LEGAL HISTORY—IS IT HUMAN?

By L. J. Downer*

Perhaps no subject in the curriculum of the Faculties of Law in Australian Universities is called upon to justify itself more frequently than legal history, and, though some of the reasons which prompt this questioning attitude may occasionally appear tiresome, there is, no doubt, some benefit to be gained by a frequent examination of its claims. It is conceivable, and for legal historians even comforting, that mathematics and English and pathology could be a mite the poorer because they are less often required to explain themselves and indulge in extensive soul-searching. But war is war, and the mediaevalists are still obliged to beat off heavy assaults because for them the battle is not yet won. And what is more (as will appear later in this discussion) their victory may be yet a long way off because of divisions within their own ranks, divisions, that is to say, which touch on the question of what is the true purpose of legal history. It is always more difficult to conduct a campaign when the combatants cannot agree on their war aims.

It is a happy thought, nevertheless, that the place of legal history is a subject of such lively discussion, nor need that happiness be diminished by the knowledge that the topic is still so fashionable after all the contributions to it by the giants of the past.[1] It is less fortunate, however, that on one point (though they may arrive at an accord on other matters by their own personal routes) legal historians may not easily be able to reach agreement and that is whether the subject which they promote has a claim to enjoy an independent status and has a *raison d'être* of its own, whatever the modern law may be, and however it may be taught. For some this pleasing conclusion is reached without much difficulty; those who take the view that we need not concern ourselves with the 'usefulness' or otherwise of legal history, who deny that we need to demonstrate that our pursuits are of practical value to the modern lawyer, will be able to offer a spirited, if uncompromising, argument. It is an argument, furthermore, which of recent years has gathered a great deal of support—so much indeed that the consequences of maintaining it call now for a closer examination. It would appear that the starting point for the proposition that the status of legal history should not be measured or determined by its usefulness is the assertion that it

* B.A. (Syd.), LL.B. (Syd.), M.A. (Oxon.); A.A.S.A., A.C.I.S.

[1] Wiener, *Uses and Abuses of Legal History* (Selden Society Lecture, 1962) 3.

must be viewed essentially as history, not as law. That is, legal historians deal with events that have taken place in the past and in order to establish the significance of these events in their contexts, must behave as historians in matters of scholarship. The things discovered by them were law once but are law no longer. They are history. But a statement of this kind does not set the matter entirely at rest, for the true nature of the distinction between law and history may still need some elucidation, and the historian and the practitioner may well return different answers. For the time being it may be enough to say that the legal historian is not necessarily concerned with the question whether the object of his pursuit is still living law or not.

The consequences of recognizing the truth of this will be considerable. It will mean that a modern rule of law will not be justified or interpreted by a reference to its history, and that greater justice may as a result be done to it. As long ago as 1888, F. W. Maitland, in his famous Inaugural Lecture delivered at Cambridge,[2] drew attention to this distinction in clear language. He asked that history should not become the handmaid of dogma; legal history and legal dogma, he said, cannot go together because the present-day provision is to be expounded in accordance with its present meaning and intent. He was prepared even to say, though this will need to be looked into further, that what the purpose and effect of laws were in 1300 cannot, in the strictest sense, be regarded as relevant. Professor Plucknett,[3] writing in 1951, has taken up Maitland's view and affirmed it with some elaboration. In particular he has criticized the common belief that English law can only be understood in the light of its history.

That legal history is merely one department of history is a truth not generally acknowledged, and tends to be obscured because history has frequently been presented as if it were concerned chiefly with politics, even though interpreted sociologically, in the modern style. Professor Plucknett draws attention to some remarks of Stubbs[4] (though it is not clear whether or not he agrees with them), where the latter attempts to draw a distinction between the lawyer and the historian. There can be no doubt that a distinction exists, but not in the terms in which Stubbs offers it. He begins by suggesting a difference between the historical study of law and the legal study of history, emphasized, he suggests, by method and by point of view. The line of reasoning seems at best over-subtle, and even over-stated when he goes on to claim that the historian 'has wider sympathies and a somewhat wider grasp'. His task, Stubbs says, is to cultivate

[2] *Collected Papers* (1911) i, 491-492.
[3] See now *Early English Legal Literature* (1958) 12, 16 ff.
[4] In *Lectures on Early English History* (ed. Hassall) 37.

the whole garden, whereas the lawyer deals only with the one cabbage. Stubbs' enthusiasm for his own intellectual discipline is admirable, but it scarcely can be maintained that there is any difference in kind. Stubbs is describing, if the situation be correctly analysed, the general historian as against the specialized historian. The person who tends the cabbage of mediaeval law is indeed concerned with *legal* things, but they are also history, and Stubbs' attempted dichotomy must be regarded as unsuccessful.

Once legal history is accepted as history and not law, it is possible to accord it a more honourable status. In particular it can assert an independent existence, free of any demands that it be necessarily related to the modern law. Evidences of continuity do not have to be produced to prove that it is history that is being practised. 'The essence of the historical study,' says Stubbs, 'is in the working out of the continuity of the subject.'[5] This, which would be a dangerous proposition to submit at any time, furnishes little encouragement for legal history, and no credence can reasonably be given it. In fact it has led Stubbs to conclude that legal history is not part of the historian's craft because it is directed only towards reducing a subject to theoretical principles—a rather unpicturesque view of its essential constitution which would deny it the saving grace of intellectual imagination. Stubbs' approach is too uncompromising and certainly misdirected.

C. H. S. Fifoot has also protested against what he calls the lure of continuity, and goes on to reject the idea that history must serve a useful purpose.[6] There have been many attempts to demonstrate that history has a Message or a Purpose, that organic principles are waiting to be revealed, and one suspects the existence behind these endeavours of a belief that history is a utilitarian pursuit. On the whole historians have been successful in correcting this misapprehension. It has been a more difficult task with legal history because of the demand that modern law be explained in historical terms. Once legal history is taken into the fold of history, it becomes much easier to insist that it is fit to be studied for its own sake, not as some kind of shifty and questionable prologue to the present-day system. It will not need to apologize for itself; it will stand on its own feet without reference to modern law. Furthermore, it becomes possible to make a proper assessment of the true relationship between law and history. Legal history, says Mr Fifoot,[7] needs to be disinfected from the disease of purpose, and this, it might be added, can hardly be done while it is not thought to be history. He makes his

[5] *Ibid.*
[6] *Law and History in the Nineteenth Century* (Selden Society Lecture, 1956) 15 ff.
[7] *Ibid.* 20.

point by drawing attention to a group of scholars who wrote a memoir of Ames, the American legal historian. 'They were at almost frantic pains to dispel the suspicion that their author had pursued history for its own sake.'[8] It seems unfortunate that it is still necessary to spell out the value of scholarly research as an end in itself, and to insist that this is a profitable and desirable enterprise, even if long investigations should in the end shed little light. Negative results are not always unprofitable; it is of some help to those who follow to know which is the barren or boggy ground.

Mediaeval law is not infrequently called upon when the meaning of a modern doctrine is being discussed, or a solution to a problem before the courts is being sought, or when there is a proposal to change the law. There are those who argue that in these circumstances the history is irrelevant. Mr Fifoot[9] believes that the historian and the reformer of law are pursuing quite different ends, which might indeed be incompatible. He suggests that the origins of any legal provision cannot matter if what is at issue is whether it is appropriate, in the form in which it has survived, to existing conditions and needs. If that is so, he argues, history will be of no consequence to the law reformer. His job is to provide laws which are suitable for the society in which he finds himself. So it could be an abuse and a misunderstanding of legal history to argue that it can serve the purpose of legal adviser and parliamentary draftsman, and there might well be a fatal compulsion to limit our knowledge of legal history to those facts which we think help to explain the present. Such a view of the subject would indeed convert it from a self-sufficient discipline into a mere service station, even though (as will be discussed later)[10] the measure of independence which Mr Fifoot advocates for legal history may be rather more than it can effectively enjoy.

There can be no doubt, however, that legal history must be allowed to set up house on its own account, and it is on this understanding that it should be given a place in the universities. In fact its status in Australian Law Faculties is a subject of considerable dispute and disagreement, or at least a matter of varying practice. It might, however, be considered an easy step from standing legal history up as a discipline in its own right to asserting that no practitioner need be required to pursue it. An easy step, but one which may call for justification. And this has been pressed by Maitland in his Inaugural Lecture.[11] The fact is that the technique of the practising lawyer is very different from that which is demanded of the mediaeval historian.

[8] *Ibid.* 17. [9] *Ibid.* 18. [10] See p. 15 *infra.*
[11] Maitland, *Collected Papers* (1911) i, 493.

> What is really required of the practising lawyer is not, save in the rarest cases, a knowledge of medieval law as it was in the middle ages, but rather a knowledge of medieval law as interpreted by modern courts to suit modern facts.[12]

The outstanding illustration of this argument is of course Magna Carta, the vicissitudes of which, in Mr Fifoot's words,[13] are notorious. The point here is that the document will be able to bear quite different interpretations, depending on the nature of the key which is used to unlock it. Thus the mediaevalist will deny (among other things) that Magna Carta gave us trial by jury, and he will be right. The modern lawyer-cum-politician will be heard to assert that it did. He, too, will be right. What is historically a legend has become politically an overpowering reality. The explanation of this phenomenon is that laws are expected to have a history which will support a present interpretation. Modern law is sought to be justified by its history.[14] This was an intellectual practice much indulged in by Sir Edward Coke, among other common lawyers. What it does in the end is to have history distorted, though this may not matter if the finished product, as a rule of law, is acceptable. The familiar section 92 of the Australian Constitution is as fine an illustration as any of the way in which history fails to tell us what today's law is. We are of course here in the field of legal interpretation, where the question is the extent to which *intention* counts in unravelling a statute, and the answer of the courts in this instance has caused the original meaning and purport of the section to be so overlaid that it now provides a rule of law and reflects a line of political thought contrasting notably with the situation envisaged in 1901.

Maitland has analysed this matter in a penetrating and striking passage[15] which Professor Plucknett has also cited with approval:

> A lawyer finds on his table a case about rights of common which sends him to the Statute of Merton. But is it really the law of 1236 that he wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. The more modern the decision the more valuable for his purpose. That process by which old principles and old phrases are charged with a new content, is from the *lawyer's* point of view an evolution of the true intent and meaning of the old law; from the *historian's* point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority, and the logic of evidence. What the lawyer wants is authority and the newer the better; what the historian wants is evidence and the older the better . . . . It is possible to find in modern books comparisons between what Bracton says and what Coke says about the

[12] *Ibid.* 490.
[13] *Law and History in the Nineteenth Century* (Selden Society Lecture, 1956) 19.
[14] Wiener, *op. cit.* 12, 14-15, provides examples from courts in the United States.
[15] Maitland, *op. cit.* 490-491. Author's italics.

> law as it stood before the statutes of Edward I, and the writer of course tells us that Coke's is "the better opinion". Now if we want to know the common law of our own day Coke's authority is higher than Bracton's and Coke's own doctrines yield easily to modern decisions. But if we are really looking for the law of Henry III's reign, Bracton's lightest word is infinitely more valuable than all the tomes of Coke.

In this regard, there is further support to be found in the United States of America, where Professor W. F. Swindler (though primarily concerned with American legal history) has inquired into what he calls the problem of definition of legal history.[16]

> The other form of the problem—that which I have called the generic vs. the synoptic view—brings us back again to the characteristically pragmatic and usually short-sighted attitude of many practitioners and all too many law schools. This is the attitude that legal history derives its primary validity as the documentary background to a current problem of law; that legal history is the legal history of something, some element in a subject in litigation. From there it is but a step to the assumption that all legal history is either of practical use in an *ad hoc* situation, or is insufferably pedantic. This is what I call the synoptic view; I am not sure that the dictionary agrees with this definition of "synoptic"—but so much the worse for the dictionary, this may be offered as an original contribution to knowledge. The generic view of legal history . . . rather deals with legal history as legal history rather than as the legal history of something. In case we lost each other on that last sentence, this view of legal history accommodates the project which deals with isolated particulars as well as with synthesising studies. It is sympathetic to the approach which deals exhaustively with the subject within the definition set by the researcher. It is ultimately pragmatic, but not in the sense of the synoptic idea I described above. But until it gains ascendancy the pursuit of legal history will continue to breed unhappy hybrids.[17]

If the lawyer and the legal historian can be shown to be in search of different goals, and that their respective evaluations and methods of approach are fundamentally unrelated, it may be a simple matter to determine where the practitioner fits in. The general answer is that for the barrister or solicitor practising his profession the history of the law is not properly to be put forward as a *sine qua non,* precisely because the two disciplines are distinct. In many common law jurisdictions a person may be admitted to practice without being examined in legal history; it may not even be necessary to take a university degree. It is proper that for these lawyers the non-professional subjects should not be obligatory, and it is equally proper that the universities should be able to nourish the entirely academic subjects

[16] Swindler, 'Legal History—Unhappy Hybrid' (1962) 55 *Law Library Journal* 98, 108-109.

[17] *I.e.* those who have been unable to embrace legal history as an independent body of learning.

without thought for their suitability for practice. The argument that legal history needed an academic environment for its health and vitality had already, as we have seen, been pressed by Maitland before Professor Plucknett added his own comment that 'to make legal history the preserve of professional lawyers is indeed to condemn it to extinction'.[18] For professional lawyers the history is an impediment and not a source of enlightenment; their vocation demands that they be up to date, and since legal history and mediaeval law by definition are not, these cannot in consequence serve them. It is, then, as an academic pursuit in the strictest and best sense, that legal history is to be regarded. In other words it is entitled to be studied for its own sake, and not only because it might be thought to be sometimes helpful to the city solicitor.

It is odd to reflect that in many quarters this is still thought to be a shocking concept; nor can it yet be said that mediaeval law is accepted as a self-contained discipline even in the law faculties of Australian Universities. It was once used, in several places, as a kind of introduction to the study of modern law, and is still to some degree marked with this 'purposeful' view, even in faculties which now provide a comprehensive course in elementary jurisprudence for first year students. Yet to employ legal history as a sharp instrument to open up the oyster of modern law is a violation of its true purpose which could cause it grave injury. There could be no greater misunderstanding of its nature, and there is always present the possibility of its being the first to receive notice to quit when the not infrequent demand is made for the expansion of professional subjects. Under pressure of this kind it is all too easily edged out. If it can receive due recognition as an academic pursuit which is not dependent on other courses for its gift of life, its place in a University course could become rather less precarious. There is no contradiction involved in maintaining at the same time that it is not necessary for all lawyers to take the subject. Many will make more successful and effective practitioners by confining themselves to current law and its practical application. For perhaps most of them the mediaeval history of their subject would be a needless and pointless drudgery. There is no reason why legal history should be forced on lawyers whose proved aptitudes are for the *practice* of the law; it will do neither them nor legal history any service.

But though it may be agreed that legal history should not be thrust upon the practitioner, its place in the normal degree course remains to be considered. The solution is simple, though it does not easily command general acquiescence. It is entitled to its place in a university curriculum because it is a proper object of scholarly

[18] *Early English Legal Literature* (1958) 13.

study. And if it is not given shelter by law faculties, where it rightly belongs because it is the history of *law,* it will not be taken in anywhere, except by the occasional pure historian. Nowadays, of course, very many, indeed most, lawyers obtain their qualifications by way of the university degree. The question is therefore repeatedly asked whether universities should not now be prepared to make some concessions to the non-academic practitioner by withdrawing academic subjects from his syllabus. This of course is as hoary a problem as will be found. The answer in part is that to some extent this is done; for example, in universities where courses are provided which lead to professional qualification but not to a degree, since a number of 'non-practical' subjects are excluded. This approach allows for training on a high level of scholarship (which may even in some measure be academic) but with relief from studies not necessarily appropriate for the practising lawyer. The plan appears to meet successfully one type of educational demand in law. A strong argument can be made out, however, for a professional non-university course. This has in many places been long a familiar part of the scene; for example, the Admission Board courses in New South Wales, and the Law Society's School of Law in London. That is to say, there is much to be said for the provision of different courses of training for different vocational requirements, even though there may be initial difficulties for some prospective students in determining which is the appropriate course. A recognition of these differences should only serve to strengthen the demand of academic courses to be academic, and to underline the right of legal history to its private life. It must be acknowledged that university degree courses with a preference for subjects like legal history are unassailable on their own terms, or they will be robbed of their true significance. There is today strong pressure on law faculties to provide professional qualifications, with a consequent tendency for pure learning (that is, the courses designed without an eye on utility) to be pushed aside. There is little doubt that when syllabus revision is in the air, legal history and its allies are among the first to be considered for retirement. We may take it that up to a point this kind of pressure is inevitable in the modern world; we need to be prepared nevertheless to put up a strong resistance. This resistance is all the more necessary because of the continuing difficulties in finding teachers of legal history. In the nature of things it is only to be expected that the subject will be, among law lecturers, caviare to the general. Yet it does seem to suffer more difficulties than it need. It is a gloomy experience to see the subject hawked around as if an attempt were being made to fob off an article infected with the plague. To a large degree this comes about because law faculties themselves have an uncertain approach

to the problem and are not convinced finally that it is a reputable subject. What is required is a fundamental change of attitude on the part of law faculties, a recognition of legal history as an important and necessary part of a university curriculum, and a refusal to regard it as the inescapable casualty in the war of the syllabus. It is likely that it could most successfully be defended by the co-operation of all the law faculties in Australia, but it is nevertheless an unpleasant truth that such joint action is highly improbable. Most Australian law teachers do meet annually in conference, and have indeed discussed, in the recent past, the teaching of legal history. These meetings do not necessarily bear fruit, and it would not be unfair to say, as a general proposition, that in Australia each university does not in detail know, and scarcely wishes to know, what is being practised in any of the others. The old colonial borders are still a formidable barrier.

The argument so far discussed, as propounded by Maitland and Professor Plucknett and Mr Fifoot, leads them to the conclusion, if it may be put briefly, that legal history has not and should not be expected to have any use. It is appropriate then to inquire whether in these circumstances the place of legal history might be described more definitively once the point is made that it is a discrete creature of mind and not some kind of unspeakable disease, perhaps a parasite, or at best an unpleasant surface scum. Its leading champions would install it in the field of liberal and humane studies. As Professor Plucknett has argued:[19]

> It is still too often said that English law can only be understood historically. Now English law may be bad, but is it really as bad as that? Is the law of contract unintelligible without the history of *indebitatus assumpsit*? Is tort a closed book to those who do not understand the history of trespass on the case? Surely not. But then another will get up and say, "if that is so, why bother about legal history?"

Professor Plucknett's answer to this question is that a university should aim to administer something more than a professional qualification, that its primary interest must be in education and the production of scholars, so that the study of legal history really implies an acceptance of values which look beyond immediate utility.

At this point it may be appropriate to stop and draw breath. The case now stated carries its own argument as far as may possibly be done, but the foundations on which legal history is thus laid may be thought by some insufficient to justify further retention. It would be more than unfortunate if the view that legal history is unprofitable should carry the day, and if this were the consequence of an effort

[19] *Ibid.* 17.

to present it as a self-contained body of human knowledge and a proper subject for scholarly and scientific investigation free of ties with modern law. However, it would be true to say that this risk will always be present, and the case must continue to be put forcefully to those who are moved only by arguments of utility.

But the matter is not yet closed. One may with justice and profit travel a long way with Mr Fifoot and Professor Plucknett, but there comes the point where one must ask where the severance of history from law is likely to lead, and consider when words of qualification, indeed of caution, should be added. Maitland himself gives a hint of some exception to his far-reaching observations when he says in the passage already quoted[20] that practising lawyers do not want to know the mediaeval law as it was in the middle ages 'save in the rarest cases'. These same rare cases may well constitute a breach in the defences which will cause us to recall as well Maitland's own famous words about the ghosts of the forms of action. It is perhaps not as easy to hold history and law so completely apart as Maitland has occasionally though powerfully claimed. That there is a real problem of comprehension and distinction here is also suggested by Mr A. W. B. Simpson in his recent book.[21] After noting that Holdsworth held the view that modern land law must be approached historically, he continues by saying:

> Modern text books on Real Property necessarily contain a good deal of historical matter . . . . I am not sure that the heavy emphasis on history at an early stage in the teaching of modern property law is entirely admirable; for many students it seems better to study the history in more detail after they have studied the modern law, rather than before. Though it is true that some historical knowledge is essential to an intelligent understanding of property law as it is today, I rather wonder whether there is not a tendency to carry the historical approach to excess. It seems to me better for undergraduates to keep historical studies, to some extent at least, distinct from their work on current law—to read history as history, and law as law.

Mr Simpson thus calls attention to a problem which is probably more pointed in the field of property law than elsewhere, but while acknowledging his plea for moderation it would perhaps not be unfair to assert that the account which he goes on to give of English property law does suggest that for some branches of modern law at least, the history is not altogether irrelevant, even when it is agreed that the tendency to drown modern law in its own past should be kept under restraint. Indeed a sober survey of property law might well lead to the conclusion that Professor Plucknett may have overstated his case for the defence of English law. The law of contract

[20] *Supra.* p. 5.
[21] *An Introduction to the History of the Land Law* (1961) vii.

may, in some areas, be unintelligible and the law of tort a closed book if the history is not given attention. English law *may,* not infrequently, be as bad as that.

Doubts as to whether the views of Maitland and Professor Plucknett should be accepted unreservedly and in their entirety have recently been expressed by Sir Cecil Carr, though he also embraces the argument in favour of legal history for its own sake. On the one hand he seems prepared to endorse the view that a liberal education in part supplied in the form of legal history is to be recommended. On the other hand he presents with renewed emphasis the long-established argument in favour of the historical approach to modern law. He refers to the many statements from the past, by Holmes, Selden and Coke, that historical search into the law justifies itself by the light it throws on present-day law. The emphasis which he adds, however, takes the matter substantially further. It is, he says, not simply a matter of claiming that some matters before the courts may require historical inquiry. They may in fact be inextricably entangled with their own history which in consequence cannot be ignored.

> Dare we take a more positive line, recalling Benjamin Cardozo's view that some legal concepts are not to be understood except as historical growths, that real property law cannot be mastered without history, that the doctrine of consideration is merely historical and that the effect given to a seal is to be explained by history alone? Would the practising lawyer resent our suggestion that he cannot help looking backwards?[22]

Now it seems clear that Sir Cecil Carr is in effect re-asserting the conventional defences of legal history—without it, you cannot grasp modern law; it is, from one point of view, at least, a utilitarian pursuit. Perhaps he did not altogether intend this as so emphatic a conclusion, yet it seems unavoidable from the language he has used.

> A learned friend of mine with long experiences of teaching tells me that old pupils in active practice have said to him that the part of their legal study at the university which they find most *useful professionally*[23] is their grounding in legal history.[24]

If we were now to let the matter stand, we should be left merely with these two rather different answers from which to choose. Legal history is either to be encouraged as an aid to the modern law, or, if that is unacceptable, its value is educative only and it is to be characterized as something enjoying a life unconcerned with professional training.

It may well be that the truth lies somewhere in between, and the

[22] *The Mission of the Selden Society* (Selden Society Lecture, 1960) 18.
[23] Author's italics. [24] *Ibid.* 18-19.

problem is less prickly after all. In fact, as long ago as 1910, the proper appraisal was made by Holdsworth in an address to which Sir Cecil Carr himself draws attention, on 'The Place of English Legal History in the Education of English Lawyers'.[25] In the first place Holdsworth begins rather traditionally by pressing the argument that an English lawyer still needs to encompass legal history.

> In the compilation of the *Digest of English Civil Law* which a few of us here are producing . . . , we find that a constant recourse to legal history is necessary; and a similar recourse will clearly be necessary to those students who wish to understand the whole import of some of those short propositions in which we have endeavoured to state the law. . . . It is no exaggeration to say that it has been necessary to make a careful study of particular topics in legal history in order to arrive at a decision in some of the most important of our leading cases in all branches of the law.[26]

Holdsworth appends an impressive list of cases where interpretation has depended on history, the significance of which should not be under-estimated, the more so seeing that it is a simple matter to add further illustrations—which indeed Sir Cecil Carr does. The diversity of subject matter of these cases is a revealing indication of how much legal history might in fact be required; the knowledge is not confined to any particular part of it. In the case of *In re Holliday*[27] the Chancery Division was obliged to consider the application of the statute *Quia Emptores*, 1290. In 1837 the lord of a manor held of the King *in capite ut de corona*, purported to transfer portion of it by way of subinfeudation[28] to a person who had until then been a customary tenant on the rolls in respect of the portion being transferred. When in 1910 the person in whom the land had eventually become vested died without heirs, the lord claimed the property as an escheat. The Crown, however, contested this and claimed to be entitled itself. Judgment was passed in favour of the Crown, on the ground that subinfeudations in fee simple by tenants in chief *ut de corona* were either forbidden by *Quia Emptores* or rendered invalid by 34 Edward III, Chapter 15.

Orme's Case[29] and *Hadfield's Case*[30] were concerned, in 1872, with the operation on the Statute of Uses, 1535. The New South Wales case of *Elliott v. Barnes*[31] raised questions as to the operation of the old Statute of Limitations,[32] and its application to cases of trespass or trespass on the case. The limit is four years for the former and six years for the latter, and it was therefore of importance to know, after the lapse of four years, how a case of injury caused by the

[25] Printed in *Essays in Law and History* (1946) 20 ff.
[26] *Ibid.* 23. [27] [1922] 2 Ch. 698.
[28] 'To be holden of the lord or lords . . . of the said manor in free and common socage.' *Ibid.* [29] (1872) L.R. 8 C.P. 281. [30] (1872) L.R. 8 C.P. 306.
[31] (1951) 51 S.R. (N.S.W.) 179. [32] 21 James I c. 16 (1623).

defendant's negligence was to be classified. This case may be described as historical only, in the sense that it deals with legal provisions and concepts which had their origin centuries before, though still in force and applicable in New South Wales. *Milotin v. Williams,*[33] on the other hand, comes from South Australia where the statute of King James is no longer as such in force, and where the forms of action were abolished in 1878 following the English legislation on the subject. But a similar question as in *Elliott v. Barnes* arose because of the wording of the South Australian Limitation of Actions Act, 1936, then applicable, which prescribed a period of three years in the case of an action for trespass to the person, or a period of six years in the case of an action which would under the old law have been brought as an action of trespass on the case. The plaintiff complained of an injury allegedly incurred as a result of the defendant's negligence three years before the writ was issued. After a long discussion of the history of limitations of actions and of the distinction between trespass and case, the Court concluded that the situation was one involving trespass on the case, and hence the action was not barred by the statute, which in those circumstances allowed six years for action to be brought. This case thus required a reference to history for its solution. Others in the same category would make it appear that they are not so rare as Maitland thought, and further illustrations are constantly being produced.[34]

It is probably the case that the dividing line between history and law is not always easily to be found, and we need to know clearly what we mean when we employ these terms. The kind of confusion that can be aroused by a failure to identify the limits of the two is illustrated by the observations of the Richmond Herald, Dr A. R. Wagner, on the dispute on the Right to Bear Arms in the early part of this century:[35]

> I therefore soon found myself studying the whole subject with close attention and in time I came to two conclusions. The first was that the original controversy had been an *elephantocetomachia,* a fight between an elephant and a whale, incapable of decision because the adversaries lived in different elements and could not come to grips. Oswald Barron, a historian, was trying to settle a legal question by reciting history. Fox-Davies, a lawyer, hoped to settle history by quoting law. My second conclusion was that neither party had got to the bottom of his own case and that no decision could be looked for till much more was known both of the history and the law.

There can be further confusions. The Statute of Uses, 1535, is 'history' in England since its repeal in 1925, but it is still current law

[33] [1957] S.A.S.R. 228.
[34] See Wiener, *op. cit.* 15 ff.
[35] In Squibb, *The High Court of Chivalry* (1959) vii.

in Victoria. Indeed the words 'legal history' are frequently used ambiguously, because they may be found to describe any law which is no longer in force, or any law which has about it an air of antiquity. At this point Maitland's advice, previously quoted,[36] arises to confront us; the historian seeks to know a thing as it once was, in the setting of its true social and political chronology, but the lawyer wants his rules of law, whatever their point of origin in time, provided in their most up-to-date form. And this is the second point, but with a highly significant qualification, made by Holdsworth when he speaks of two essential conditions of the lawyer's art.[37]

> In the first place, lawyers are concerned primarily with deciding present disputes, and only secondarily in extricating the facts of history. They must decide these disputes as quickly as possible, using the best evidence they can get. In the second place, they must follow the law laid down in past cases. They only have a free hand if there is no previous case precisely in point. . . . If it were not so the law would be wholly uncertain; and for certainty in the law a little bad history is not too high a price to pay.

It is the doctrine of precedent, as much as anything (in spite of Maitland) which in the end forces on us the necessity of accepting history as an element in the lawyer's training. This is necessarily rooted in history, and the proposition is in no way invalidated by the undeniable fact, which Maitland made clear, that the latest authority is the best. That latest authority itself often, though not by any means always, is the result of a long history of affirmation. In *The Winkfield*[38] we find stated as a rule of modern law one which in fact is of considerable antiquity. It was said there, in an action by a bailee in possession against a third party for the loss of mail-bags, that

> it may, therefore, be asserted that from time immemorial bailees have been regarded in English law as possessors and entitled to possessory remedies—that is to say, the right of the bailee to bring his action rests, not on his being chargeable over, but as against a wrong-doer, on his possessory title. . . . This view that the infringement of the possessory right is the true cause of action is established by a long line of authorities.[39]

Such a long line could be demonstrated in many other cases. *Swaffer v. Mulcahy*,[40] for example, takes us into the realm of statutory interpretation in an unusual, but certainly historical form. The facts were that sheep had been seized by way of distress, but when the action was challenged it was held that the distraint was improper since the sheep were privileged under the so-called Statute 51 Henry III, Statute 4 (Les Estatuz del Eschekere). The court found it neces-

[36] *Supra* p. 5.
[37] In *Essays in Law and History* (1946) 24-25.
[38] [1902] P. 42.
[39] *Ibid.* 46.
[40] [1934] 1 K.B. 608.

sary for its guidance to obtain an expert interpretation of the law French text, which established 'the uniform decision of the Courts for a good many centuries'. It will not of course be the lawyer's lot every day of the week to handle cases of this kind, where the historical element is so strikingly present. Yet it is doubtful if any modern human activity can be sealed off from the dimension of time. We are always likely to be looking over our shoulders, not with apprehension, but for the purpose of instruction.

One may even take issue with Mr Fifoot on the grounds that he, too, has overstated his case.[41] 'When,' he says,[42] 'in preparation for the Law of Property Act, 1922, the rule in *Shelley's Case* was re-examined, its history was irrelevant.' But it was only irrelevant in the sense which he expounds in the following sentences. That is, when the question at issue is the appropriateness of a rule of law to current conditions, its history—how it came to be what it is—ought to play no part in the ultimate decision; it is the present social and political conditions which have to be satisfied. Hence he justifiably proceeds to say in the same paragraph that if

> the origins of the Statute of Frauds . . . could be disinterred from the past, they would not justify the belated if fragmentary, survival of the Statute in a new and incongruous setting.

But this is as far as we should go with him. Resort to legal history cannot be condemned in all cases on the grounds that it does not help to tell us what the modern law should be, or on the grounds that modern lawyers are apt to get their history wrong anyway. 'A little history is a dangerous thing,' says Mr Fifoot.[43] But we have already seen the answer to this, provided long before by Holdsworth:

> for certainty in the law a little bad history is not too high a price to pay.[44]

In any case, when the rule in *Shelley's Case* is being abolished, or any other legal provision, of greater or less antiquity, is being amended or repealed, it is still a prime necessity to know what *is* being so dealt with, if the repeal or other action is to be effective. You cannot change the law successfully unless you understand fully what it is you are proposing to change. This is pre-eminently the occasion for calling in aid legal history; you must first catch your hare.

Perhaps the legal historian, who sometimes feels himself to be a castaway on a desert island, may be forgiven if he appears to be wanting the best of all possible worlds. Professor Swindler has given

[41] *Supra* p. 4.
[42] Fifoot, *Law and History in the Nineteenth Century* (Selden Society Lecture, 1956) 18. [43] *Ibid.* 19.
[44] Holdsworth, 'The Place of English Legal History in the Education of English Lawyers' printed in *Essays in Law and History* (1946) at 20 ff.

a broad hint of this possibility.[45] Sir Cecil Carr[46] appears to be doing the same when, after reporting with some satisfaction that legal history can be shown to be of practical use, he ends by suggesting that its study may prove to be a rewarding cultural background for lawyers, finding like others comfort for this view in Roger North:

> [the history] is a wonderful accomplishment and without it a lawyer cannot be accounted learned in the law.

We may agree with Professor Plucknett that it would be most unfortunate if English law could be understood only historically, and reject Sir Cecil Carr's uninhibited acceptance of the proposition that some parts of the law can be explained by history alone. We may reject also Mr Fifoot's assertion that the history is for all practical purposes irrelevant, while warmly embracing his claim that the historical explanation of why a particular piece of law is what it is, should be something to be enjoyed for its own sake.

> The passport to historical study is disinterested intellectual curiosity.[47]

If all these arguments are true, legal history is on secure ground indeed. All it needs thereafter is the adherence of many more enthusiasts to the cause.

[45] *Supra* p. 6.
[46] Carr, *The Mission of the Selden Society* (Selden Society Lecture, 1960) 19.
[47] Fifoot, *op. cit.* 21.