founded on the corporation power and not suffer from a fatal complaint of mixing judicial and legislative functions. However, this latter point remains in some doubt due to comments from the Bench in the *Builders Labourers* case[1] and more particularly in the recent *Shop Assistants Federation* case.[2]

It would seem proper to conclude that the Tribunal is properly appraised of the economic realities of Australia's mature and mixed industrial economy. It cannot be said to be the doctrinaire creature of any particular political view point, or of the Government of the day. The Chairman in the Second Annual Report has referred to some of the criticism levelled at the Tribunal, particularly by segments of the business community, which accused it of being unresponsive to business needs or, more damagingly, of compressing profit margins to such an extent as to create unemployment or a disinclination to invest. The Chairman said '. . . in some instances they [the criticisms] appear to have been mainly directed at destroying the Tribunal or bringing it into disrepute. In the view of the Tribunal there has also been tendency for some companies to try to use the Tribunal as a scape goat by blaming it for shortcomings attributable to bad management . . .'. The Tribunal is a sturdy creature and is showing a robustness and independence of action which, of its own, should justify its continuation. Mr Scott's book may well be the first of a line considering the Prices Justification Tribunal and its works.

HOWARD NATHAN*

A History of Contract at Common Law, by S. J. Stoljar, (Australian National University Press, Canberra, 1975), pp. i-xi, 1-221. Recommended Australian Price $9.95.

Stoljar's work, the latest in a long series of publications by this distinguished scholar, makes a significant contribution to the debate on the nature and origins of the fundamental doctrines of contract.[1] His aim is to explain 'complex developments' and even treat legal history 'almost as an extension of legal analysis' (preface). In the course of fulfilling this aim, Stoljar challenges many widely held views.

Stoljar's fundamental position is that the classical theory of the common law of contract viewed contract as a reciprocal bargain with mutual benefits. So, in the continuing debate, Stoljar takes the 'bargain/benefit' position. His position is founded on a close study of the sixteenth and seventeenth century cases. For instance, he argues forcefully that the notion of 'consideration' (or 'motivation') was not fundamental. It was introduced by the courts to distinguish between non-gratuitous exchanges ('bargains') and gratuitous acts in disputes over the provision of services. It had no role in disputes over sales where the 'synallagmatic' element was evident on the face of agreement. Though acknowledging the major formative role played by *Slade's* case,[2] Stoljar demonstrates that it evolved from a long line of Elizabethan cases elaborating the 'bargain/benefit' basis for enforceability. Here, as elsewhere in the book, Stoljar speculates that more pragmatic influences were also at work. The court in *Slade's* case, by taking over much of the work of debt under the heading of assumpsit, was responding to the community's need to have contractual disputes settled by a method of proof (trial by jury) more appropriate than that applicable to debt (wager of law). At other points, Stoljar argues that development of the law took place in spite of the difficulties posed by the rules of pleading.

[1] 1976, High Court of Australia, not yet reported.
[2] 1976, High Court of Australia, not yet reported.
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[1] A synopsis, listing the names and works of the leading proponents for the various views is found in Sutton K. C. T., *Consideration Reconsidered*, (1974) chs 1 and 2.
[2] (1602) 4 Co. Rep. 91a; 76 E.R. 1072.

Perhaps the most interesting aspect of Stoljar's argument is his contention that the classical theory knew no doctrine of privity. The Elizabethan cases recognized the rights of the donee-beneficiary and the creditor-beneficiary under a contract, consistent with the need to uphold 'bargain'. The late eighteenth century judges Lord Mansfield and Buller J. were simply restoring the common law position in their decisions on the point, which were finally rejected in *Tweddle v. Atkinson*.[3] Stoljar effectively refutes Crompton J.'s view, expressed in that case, that to have held otherwise would involve a 'monstrous proposition', by pointing out that a theory concerned to enforce 'benefits' would not be troubled by the absence of any 'detriment' or 'burden' in the case of third party beneficiaries.

Throughout the work, Stoljar assails the work of the nineteenth century courts, apart possibly from their decisions (based on a new notion of implied terms) in the areas of failure of consideration and impossibility (ch. 14). Stoljar provides some clue as to why the nineteenth century courts departed so far from the 'classical theory'. They became concerned with form. The rules of offer and acceptance — because of the growth of non-oral communication (letters) — acquired a new significance. The doctrine of consideration, constantly defined in terms of detrimental reliance by the promisee, flourished. These developments excluded the flexibility of the old approaches (seen in such areas as performance, third party rights and allocation of risk).

Stoljar's book is an encouragement to those grappling today with modern authority based so often on nineteenth century precedents. It not only questions the basis of much of modern contract law as a matter of history but it points the way to sounder and more flexible bases upon which to found future doctrinal developments. If nothing else, it shows that the inventive guile displayed by English common law judges (such as Lord Denning in *High Trees*[4] and Lord Wilberforce in *The Eurymedon*[5]) may not have been necessary had greater attention been paid to the roots of the common law.

If any criticism is to be made of Stoljar's work it is that it might have gone a little further. It would be illuminating to have Stoljar's views on the role of remedies in the development of the modern law, in particular the interplay between common law and equity.

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[3] (1861) 1 B. and S. 393; 121 E.R. 762.
[4] *Central London Property Trust Ltd v. High Trees House Ltd* [1947] K.B. 130.
[5] *New Zealand Shipping Co. v. A. M. Satterthwaite & Co.* [1975] A.C. 154.
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