

# Contents

---

<i>Preface</i>	ix
<i>Permissions</i>	x
<i>Table of common law cases and practice directions</i>	xi
<i>Table of common law legislation</i>	xvi
General introduction	1
1 What was the contribution of the medieval civilians?	12
1.1 General remarks	12
1.2 Glossators	14
1.3 Methods of the glossators	17
1.4 Post-Glossators (Commentators)	21
1.5 Theory and methods of the Post-Glossators	24
1.6 <i>Ius commune</i> and the development of method	27
2 What was the contribution of the Roman lawyers?	33
2.1 General overview	33
2.2 <i>Institutes</i> : persons, things and actions	36
2.3 Casuistry and categorisation	38
2.4 Philosophical and theory contexts	41
2.5 Attitude and specific techniques	42
2.6 Logic and rationalisation	47
2.7 Reasoning and texts	49
2.8 Legal fictions	51
2.9 Assessing the contribution of the Roman jurists	52
3 What was the contribution of the later civilians and the common lawyers?	57
3.1 Humanist re-orientation	57
3.2 Civilian rationalists	60
3.3 Nominalism and rights	65
3.4 Codification and reasoning	67
3.5 Codification and legal science	70
3.6 Social interests	73
3.7 Common law reaction	74
3.8 Reacting to civilian formalism	79

3.9	Legal argumentation	82
3.10	Legal argumentation and the civilians	84
3.11	<i>Quo vadis?</i>	86
4	What is the institutional legacy?	87
4.1	Introduction	87
4.2	Rule model	89
4.3	Interpretation model	95
4.4	Rights model	99
4.5	Interest model	105
4.6	Policy model	109
4.7	Remedies model	111
4.8	Legal models: some concluding remarks	114
5	What is the legal literature legacy?	117
5.1	Teaching and practice of law	117
5.2	Common law teachers	120
5.3	Legal taxonomy	122
5.4	Taxonomy and reasoning	126
5.5	Taxonomy and fact	128
5.6	Mapping and reasoning	131
5.7	Representing knowledge	132
5.8	Unjust enrichment	134
5.9	Scientific and legal taxonomy	136
5.10	Empirical categories	138
5.11	Rationalisation and reasoning	140
6	How do legal reasoners treat facts?	143
6.1	Introduction: law and fact	143
6.2	Institutional model and facts	145
6.3	<i>Ex facto ius oritur</i>	147
6.4	Law and causation	151
6.5	Proof of causation	155
6.6	Causing damage and causing a risk	158
6.7	<i>Ex iure factum oritur</i> (virtual facts)	160
6.8	Competing narratives	163
6.9	Theorising fact	166
7	Is legal reasoning like medical reasoning?	168
7.1	Introduction: patients and clients	168
7.2	Legal and medical reasoning: generalities	170
7.3	Diagnosing a legal problem	171
7.4	Reasoning and models	174
7.5	Knowledge models and reasoning about facts	176

7.6	Induction	179
7.7	Deduction	181
7.8	Coherence versus policy: dialectical and functional reasoning	184
7.9	Explanation, understanding and confrontation	188
7.10	Explanation and manipulation	190
8	Is legal reasoning like reasoning in film studies?	197
8.1	Preliminary problems	197
8.2	Form and content (personification theory)	202
8.3	Role of <i>anima</i>	207
8.4	Childish (and elitist) introspection	209
8.5	Representation and dimensions	211
8.6	Depicting reality: representation theory	213
8.7	Competing images	216
8.8	Reception theory	218
8.9	From theory to interpretation	222
8.10	Theory versus interpretative frameworks	225
8.11	Towards fiction theory?	228
9	Is legal reasoning based on fictions?	229
9.1	Introduction: fiction theory	229
9.2	Epistemological attitude	231
9.3	Legal reasoning and concepts	233
9.4	Reasonable person	236
9.5	<i>Nomen iuris</i>	238
9.6	Inferential legal reasoning	238
9.7	Fiction and policy	241
9.8	Fact and fiction	243
9.9	Interpretation and fiction	246
9.10	Taxonomy and fiction	248
9.11	Fiction and knowledge representation	251
9.12	Conclusion: legal reasoning and reality	255
10	Can legal reasoning be rethought?	258
10.1	Introduction: demystifying legal reasoning	258
10.2	Rule model and system	260
10.3	Analogy	263
10.4	Analogy and the rule model	267
10.5	Casuistic reasoning	270
10.6	Reasoning about facts: schemes of intelligibility	273
10.7	Lessons from social science schemes	276

10.8	Demystification and the rule model of law	277
10.9	Paradigm question	279
11	Rethinking legal reasoning: should jurists take interests more seriously?	285
11.1	Introduction	285
11.2	Rights and interests	286
11.3	Defining an interest	289
11.4	Advantages attaching to the notion of an interest	291
11.5	Interests attaching to the <i>persona</i>	294
11.6	Interests attaching to the <i>res</i>	298
11.7	Interests attaching to the <i>actio</i>	301
11.8	Interests and the institutional plan	306
12	Should jurists take interests more seriously (continued)?	307
12.1	Abuse of a right	307
12.2	Liberty, expectations and interests	310
12.3	Damages, debt and interests	312
12.4	Penalties and interests	315
12.5	Sectional interests	317
12.6	Mediating role of an interest	321
12.7	Diluting tendencies of interests	323
12.8	Rights versus interests	325
12.9	Taking interests seriously	327
	Concluding remarks	329
	<i>Bibliography</i>	333
	<i>Index</i>	347