlawry chapter, the author explains that outlawry was still available to the executive of New South Wales in 1900, through the nearly obsolete *Felons Apprehension Act*. This particular legislation began in NSW in 1865, with outlawry as its centre piece. A declaration of outlawry meant that it was lawful for anyone to capture and even kill the named persons. At first, it was short-term legislation, aimed at individuals. By 1900, it was a continuing Act.

The outlawry chapter is particularly effective. It shows that the Attorney General, Bernard Wise, was reluctant to use outlawry against the Governors. One of the principal figures in the federation movement, Wise thought outlawry to be archaic in a modern nation.

There had also been resistance to the similar bushranging legislation, in the 1830s.[1] This did not include outlawry, but it allowed police or any free person to capture a person suspected of being an escaped convict, or any armed person suspected of an intention to commit a felony. The onus was on the captured person to prove innocence. Justice Burton thought that the 1830s legislation was repugnant to English law, along what would later be called civil liberties principles. Burton's two colleagues on the bench disagreed, as did the British government, and the law went into force.[2] Wise would have agreed with Burton.

Eventually Wise declared the Governors to be outlaws, leading to the violent conclusion of the story. After a long chase, Joe Governor was shot dead by civilians, followed by one of numerous coroners' inquiries into these related deaths.

Jimmy Governor and Jack Underwood were captured and put on trial. Jimmy's defence argument was that he was entitled to *autrefois convict*. The declaration of outlawry, it was argued, was the equivalent of a conviction and after that he could not be tried again. Unsurprisingly, this was rejected both at trial, and on appeal. Also rejected was the possibility of a provocation defence, which might have led to a conviction of manslaughter rather than murder, and thus saved him from the gallows. Jimmy's very young white wife, Ethel, had been taunted by the first two women Jimmy murdered. What white woman would marry such a man? This book also points to the exploitation the Governors had suffered under their employer, the absent husband of one of the first victims. Jimmy Governor and Jack Underwood were both hanged in January 1901, within three weeks of the commencement of Australian federation.

1 (1834) 5 Wm 4 No. 9. Burton's opinion is online in [R v Elliot [1834] NSWSupC 11 (18 February 1834)]().

The author places these trials and killings in the context of modernising Australia and federation. Jimmy's trial was carefully conducted, even though little was made of the circumstances of the police interview at the time of his capture. His appeal argument was made by O'Connor QC, who would soon be appointed to the High Court of Australia. What place would a modern nation have for outlawry or even capital punishment? Joe's brain was removed for scientific study, but even scientific anatomisation was rapidly fading.

The Governor and Underwood cases were among the last remnants of a brutally violent nineteenth-century approach to the operation of criminal law on the frontier. They were not, of course, the last instances of capital punishment. Nor were they the last examples of the continuing legal neglect of Indigenous rights. Massacres continued well into the modern twentieth-century, as Lyndall Ryan showed so clearly. It was also many decades into the next century before the civil law paid serious attention to the founding injustice of Australia, the theft of an entire continent.

This book is a work of compassion, but one which does not hide the hideous nature of the murders. It is based on the author's passion for the subject matter, the culmination of Katherine Biber's twenty years of work on these events. She patiently read the vast archival references, visited the sites of the killings and coronial inquests, searched for Jimmy's grave, and for Joe's stolen brain. Her project led to a multi-award winning series of podcasts, also called *The Last Outlaws*. The podcasts and this book were created with the assistance of a direct descendant of Jimmy and Ethel Governor, Aunty Loretta Parsley. Once again, the excellent group of legal historians at the University of Technology Sydney, have produced a great work of Australian legal history.

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Catharine Coleborne, *Vagrancy Lives in Colonial Australia: Regulating Mobility, 1840-1910* (London: Bloomsbury Academic, 2024). Pp. 216. ISBN 9781350252691. AUD 170.00.

Investigating systems of vagrant regulation and numerous aspects of vagrant lives within New Zealand and Australia's south-east, *Vagrancy Lives in Colonial Australia: Regulating Mobility* is, its author asserts, a welcome 'vagrancy from below' of a goodly chunk of colonial Australasia. By highlighting how particularities of social structure and shifting settler identities helped govern notions about vagrancy and attitudes towards those deemed vagrant, Catharine Coleborne uncovers the distinctiveness of the colonial vagrancy experience.

Arranged thematically, this volume deals in turn with lawmaking and policing before turning to questions of individual experiences and collective vulnerabilities. Exploring how local lawmaking was influenced by the framework of Britain, while inflecting local circumstances and concerns about criminality and class, the author paints a complex social picture. She notes, for instance, that emigration could be seen as a 'cure' for poverty in Britain but not in the colonies. Neither was there a framework of 'poor law' support for colonial vagrants to fall back on in times of need. Such disconnect between British conventions and colonial context goes some way to explaining how vagrancy came to be regulated in the colonies in more nuanced ways than a straightforward inheriting of British law.

Charting the regulation of mobility in the convict colonies of New South Wales and Van Diemen's Land, followed by the goldrushes of Victoria and New Zealand, Coleborne surveys the increasing regulation of mobility over time as well as across jurisdictions. Drawing attention to the ways in which mobility was both necessary and threatening in a colonial setting, she intriguingly suggests that the mobility of the legal profession itself, as well as the dissemination of legal ideas, also helped consolidate some of the legal trends that emerged in the colonial setting. However, irrespective of the curious dynamics in the legal background, Coleborne posits that local circumstances seem most influential in explaining the development of specific regulatory frameworks in each jurisdiction.

Coleborne also draws out some interesting observations regarding developing colonial police cultures and vagrancy's notional relationship with crime and criminality. Ideals about the smart, capable, and manly policeman, for instance, inflected thinking about crime prevention. Overall, and unsurprisingly, the colonies clearly witnessed regular police use of the vagrancy laws to shape and maintain public order. This, of course, intersected with real human lives. Throughout the book Coleborne endeavours to foreground such individuals, periodically giving longer accounts of persons who ran afoul of the law or press and thereby entered the historical record. In the book's third chapter Coleborne's focus shifts firmly from police to policed. Probing vagrant experiences for common threads, she writes interestingly of the intersection between press representations of vagrancy and its actual experience, noting that cultural stereotypes could both feed from and feed into lived experiences and attitudes. Similarly, she notes how economic realities like the general mobility of labourers, work seasonality, and seafaring, all had their part to play in governing the actuality of mobility for individuals. While drawing our attention to some common experiences of vagrant life, including the need for shelter and encounters with violence, Coleborne expands this concern in another chapter which focuses on discernibly vulnerable groups and types of vagrant person. Here the later colonial construal of 'the vagrant' became something closer to destitute paupers and a generalised social nuisance, rather than the latently violent convict underclass that was perceived by lawmakers in the deeper colonial past. Coleborne discusses the elderly, children, and disabled as groups, illustrative of how persons could be made vagrant by being pushed to the edges of society, while gradually shifting her focus to questions of agency in the book's final sections.

Overall, this volume contributes meaningfully to our understandings of the cultural construction of vagrancy and its social experience in colonial Australia and New Zealand. Drawn from much policing data and populated with lots of human examples, *Vagrancy Lives in Colonial Australia: Regulating Mobility* paints a picture of the increasing regulation of mobility through a combination of law and social surveillance. Its great strength, however, is Coleborne's sensitivity to the human stories she tells therein.

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Cerian Griffiths and Łukasz Jan Korporowicz (eds), *English Law, the Legal Profession, and Colonialism: Histories, Parallels, Influences* [Routledge Studies in Comparative Legal History, edited by Aniceto Masferrer and Heiko Tapio Pihlajamäki] (Routledge, Abingdon, Oxfordshire and New York, NY, 2024). Pp. xi + 264 ISBN 9781032326306 AUD 94.34

As the title of this miscellany might suggest, its twelve essays are not exactly united by a common theme or question. English law (taken to mean the common law, as distinct from civil, canon, customary or any other sort of law) is less their subject than the legislative regimes of British colonial possessions from the seventeenth to the mid-twentieth century – so perhaps English law (or laws) by extension. The legal profession, as distinct from individual practitioners, figures only marginally. Yet many readers will find Matilde Cazzola's account of how the political views of the eminent English barrister and high court judge James Fitzjames Stephen (1829-94) were affected by his experience as legal member of the Indian viceroy's council from 1869-72 a highlight of this collection.

The essays range widely in geographical focus: from London, Wales, the North Atlantic and Caribbean to India, Hong Kong and Australia. Although Canada, New Zealand and Africa appear only occasionally. Their authors include four Australians, two North Americans (US), four from British and three from European universities, plus two representatives of the Chinese University of Hong Kong. A bare majority (8 out of 15) are relatively youthful, junior, or emerging scholars, supported by some relatively well-published veterans.

According to its preface, the collection sprang from an online conference on 'English law and colonial connections' held in January 2021, together with additional contributions subsequently commissioned to:

'strengthen the "global" character of the topics discussed'. It seems probable that Michael Lobban's initial overview chapter, labelled 'Introductory Remarks', was among these last, displacing a brief editorial introduction which now appears as the volume's final chapter. Helpfully or hopefully, Lobban finds a degree of coherence among otherwise seemingly disparate contributions. All are characterised as explorations of: 'the nature of the relationship between the imperial centre and the colonial periphery, considering questions such as how legal ideas were transmitted from one area to another and how forms used in one place were adapted in another', as well as 'the perennial tension in the empire between liberalism and authoritarianism'.

This framing fits most chapters, although Sally Hadden's account of 'London's Middle Temple and Law Students from the New World' says little about the transmission of legal ideas or forms, let alone imperial tensions. Hadden makes clear that, *pace* Lobban, the inns of court hardly sheltered their members from London's tempting array of vice. While speculation about why the eighteenth-century Middle Temple proved so much more attractive to Irish, Caribbean and North American students than the other three inns may well continue, Hadden is surely right to focus on that society's relatively more lenient and easily monetised requirements for call to the bar. Perhaps mere topography also played some part: the Middle Temple was and is the first legal society encountered by travellers from London's West End, or indeed the Atlantic ports where many if not most young colonials disembarked.

Hadden's chapter is paired with Justine Collins's careful if depressing account of the legislative enslavement of indigenous populations of English and American (but mainly Caribbean) colonies from the mid-seventeenth through the eighteenth century. These two 'Atlantic Relations' are followed by two 'Indian Relations'. Firstly, co-editor Korporowicz on the six-year tenure of Sir James Mackintosh as recorder of Bombay and judge of the Bombay vice-admiralty court in the early nineteenth century. Secondly. Cazzola's previously mentioned account of 'Remaking Britain in the Image of the Raj: James Fitzjames Stephen's "Indian" Correctives to Electoral Reform'. While the former depends largely on the posthumous *Memoirs* compiled in the 1830s by Mackintosh's son, Cazzola's bibliography extends over four pages, including some thirty items of Stephen's own publications. This formidable Benthamite advocated for Britain's traditional governing élite to remodel the nation's legal and political structures along the authoritarian-bureaucratic lines of post-mutiny British rule in India. This was preferred over educating their new democratic masters. Parallels with present-day anxieties about populist challenges to democratic Western societies are not hard to find.

The following section, 'Australia and South-East Asia Relations', includes a further three very distinct contributions, two from past and current colleagues of the present reviewer. Although when this appears our University of Adelaide will have been formally extinguished, or transmogrified into the new merged institution of Adelaide University. Greg Taylor presents an expert lawyerly assessment of a legislative non-event: the surviving Colonial Office draft of a comprehensive 1864 Bill designed to enhance colonial self-government in the face of the South Australian constitutional crisis. This crisis arose from Mr Justice Boothby's 'excessive zeal'. While a change in the political office of Colonial Secretary may have been immediately responsible for the Bill's demise and supersession by the *Colonial Laws Validity Act* (28 & 29 Vict. c. 23, 1865), Taylor's analysis benefits from his broad knowledge of public law and constitutional arrangements across the later nineteenth-century British Empire, and the United States.

The second contribution likely to particularly interest local readers is 'Outlaws in Their Native Land: The "Incompetence" of Aboriginal Witnesses in 19th-Century Colonial Australia'. This is the joint work of Andrew John Alexander (a Noongar person from Western Australia now studying at Flinders University), Holly Nicholls and David Plater, researcher and deputy director respectively of the South Australian Law Reform Institute (SALRI), The authors are assisted by John Williams and Keagan Lee of SALRI and an undergraduate law reform class at the University of Adelaide. Their main message is that while the unsworn testimony of Aboriginal witnesses came to be allowed by legislation in all Australian colonies (from 1844 in SA, not until 1876 in NSW) after passage of the British *Colonial Evidence Act* (1843), it was treated as less reliable than that of sworn witnesses. Various cultural and linguistic matters compounded the disadvantages and disbelief routinely encountered in legal proceedings by Aborigines, children and people with disability. The author's closing question is whether that situation has significantly improved today, and if not, how it might be changed for the better.

The third piece in this section by Christopher M. Roberts and Hazel W. H. Leung traces the use of vagrancy law in the governance of Hong Kong from the British takeover in 1841 to the outbreak of World War II. The sweeping powers available under the 1824 *Vagrancy Act* (5 Geo. IV, c. 83) were employed not only to facilitate control over a rapidly expanding Chinese population, but also to deal (by imprisonment and deportation) with non-Chinese 'undesirables'. A police sergeant in 1876 labelled the non-Chinese population: 'the debris of the open ports of China'. In 1905 Hong Kong's governor complained about: 'wandering Europeans who come … to lead an irregular life supported by charity and not infrequently ending in crime', with 'bad effect on the estimation in which all Europeans are held'. The rule of (English) law in Hong Kong was clearly not quite the same as in the Home Counties.

But perhaps even these examples were not always as legal historians have taken them to be. The final section, 'Legal Doctrine, Empire and Legacies', includes four essays, headed by Richard Ireland's characteristically insightful and witty rumination on 'Imagination and the Colonial Challenge to English Legal Historiography'. Drawing on his understanding of the distinctive Welsh experience of and disregard for English law, Ireland suggests that the social penetration or acceptance of law should be central to our conceptualisation of jurisprudence, or the legal system in any setting, past or present. Julia Rudolph then pursues her interest in the development of lending on mortgage in eighteenth-century Britain and its empire with an account of 'Jamaican Mortgages and English Inheritance Disputes'. This contribution is based on papers relating to the heavily indebted estate of the Jamaican planter John Gardner Kemys (d. 1793) now in London's Metropolitan Archives. Rudolph's essay illustrates well the thorough inter-penetration of English legal forms and principles with colonial societies and legal practices, as well as the complex networks of advisers, attorneys, brokers, solicitors and trustees required to establish, maintain and litigate over loans on dubiously profitable West Indian plantations. These plantations were secured by mortgage and eventually only liquidated (as Richard Pares pointed out) by the compensation payments which followed emancipation of their enslaved labour force in 1833. Following Jan Halberda's discussion of the disputed role of good faith and fair dealing in mostly recent English, Commonwealth and American contract law cases, the editors' Conclusion opens with the interesting assertion that the history of the common law is the traditional 'poor relation of its civil law cousin'. This may well be true in Continental Europe and South America, but ignores a long-standing Anglo-American scholarly tradition, to say nothing of more recent Australian, Canadian and New Zealand activity. Likewise, the days when medievalists dominated common law history are long past. But we can all surely agree with the editors' closing words: 'There is still much more to do within the history of law'.

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Isabella Alexander, *Copyright and Cartography: History, Law, and the Circulation of Geographical Knowledge*, Hart Publishing, (eBook, Bloomsbury Open Access). Pp. 328 ISBN: 9781509958375AUD86.00 (paperback), AUD200 (hardback), open access,

If I were to stop a passerby and ask if they know anything about how maps are copyrighted, at most I might expect them to mention 'trap streets' or other intentional mistakes used by cartographers to catch out plagiarisers. It would be a rare person indeed who could tell me on the spot about the historic debate about the difference between a map contained within a book, and one printed for sale on its own, or who has a considered opinion about whether duplicated information can be copyrighted by the copier. *Cartography and Copyright: History, Law, and the Circulation of Geographical Knowledge* demonstrates an impressive grasp of its subject matter. Over ten chapters, Isabella Alexander walks her reader through those discussions, demonstrating that they – and others – took several centuries to resolve. Instead of becoming weighed down in the cartographic history, Alexander has adopted a multidisciplinary approach, taking only the necessary historical background, and weaving it with new findings from the historical archive and examples from the courts.

The very definition of a 'map' is one that historical geographers and other scholars have been debating for several decades. Alexander acknowledges the difficulties of labelling her research materials and applies an argument from Matthew Edney's 2019 work *Cartography: The Ideal and Its History*. In this book, Edney deconstructed the modern 'map' which he argues has been idealised and as a result has been used continuously without a full interrogation of the assumptions that form it. For Edney, the foundations for these assumptions were laid with the development of scientific ideas from the end of the eighteenth century. Although this book explores earlier copyright history, Alexander has intentionally concentrated on the period from the eighteenth century onwards, arguing that the ability of creators and publishers to enforce copyright law on spatial sheets was crucial in the development of this cartographic ideal (6–7).

This book serves well as a condensed history of British cartography between the seventeenth and nineteenth centuries. It is more than a general history, however. *Cartography and Copyright* tells its story through a specific lens: how the creators and publishers of maps (along with plans and charts) have fought for copyright protection in the courts. What results is a clear explanation of how depictions of space have differed in books and artworks across the centuries, and what makes them a historical source worth attention in their own right.

The structure moves smoothly between time and theme. Several chapters provide a broad overview of the legal frameworks and cartographic developments within a set period, for example between 1400 and 1700 in Chapter Two, while others examine processes such as eighteenth-century legislation (Chapter Three) or specific sets of maps like the Ordnance Survey (Chapter Six).

The strength of Alexander's account of this history is in her use of case law to explain the development of both common law and legal instruments over several centuries. Here we learn that the *Engravings Act* 1735 was introduced when *An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned*, otherwise known as the *Statute of Ann* 1710 was recognised as insufficiently protecting engravers who published items as separate prints outside of books. The issue that then arose from the *Engravings Act* was how 'invention' was defined. While a satirical work by William Hogarth was clearly an original work, was a map that depicted the natural world also a work of 'invention', or merely copying what already existed in nature? Elizabeth Blackwell tested the Act with a suit against printsellers who had been selling copies of her botanical artworks. The defendants claimed they were 'only Copies from Nature', but this was not accepted (58–62).

By the time we reach the sophisticated *Copyright Act* 1911, arguing about whether an intricate drawing of a plant was original or a mere copy of nature may seem to define 'pettifogging'. But through her use of case law, Alexander has clearly described the route from the *Engravings Act* 1735 to the twentieth century, when the Ordnance Survey found itself deciding how to protect its physical maps while also granting the public free use of the data of which they were composed.

This is an accessible book that will appeal to historical geographers, legal and intellectual historians, and scholars who have an interest in how legal structures have shaped the maps, charts and plans we use today. By showing how these spatial constructs have been legally defined over more than three centuries, we see how surveyors, cartographers, engravers and publishers have followed suit and shaped their creations to fit the legal definitions. In turn, arguments about privatised and public knowledge and the nature of 'invention' informed what is today known as a map, plan or a chart.

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