

Francis Forbes Lecture 2020

Lawyers' uses of history, from *Entick v Carrington* to *Smethurst v Commissioner of Police*

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Half a century ago, the University of Queensland Law Journal published an article called “Lawyers' Uses of History”.¹ In part it is a close reading of selected High Court judgments invoking legal history, notably those of Sir Victor Windeyer. In part it is a collection of curiosities of the unreformed common law² – what Lord Radcliffe once called those “unravished remnants” of uncodified judge-made law³ – deployed in order to explain how changes in judge-made law are brought about and how they result in ripple-like disturbances elsewhere in the law. (Today we might call this

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1 E Campbell, “Lawyers' Uses of History”, (1968) 6 *UQLJ* 1.

2 Including *Swaffer v Mulcahy* [1934] 1 KB 608, as to which see below text accompanying fn 119.

3 C Radcliffe, *Law and its Compass* (Northwestern University Press, 1960), p 52.

“coherence”.⁴) In part it enumerates a surprisingly long list of errors in judicial reasoning arising from a misuse of history.

One of the article's themes is the wide variety of ways in which historical learning can be deployed in legal reasoning. Hence the multiplicity of “uses” made by lawyers of history. This is as true today as it was half a century ago. The same point was made much more recently by Gummow J: “There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms”.⁵ His Honour then invoked Sir John Baker's adage that lawyers have “been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding”.⁶ In other words, lawyers are so accustomed to emphasise continuity that their understanding of legal history may be affected, a theme to which I shall return. The article makes a similar point, citing United States literature on legal history, including that “the continuity of legal thought processes is to a very considerable extent a fiction”.⁷ That gives you an idea of some of the themes of the article “Lawyers' Uses of History”.

The article opens and closes with a seeming paradox. It begins with a reference to the continuing force of precedent:

Ours is a legal culture that is highly attentive to its past. Lawyers cannot help looking backwards; the law compels them to do so. Judges are directed to decide consistently with what has been decided before and to that extent continuity with the past becomes a matter of legal duty.

Yet one purpose of the article is to illustrate the truth, stated by Maitland, that historical research serves the purpose of⁸

4 Although as Matthew Dyson has recently observed, it would be as well to think carefully about what precisely we mean by the word: M Dyson, “Coherence and illegal claims” (28 April 2020), available at SSRN: <https://ssrn.com/abstract=3587435>.

5 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182-183.

6 J Baker, “The Legal Profession and the Common Law – Historical Essays” (1986), p 436, cited in *Wik* at 182-183.

7 C Friedrich, “Law and History” 14 *Vand L Rev* 1027 at 1047 (1961) and R Pound, “What Do We Ask of Legal History?” 11 *Am ULR* 117 (1962), quoted in E Campbell, n 1 above, at 23.

8 F Maitland, “A Survey of the Century” (1901) in H Fisher (ed), *Collected Papers of Frederic William Maitland* (Cambridge University Press, 1912), Vol 3, 432 at 439, cited by E Campbell, id, at 23.

explaining and therefore lightening the pressure that the past must exercise upon the present, and the present upon the future.

That famous statement – made in the year the Australian Commonwealth came into existence, by a statute passed at Westminster – itself reflects an altered, more sophisticated, understanding of history at around the time Maitland was writing. The details are outside the scope of this paper, but Emeritus Professor Lowenthal has observed – published in 2015 when he was 92 (it was that polymath's *penultimate* book) – that the “consensual knowledge of the past dwindles in inverse proportion to how much is known in total”.⁹ After all, the past is complicated, and it is easily misunderstood. Nevertheless, the more deeply we understand the details of what has been decided before in their context, the less heavily the past weighs upon the present in our legal system which looks to the past for continuity.

The author of “Lawyers' Uses of History” was Professor Enid Campbell. She was at the time the only female professor of law in Australia, indeed the only female professor of law the country had hitherto seen. She wrote it in around 1968, shortly after she was appointed to a chair, in her mid thirties. Her work shows her at ease with mediaeval and nineteenth century legal resources, contemporary judgments, and North American academic criticism. She had just begun publication of a long series of influential monographs on difficult, superficially disparate and under-appreciated subjects (including parliamentary privilege and the liability of public authorities). (They are only superficially disparate – both are at the intersection of public and private law.)¹⁰ It is as though she searched for difficult gaps in legal literature, and then set out to fill them, recalling the early works of Glanville Williams.¹¹ There is no suggestion of the reiteration of a theme, perhaps

9 D Lowenthal, *The Past is a Foreign Country - Revisited* (Cambridge University Press, 2015), p 591. Lowenthal's surveys *The Past is a Foreign Country* (Cambridge University Press, 1985), pp 233-234 and *The Past is a Foreign Country - Revisited* (Cambridge University Press, 2015), pp 365-366 are a useful starting point for the changed perception of history.

10 For the former, consider the long line of actions in trespass concerning the powers of colonial legislatures (very many of which are Australian) culminating in *Egan v Willis* (1998) 195 CLR 424; for the latter, see most recently M Allars, “Private Law Remedies and Public Law Standards: An Awkward Statutory Intrusion into Tort Liability of Public Authorities” (2020) 14 *FIU L Rev* 5.

11 *Liability for Animals* (1939); *The Law Reform (Frustrated Contracts) Acts* (1943) (1945); *Crown*

with minor variations, which is often seen today and which is a predictable consequence of rewarding academic publication assessed by sheer number. Most importantly, the article, like much else of her writing, repays careful reading decades later.

It is a great honour to give this year's Francis Forbes lecture. I am grateful for the permission of Forbes' successor, Chief Justice Bathurst, for the use of the Banco Court tonight, nearly two centuries after Forbes first presided in the Supreme Court of New South Wales. I thought it fitting for the title of this lecture to acknowledge Professor Campbell's work. I too want to explore the multiplicity of ways in which history is used by lawyers. And it was a happy coincidence that the High Court's decision, last month, in *Smethurst v Commissioner of Police*,¹² provides an important contemporary example. In talking about the uses, I shall pass very lightly over something deeply controversial, which is what precisely "history" and "legal history" are.¹³

One use of legal history is vital for all members of the legal profession. It was encapsulated in the opening sentences of Professor Campbell's article. Litigants cite cases, including old cases. Old cases influence and sometimes bind courts and determine the outcome of litigation. But the older the decision is, the harder it can be to understand, and the easier it can be to misunderstand. And in litigation, it is quite possible that advocates will argue as persuasively as they may in the interests of their clients that the same decision means different things, and that *at least one and perhaps both* will be wrong. We must all remember, and, dare I say it, judges should especially remember, that legal history in the hands of a litigator is the opposite of some disinterested quest for greater understanding. Rather, the submissions which are made on historical materials, and indeed whether or not

Proceedings (1948); *Joint Obligations* (1949) and *Joint Torts and Contributory Negligence* (1950).

12 [2020] HCA 14.

13 See (without for a moment being exhaustive) D Ibbetson, "What is Legal History a History of?" (2003) 6 *Law and History: Current Issues* 33; H Lücke, "Legal history in Australia: The development of Australian legal/historical scholarship" (2010) 34 *Aust Bar Rev* 109 and J Rose, "Studying the Past: the Nature and Development of Legal History as an Academic Discipline" (2010) 31 *Journal of Legal History* 101. From an earlier generation, see L Downer, "Some thoughts on legal history" (1954) 3 *UWALR* 13 and "Legal history – Is it human?" (1963) 4 *MULR* 1.

resort is had to historical materials in the first place, is necessarily driven by what is perceived to be in the interests of the client. This undoubtedly exacerbates the ordinary problems occasioned by reading the documents of the past with the eyes of the present. I have no doubt that whilst courts will continue to make historical errors, that is in part a consequence of the litigation process. None of this detracts from the basic point that an understanding of legal history helps to explain the reasons for judgment and therefore the rule or principle for which the decision stands as authority.

Maitland is famous (and perhaps Lord Denning is more famous) for stating, “The forms of action we have buried, but they still rule us from their graves”. As often occurs in law, that vivid metaphor captures the imagination and is cited and re-cited. Lord Denning was deciding, by pronouncement which employed rhetoric as opposed to reasoning, that there was no such thing as a negligent trespass – something deeply anhistoric.¹⁴ On no view is that the law of Australia – although the cases on this issue confirm that such taxonomical questions tend to arise because of the effect of statute, just as they did in *Letang v Cooper*.¹⁵ But returning to Maitland, what was the serious point he was making, sought to be captured by that evocative language? Maitland was saying that it was no longer possible to assume that law students knew what a form of action was, but insisted that it was still important to know what one was if they were to have “more than a very superficial knowledge of our law as it stands even at the present day”.¹⁶ Maitland was in fact railing against the very type of reasoning which Lord Denning employed.

Take Jordan CJ's famous judgment in *Coroneo v Australian Provincial Assurance Association Ltd*.¹⁷ It was delivered by the Chief Justice on the Friday after a hearing on the Tuesday which stretched into the Wednesday of the same week, in the “Banco Court” then located on St James Road.¹⁸ The judgment commences:

14 *Letang v Cooper* [1965] 1 QB 232.

15 See the authorities reviewed in *State of New South Wales v Ouhammi* [2019] NSWCA 225.

16 F Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1936), 1.

17 (1935) 35 SR (NSW) 391.

18 The court list for the Wednesday listed a motion for a new trial at not before 10.30, and another matter at 2pm on that Wednesday (see *Sydney Morning Herald*, 21 August 1935, p 10).

This is a demurrer by the defendant to the three counts of the declaration.

Much can be said about those 14 words. They cannot be understood without appreciating that, putting to one side the opaque summons by which every personal action at law was commenced,¹⁹ pre-judicature pleadings at law commenced with a “declaration”²⁰ (to which I shall return). A declaration might (like an indictment) contain a number of “counts”. A defendant might demur on the basis that there was no cause of action,²¹ and the demurrer would be determined by the Full Court, based on the relevant parts of the pleadings and the pleadings alone.²² There used to be general and special demurrers, but in 1935 and 1968, when Sir Frederick Jordan and Professor Campbell were writing, s 60 of the *Common Law Procedure Act* provided that “no pleading shall be deemed insufficient for any defect which before the commencement of the Common law Procedure Act of 1853 could only be objected to by special demurrer”. That is an example of statute which speaks in terms directed to the maintenance of historical continuity, and forces a continued awareness of historical procedure. It is a common drafting technique; the role of juries in every defamation case in New South Wales is affected by similar statutes, as explained last year in *Fairfax Media Publications Pty Ltd v Gayle*.²³ It is very easy to draft, but it can be very hard to litigate if parties' rights turn on the position which obtained many years previously. This sort of legislation brings one type of legal history to the forefront. Thus there are people alive today who advised on common law demurrers²⁴ and needed to be familiar with the abolition of the special demurrer, associated with Baron Parke, when the disastrous Hilary Rules of 1834 plagued for almost 20 years the English courts with delay and technicality – it was

19 *Common Law Procedure Act 1899* (NSW), s 4. The summons said nothing of the cause of action but was directed to in personam jurisdiction.

20 *Common Law Procedure Act 1899* (NSW), s 69.

21 *Common Law Procedure Act 1899* (NSW), s 59.

22 See General Rules of Court, Order XXIII, rr 3, 4.

23 (2019) 100 NSWLR 155; [2019] NSWCA 172; see also *Fairfax Media Publications Pty Ltd v Bateman* (2015) 90 NSWLR 79; [2015] NSWCA 154 at [136]-[144] and *TCN Channel Nine Pty Ltd v Pahuja* [2019] NSWCA 166, especially at [43]-[47].

24 The procedure was abolished in 1972 in New South Wales; it continued in Queensland for some years but was described in *Wichmann v Dormway Pty Ltd* [2019] QCA 31 at [7] as a “now archaic procedure” and remains a useful procedure in r 27.07 of the High Court Rules: see for example *Glencore International AG v Commissioner of Taxation* [2019] HCA 26.

said that one case in four turned on pleadings rather than substance.²⁵ (I am not suggesting chancery was much better. There is a marvellous description in volume 6 of Chancery Appeals of the position in 1830 that “questions ... are in the following order, with respect to the importance attached to them and the zeal with which they are argued, namely, practice first, costs second, and merits third and last”.²⁶) Essentially, a general demurrer had to go to the substance of the pleading, rather than its form.

My point is that even Chief Justice Jordan's simple opening sentence is heavily laden with history, and cannot hope to be understood divorced from that history. Law is like that. We need, in Sir John Baker's words, to “switch our minds over to the same thought processes as the lawyers of the period in which we are working.”²⁷

Although Mr Coroneo's legal advisers had got the position badly wrong, many and perhaps most legal readers in 1935 would instantly have appreciated that this was the defendant's successful challenge to a proceeding brought at law. And perhaps many non-legal readers too. Essentially the entirety of the decision was reported, almost *verbatim*, on page 12 of the *Sydney Morning Herald* the following day (Saturday 24 August 1935).

25 Holdsworth, *History of English Law*, Vol ix, p 325, cited in P Polden, “The Superior Courts of Common Law”, in W Cornish et al, *The Oxford History of the Laws of England* (Oxford University Press, 2010), Vol XI p 587.

26 *Mounsey v Earl of Lonsdale* (1870) LR 6 Ch App 141 at 143.

27 J Baker, Introduction to *Collected Papers on English Legal History* (Cambridge University Press, 2013), Vol I, p 7. See also L Dingle, *Conversations with Sir John Hamilton Baker QC: Aspects of Resolving the Legal History of the Common Law* (March 8, 2018). Available at SSRN: <https://ssrn.com/abstract=3136466>.

LAW REPORT.
—•—
SUPREME COURT.
—
FULL COURT.
(Before the Chief Justice, Mr. Justice Jordan,
Mr. Justice Halse Rogers, and Mr. Justice
Street.)
DEMURRER UPHELD.
**Coroneo v Australian Provincial Assurance
Association, Ltd.**
The Full Court upheld the defendant's
demurrer to the three counts of the plaintiff's
declaration in an action brought by Samuel
Coroneo against the Australian Provincial
Assurance Association, Ltd.
By the first count the plaintiff alleged that,
being the tenant in fee simple of certain

The Chief Justice explained how it was complained that the mortgagee had sold the land and buildings and had “so recklessly, wilfully and negligently conducted itself in and about the said sale that the said lands and buildings were sold at a gross under-value.” The report in 35 State Reports continues:

It is contended on behalf of the defendant company that this count does not disclose a cause of action maintainable at common law. I agree; and I think that the count is based upon a misconception of the nature of a power of sale in a mortgage.

That was all faithfully reported in the *Sydney Morning Herald*:

The Chief Justice, in the judgment of the Court, agreed with the contention of the defendant company that the count did not disclose a cause of action maintainable at common law. He believed that the count was based upon a misconception of the nature of a power of sale in a mortgage. A mortgage at common law was a conveyance of the legal title in property from one person to another to secure the doing of some act, ordinarily

It is difficult to know how fully the non-legal public understood the sense of the Chief Justice's reasons. The so-called “Law in context” movement is a very helpful way to gain a different understanding of law – although the opening words of Twining's intellectual memoir,²⁸ “Pick up today's newspaper and you will probably find law on every page” did not have in mind page 12 of the Sydney Morning Herald of 24 August 1935!

Even if non-legal readers struggled, the Chief Justice's conclusion is perhaps easier to grasp:

I think that the whole declaration is an attempt to litigate questions as between mortgagor and mortgagee which can only be the subject of proceedings in Equity, in a suit in which the mortgagor offers to redeem or to account for what is owing.

Thus Mr Coroneo's complaint that his mortgagee had negligently or recklessly exercised its power of sale never went to trial. No such obligation was known at law. Such duties as were owed by the mortgagee – which was treated as the legal owner of the land it purported to sell – were owed in equity and had to be vindicated by a suit commenced on the other “side” of the Supreme Court.

Now what was said in 1935 as to the different procedure at law, and the need to commence in Equity, has not been good law in New South Wales since statute intervened in 1972.²⁹ But what was said about the essential nature of a power of sale under a mortgage, and when it would be treated as ineffective to defeat the mortgagor's equity of redemption, continues as a foundation of property law in the 21st century.

The crisp clarity of *Coroneo* invokes its antithesis, *Cuckmere Brick Co Ltd v Mutual Finance Ltd*,³⁰ which neglected the nature of a mortgage and subjected the

28 W Twining, *Jurist in Context – a Memoir* (Cambridge University Press, 2019).

29 The commencement of the *Supreme Court Act 1970* (NSW) and the *Law Reform (Law and Equity) Act 1972* (NSW).

30 [1971] Ch 949.

mortgagee to a duty at common law based on reasonableness. That decision and those which followed may be seen as flowing in part from the imperial march of negligence,³¹ in part from forgetting the true nature of a mortgage, and in part from the understandable instinct grounded in the coherence of the law that a mortgagee ought to take reasonable care when realising security after default. Statute now modifies the duties owed by mortgagees, but those provisions³² in turn give rise to further issues, and as the authorities addressed in *James v Australia and New Zealand Banking Group Ltd* illustrate,³³ the intrusion of statute here, as in so many areas of the law, simply means that this practical legal history is all the more essential.

A less well known aspect of *Coroneo* is the rejection of Mr Coroneo's claim for damages for the mortgagee effecting a sale without the leave of a court having jurisdiction under the *Moratorium Act 1930*, holding that the criminal offence created by that Act stood in the way of a private law right to damages. No one today much cares about the effect the *Moratorium Act* had upon the exercise of private powers. But perhaps there is something which can be learned from it. The *Moratorium Act 1930* was in fact a response to a global crisis; the response, last month, to the economic consequences of the COVID-19 virus is not dissimilar, especially in Victoria, in fettering mortgagee's exercising powers of sale.³⁴

This notion of multiple layers of a label's legal meaning, easily uttered in a submission or a judgment, but which require a deal of understanding of legal history in order to unpack them, occurs throughout law. And it does so in a multitude of ways.

31 Cf *Astley v Austrust Ltd* (1999) 197 CLR 1; [1999] HCA 6 at [48].

32 *Conveyancing Act 1919* (NSW), s 111A and *Corporations Act 2001* (Cth), s 420A.

33 (2018) 97 NSWLR 663; [2018] NSWCA 41 at [58]-[68]. Shortly put, the confusion caused by *Cuckmere Brick* was noted by the Queensland Law Reform Commission and led to legislative clarification, but not so as to alter the rights at general law as between mortgagee and a third party such as a guarantor of the mortgagor's indebtedness.

34 See s 46 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic); the New South Wales legislation applies to landlords but not, so far as I can see, to mortgagees: see Retail and Other Commercial Leases (COVID-19) Regulation 2020 (NSW).

The entirety of the *Civil Liability Act* is heavily dependent upon the position “at common law”, as I have sought elsewhere and at some length to explain.³⁵ The legislation interacts with judge-made law at a number of levels. One is that it alters the rules formulated at general law. Hence causation in cases to which s 5D applies (most cases in negligence) resembles McHugh J's minority approach in *March v E & MH Stramare Pty Ltd*.³⁶ Another is that it overturns the results in particular cases. Hence a decision that a plaintiff is 100% contributorily negligent is possible thanks to s 5S, contrary to what had been held (one might think, as a matter of common sense and self-evident construction) by a unanimous High Court in *Wynbergen v Hoyts Corporation Pty Ltd*.³⁷ A third is that the legislation picks up the very words of influential judgments, and then modifies them both textually and structurally; the clearest example is perhaps how s 5B alters what was said by Mason J as to breach in *Wyong Shire Council v Shirt* in the familiar passage in volume 146 of the Commonwealth Law Reports, where the volume is apt to open of its own accord, at the bottom of page 47 and the top of page 48.³⁸ One cannot understand ss 5B and 5D and 5S without an understanding of legal history in this sense.

Many other simple labels employed in legal discourse carry with them concealed complexity. The “rule” in *Jones v Dunkel* is one example.³⁹ The “duty to hold harmless” in an insurance policy reflects the complex interplay of equitable intervention to ameliorate common law's insistence that an insured pay before calling on an indemnity, and the availability of statutory damages after 1858.⁴⁰ “Modified common law damages” made available to workers under Part 5 of the *Workers Compensation Act 1987* (NSW) reveal complexity of a different order: the quantum for precisely the same injury is quite different from damages to which the *Civil Liability Act* applies, with extraordinarily complicated modifications for tortfeasor contribution but – somewhat counterintuitively in light of the label – the

35 M Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019).

36 (1991) 171 CLR 506; [1991] HCA 12.

37 [1997] HCA 52; 72 ALJR 65.

38 (1980) 146 CLR 40 at 47-48.

39 See *RHG Mortgage Corporation Ltd v Ianni* [2016] NSWCA 270 at [19]-[21].

40 See *Globe Church Inc v Allianz Australia Insurance Ltd* [2019] NSWCA 27 at [295]-[299].

test of causation is *not* that prescribed in s 5D, but rather is a rare surviving example of the majority reasons in *March v Stramare*.

In one sense, this is very much legal history in practice, happening all the time without our thinking about it – much as M Jourdain spoke prose. There are hundreds of essential things in the professional kit of a litigator which are basal and often unwritten. This is a theme of Sir John Baker's monograph *The Law's Two Bodies*, which dwells on the distinction between “the law as found in books of authority and the law as it operates in real situations (whether in or out of court)”,⁴¹ and on another occasion it warrants exploration. For now it suffices to note that the essential aspects of legal history in this sense include: the relationship between the Supreme Court Rules in force between 1972 and 2005 and the Uniform Civil Procedure Rules 2005; the differences in procedure at common law and in equity in the Supreme Court prior to 1972, the basic operation of the Judicature legislation, the highly regarded character of chancery under Cairns and Selborne, of common law in the 1860s-1880s, of the merits of Haldane and Hamilton (who rapidly became Lord Sumner), of the English Court of Appeal adorned by Scrutton, Bankes and Atkin, and so on. I wonder if in the intensity of practical training to which readers at the New South Wales Bar are subjected, some of this partly unwritten essential background knowledge is overlooked? This may sometimes backfire. One counsel who appeared before the Judicial Committee of the Privy Council in 1984, and who led me in an early appearance in this court a decade later,⁴² told me how. In a contract case, he as junior had worked up a line of public law cases on a point. Lord Diplock asked, “Why are you bothering us with all these cases about statutory powers? This case has nothing to do with statutory powers. It's a contract case.” The response was, “My Lord, in the golden age of contract law, contracts were referred to as private statutes.” “Mr Katz, I wasn't aware that the golden age of contract law had ended.”⁴³

41 J Baker, *The Law's Two Bodies* (Oxford University Press, 2001), p 1.

42 In *Arena v Nader* (1997) 42 NSWLR 427, of which, unsurprisingly, Professor Campbell wrote, in “Commonwealth Powers and Privileges of State Parliaments” (1999) 20 *UQLJ* 201.

43 Leslie Katz, personal communication, and see https://www.bailii.org/uk/cases/UKPC/1985/1985_1.html. I am told the junior counsel resumed, undaunted, “My Lord, in the formative years of contract law, ...”

Oliver Wendell Holmes noted “one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis”.⁴⁴ Holmes was saying something about the role of legal history in understanding what such legal slogans meant. This too is an aspect of Maitland's paradox that the better an understanding of legal history one has, the more its burden is lightened. The more we understand how the law has come to where it is, the more we can see why it has done so, and the more deftly we can avoid inertial tendencies which are foreign to that purpose, which is to say, preventing decisions being read more widely than they warrant.

There are occasions, relatively rare, when what Cardozo termed the “Method of History”⁴⁵ is at the forefront of a choice to be made by a court – normally, an ultimate appellate court. Examples may be seen in such landmark decisions as the *Marriage Act* case,⁴⁶ in the Australian approach to penalties in *Paciocco*,⁴⁷ and in the analysis of the competency of accused persons to give evidence in *Cornwell*.⁴⁸ I've chosen examples in constitutional law, equity and crime, but I am sure you could think of many other decisions in your favoured areas of law. Landmark cases such as those attract a deal of attention, and don't need any exhortation from me to highlight the significance of history.

I want to address two different uses of legal history, as illustrated by last month's outstandingly important decision, *Smethurst v Commissioner of Police*.⁴⁹ The High Court answered questions in a special case filed in its original jurisdiction concerning the issue and execution of a warrant upon a journalist. The High Court unanimously held that the warrant was invalid, but divided on relief.

The facts insofar as they presently matter are straightforward. No physical thing

44 *Hyde v United States* 225 US 347 at 391 (1912).

45 B Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), ch 2.

46 *Attorney General (Vic) v Commonwealth* (1962) 107 CLR 529, esp at 584-598.

47 *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525; [2016] HCA 28.

48 *Cornwell v The Queen* (2007) 231 CLR 260; [2007] HCA 12 at [32]-[56].

49 [2020] HCA 14.

was taken by the executing federal police officers. The journalist, in compliance with an order made pursuant to s 3LA of the *Crimes Act 1914* (Cth), provided the passcode to her mobile phone. That permitted the police to make a copy of some of its data onto a laptop. The data was then interrogated by keyword searches with a view to identifying what answered the warrant, and the hits were copied onto a USB stick. The data was then erased from the laptop,⁵⁰ and the police left with the USB stick.

The journalist sought injunctive relief, consequent upon the invalidity of the warrant, requiring the return or destruction of the information which had been copied onto the USB stick.⁵¹ No claim was made based on breach of confidence or copyright or invasion of privacy. Instead, her claim was based either on an implied entitlement under the statute under which the warrant was obtained, or else as a consequence of the trespass which occurred because the warrant was invalid.

All members of the Court agreed that the statute did not impliedly oblige return of the copied information. Four judges held that there was no right at general law to such an injunction, and, further, held that if there were, it was discretionary and the discretion should not be exercised in favour of the journalist. The three dissentients favoured granting mandatory injunctive relief – although on terms which would permit a further warrant to be sought and obtained if a proper basis were available.

This is a fundamental question at the intersection of public and private law. It is to be borne in mind that in the past “significant questions of public law frequently were determined not by prerogative writ procedures but as issues in actions for damages at law or in equity suits”.⁵² Gummow J gave as examples, among others, the injunction sought by Bradlaugh to restrain the Sergeant-at-Arms from excluding him

50 The litigation proceeded on the basis that this occurred, although perhaps merely some internal directory pointers were altered; it is quite hard to delete a file; cf *Clark v R* [2008] NSWCCA 122 at [242].

51 She also sought an injunction restraining police from making the data available to prosecuting authorities.

52 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 558 (Gummow J).

from the House of Commons,⁵³ and the 18th century decisions of the Court of Common Pleas on general warrants, including *Entick v Carrington*. Such litigation illustrates the importance of there being, in Matthew Dyson's words, “fewer conceptual silos for the law”.⁵⁴

The Australian Constitution being a child of United Kingdom and United States ancestry, the issues prompted by Ms Smethurst's case turned in part on the role of s 75(v) in the Constitution authorising amongst other things injunctive relief against officers of the Commonwealth, and in part on the role of equity in providing remedies when common law damages for the trespasses committed by the police officers are inadequate. One cannot begin to understand this without an appreciation of (a) the role played by s 75(v), which is a response to *Marbury v Madison*⁵⁵ and (b) the inclusion in s 75(v) of the equitable remedy of an injunction.

A great deal of purely historical learning was deployed in the judgments,⁵⁶ exposing the near-run exclusion of s 75(v), which grants original jurisdiction to the High Court in all matters “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. Briefly, the 1891 draft contained a clause which resembled s 75(v), but confined to mandamus and prohibition. That clause was removed in a tidy-up in 1897, in the absence of Griffith and Clark. Clark noticed, and wrote to Barton. That telegram seems to have been lost, but the Clark papers in the University of Tasmania Archives preserve Barton's response, the relevant paragraph of which is:⁵⁷

53 *Bradlaugh v Gossett* (1884) 12 QBD 271.

54 M Dyson, “Coherence and illegal claims” (28 April 2020), p 28, available at SSRN: <https://ssrn.com/abstract=3587435>.

55 5 US 137 (1803).

56 Including W Gummow, “The Scope of Section 75(v) of the Constitution: Why Injunction but No Certiorari?” (2014) 42 *Fed L Rev* 241, D Reynolds, “The Injunction in Section 75(v) of the Constitution” (2019) 30 *PLR* 211 and indeed M Leeming, “Standing to seek injunctions against officers of the Commonwealth” (2006) 1 *J of Eq* 3.

57 University of Tasmania Archives, Andrew Inglis Clark Collection, C4/C15, letter from Barton to Clark dated 14 February 1898, reproduced pursuant to Creative Commons Attribution-NonCommercial-NoDerivs 2.5 Australia (CC BY-NC-ND 2.5), and available at <https://eprints.utas.edu.au/10241/>.

I have to thank you further for your telegram as to the shifting out of the power given to the High Court to deal with cases of mandamus & prohibition against officers of the Commonwealth. None of us here had read the case mentioned by you, or if seen, had been forgotten - It seems however to be a leading case. I have given notice to revise the words on the reconsideration of the clause.

Ow

I think this is an example of the “thrilling interest” of legal history to which Maitland once referred.⁵⁸ We can see the very document which reflected a tipping point in the constitutional development of Australia. In the absence of Clark and Griffith from the 1897 convention, the tidying-up process had deleted the clause in ignorance of its high constitutional purpose. Barton, who knew as much about the drafting as anyone at the convention, is shown to have been as fallible as any of us, in relation to *Marbury v Madison*.⁵⁹ But for Clark's intervention from the sidelines, an important aspect of federal jurisdiction – on which thousands of decisions in all areas of federal administrative law depend – might not have been available.

(Or was it a tipping point? In some counterfactual version of Australian constitutional law, where Clark's telegram was lost and s 75(v) was never enacted, perhaps the law would have developed some means by which executive action could invariably be reviewed. Consider, after all, *Kirk*,⁶⁰ and note that judicial review of legislative and executive action was well-established in the Australian colonies – and was much resented in the 18th century when *Entick v Carrington* was heard and

58 “The only direct utility of legal history (I say nothing of its thrilling interest) lies in the lesson that each generation has an enormous power of shaping its own law”, cited by C Fifoot, *Frederic William Maitland: A Life* (Harvard University Press, 1971), p 143.

59 It is difficult to see on the black and white reproduction, but the original letter has “Marbury v Madison” in a different pen, after the rest of the letter had been written, suggesting Barton had forgotten the name of the case even when replying to Clark.

60 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1.

decided.⁶¹⁾

Of course Barton caused the clause to be reinstated, in an expanded form so as to include injunctions. The alteration matters. Injunctions are more broadly availability than the prerogative writs; for example, they are not limited by jurisdictional error.⁶² More generally, as Sir Anthony Mason observed:⁶³

[E]quitable relief in the form of the declaration and the injunction have played a critical part in shaping modern administrative law which, from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.

Ms Smethurst sought not merely the quashing of the search warrant but also a mandatory injunction for the return of the information copied by the executing officers. The main basis on which Ms Smethurst grounded her proceeding in the High Court's original jurisdiction was under s 75(v).

The basic proposition that it is a trespass for anyone, including the executive, to enter into one's property and seize one's goods, is long established. The officer will commit a tort unless he or she can establish a defence of necessity or lawful authority. As much was said in *Coco v The Queen*⁶⁴ and *Plenty v Dillon*.⁶⁵ Both those joint judgments cited Lord Camden's famous 1765 judgment in *Entick v Carrington*.

However, the careful reader will see that they did so a little differently. *Coco v The Queen* cited the report by Serjeant Wilson, while *Plenty v Dillon* gave the citation from State Trials. This may be contrasted with the Supreme Court of the United

61 See M Bilder, "The Corporate Origins of Judicial Review" 116 *Yale LJ* 502 (2006) and M Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011), pp 100-106.

62 *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146; [2008] HCA 32 at [46].

63 A Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World", (1994) 110 *LQR* 238 at 238, cited in *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247; [1998] HCA 49 at [24].

64 (1994) 179 CLR 427 at 435-436.

65 (1991) 171 CLR 635 at 639.

Kingdom's unanimous decision late last year in *Miller*,⁶⁶ where the basal proposition that lawful statutory authority was required was reaffirmed, citing *Entick* and giving the citations in both the English Reports and in State Trials.⁶⁷

You might think this is nitpicking – even by my standards. But let me explain the point.

Consistently with what I have said about context, what do we know about *Entick v Carrington*? *Entick v Carrington* is one of those decisions which are famous now, but spent much of their lives relatively unknown. One commentator has said:⁶⁸

That *Entick* is a great case and, specifically, that it is a great constitutional case about the rule of law may be a twentieth-century notion.

Entick v Carrington thus falls into the same category as *Donoghue v Stevenson* and *Marbury v Madison* and many others.⁶⁹ This phenomenon recurs throughout law. It is an instance of the complexity accompanying any appropriation of the past – as one reviewer of Lowenthal's *The Past is a Foreign Country - Revisited* wrote, there are many ways in which “societies view, appropriate, use, misuse, construct, reconstruct, glorify, and distance themselves from the past”.⁷⁰

David Feldman has written a marvellously luminous overview of the political, judicial and factual context.⁷¹ The contemporaneous documents tell us something about the decision. There is good reason to believe that judgment took 2 hours and 20

66 *R (on the application of Miller) v Prime Minister* [2019] UKSC 41; [2019] 4 All ER 299 at [32].

67 Actually, the judgment delivered by the Supreme Court, and as reported in [2019] 4 All ER 299, did so. The judgment as reported at [2020] AC 373 omits reference to Wilson's reports. Why that is so is unclear; perhaps it was regarded as a matter of style. More generally, it should not be too readily assumed that the text of a modern judgment is the same in different reports. By way of example, there are at least six textual divergences (all very minor) between [34] of the judgment published by the Supreme Court under the name *Re French Caledonia Travel* [2003] NSWSC 1008 and the same judgment reported as *Sutherland Re; French Caledonia Travel Services Pty Ltd (In Liq)* (2003) 59 NSWLR 361. Cf the work of Pollock when editor of the law reports, mentioned below, text at n 102.

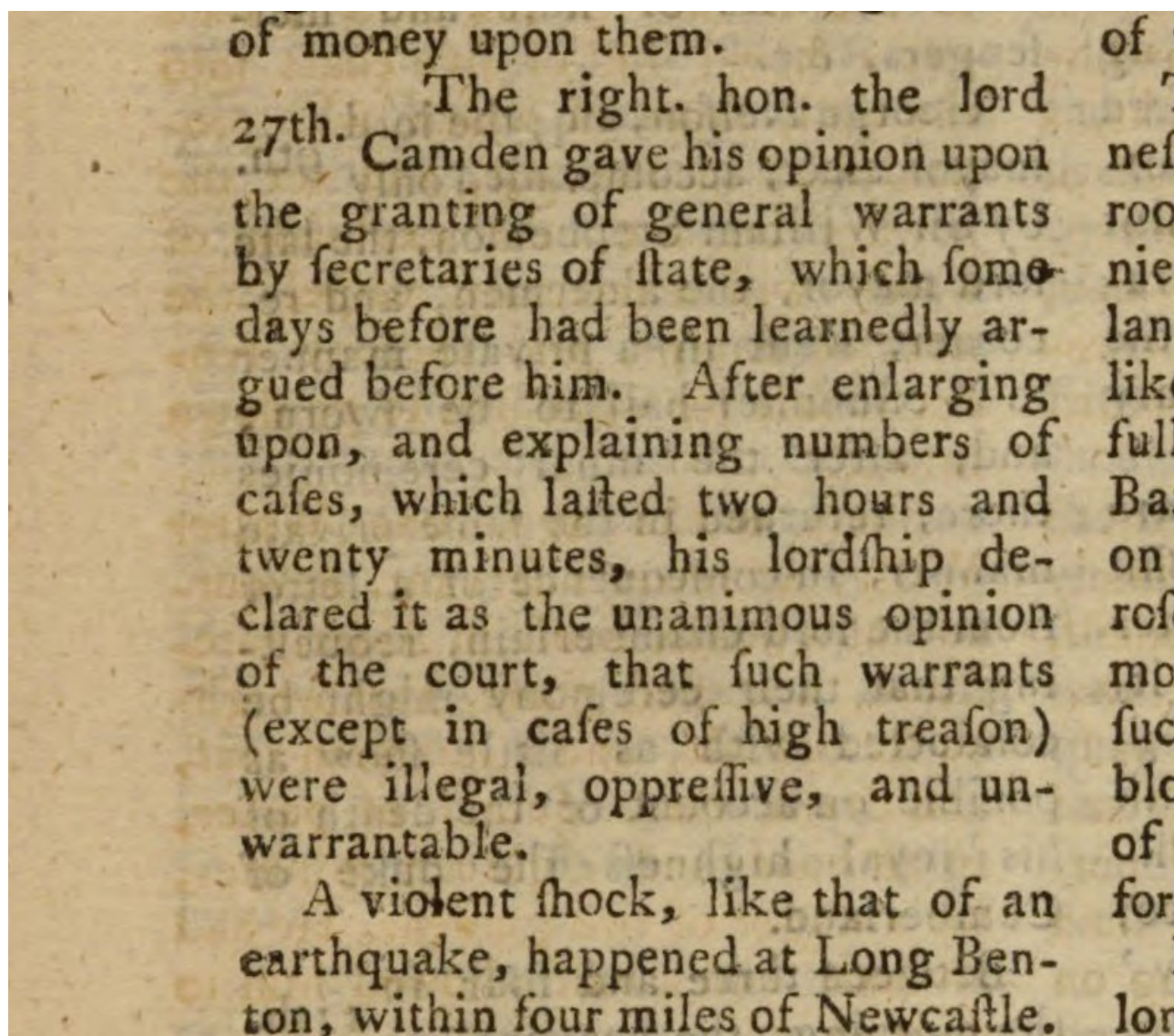
68 A Tomkins, “The Authority of *Entick v Carrington*” in A Tomkins and P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing, 2015) 161 at 162.

69 See R Goff, “The Search for Principle” in (1984) 69 *Proceedings of the British Academy* 169 at 178-9.

70 A Murphy et al, (2017) 5(3) *The AAG Review of Books* 201.

71 D Feldman, “The Politics and People of *Entick v Carrington*” in A Tomkins and P Scott (eds), *Entick v Carrington: 250 Years of the Rule of Law* (Hart Publishing, 2015), pp 5–41.

minutes to be delivered. Burke and Dodsley's Annual Register was published in Pall-Mall in 1766, and mentions the decision:⁷²



The *London Chronicle* likewise remarked on how long the judgment had taken to deliver (2½ hours).⁷³ One might infer that the duration of the oral delivery of judgment was regarded as remarkable for the time.⁷⁴

The two reports of the judgment are quite different. That in volume 2 of Serjeant Wilson's reports is 4½ pages long. The judgment in State Trials occupies columns

72 Google Books makes available a scanned copy of E Burke and J Dodsley, *The Annual Register, or a view of the History, Politicks and Literature for the year 1766*.

73 Cited by T Davies, "Recovering the Original Fourth Amendment" 98 *Mich L Rev* 547, 563 n22 (1999).

74 Cf *Fairall v Hobbs* [2017] NSWCA 82 at [2]-[4] and [10]-[15].

1044-1076 – some 32 columns in much smaller typeface. The large majority of what Lord Camden is portrayed as having said in *State Trials* is absent from the report in *Wilson*. Yet *Wilson* was described in a contemporaneous source as “that most accurate and judicious reporter”,⁷⁵ and the fact that his reports went to a third authorised edition tends to corroborate that opinion. The reports were published, respectively, 5 and 15 years after judgment was delivered orally.⁷⁶ There was ample room for error to intrude. But perhaps that statement is an example of failing to switch our minds over to 18th century thought processes. In the 21st century it is important to avoid what has aptly been called the “textualisation of precedent”,⁷⁷ but three centuries earlier, notions of an authentic text were different. Further, part of the explanation appears in the report in *State Trials* itself. The editor candidly says that the state of the case and counsels' arguments is taken from Serjeant *Wilson*'s reports, but adds that for the judgment, he has “the pleasing satisfaction to present to the reader the Judgment itself at length, as delivered by the Lord Chief Justice of the Common Pleas from written notes”.

Let me now turn to the statement of the case:

75 Anonymous translation (by “a Gentleman of the Middle Temple”) of S Euer, *A System of Pleading* (London 1771), p 480; he was also praised by J Wallace, *The Reporters Arranged and Characterized* (Soule and Bugby, 4th ed 1882), pp 442-3 (I am grateful to Leslie Katz for the references).

76 The *English Reports* reproduce the 3rd edition of *Wilson*, published in 3 octavo volumes in 1799. I have not located a physical or imaged copy of the first edition. However, the first and second editions were published in three folio parts in 1770 and 1775 and bound in two volumes, and the first edition was published in 1770 and 1775: R Bridgman, *A Short View of Legal Bibliography* (London, 1807) p 364. The second volume of the second edition is available on Google Books, and shows that it contains the third part alone, of cases reported from 1769. Accordingly, *Entick v Carrington* was published in the first volume of the first edition in 1770. The 11th volume of *State Trials* (reprinted as 19 Howell *State Trials*) was published in 1781: see T Davies, “Recovering the Original Fourth Amendment” 98 *Mich L Rev* 547, 565-566 n25 (1999).

77 See P Tiersma, ‘The Textualization of Precedent’ (2007) 82 *Notre Dame L Rev* 1187 and see for example *Comcare v PVYW* (2013) 250 CLR 246; [2013] HCA 41 at [15]-[16].

John Entick, Clerk, *versus* Nathan Carrington and three others, Messengers in ordinary to the King. C. B.

IN trespass; the plaintiff declares that the defendants on the 11th day of *November* in the year of our Lord 1762, at *Westminster* in *Middlesex*, with force and arms broke and entered the dwelling-house of the plaintiff in the parish of *St. Dunstan Stepney*, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes,

Trespass for breaking and entering plaintiff's house, &c.

The opening sentence in the report resembles the opening sentence in *Coroneo*. That reflects the fact that the same procedure at common law applied in 1765 in Common Pleas, and in 1935 in the Common Law “side” of the Supreme Court of New South Wales. That is an example of *superficial* continuity. If you think about it, it is an utterly remarkable thing, how procedure abolished in England and Wales in 1875, and only ever applicable to courts at common law, could have been transplanted to New South Wales, whose Supreme Court always had a general jurisdiction at common law and in equity. With the enormous assistance of primary research done by John Bennett and John Bryson, I once sought to understand how that came about, and it is a remarkable story of the determination of the Colonial Office to impose uniformity, and the inertial habits of practitioners.⁷⁸

Turning now to those reasons delivered at length in 1765, both reports of *Entick v Carrington* contain the same substance of the passage relied on in *Plenty* and

⁷⁸ See M Leeming, “Fusion-Fission-Fusion: Pre-Judicature Equity Jurisdiction in New South Wales 1824-1972” in J Goldberg et al (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019), pp 118-143.

Coco. Here they are, first Wilson⁷⁹ and then the corresponding passage from the report in State Trials.⁸⁰

our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's clofe without his leave; if he does he is a trespasser, though 'he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law. The defendants have no right to avail themselves of the usage of these warrants since the Revolution, and if that would have justified them they have not averred it in their plea, so it could not be put, nor was in issue at the trial; we can safely say there is no law in this country to justify the defendants

general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the

It is as though the report in State Trials has taken every clause in Wilson and expanded it – as if the reporter were being paid by the word (as lawyers used to be). There is in fact a much closer resemblance between Arthur Conan Doyle's first description of Sherlock Holmes in "A Study in Scarlet",⁸¹ and Umberto Eco's description of Brother William of Baskerville in *The Name of the Rose*⁸² – even

79 (1765) 2 Wils 275 at 291

80 (1765) 19 St Tr 1029 at 1066.

81 "In height he was rather over six feet, and so excessively lean that he seemed to be considerably taller. His eyes were sharp and piercing, save during those intervals of torpor to which I have alluded; and his thin, hawk-like nose gave his whole expression an air of alertness and decision. His chin, too, had the prominence and squareness which mark the man of determination. His hands were invariably blotted with ink and stained with chemicals, yet he was possessed of extraordinary delicacy of touch, as I frequently had occasion to observe when I watched him manipulating his fragile philosophical instruments."

82 "His height surpassed that of a normal man and he was so thin that he seemed still taller. His eyes were sharp and penetrating; his thin and slightly beaky nose gave his countenance the expression of

allowing for what is lost in translation.

In *Smethurst*, each of Gageler J and Edelman J, separately dissenting as to remedy, referred to *Entick v Carrington*. Gageler J relied on it thus:⁸³

It is now more than 250 years since the celebrated judgment of Lord Camden in *Entick v Carrington* cemented the position at common law that the holder of a public office cannot invade private property for the purpose of investigating criminal activity without the authority of positive law. Lord Camden referred to the private papers unlawfully seized in that case as their owner's "dearest property". He said that "though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass". In so saying he recognised a link between protection of personal property and protection of freedom of thought and political expression.

Gageler J regarded the juridical basis of Ms Smethurst's entitlement to an injunction as grounded in the constitutional grant of jurisdiction in s 75(v):⁸⁴

The juridical basis for the final mandatory injunction sought by Ms Smethurst lies in its issue within the discretion of the Court being constitutionally appropriate to restore Ms Smethurst to the position she would have been in had her common law rights to control access to her real and personal property not been invaded by the tortious conduct of the AFP in circumstances in which money alone cannot restore her to that position.

Edelman J also favoured granting injunctive relief, but without reliance on something extrapolated from s 75(v):⁸⁵

In particular, contrary to the plaintiffs' submissions, it is not permissible to resort to assertions of a generally unarticulated new principle such as a power to "reverse consequences" by the mere assertion that the violation of a plaintiff's property rights was committed by the State. No such principle was recognised in *Entick v Carrington*, which involved neither an injunction nor the exercise of jurisdiction under s 75(v) of the Constitution. Indeed, the

man on the lookout, save in certain moments of sluggishness of which I shall speak. His chin also denoted a firm will, though the long face covered with freckles could occasionally express hesitation and puzzlement" (English translation by Weaver).

83 At [124].

84 At [130].

85 At [239].

highfalutin language in that case might reflect an eighteenth century elevation of the right to property above other rights, which are at least as fundamental, such as bodily integrity or liberty. It would be remarkable if today the remedies for infringement of rights to property were somehow elevated to a privileged position over bodily integrity or liberty.

Both judgments rely on reasons for judgment delivered a quarter of a millenium ago, for very different purposes.

The different approaches suggest a very important question. What is the correct way to conceptualise the problem? Indeed, is there a correct way? The issue arises at the intersection of public law and private law (which you will recall was one of the themes of Professor Campbell's work). The non-compliance with the statute leads to an absence of power, and therefore a trespass to land and to goods for which there is no defence of lawful authority, and for which an equitable remedy in the form of a mandatory injunction is sought.

One approach is to focus upon the constitutional role of the courts in enforcing the limits governing the exercise of public power, and to deduce that the private law remedies expressly made available by s 75(v) may be fully employed to that end. That coheres with what was said by Gaudron and Gummow JJ in *Re Refugee Review Tribunal; ex parte Aala*,⁸⁶ that “in the operation of s 75(v) of the Constitution, terms such as 'prohibition' and 'jurisdiction' are not simply institutions or concepts of the general law. They are constitutional expressions”. The same might be said of “injunction” in s 75(v).

Another approach is to proceed on the basis that the “common law” is the ultimate foundation of the Australian legal order, and that restraints on the exercise of public power result in the availability of traditional private law rights (here, trespass to which no defence of lawful authority is available) and private law remedies (here, injunctions, damages being inadequate). The latter is consistent with results such as the rejection of a *Bivens* cause of action for damages for breach of the

86 (2000) 204 CLR 82; [2000] HCA 57 at [19].

Constitution in *Kruger v Commonwealth*,⁸⁷ and the need to rely on private law. It also recalls Dixon's observation when speaking in the United States in 1942 that "Australia, as you know, is a common law country. That simple statement carries with it prodigious consequences".⁸⁸

I am far from persuaded that there is a correct way. I think it is necessary to have a conceptual understanding of the ways in which bodies of law collide to produce the issue raised in *Smethurst*. I also think it is necessary to appreciate how similar issues have been determined in the past. But more than anything, I think it is vital not to be too sure of one's own instincts. One of the most famous statements by one of the most distinguished judges in the United States pointedly emphasised – after more than three years of bloody worldwide conflict, and at a naturalisation ceremony where the tendency to belligerent nationalistic certainty was ever-present – the importance of not being too sure that one is right.⁸⁹ Judge Learned Hand was talking about what he called "The Spirit of Liberty". Humility is an under-appreciated virtue in law. Indeed, this may be the greatest difference between our times and the attitude of those Victorians such as Blackburn and Jessel who had the self-confidence and certitude of their age. Robert Goff was alive to this, and in his address "The Search for Principle" he warned those who were minded to state legal principles against what he called "the temptation of elegance", saying of it:⁹⁰

This is a temptation which can attract us all, simply because a solution, if elegant, automatically carries a degree of credibility; and yet the law has to reflect life in all its untidy complexity, and we have constantly to be on our guard against stating principles in terms which do not allow for the possibility of qualifications or exceptions as yet unperceived.

Goff was echoing – whether consciously or unconsciously I do not know – Fullagar J's reference to "the temptation, which is so apt to assail us, to import a

87 (1997) 190 CLR 1.

88 O Dixon, "Two Constitutions Compared" in S Crennan and W Gummow (eds), *Jesting Pilate* (Federation Press, 2019), p 220.

89 L Hand, "The Spirit of Liberty", speech given 21 May 1944, Central Park, New York.

90 R Goff, "The Search for Principle" in (1984) 69 *Proceedings of the British Academy* 169 at 174.

meretricious symmetry into the law”.⁹¹ Yet another advantage of a knowledge of legal history, and it is far from the least important, is an appreciation of one's own fallibility.

My real reason for highlighting the different texts of Lord Camden's judgment in *Wilson* and *State Trials* is not so much the difference between the two. There is in fact a third version of the judgment. A manuscript was prepared for the then Attorney-General under Lord Bute, Charles Yorke (Lord Hardwicke's son, who died mysteriously in 1770 three days after being made chancellor),⁹² and is held in the British Library.⁹³ A very similar manuscript is held in Lincoln's Inn.⁹⁴ Neither has as yet been formally published, although a transcription was made available, earlier this year, in the form of a preprint of a law review article on SSRN⁹⁵ by two scholars, Professor Arvind of the University of York (who may be familiar for his book on legislation and tort law),⁹⁶ and Professor Burset of Notre Dame University, Indiana (which is the only law school so far as I am aware which teaches Equity using as a compulsory text *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies*). I am grateful to them for permission to use these images, which I think is the first time the manuscript has been seen publicly in this country. It is exquisitely beautiful:

91 *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237 at 285.

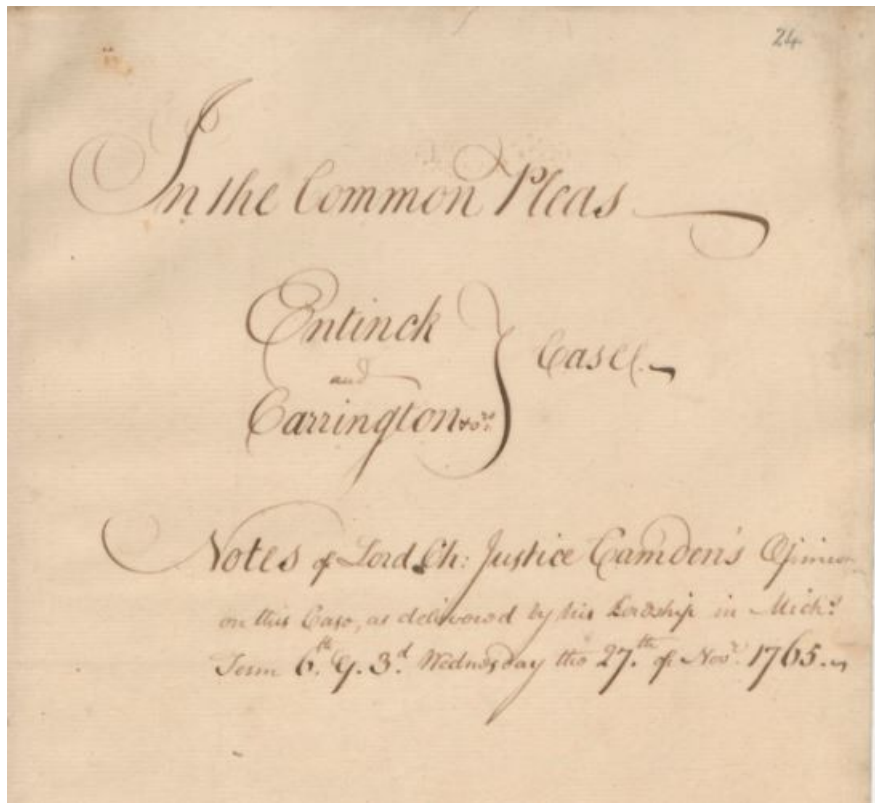
92 See the contemporaneous, pointed account by Horace Walpole, *Memoirs and Portraits* (M Hodgart, ed, Macmillan, 1963), pp 220-222.

93 BL Add MS 36206.

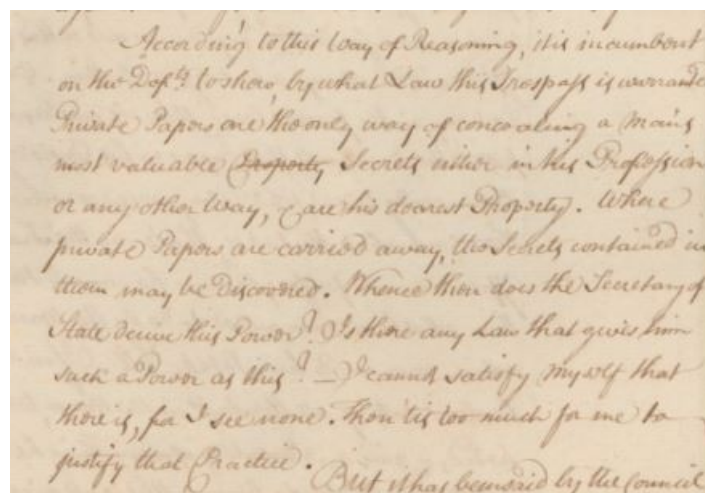
94 Lincoln's Inn Library, Misc 562.

95 T T Arvind and C R Burset, "A New Report of *Entick v Carrington* (1765)" <https://ssrn.com/abstract=3529420>.

96 T Arvind and J Steele (eds), *Tort law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford: Hart Publishing, 2012).



Here is the passage which quotes Lord Camden's reference to private papers being a man's "dearest property".⁹⁷



There is no mention *at all* of the passage concerning the eye not being guilty of a trespass, nor the aggravation of a trespass by the secret nature of private papers.

⁹⁷ I am most grateful to Professors Arvind and Bursat for this image of the 39th page of the manuscript in the British Library.

There is good reason to think that those words were never spoken by Lord Camden. The volumes of the State Trials are famously embellished. Sir John Baker has written of the prolixity of the style of their editor, Francis Hargrave.⁹⁸ The embellishment of language for publication was endemic in the 18th century; one famous example a few years later is Hawkesworth's appalling efforts to “elevate” the account of Cook's first voyage in the 1773 publication.⁹⁹ “High falutin language” is largely absent from the manuscript report.

None of this is or should be taken to be a criticism of Gageler J's reasoning. This is not some *Name of the Rose* account of a long lost manuscript whose non-availability has profoundly influenced western thought. If you are waiting for Sean Connery as Brother William to walk through the door carrying a smouldering manuscript, you will be disappointed. The report in State Trials has been available for 240 years and has influenced the law profoundly. Even if it is not what Lord Camden said, that does not mean the published text is not a source of law. The best evidence rule does not apply here. The processes of legal history are utterly different from the patient textual analysis of conflicting manuscripts familiar to students of classical and mediaeval texts.

I believe the last time this issue arose in this courtroom was when counsel each preferred different reports of another 18th century decision on misfeasance in public office, delivered this time in 1783 in King's Bench: *R v Bembridge*.¹⁰⁰ In *Obeid v R*,¹⁰¹ the issue was presented as a binary one: either the report in State Trials published in 1817, or that in the third volume of Douglas, published even later in 1831. There the issue turned on a very fine point of expression, and ultimately it was not necessary to decide which was preferable. That was probably just as well,

98 J Baker, 'Hargrave, Francis (1740/41 – 1821)' in *Oxford Dictionary of National Biography*.

99 Cook was mortified, not merely by the classical allusions Hawkesworth placed in his words, nor by the nautical blunders introduced by Hawkesworth, but by the simple lie in the introduction that “the manuscript had been read to him at the Admiralty for his approval, and such emendations as he had suggested had been made”: see J Beaglehole, *The Life of Captain James Cook* (A & C Black, 1974), p 439, and M Leeming, “Hawkesworth's *Voyages*: the first “Australian” copyright litigation” (2004) 9 *A J of Leg His* 159.

100 (1783) 3 Doug 327; 99 ER 679; 22 St Tr 1.

101 (2015) 91 NSWLR 226; [2015] NSWCCA 309.

because both have been influential. An inaccurate account of what was said may be influential – indeed, more influential than the words actually spoken by the judge. One of Frederick Pollock's numerous contributions to the common law was prevailing upon judges to alter their judgments as a condition of their publication in the law reports. His correspondence with Holmes is full of cathartic complaints, including about one decision,¹⁰² of which he said to Holmes “unluckily it came before the one weak judge of our Chancery Division and I had to edit his offhand judgment considerably to make a decent show of it for the Law Reports”.¹⁰³ Which is the more authoritative source – that delivered on the day, or that authorised for publication and circulating widely?

The manuscripts in the British Library and Lincoln's Inn were largely unknown until recently. That is not to say that they were unknown at the time. Manuscript notes of decision circulated in an age of capricious and much-delayed law reporting,¹⁰⁴ and it is *certain* that manuscript notes of this particular judgment circulated. The surviving documentary record demonstrates this. A 1766 pamphlet, *State Necessity Considered As a Question of Law*, commences with a quote which is absent from Wilson's report, and differs considerably from State Trials, but closely resembles the manuscripts.¹⁰⁵

102 *National Sailors' and Firemen's Union of Great Britain v Reed* [1926] Ch 536, noted (1926) 42 *LQR* 289.

103 Pollock to Holmes, 12 June 1926, in M Howe (ed), *The Pollock-Holmes Letters* (Cambridge University Press, 1942), Vol 2, p 183.

104 J Oldham, “The indispensability of manuscript case notes to eighteenth-century barristers and judges” in A Musson and C Stebbings (eds), *Making Legal History* (Cambridge University Press, 2012) 30.

105 As explained by Arvind and Bursset, above n 1, text at fn 32.

STATE NECESSITY

C O N S I D E R E D .

As a QUESTION of LAW,

“ I know of no distinction between *State Necessities* and
“ others ; our books do not make any such distinction ;
“ and we find in 3^o Car. 1st. Mr. Serjeant Ashley was
“ committed to the Tower, for saying in one of his ar-
“ guments at the bar, there was a *State Power*, or law
“ of the state, as well as of the country. And the Judges,
“ with respect to ship-money, were committed for saying,
“ there was a state necessity for it.”

Judgment in the case of Entick and Carrington, C. B.
Michaelmas 1765, delivered by L. Ch. J. Pratt.



L O N D O N :

Printed for S. BLADON, in Pater-noster-Row.

MDCCLXVI.

The most interesting thing of all, to my mind, is a passage in the manuscript which is not found either in Wilson or in the State Trials. It concerns the role of *stare decisis*. The manuscript records Lord Camden saying:

But I wou'd have it understood (tho' that is my Opinion), that the Law of this Country is never so safe, as where Courts of Justice hold themselves to be concluded by the Authorities of their Predecessors; for if Judges did not regard former Determinations, & were to think themselves at Liberty not to adhere to the Precedents of those who had gone before them; but on Principles and Opinions of their own, wou'd overturn former Determinations & settled Cases, they wou'd by that means, invest themselves with little less than Legislative Power, & no Certainty of Law cou'd be had.

Of course, the notion that courts today should restrain their decisions simply because other courts – even other courts which do not bind the court – have

decided the point – is one of the more important sources of continuity and stability in the legal system.¹⁰⁶ It is sometimes said that the modern notion of *stare decisis* is recent, going hand in hand with decent law reporting.¹⁰⁷ As Brian Simpson wrote:¹⁰⁸

The elaboration of rules and principles governing the use of precedents and the status of authorities is relatively modern, and the idea that there could be binding precedent more recent still. The common law had been in existence for centuries before anybody became very excited about the matter ...

On one view, what Lord Camden said may put the origins of *Stare decisis* a few decades earlier than may often be thought.

But it is important not to be too sure that one is right. Perhaps there is another way of understanding that passage. There was rivalry between Lords Camden and Mansfield on many issues (not least, George III's disastrous policies towards America).¹⁰⁹ It will be recalled that that was one of Adam Smith's praise of the English legal system, the "rivalship" between the courts¹¹⁰ - which in the 18th century operated in close proximity to each other, and competed with each other for fees. It was thought that Mansfield was irritated that the series of cases associated with Wilkes had been brought in Common Pleas, rather than King's Bench.¹¹¹ There is reason to think that Lord Camden was critical of Mansfield's attempts to reform the law of contract, including by incorporating much mercantile law. Speaking in the

106 See *Bourne v Keane* [1919] AC 815 at 874 per Lord Buckmaster: "the construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless your Lordships could say positively that it was wrong and productive of inconvenience", applied more recently in *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 28-29 and *Plaintiff M76-2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; [2013] HCA 53 at [198].

107 See N Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008), pp 53-57.

108 AWB Simpson, "The Common Law and Legal Theory" in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (1973), 77.

109 See J Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (University of North Carolina Press, 1992), Vol 1, pp 62-65. The contemporaneous editions of *Gentleman's Magazine* for November and December are much more preoccupied with the Stamp Act (enacted in March 1765 and repealed in early 1766) and the writings of Edmund Burke.

110 "Another thing which tended to support the liberty of the people and render the proceedings in the courts very exact, was the rivalry which arose betwixt them", A Smith, *An inquiry into the nature and causes of the wealth of nations* (1776) p 280, cited by T Zywicki, "Rivalry and superior dispatch: an analysis of competing courts in medieval and early modern England" (2011) 147 *Public Choice* 497.

111 Newcastle to Devonshire, 2 May 1763, Add MSS 32948 f 203, cited in N Poser, *Lord Mansfield: Judge in the Age of Reason* (McGill-Queen's University Press, 2013), p 249.

House of Lords against Mansfield's famous (and short-lived) copyright decision in *Millar v Taylor*,¹¹² Camden said of the common law judges that:¹¹³

Their business is to tell the suitor how the law stands, not how it ought to be; otherwise each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind.

It is tempting to think that the rivalry was within Westminster Hall, and even perhaps that Mansfield could see or hear what was happening at the northern end of the hall, as depicted by this famous print of earlier in the century, where Common Pleas is to the front right and Kings Bench is at the rear, to the right of the throne:



But an abundance of evidence (including archaeological) establishes Common Pleas moved into a “new building between the Hall wall and Richard's wall joining

112 (1769) 4 Burr 2302; 98 ER 201.

113 Cited by Oldham, *op cit*, p 108.

the main buttresses, also to the Tudor building called 'Queen Elizabeth's bedchamber'.¹¹⁴ The famous print, which is an excellent illustration of what was meant by a litigant such as Mr Coroneo having to start again on the other side of Westminster Hall, was inaccurate after around 1740 in relation to Common Pleas. It became more inaccurate still after 1826, when chancery relocated (decades before *Bleak House* was published).¹¹⁵ Even so, it may be that the unpublished remarks of Lord Camden accurately record a criticism of the wholesale changes introduced by Mansfield, which were not picked up in his own court, and which his successors would do much to reverse.

Let me turn to another poorly understood aspect of precedent. We are used to thinking of Australian law developing late in the period during which the federation became first a Dominion and then a nation. The critical steps are the High Court's refusal to be bound by the House of Lords, the acceptance of that by the Privy Council¹¹⁶ and the cessation of federal and state Privy Council appeals. That is a simple and somewhat satisfying story. But there is a lot to be said for the proposition that law as practised was quite different. The question in the subtitle of Professor Lunney's most recent book,¹¹⁷ "England's Obedient Servant?" encapsulates his thesis: tort law in the first half of the 20th century was different and innovative – notwithstanding the shadow of appeals as of right to the Privy Council. Recent research in New Zealand suggests a similar position.¹¹⁸ The finches Darwin saw on Galapagos evolved differently because of geographical separation; it is

114 "Unlike King's Bench and Chancery, which were still located inside Westminster Hall, as they had been since the Middle Ages, after 1732 the Court of Common Pleas moved to a room just outside the Hall to the west. In 1740, it received its own new courtroom.", citing D Gerhold, *Westminster Hall: Nine Hundred Years of History* (1999), p 44 and M Herber, *Legal London* (1990), p 9, both cited in E Kadens, "Justice Blackstone's Common Law Orthodoxy" 103 *NW UL Rev* 1553 (2009).

115 See L Katz, "Bleak House in Australian Reasons for Judgment" (April 3, 2020), available at SSRN: <https://ssrn.com/abstract=1315862> fn 6, with references to the *The Times*, April 15 1826, p 3) and R Shepherd, *Westminster: A Biography* (2012), at p 253 concerning Soane's new Law Courts built outside Westminster Hall's western wall.

116 *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221.

117 M Lunney, *A History of Australian Tort Law 1901–1945: England's Obedient Servant?* (Cambridge University Press, 2018).

118 See W Swain, "'The Great Britain of the South': the Law of Contract in Early Colonial New Zealand" 60 *Am J Leg History* 30 (2020), and see also the work of Professor Dorsett, including "The First Procedural Code in the British Empire: New Zealand 1856" (2017) 27 *NZULR* 690 and "Making Up the Issue: The Judges' Role in Formulating Actions in the Crown Colony Period - *Pharazyn v Smith* (1844)" (2010) 41 *VUW L Rev* 427.

natural to expect the same of legal systems. The natural human yearning for links and continuity may tend to disguise how disparate the present is from the past. That was one of Maitland's points and one of Enid Campbell's themes.

My last illustration of lawyers' uses of legal history is taken from an example of the "unreformed common law" from Professor Campbell's article. In *Swaffer v Mulcahy*,¹¹⁹ the question was whether the owner of tithe rent-charge could levy a distress upon certain sheep pursuant to s 81 of the *Tithe Act 1836*. The land owners responded by claiming that a statute 51 Hen III c 4 known as "Les Estatuz del Eschekere" exempted sheep from distress at common law, and that the 1836 statute did not alter that position. Not to be outdone, the owners of the tithe rent-charge contended that the early statute was not in fact a statute, that it was not on the statute roll, that it was almost certain to have been enacted in the reign of Edward I, and called Professor Plucknett, newly appointed Professor of Legal History at the London School of Economics, as an expert witness.¹²⁰ The primary judge said that "if it were necessary to decide whether this document of this uncertain origin really is a statute, or enforceable as a statute, I should find great difficulty about it",¹²¹ but regarded it as declaratory of the common law.

The occasions where a pure question of legal history, such as the status of a 13th century document, directly feeds into a modern litigation are rare – although the phenomenon of statute and judge-made law interacting over the centuries is surprisingly common. But legal history can only help so far. The farther back we look, judgments look less and less like judgments (the *Earl of Oxford's case* is an example) and statutes look less and less like statutes.

Conclusion

Lawyers use legal history in a wide range of ways. Two things emerge from the examples mentioned above. First, and less importantly, legal history is basic

119 [1934] 1 KB 608. See also L Downer, "Legal History – Is it Human?" (1963) 4 *MULR* 1 at 14-15.

120 See [1934] 1 KB at 614.

121 [1934] 1 KB at 628.

background knowledge that cannot hinder an advocate and is essential to his or her craft. A deep appreciation of all aspects of the elements of our legal system ultimately is apt to improve and sharpen one's understanding of the authorities. It may even give rise to that very rare case where one lawyer sees a solution others have missed.

Secondly, and to my mind more importantly, the multiple dimensions of legal history are interesting, not to mention civilising, in their own right. There will always be a role for irrelevant knowledge – and not merely now, when our innately social species is forced into artificial semi-seclusion. To slightly paraphrase Sir Victor Windeyer's words, there is a use and a purpose in a knowledge of history for most people, and especially for lawyers, because it is part of an educated person's equipment for a full life.¹²² Moreover, that which seems most irrelevant may sometimes shed striking insight into the most practical of legal problems.

To return to a few decades before the *Earl of Oxford's case*, Tudor history has never been so popular. One may choose between Diarmid MacCulloch's biography, Hilary Mantel's historical novels, Mark Rylance's portrayal on the small screen and the memorably creative and raucous *Six* brought to this city from the Edinburgh Fringe Festival (all are excellent in their own very different ways). Why this is so is deeply mysterious. Why the Tudors, and not, say the 18th century? And why the disregard of Australian legal history? Indeed, why has it taken until 2020 for the *Cambridge Legal History of Australia* to be published? The history of this country is a history of law. Laws, rather than revolutions, created local political bodies and resolved the relations between them and imperial powers. Laws created a new thing, Australian citizenship, so recently as 1948, whilst preserving the status of “British subject”.¹²³ Federalism is inevitably a government of laws, where judicial power resolves contests between competing legislative and executive power. The constitutional history of Australia – the steps whereby the

122 V Windeyer, “History in Law and Law in History” (1973) 11 *Alberta L Rev* 123 at 132.

123 See J Mann, “The evolution of Commonwealth citizenship, 1945-1948 in Canada, Britain and Australia” (2012) 50 *Commonwealth & Comparative Politics* 293 and C Saunders, “Constitutionalism in Australia”, in P Cane et al, *The Cambridge Legal History of Australia* (Cambridge University Press, forthcoming).

new federal colony became a nation – falls squarely within legal history, and the local developments in statutory and judge-made law probably have not received the attention they warrant. The vibrant rule of law which is a product of that history is one of the brightest lamps our country shines out in this region.

Professor Campbell's paradox in "Lawyers' Uses of History" may be complemented with a more famous one from Holmes: "the present has a right to govern itself so far as it can, and it ought always to be remembered that historic continuity with the past is not a duty, it is only a necessity".¹²⁴ We need to understand legal history not merely in order to practise our profession. That is the necessity. But we are not bound by the past. We should pursue it not merely to lighten the burden of the past, but because it presents a feast of intellectual riches of intrinsic worth. It makes our profession civilised, more learned, and, not least, more fun.

124 O Holmes, *Learning and Science* (New York, 1920), p 139.