# Index

Account, 238-239	defamation, 122-126
account stated, 244-245	early claims in conversion and detinue,
relationship with agency, 369-370	94-96
Astion on the Coop on Coop Astion on the	early claims in negligence, 176
<b>Action on the Case</b> , see Case, Action on the	High Court distinguishing trespass and
Agency, 366-383	conversion, 95
authority, 367, 374-375, 378-380, 383	legal professional privilege in,
definition, 366-367	dominant purpose test, 169-170
fiduciary, 377-378	Evidence Acts, 170-171
Mansfield, 374-375, 383	
mistake, 376-377	fundamental common law right,
partnership, 369, 378-380	166-169, 172
relationship with account, 369-370	legal advice, 162-163, 166
	rationale for, 163-164, 165
relationship with covenant, 371	third party communications, 160-161,
relationship with debt, 372-373	164
relationship with indebitatus assumpsit,	no unifying theory of restitution in, 234-235
373, 375-376	statutory regulation of assignments,
vicarious liability, 380-382	364-365
Aristotle,	tort of "negligent trespass", 66-67
commutative justice, 27-28	Authority, see Agency
criticised by Hobbes, 28-29	
contrast with Glanvill, 35	<b>Banking</b> , 323-333
metallist fallacy, 296	definition of banker, 332
	goldsmiths, 330, 331-333
Assignment,	moneychangers
bills of exchange, 305-307	Continental, 323-330
choses in action, 353-365 and see separate	English, 330-336
entry	scriveners, 330-332
assignable in equity, 349-350, 360-362	contrast with bankers, 332
assignment pursuant to statute, 363-364	taking deposits, 324-325
not assignable at common law, 353-357	Parlamentary and incolven are 415, 461
common law exceptions, 357-360	Bankruptcy and insolvency, 415-461
definition, 343	ancient civilisations, 418-420
maintenance and champerty, 355-356	arrangements with creditors, 429-430, 441,
negotiability of cheques, 336-337	443-444
<b>Assumpsit</b> , see Case, Action on the	Australia, 448-460
	Clyne Committee, 458-359
Australia,	divergence from English laws, 453,
bankruptcy and Insolvency, 448-460	456-457
Clyne Committee, 458-459	early colonial laws 448-453 (NSW), 454
divergence from English laws, 453,	(others)
456-457	federal law, 455-459
early colonial laws 448-453 (NSW), 454	Harmer report, 459
(others)	Bankruptcy Commissioners, 428
federal law, 455-459	Court of Chancery, 428-429
Harmer report, 459	definitions, 416-417
contract law, good faith in, 232-233	discharge from bankruptcy, 430-433
corporations legislation, 410-412	fraudulent conveyances 426

# INDEX

imprisonment, 417, 435-437 mesne process, 439-440 final process, 444-445 joint stock company, 446-447 medieval, 420-423 nineteenth century English laws, 433-448 Bankruptcy Court, 438-439, 441 Insolvent Debtors' Court, 437-438 non-traders, 441-443 relation back, 426-427 Roman law, 419-420 Tudor and Stuart statutes, 423-426  Bentham, bankruptcy, 434, 440 privilege, 149	Cheques, 292, 333-341 and see Bills of exchange crossing, 338-341 definition, 323 development of, 333-336 negotiability of, 336-337 stamp duty on, 337-338  Chose in action, 344-365 assignable in equity, 349-350 contrast with choses in possession, 348-349 definitions, 351-353 examples, 344-345 expansion of, 346-347 merger of choses in action real and personal, 347, 356-357
<b>Bills of exchange</b> , 291-292, 300-322 and see Cheques	personal rights incapable of assignment, 345
assignment of, 305-307 Bracton, 303, 311	Coin, see Money
custom of merchants, 314-315	Common money counts, see Restitution
development of rules relating to by common law, 316-322	Company, see Corporations
acceptance after date for payment, 316 effect of undated bill, 316 effect of indorsement in blank, 317-318 liability of drawer to indorsee, 318-319 oral acceptance, 318 protest, 316-317 rights of bearer, 319-320 validity, 321-322  Lombard lawyers, 301-304  Mansfield, 265-267 mercantile courts, recognised by, 307-312 usury, 304-305  Blackstone, indebitatus assumpsit, 247-248 privilege, 143  Bond, 43-45 conditional, 44-45  Bracton, 35-36 bills of exchange (Missibilia), 303, 311	Contract, consideration, 16-17, 20, 242-243 early history of, 202-203 efficient breach, 19 implied terms, 201-233 business efficacy, 220-225, 226-227, 229-230 custom, 210-211 good faith, 232-233 implied promise as basis of liability, 205 implied promise as basis for incorporation by usage, 216 intention, development of tests for, 217-225, 231-232 law and fact distinction, 225-231 necessity, 220-225, 228-231 originally obligations existing as part of the relationship, 204 trade usage, 211-217 privity, 18, 176-177
bills of exchange (Missibilia), 303, 311 influenced by Roman law, 36  Case, Action on the, 5-9, 68-69 assumpsit, 9-25, 58, 239-243 contract, 12-20 indebitatus assumpsit, 21-25 negligence, 10-12 quantum meruit, 20-21 warranty, 206 defamation treated as, 112 reasons favouring over trespass, 63-64 origins of trover, 81-82	trespass on the case on assumpsit, 12-20 warranty, 206 warranty of title, 206-208 warranty of quality, 208-209  Conversion, 68-105 documents, 98-101 origins as trover, 81-82, 93 possession sufficient to found, 82-84 expansion to loss and finding, 84-85 modern developments, 104-105 replevin and, 91

# HISTORICAL FOUNDATIONS OF AUSTRALIAN LAW

Conversion (cont)	Covenant, 37-40, 235-236
strict liability, 101-102	contrast with debt, 43-44
supplants detinue, 89-91	relationship with agency, 371
supplants trespass, 88-89	1 0 7
to own use, 86-87	Damages,
to own use, 60-67	distinct from debt, 48-49
Corporations, 384-414	direct and indirect, 62-65, 69
Australian, 410-412	ecclesiastical courts unable to order, 109
Bubble Act,	gist of action for defamation at common
•	
enactment, 390-392	law, 112, 124
enforcement, 394	no requirement for in scandalum magna-
repeal, 395	tum, 118
by-laws, 387	remedy for detinue, 80-81
charters to create, 386	royal courts ordering for defamation,
corporations sole, 385-386	109-110
corporations aggregate, 386-387	D 14 26 40 226 220
directors' duties, 409-410	Debt, 26-49, 236-238
	account stated, source of, 244-245
distinguished from companies, 385	Aristotle's commutative justice, 27-28
joint stock companies, 387-390, 424	bonds, 43-45, 237-238
1844 Act, 398-402	causes of action on which claim could be
1855 Act, 403-405	based, 33-34
insolvency of, 446-447	covenant, relationship with, 43-44
limited liability, 384-385, 389-390, 403-404	damages, distinct from, 48-49
modern legislation, 405-407	deeds, relationship with, 40-45
nineteenth century views on, 396-398	
separate legal personality on registration,	Germanic origins, 30-31
384, 407-408	Glanvill, 32-35
	Hobbes, 28-29
shares,	quid pro quo, 38-40, 237
legal nature of, 395-396	replaced by action on the case for assump-
redeemable preference shares, 393	sit, 58
Courts,	relationship with agency, 372-373
	statutes and, 45-48
common law,	
bills of exchange recognised by , 312-322	Deeds, 40-45
ecclesiastical,	Defamation, 106-126
contract in, 202	
defamation in, 107-110	Australia, 122-126
excommunication and other remedies,	ecclesiastical courts and, 107-110
109	libel and slander,
incapacity to order damages, 109	distinction between, 114, 124
local,	local courts and, 120-122
contract in, 202-203	mitior sensus rule, 113
	popularity of, 113-114
covenant in, 235	royal courts and, 110-114
defamation in, 120-122	Scandalum Magnatum, 117-120
mercantile, 307, 308-312	Star Chamber, 115-117
bankruptcy law, 421-422	
royal,	<b>Detinue</b> , 68-105
covenant in, 235	bailment and, 70, 73
defamation in, 110-114	devenerunt ad manus, 74-75
ability to order damages for defama-	destruction of chattel, 78
tion, 109-110	detinue sur trover, 75-81
prohibition against ecclesiastical	emergence from debt, 68, 237
courts, 110-111	loss and finding, 76-77
Star Chamber, defamation in, 115-117	nineteenth century reforms to, 96-98

#### **INDEX**

replaced by action on the case for conversion, 58, 89-91 transformation of chattel, 78-79 wager of law, 77

**Discovery**, 144, 153-155 at common law, 155-156 by Mansfield, 262

## Ecclesiastical Courts, see Courts, Ecclesiastical

Forms of action, see Procedure and particular writs abolition of, 96-97 appeal of robbery or larceny, 70-71 trespass de bonis asportatis, 71-72 replevin, 72-73, 91

Gauge, 30-31

#### Glanvill,

contrast with Aristotle, 35 on debt, 32-35

Hardwicke, Lord, influence on Mansfield, 258, 259

# Holt, Sir John,

bills of exchange, 312-313, 316-321 indebitatus assumpsit, 245-246

### Implied terms, see Contract

Indebitatus assumpsit, 21-25 relationship with agency, 373, 375-376

**Insolvency**, see Bankruptcy and Insolvency

# Jury,

commercial, 269-270 defamation, 125

Kenyon, Lord, 142-143, 263, 264, 320

## Legal fictions,

in trespass, 55-56 in contract, fictional intention, 209, 216-217 consideration, 242 in conversion, 84-85, 98-101, 104 in indebitatus assumpsit, 245-246, 250-251, 252-253, 274-275

Legal professional privilege, 127-173 chancery subpoena, 129 dominant purpose test, 169-170 eighteenth century, 133-144 Elizabethan origins to protect lawyers, 128-132 Evidence Acts, 170-171

fraud exception, 137

fundamental right, 166-169, 172 honour theory of, 130 legal advice, 162-163 litigation privilege, 152-153, 156-157 nineteenth century, 144-160 principles underlying, 151-152, 163-166 "privilege" first used, 133 seventeenth century, 132-133 third party communications, 160-161,

#### Libel, see Defamation

Local Courts, see Courts, Local

Mansfield, Lord, 255-290 agency, 374-375, 383 Attorney-General, 259-260 barrister, 257-259 bills of exchange, 265-267 birth and early life, 255-257 Chief Justice of King's Bench, 260 common law counts, 271-275 custom, 211 Gordon riots, 285-286 illegality, 278-282 indebitatus assumpsit, 247, 248, 250 influenced by Lord Hardwicke, 258, 259 insurance, 267-269 Junius, 282-284 jury, commercial, 269-270 Lord Kenyon, 263, 264 personality, 286-290 privilege, 140-142 procedural reforms, 260-263 restitution, see Common law counts retirement and death, 263-264 Solicitor-General, 259 Somerset's case, 275-277 warranties, 206

## Modes of trial,

wager of law, 1, 8, 77, 235-236

Money, 291-300

barter, contrast with, 294 chattel, as, 298-299 coins, 295-297

definition, 292 legal tender, as, 299-300 medium of exchange, 292-295

debasement and reformation, 327-328

Negligence, 174-200 attorneys, 183 carriers and innkeepers, 181-182 common callings, 181-182

#### HISTORICAL FOUNDATIONS OF AUSTRALIAN LAW

Negligence (cont)

contributory negligence, relationship
between fault in trespass, 60
death of victim, 180, 187-189
doctors, 182
duty of care, 195-199
manufacturers, 183-184
occupiers liability, 184-187
pure economic loss by negligent words, 199
railways, 189-193
reasonable man, 193-195, 200
relationship with contract, 176-179
concurrent liability, 177-178
privity of contract, 176-177
relationship with trespass, 10-12, 65-67, 175
workplace defences, 179-180

Nuisance, 58

#### Pleading,

general issue, 54-55 nineteenth century reforms, 249-250

Pledge, 30-31

Privilege, see Legal professional privilege

#### Procedure,

forms of action, 51-52, 68, 70, 103 question of law, 2 reforms of Mansfield, 260-263 writs, 51-52

# Quantum meruit,

trespass on the case, 20-21

Quasi-contract, see Restitution

Quid pro quo, see Debt

Restitution, 234-254 account stated, 244-245

common indebitatus counts, 243-246, 248-249, 271-275 empirical nature of common law, 253 legal fictions in, 245-246, 250-251, 252-253 fictional promises to pay, 245-246 Mansfield, 271-275

money had and received, 246, 247-248 quantum meruit, 244, 247 quantum valebant, 247

shortcomings of unifying theory of, 251-254

## Roman law,

bankruptcy, 419-420 influence on Mansfield, 273, 279

Royal Courts, see Courts, Royal

Slander, see Defamation

## Trespass, 50-67

allegation amounting to defamation, 111-112

contra pacem, 3, 52-56, 57-58 direct and indirect damages, 62-65, 69

fault in, 59-60

five writs in Fitzherbert, 4 in royal courts, 52-56

negligence, relationship with, 65-67, 175

origins of, 2-4, 52-53

relationship with trover, 88-89

relationship with tort informed by royal and local courts, 50-51

relationship with trespass on the case, 56-65 vi et armis, 3, 52-56, 57-58

Trover, see Conversion

Unjust enrichment, see Restitution

Wager of law, 1, 8, 77, 235-236

Warranty, see Contract