HISTORY IN LAW AND LAW IN HISTORY*

SIR VICTOR WINDEYER**

I am to speak to you on the place of history in law and of law in history. The topics overlap.

Lawyers here may expect me to state first what qualifications I have to give opinion evidence on a matter of that kind. I can only say that I spent a great part of my life in two studies, law and war; and I have practical experience in each. Being now emeritus, in the Roman military sense of the word, I can speak more or less as I like. It has always seemed to me that in law we have to meet new situations, new demands of right and justice springing from new social conditions, with old instruments, old procedures and forms of action which we have furbished up for the purpose. In war, on the other hand, we have to meet old situations of strategy and tactics with new and ever more powerful weapons. But one thing legal scholarship and military studies have in common; neither can ignore the past.

In military history lessons derived from success or failure are distilled into age-old principles of war. When I was a young militia officer I had to pass examinations in military history to qualify for promotion. I had to see in past events illustrations of those permanent principles, adherence to which, or departure from which, could lead to either triumph or disaster on a battlefield or in a campaign.

But history for lawyers has a different purpose. When I was an undergraduate, legal history was not a separate subject for study or examination in the University of Sydney. Later I was appointed, more or less by chance, to deliver courses of lectures in legal history in the Sydney Law School. I did so for some years and wrote a textbook on the topic while practising at the bar. That is, I suppose, my qualification for talking to you now. I would not have you think that the history of law, although not a separate subject in the Law School when I was a student, was ever considered to be of no consequence. On the contrary, it was assumed by those who taught us, that the useful study of present-day doctrine on many topics could not proceed without some knowledge of antecedents. This of course was correct. Law is a matter of present-day rules. Yet the rules are the products of the past. Their origins, whether remote or recent, are there. It may be in some ancient statute, or old ruling of a court, or in the exposition by one of the old writers from Glanvil or Bracton to Coke, Hale or Blackstone. Or it may be in a statute or by-law made yesterday or in a decision of a court given yesterday. Of the latter, Professor Hanbury in his book *The Vinerian Chair and Legal Education,* published in 1958, quoted Professor Geldart:

> Every legal decision is a step in the progress of growth. In every case it is true that there is already a law applicable to the facts; but it is equally true that when the decision has been given, the law is not precisely the same as it was before.

That is certainly true of a decision of a final court of appeal in any

---

* This is the text of an address during The Weir Memorial Lectures held at The University of Alberta, March 13, 14 and 21, 1972.

** The Rt. Honourable Sir Victor Windeyer, a former justice of The High Court of Australia.

country that has inherited the tradition of the law of England governed by its system of precedent.

It is a common practice to commence any discourse by a definition of terms. I am speaking of law and history. To try to define law would lead me into territory where some writers on jurisprudence have abandoned simplicity of language for the analysis and elaboration of concepts, but it is unnecessary for me to enter those fields. The fundamental purpose of law is still as it was stated long ago: "Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere." The reasons for the study of law as a professional and academic discipline are well known to all of you who are of the profession of the law: but the case for history is not so clear. Of course any teacher of legal history approves what Mr. Pleydell in *Guy Mannering* said in showing his library—that "a lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect." But more than exhortations of that kind are necessary to justify to some persons the study of history as either a separate discipline or as an incident in the study of law.

Henry Ford, in the witness box in 1919, said that "History is bunk". I must reject his evidence as inadmissible, he not being qualified as an expert, peritus, in either history or bunk, which I assume to be a minor form of buncombe. The testimony of Henry St. John, Lord Bolingbroke, in his *Letters on the Use and Study of History* in 1735 is more reliable: "I have read somewhere or other," He said "—in *Dionysius of Halicarnassus,* I think—that history is philosophy teaching by examples." He was right, I believe, in remembering Dionysius, who was really quoting Thucydides in this. Surely we must admit Thucydides as a qualified witness? J. B. Bury, in his book *The Ancient Greek Historians,* makes the point that Thucydides, departing from and deprecating the entertaining and imaginative narrative style of Herodotus, set as his ideal of historical writing, first accuracy and second relevance—both qualities commendable to lawyers: and he did not doubt the value, for the present and the future, of a knowledge of the past. "I shall be content," he said, "if those shall pronounce my history useful who desire a view of events as they did really happen, and as they are very likely according to human probability to happen again." That is the value of recorded experience, especially for statesmen and soldiers.

History has many facets. For the natural sciences and medicine it is largely a record of discoveries of natural laws, always existing, by notable discoverers, the founders of our knowledge of the nature of natural phenomena—great names like Newton, Lavoisier, Faraday, Harvey, and a hundred or more others. In the social sciences the content of history is altogether different. The names of many of its heroes are not of discoverers of what has always been, but of begetters of what is new. The history of economics is, I suppose, mainly the story of theories and of schools, of their influence in political thought and action, from before Adam Smith to Marx and modern times. Law too is one of the social sciences: but for it history has a different significance again. It may mean a study of obsolete rules and the institutions of an earlier age. These have an interest of their own. But let us not forget Dicey's remarks in his chapter "The True Nature of Constitutional Law":

> Let us eagerly learn all that is known, and still more eagerly all that is not known about the Witenagemot. But let us remember that antiquarianism is not law, and that the function of a trained lawyer is not to know what the law of England was yesterday, still less what it was centuries ago, or what it ought to be tomorrow, but to know and be able to state what are the principles of law which actually and at the present day exist in England.

And Maitland himself wrote:

> Are we to say that the study of modern law and the study of legal history have nothing to do with each other? That would be an exaggeration; but it is true, and happily true, that a man may be an excellent lawyer and know little of the remoter parts of history.

Yet you will notice that he did not say "know nothing"; but "know little"; and of the "remoter parts of history". He certainly would not have said that a man can be an excellent lawyer if he fails to appreciate that our law is an historic growth, and that it is still growing.

You will not think it inappropriate if at this point I go to the United States to quote again two passages, well known I realize, from the writings of that very great man, Mr. Justice Holmes. You may remember that on the first page of his book *The Common Law,* he said:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage.

And from his address, *The Path of the Law:*

> The rational study of law is still to a large extent the study of history. History must be part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step towards an enlightened scepticism, that is towards a deliberate reconsideration of the worth of those rules.

It is because the common law—in the comprehensive sense including equity and statutory enactments—as it is in its English homeland, and as you in Canada, we in Australia, and they in the United States have it, is a body of dynamic doctrine, not a list of detailed dogmas, that its history is an intellectually rewarding study. It is a study of a process of evolution; for the common law is not and never was a static system. It combines stability and continuity with an inherent capacity to change and be changed—gradually by courts, rapidly by any sovereign legislature for its own domain.

There is little value for any practising conveyancing lawyer today in knowing the details of mediaeval conveyancing. But, even if his practice be in a place where the Torrens system prevails, he ought surely to know something of feoffments with livery of seisin and of conveyances by lease and release. He must know what an estate of freehold is and what is socage tenure. He should know the results that have come from, say, Quia Emptores, De Donis Conditionalibus, and the Statute of Uses. If he knows nothing of this he may not even be able to copy from books of precedents without risk to his client.

And some parts of this a student of British history who is not a lawyer should know if he is to understand the feudalism of the Middle Ages and its legacy for modern times. The growth and development of the law of a people is an important part of their history—just as important as their battles and conquests, their national heroes, their songs and their literature, their trade and economic vicissitudes. Law is always closely related to a people's political institutions. Political events usually have a great place in history courses. If I were still concerned with the teaching of history to undergraduates I would insist on all my pupils reading Maitland's *Constitutional History.* And I would remind them that—and I use here the words of Professor Ullmann in his book *A History of Political Thought: The Middle Ages:*

> The label of antiquarianism can never be attached to the study of the history of political ideas. The history of political ideas not only promotes the understanding of how and why modern society has assumed the complexion it has—in itself assuredly a worthwhile task—but also demonstrates more convincingly and persuasively than any other study can hope to do, the differences between the various forms of government practised in different countries.

Sometimes statements in history books concerning the law or political institutions of past times are disquieting to an instructed lawyer. He would then like to tell the author of Coke's warning:

> To the grave and learned writers of histories, my advice is that they meddle not with any point or secret of any art or science, especially with the laws of this realm, before they confer with some learned in that profession: *Reports,* Vol. ii, preface.

I would add to that a somewhat similar warning, implicit in M. Marc Bloch's emphasis of the continuity of history:

> This solidarity of the ages is so effective that the lines of connection work both ways. Misunderstanding of the present is the inevitable consequence of ignorance of the past. But a man may wear himself out just as fruitlessly in seeking to understand the past if he is totally ignorant of the present.

A present-day lawyer, whether counsel or judge, who has a present question to resolve is concerned to go back into the past only to come forward to the present—to understand the law of the present by seeing it as a continuation of, or departure from, that which formerly prevailed. I have said elsewhere that history is useful to the practising lawyer only if he reads it as history should be read, as a narrative of a movement from the past towards the present. The method of the genealogist is of little value for him. He is not concerned to find an early ancestor of a doctrine or a rule unless by this he can better understand its progeny. I do not mean that the examination of the past without a care for the present is not rewarding in the pleasure it yields, as is any form of pure scholarship. And its fruits may well prove useful as starting points from which others may commence the march of history. I hasten to say that, because as a Vice-President of the Selden Society, as I have the honour to be, I would not wish to discourage an interest in the pure scholarship of the history of law, or to underrate the claim of the Middle Ages. Indeed I would like to foster an addiction.

In *Coke on Littleton* this appears:

> Now it is to be observed that oftentimes for the better understanding of our books the advised reader must take light from history and chronicles, especially for distinction of times.

I quote that to emphasize the need to remember distinction of times, which is sometimes forgotten. Moral judgments are inseparable from history. Narratives would be dreary and dull if we did not take sides with the people who were concerned in past events—and in our minds praise them or censure them. In that we inevitably use our own present standards of right and wrong. But, in relation to customs and laws long since obsolete, there is a danger if we now look at them as if they were still afoot. The procedures of the law tend always to reflect contemporary political theory or the moral outlook of the time or of times then recent. This is especially so when legal practices stood in close relation to ecclesiastical procedures. We should try to understand by the standards of the time even such things as the grim harshness that marked the criminal law until the nineteenth century, or the fictions and the antics of John Doe, Richard Roe and William Styles in actions of ejectment. And before we give way to sorrow or amusement at these things, let us look at the law of today and ask if it is in need of reform to answer present social needs. And, as I have on other occasions said, let us put alongside John Doe, Richard Roe and William Styles, genii who came so easily from inkwells in attorneys' offices, the modern private companies, that accountants so readily conjure up by typewriters and formal registration to enable men to avoid taxes or engage in activities of sundry kinds without financial risks. Of course you will say that the private companies are entities, that they are persons in the eye of the law. That is so, the law being here one-eyed but logical. We are not allowed to see the company as a *nom de guerre.* We must see it as a person. *Persona* would be better perhaps; for that in Latin means a mask or disguise. *Eripitur persona, manet res.* I once ventured that Lucretian quotation as an equivalent of, but preferable I think to, the talk of "piercing the corporate veil", which is now fashionable.

If we must regard the one-man or two-man company as a person, why cannot we, for some purposes, see that person as the agent of its masters? Perhaps it is that law reformers do not dare suggest this. To enable the law to tear aside the disguise that it has provided would no doubt be difficult—how and where should one start and where would one stop? The concept of incorporation and of a separate personality, not only for a collective group, but for a single dominant individual, may well be beneficial, not only to the master of the corporation, but also in promoting commerce and industry. But so it may be said were the activities of Doe and Roe and the Casual Ejector—and at one time they were real people. And let us not forget, when we ask how much time should be devoted in law schools to tax law, how much of our law is the product directly and indirectly of taxation. From feudal dues and tallages to modern times the form of legal transactions has been influenced by the incidence of taxes, by schemes to avoid taxation, and counter measures to aid tax gatherers. Think here of the history of the law of testamentary disposition and of death duties today. Then remember the Statute of Uses, and in passing ponder how far its provisions have influenced conveyancing practice and forms and indirectly the law of trusts and trustees. Devices to dodge taxation—more euphemistically to avoid it lawfully—are not for lawyer newcomers.

So let us not be too censorious of the past oddities of the law. Many

of them served the purpose of their times. We can learn of them and from them without despising them. I add to this that we should understand the contemporary language of the law when we are considering old practices and rules. This was emphasized by John Reeves in the preface to the first volume of his *History of English Law from the Time of the Saxons to the End of Philip and Mary,* issued in 1783. Reeves (1752-1829) is perhaps best known to you in Canada not by his history, but as having been Chief Justice of Newfoundland for two difficult years, 1791 and 1792. Afterwards he published a short history of the government of Newfoundland. He was a prolific writer on various topics. A list of his writings is given in the Dictionary of National Biography. One of his pamphlets, thought by the House of Commons to be disparaging of Parliament, led to his being prosecuted for libel. He was acquitted. His major work, the *History of English Law,* is in several volumes. It is not easy to read and I have never been able to get through all parts of my copy of it. Holdsworth has said it "is indescribably dull—indeed its dullness has probably injured the cause of legal history as much as the literary style of Blackstone and Maitland has helped it forward." And he has said too that, "Reeves has no sense of proportion, no idea that the 'sterile part of antiquity' [a phrase of Selden's] ought to be avoided. He describes the most minute procedural technicalities at inordinate length." But, notwithstanding these and other defects, Reeves' work is notable as the first general history of English law. We may even approve its minuteness, as useful sometimes, now that we can turn to broader and more attractive surveys, including of course, the works of Maitland and Holdsworth. To go back to my particular reason for referring to Reeves. It is his statement:

> The plan on which I have pursued this attempt at a History of our Law, is wholly new. I found that modern writers, in discoursing of the ancient law, were too apt to speak in modern terms, and generally with a reference to some modern usage. Hence it followed, that what they adduced was too often distorted and misrepresented, with a view of displaying, and accounting for, certain coincidences in the law at different periods. As this had a tendency to produce very great mistakes, it appeared to me, that, in order to have a right conception of our old jurisprudence, it would be necessary to forget for a while every alteration which had been made since, to enter upon it with a mind wholly unprejudiced, and to peruse it with the same attention that is bestowed on a system of modern law. The law of the time would then be learned in the language of the time, untinctured with new opinions; and when that was clearly understood, the alterations made therein in subsequent periods might be deduced, and exhibited to the mind of a modern jurist in the true colours in which they appeared to persons who lived in those respective periods.

There is much to be said for that approach if it does not become merely antiquarian learning expressed in antiquated language.

As I am with you by the kind invitation of the Institute of Law Research and Reform, I turn for a few moments to the place of the history of law in law reform. Here we are looking upon present ills, the product of the past: but we look, too, at the lessons of the past as an aid in curing those ills.

In the year 890 Alfred, King of Wessex, published dooms for his people. In this he was a great lawgiver: for the Anglo Saxons' dooms were not so much enactments of new law as pronouncements of the law. They were statements in writing of the law as it was deemed (doomed) to be. Alfred prefaced his dooms by what would I suppose today be called a preamble as follows:

> I then Alfred King gathered these together and commanded many of those to be written which our forefathers held, those which seemed to me good; and many of those which seemed to me not good, I rejected them by the counsel of my Witan, and in otherwise commanded them to be holden; for I durst not venture to set down in writing much of my own, for it was unknown to me what of it would please those who should come after me. But those things which I met with, either in the laws of Ine, my kinsman, or of Offa, King of the Mercians, or of Ethelbert, who first of the English race received baptism, those which seemed to me the rightest, those I have gathered together and rejected the others.

Now that, written a thousand years ago, is an interesting lesson in sound methods of law revision and reform. Alfred of Wessex looked back two centuries to Ine's dooms: he looked from Wessex, back a century, to the neighbouring kingdom of Mercia: he remembered the work of the first English Christian king, Ethelbert of Kent, nearly three hundred years earlier. He thus saw the value of comparative legislation and of precedents. Yet he hesitated to make changes that he was not sure would serve future needs. Sir Owen Dixon, the former Chief Justice of the High Court of Australia, Australia's most distinguished legal scholar of recent times, in commending to law reformers a regard for legal history, said in 1957:

> Before the reform of the law can be done, it is essential that its doctrines should be understood, and that may mean an investigation of the foundation of those that are to be reformed.

This is quoted in Mr. J. M. Bennett's recent article, *Historical Trends in Australian Law Reform* in the Western Australian Law Review.

Dicey noted—in his *Law and Opinion in England*—as a significant factor in making Bentham's work as great and as influential as it was—that his father's ambition that he should become prominent in the practice of the law "induced or compelled Bentham to study with care the actual law of England; he was saved from being one of those jurists who know a little of every law but their own."

To list, still less to evaluate, all the fruits for English law of the Age of Reform from, say, 1830 to 1875 or thereabouts, would take me away from my present subject. If one were looking for a starting point it could be seen in Brougham's great speech in 1828: and if one were to name those who were leaders in the advance, Bentham and Brougham, Mackintosh, and Romilly would stand high up on the roll. But one lesson of nineteenth-century reforms was that the achievement was not that of Parliamentary sponsors alone. It was largely the result of the patient preparatory work done by the members of the commissions and committees which made reports on the state of the law, in particular those appointed after Brougham's speech to enquire into and report on practice and procedure at common law and upon the law of real property. They were among the most experienced and accomplished lawyers of the day, as Holdsworth has noted (vol. xiii, at 306). Their magnificent reports prepared the way for reform by showing with learned precision what was the state of the law as it stood. This is a lesson that has not been forgotten today. Those whose task it is to advise legislators on the reform of the law do not today neglect to study first the present law in the light shed upon it by its past: nor do they fail to notice what has been done in jurisdictions other than their own. Certainly they do not here, in Alberta. It was pleasing to learn from my correspondence with Professor Bowker that his catholic knowledge of the

common law embraced acquaintance with judgments of the High Court of Australia.

The nineteenth-century spate of statutes in England demonstrated that existing bodies of law could be altered, and altered for the better, by legislation and that the guiding beacon could be the political philosophy of utilitarianism. Bentham's influence continued to hover over Parliamentary enactments. Men of course argued and doubted, as they have continued to argue and doubt, the wisdom of any general codification. And history could stand in the way of change just as much as it could show the need of it. To many thoughtful lawyers any codification of common law principles meant a sacrifice of flexibility, a stultification of development, and a denial of the natural and national genius of the common law. That did not imply, and does not imply, an acceptance of all the Savigny and the German jurists of the historical school propounded. There is no doubt a truth in the idea that the law of a nation is a reflection of the character and quality of its people. But it does not mean that their law is shaped by a destiny. In countries that have inherited British traditions it is shaped by legislatures and by courts.

I once had occasion in a judgment to trace in some detail the history of the doctrine by which children born out of wedlock are legitimated by the subsequent marriage of their parents. The rule of the canon law was disavowed by the common law when the barons at Merton in 1236 returned their famous answer: *Nolumus leges Angliae mutare.* In the case before the High Court the question was whether a law of the Commonwealth Parliament, which in effect made the rules relating to legitimation by subsequent matrimony uniform throughout Australia instead of varying from state to state, was sustained by the constitutional power to make laws with respect to marriage. I regretfully came to the conclusion, for reasons I gave, that the law was not one with respect to marriage, but rather with respect to status affecting proprietary rights. The majority of the Court thought otherwise. Theirs was a more generous and a beneficient view. I said: "I am not sorry that that is their conclusion; but I am unable to agree in it." My reason for mentioning this here is that I there said—and this is the opinion that I hold— "The only reason for going back into the past is to come forward to the present, to help us to see more clearly the shape of the law today by seeing how it took shape." *(Attorney-General for State of Victoria* v. *The Commonwealth of Australia* (1962) 107 C.L.R. 529.) What is more, the history may show not only whence a rule of law came but whither the law is going—the shape of things to come. A judicious discernment of that may sometimes give a useful pause to eagerness for rapid and rigid formulation. Learning in the law can, I realize, induce mere conservatism, a liking for that which we know—that which is, in the mediaeval sense, our mystery. But hesitation may be wise if it is directed not to retention of obsolete rules but against arresting development by premature formulation. Since Coke's time many illustrations can be adduced supporting his statement in *Mildmay's Case* (1584) 6 Co. Rep. 40:

> By which it appears that many mischiefs arise on the change of a maxim, and rule of the common law, which those who altered it could not see when they made the change.

The words and phrases in Acts of Parliament have an intractable stub-

bornness under our traditional system of statutory interpretation. The dictates of Parliament must be obeyed and applied according to the letter. The words may sometimes take their meaning by an appreciation of the policy and purpose of the statute read against a background knowledge of the mischief it was enacted to remedy. They are not to be glossed, expanded, modified, or explained by a court, in the way that judicial statements of common law may be slowly broadened down from precedent to precedent. Thus it is that under our English system statutory exegesis is more rigid, unyielding and less generous than, as I understand it, is required in the administration of the French Civil Code. But here in Canada, you are more capable of making that comparison than I am. English doctrines of statutory interpretation do seem at times to demonstrate that the letter killeth. But *rigor mortis* need not follow *rigor juris* as a consequence of reforms—or at least the risk can be avoided—if provisions to operate in the future be founded upon a knowledge of the past.

Up to this point I have been urging that the law of today is the product of its past, and that, if it is to be properly understood, and certainly if it is to be developed to meet the challenging needs of the future, its past must be studied. That I suppose is only to say that legal history is useful—and in duty bound I say so because I believe so. And mind you it is no new idea. You will remember Chaucer's Man of Lawe among the Canterbury Pilgrims.

> A sergeant of the lawe, war and wys,
> That often hadde been at the parvys,
> Ther was also, ful rich of excellence.
> Discreet he was, and of greet reverence:
> He seemed swich, his wordes weren so wyse.
> Justyce he was ful often in assyse,
> By patente, and by pleyn commissioun;
> For his science, and for his heigh renoun
> Of fees and robes hadde he many oon.
> So greet a purchasour was no-wher noon.
> Al was fee simple to him in effect,
> His purchasing mighte nat been infect.
> No-wher so bisy a man as he ther nas,
> And yet he seemed bisier than he was.
> In termes hadde he caas and domes alle,
> That from the tyme of King William were falle.
> Therto he coude endyte, and make a thing,
> Ther coude no wight pinche at his wryting;
> And every statut coude he pleyn by rote.

Chaucer as a Comptroller of Customs was qualified to know and speak of lawyers. His "sergeant of the lawe", said to be a portrait of a man whom he knew, was clearly a learned man with a knowledge of the history of the law. He knew the case law and dooms from the time of William the Conqueror—about three hundred years to Chaucer's time—and he knew all the statutes "pleyn by rote"; that even then was I imagine an exaggeration.

I want now to go further and say that not only is legal history useful to a lawyer: but so also is almost any part of the history of his nation. Some parts, constitutional history and economic history, are indeed often indispensable to an understanding of case law of times that are past but not so remote that their contemporary judgments are irrelevant today.

I believe that we study history because it is useful to do so. I know

that there is another view—that history should only be studied for its own sake. This was roundly condemned by Bury in his work on the Greek Historians that I have mentioned. He there said:

> Let us not take the phrase 'history for its own sake' to mean that it is not the proper function of history to serve any ulterior interest, and that any practical use it may have is thrown in, but not guaranteed. This idea is characteristically academic, one of those cloistral inanities which flourish preposterous and unashamed, in the congenial air of universities.

There is I think a use and a purpose in a knowledge of history for most men, and especially for lawyers, because it is part of an educated man's equipment for a full life. That arises from the natural interest that everywhere men have in the past of the society to which they belong. Among primitive peoples this is shown by their folklore preserved by saga, law and epic verse. Later come written chronicles and annals telling often of heroes and heroic deeds. Later still are histories that men delight to read, sometimes for what they tell of men and events, sometimes for impressive language in which they tell it. These often promote pride. Narratives of this kind, whether they be the story of a family, a nation, a town, a school, or a regiment, interest present members of that society. Interest springs from, and may ripen into and promote pride, patriotism, and *espirit-de-corps.*

It is I think in this, rather than in the study of modern methods of scientific and technical historical writing, that history has a meaning and a use for lawyers. We claim to be a learned profession. And that surely means that we have, or should have, more than a knowledge of crabbed rules of practice, traditional formulae, and ritual phrases. To go again to Lord Bolingbroke's book that I quoted earlier, he had no high opinion of money-grabbing pettifogging lawyers. But they were not beyond redemption:

> . . . till men find leisure and encouragement to prepare themselves for the exercise of this profession, by climbing up to the 'vantage ground', so my lord Bacon calls it, of science: instead of grovelling all their lives below in a mean but gainful application to all the little arts of chicane: till this happen, the profession of the law will scarce deserve to be ranked among the learned professions: and whenever it happens, one of the vantage grounds to which men must climb is metaphysical, and the other historical knowledge.

With that I may set remarks by Professor Butterfield (at 227) in the chapter "History as a Branch of Literature" in his book, *History and Human Relations,* which I find one of the most delightful essays in historiography: "Already in the middle of the sixteenth century," he says, "it was noted that there were two kinds of history—that of the chronicler and that of the lawyer; and Pullen, the editor of a volume of statutes, pointed out that the chroniclers tended to be occupied with tales of war, while it was the lawyers who made a profounder study of law and government." And the lawyer's history, which proved to be the remarkable stimulus for the future and the source of significant change; for it brought about early in the seventeenth century the first great development in historical science in this country—the rise of what is we call the Whig interpretation. I shall not seek to assess, in terms of scientific accuracy and proportion, the merits of this school of British historical writing, thus said to have been engendered by the interest of lawyers in history. I am not here concerned with what lawyers have given to

history but with what history can mean for lawyers—with what use it is for us, if you like so to say.

Now first and foremost the great works of history are great works of English prose. Gibbon's *Decline and Fall of the Roman Empire* is the supreme example. However later scholarship may qualify some of Gibbon's conclusions, their defects are submerged by the balanced elegance of his language. Take just two or three of his sentences introducing his treatment of Roman law.

> Attached to no party, interested only for the truth and candour of history, and directed by the most temperate and skilful guides, I enter with just diffidence on the subject of civil law, which has exhausted so many learned lives, and clothed the walls of such spacious libraries. In a single, if possible, in a short chapter, I shall trace the Roman jurisprudence from Romulus to Justinian, appreciate the labours of that emperor, and pause to contemplate the principles of a science so important to the peace and happiness of society. The laws of a nation form the most instructive portion of its history . . .

Simplicity and clarity of language have long been recognized as qualities befitting historical writing. In 1615 Edmond Howes produced *Stow's Annals*. Stow having died ten years earlier the work is described as: "The Annales or General Chronicle of England begun first by Master John Stow and after him continued and augmented with matters forreyne and domestique, auncient and moderne unto the end of this present yeere 1614 by Edmond Howes Gentleman." Howes wrote in his preface "To the honest and understanding Reader":

> . . . Expect no syled phrases, Ink-horne termes, uncouth words nor fantastique speeches, but good playne English without affectation, rightly befitting Chronologies.

One thing that lawyers might learn is that good plain English without affectation is also rightly befitting law. They would then eschew the unnecessary, prolix and pseudo-scientific jargon that is creeping into some writings on legal topics. I take this as an example—from Professor Gurvitch's book, *Sociology of Law* (1947) at 134: "Relativistic dynamism and anti-conceptualism begin to dominate the last thoughts of Cardozo, supported by a reflection on the particularism of concrete values and by a more pronounced sociological pluralism." Do you think that all readers of Cardozo would have perceived that?

I gladly go back from that to Gibbon—to quote from the address, "After Fifty Years", that Professor Powicke delivered in 1944, reprinted in the collection of his papers called *Modern Historians and the Study of History*. He said:

> The reputation of Gibbon as one of the two or three greatest historians who have ever lived is the measure of the delight and satisfaction of the cultivated man as he surrenders himself to the finest expression of a new kind of art. . . . It suggests that history is written by scholars to be read by gentlemen.

Gibbon will rank always among the greatest of historians. But it is not uninteresting that we are told that Lord Acton, Stubbs and Creighton once agreed that Macauley was the greatest historian the world had ever produced, and that a later panel, Acton, Mommson and Harnack, confirmed this verdict. I pass on to quote from what H. A. L. Fisher wrote about the Whig Historians in 1928 in a paper reprinted in the collection called *Pages from the Past*. If lawyers skilled in the laws of evidence ask why I offer so much hearsay opinion, I would answer that

those whom I call are competent witnesses and that as King Alfred, you may remember said of his dooms, that I durst not venture to set down much of my own, for I do not know how that would please you. I therefore quote the words of others who have said what I would have said had I their capacity to express myself as they have.

Fisher, speaking of Macauley and of his nephew Sir George Trevelyan, whose *Early History of Charles James Fox* at least is, I hope, known to some of you, also perhaps his *American Revolution,* said (at 92):

> The Histories of Macauley and his nephew could not have been produced from university chairs. There is something unacademic in their impetuous flood of entertaining detail. We miss the deadly relevance and cold impartiality of the seminar. But so long as a taste for good letters survives among those who use our English tongue, the reader in search of enjoyment will never resort in vain to the two Whig kinsmen who have transmitted to posterity in a vestment of fresh and glowing colours one of the governing traditions of English public life.

We are grateful that the family's work has continued, and with greatness. G. M. Trevelyan has been for so many of us today the most appreciated of modern English historians, not only for his narration of great occasions and great events, but also for his warm sympathy in telling of the daily life of men and women in past times, and for the clarity of the language in which he tells it.

In a similar literary tradition Sir Arthur Bryant stands. Sentiments that the enthusiasm of his patriotism and his pride in commemorating British achievements arouse, and his resolute insistence that institutions on which those achievements are based should be upheld and continue, find echoes in the hearts of many of us. Those of you who have read his book, *The Mediaeval Foundation,* will have been impressed in the chapter, "The Making of the Law", by his awareness of the legacy for later ages of the time when in G. M. Trevelyan's phrase, "English law was perpetually on the anvil red hot". Bryant has explained, by pleasing generalities which laymen can understand and illustrations that legal historians can approve, how, as recorded in the *Year Books,* the law of England on the anvil was being hammered into shape by lawyers in Westminster Hall. In the then distant future, and in lands across the seas from Westminster, men would take the law so shaped, but still malleable, in their hands, as their inheritance.

Sir Arthur Bryant is a modern writer of history—not a legal historian in the technical sense—who has seen law as a part of history and has ventured across the ill-defined border between history and law. It has also been crossed from the other side. As a recent crossing by a lawyer, I may mention Professor Keeton's book *The Norman Conquest and the Common Law.* Professor Keeton is, of course, an invitee, not a trespasser in the historian's close, an invitee who has often appeared there, as a list of writings will show those of you who know him only as the author of works on trusts and trustees, equity, and the law of charities. The book that I have mentioned should make any reader realize that the Middle Ages are not simply a time that is past: that much that we have and value today comes to us from them.

In what I have said so far I have sought to justify by general statements—and without the use of detailed illustrations from the judgments of courts, which would only lead me into a wilderness or a jungle of single instances—the indisputable proposition that history has on its own terms a value for lawyers. Today it only requires the mention of a few

names, Vinogradoff and Maitland prominent among them, to demonstrate that the two disciplines, law and history, are kindred. Yet when, in 1884, Freeman became Regius Professor of Modern History at Oxford, that kinship had hardly begun to be recognized in academic circles. In depracating Balckstone's views of constitutional history he said—in the second of the eight lectures later printed in his book, *Methods of Historical Study* (at 73):

> On the whole I suppose that the temper of the mere professional lawyer is of all tempers that which is most alien to the true temper of the historian.

Nevertheless he said that better times had come, that Blackstone had been displaced, that Selden had been reinstated. And, because, he said, of the influence of Maine:

> Law has now become a mainstay of history, or rather a part of history, because the knowledge of history is coming to be received as part of the knowledge of law.

So it has continued to be. What Maine had started, as Freeman thought, Maitland carried forward.

Professor Cam's introduction to Maitland's *Historical Essays,* sums it up.

> But if Maitland brought law to bear on history, he brought history to bear on law. Again and again he emphasized the danger of imposing legal concepts of a later date on facts of an earlier date—a common fault, before his time, of the majority of legal historians and of many constitutional historians. We must not read either law or history backwards. We must learn to think the thoughts of a past age—'the common thoughts of our forefathers about common things'. 'We must not attribute precise ideas or well defined law to the German conquerors of Britain.' It is as if 'we armed Hengist and Horsa with machine guns or pictured the Venerable Bede correcting proofs'.

The last sentences are Maitland's words in *Domesday Book and Beyond.*

Since Maitland we have had the scholarship and diligence of Holdsworth in producing his splendid volumes covering the centuries to our own times. Devoted disciples of the great masters are now adding to the building. More and more dark corners of the history of our law are being illuminated. In the present day, builders and lamp bearers include those whose scholarly labours under Professor Milsom's direction and example, enrich the output of the Selden Society.

I have not mentioned all notable historians and lawyers of yesterday and today whom I might enlist as supporters of my argument. The more names mentioned, the more likely are reproaches for omissions. I do not wish to make a pretentious claim that I have read what I have not: I do not wish to be like Chaucer's sergeant and seem busier than I was.

According to Carlyle "history is the essence of innumerable biographies". We miss all the interest, as well as the instruction, that the history of law has to offer if we forget that. For law has its heroes, though they be less renowned than those of war. It is said that the history of law is the history of ideas. And so it is: but ideas come from the minds of men. Their minds are influenced, if not determined, by other men's ideas and by the beliefs that dominate their time. Certainly it has been so for the law of England. Its known history begins in the year 600 with the dooms of Ethelbert King of Kent, who, as Alfred of Wessex was to note, "first of the English race received baptism". St. Augustine had come to where Canterbury now is in 597, three

years before Ethelbert published his laws. English law was to be the law of a Christian people. For centuries it was to show the influence, indeed the control of church dogmas and clerical discipline. That institutional influence has diminished or been expelled by the secular philosophy of modern times and by a generous toleration of conflicting beliefs. But the moral values of Christianity, based very often on the values of Judaism, continue to pervade the common law and to point out the ways of its development. That is so, although nowhere is it any longer under ecclesiastical domination or professedly founded upon religion.

A divine origin or authority was never claimed for the law of England. It began with the sayings of doomsmen in village communities, not with the pronouncements of a prophet of the Lord. Yet the Ten Commandments have a place in the history of the law that governs us today. And words in the seventy-eighth Psalm have a meaning for the ideas of right and justice embodied in the common law, just as for the law of Judah and Israel: that fathers should make them known to their children: that generations to come might know them: that children to be born should declare them to their children. To keep these precepts of right and justice alive in the law, its particular rules need constant revision and its development must not be frustrated. To ensure that, men must know its history. Moral values, with a theological origin and an ecclesiastical base, have formed a seed-plot for ideas that spring and ripen into law. That continued to be so when the Middle Ages had ended, after the Reformation had come in England, and when in the seventeenth century the influence of Selden's scepticism and Hobbes' assertion of absolute secular authority had undermined ecclesiastical jurisdictions. Ecclesiastical claims were supplanted by new philosophies that were propounded, gained adherents, grew in force and effect, and then dwindled and were themselves superseded by new doctrines. Each phase of opinion affected the development of the law in its own time—sometimes by a tacit acceptance and the incorporation into the law of new ideas, sometimes by provoking a vigorous reaction. Change has come, and change has been resisted. To elaborate this would carry me too far off my course. I need only mention a few names and a few events of history from Tudor times onward, to call to your minds great winds of change, and great wind-breaks: Coke, The Restoration, Hale, Locke, Blackstone, The Glorious Revolution of 1688, Plowden, De Lolme, The French Revolution, Thomas Paine, Burke: and so on from the Age of Reason and Natural Law, to Utilitarianism and the Age of Reform, to Bentham, Austin and Mill, and on the other side Eldon: and then on to the Age of Collectivism, as Dicey called it, to state enterprises and state socialism and a state-controlled economy. All these varieties and variations of opinion are reflected in the history of law.

Bentham may be seen as contradicting any proposition that knowledge of the history of a rule of law is an aid to its reformation. Bentham had a contempt for institutions that served no useful purpose: they were not redeemed by antiquity: they ought to be swept away by legislation and forgotten. However, perhaps I can claim Grote among the Utilitarians on my side. He successfully combined philosophical radicalism with the craft of an historian. True his history was the history of ancient Greece, not of modern England: but for him Athenian democracy illuminated the contemporary scene in England.

I certainly would not suggest that the main purpose of studying the history of our law is to advance the cause of law reform. All legal historians are not law reformers. But reading about the past is often the surest path to understanding the present: the law on many subjects today cannot be usefully cast into a new mould, reformed, unless the way by which it took its present form be known. We must understand the present if we would plan the future; and we must realize that the present has been built upon the past. The dominant theme and thread of the history of the common law is neither continuity nor change, but the two in combination. Doctrines can never be rigidly separated from procedure. But the history of our law is a manifestation of the evolution of ideas. And, as I said a few moments ago, ideas come into and come from the minds of men. Mr. Fifoot in his Selden Society Lecture in 1956, *Law and History in the Nineteenth Century,* put that as follows:

> Legal history, as has often been said, is the history of ideas. But ideas are not self-sown. They are coloured by environment and conditioned by the climate of opinion; but they are, after all, the creatures of men's minds, and to isolate them from the pressure of personality, even if it were desirable, is impossible.

Thus, while it is true that a people's laws, in the sense of the body of their law, are at any time a manifestation of a stage in their history, law is not simply a spontaneous growth. In all common law lands it is the result of the thoughts and persuasions of men, of scholars and writers, of men of Parliament and men in courts of law. In that sense it is true that the history of law, along with other parts of history, is the essence of innumerable biographies: but I prefer to say it is the essence of the lives of innumerable men not all of whom have had biographies. Men are not just froth and bubbles on the waves of time. Sometimes men have made the waves by throwing pebbles into the pool. To take another and today more fashionable metaphor—it is by men that the winds of change are fanned. In his *Interpretations of Legal History,* Dean Pound spoke against those "who think of the phenomena of legal development as events, as if men were not acting in the bringing about of every one of them." For he said, "the so-called events of legal history are in truth acts of definite men or even of a definite man."

Many names come at once to mind as confirmations of that. Our law, especially in commercial matters, would have been very different today if Lord Mansfield had not been Chief Justice of the King's Bench for thirty-two years, 1756-1788. If Parliament, induced by Fox, had not repudiated Mansfield's view of the positions of judge and jury in libel cases, the law of defamation would not be before us as it is today. If John Marshall had not become Chief Justice of the United States and given his great decision in *Marbury* v. *Madison* in 1803, the legal theory of federalism and of the place of courts in a federal system, as now known in Canada and Australia, might not be what it is. The superstructures of the Canadian and Australian constitutional edifices differ; but the corner stone of each is the judicial power to interpret and enforce the constitution as a legal instrument. That is a monument to a man who fought in Washington's army—the more conspicuous because each of our constitutions is an Act of the Parliament at Westminster.

Other names, too numerous to mention, come crowding in. From those who made the great mediaeval statutes in the reigns of Henry II and Edward I onwards to later times, men in England made law by

which men now live in Canada and in Australia. Coming to recent times, it is interesting to ask in how many places, including this Province, Alberta, are land titles now regulated in a way that is a consequence of Richard Torrens having been a member of the Parliament of South Australia in 1857. I add to judges, who by their decisions on the bench have developed, expanded or confined and thus settled legal doctrine, and to legislators who have made new laws, a reference to the work that some great judges have done by writings off the bench. Their number I suppose begins with Glanvil, if you count the Justiciar as a judge. It certainly includes Bracton and Fortescue and Littleton and Coke and Blackstone and Hale and Stephen; and, coming last century across the Atlantic from England, Kent and Story and Holmes.

Legal doctrine prevailing at particular times is often the product of happenings outside the law itself. The continuous progress of events prevents generalisations of the course of legal development, like so called philosophies of history. They may serve their age and time but not all time and all ages. The decline of the social structure of feudal times and of the strata of the society that succeeded it, and the later growth of a new and freer economy, may be explained in terms of a movement from status to contract. But the process has not continued without interruption in this age of collectivism, state ownership and the welfare state. Yet from Maine to Marx and the economic interpretation of history, legal concepts have a place in the main current of history.

If we look to the law of today as a reflection of our own times, things that come vividly into view are the importance of the concept of negligence and with it of the reasonable man, the prevalence of insurance against harm and liability and with it the decline of the concept of fault by one man as the prerequisite of compensation for harm suffered by another man. In his Selden Society lecture that I have mentioned, Fifoot said that "the ethical tone of nineteenth-century liberalism was caught by legal historians, and by them translated into the equation of fault and liability." A student of the law of torts would illustrate this by shewing how negligence became of itself a cause of action and took over much of the place of trespass and a wider place than trespass. But I must avoid technicalities. I am not giving a lecture on legal history, but on the relationship between law and history. What is relevant to my purpose is to say that fault, an ethical concept, was embraced by law as meaning conduct unbecoming a reasonable man. The reasonable man is not here *homo sapiens*. He is a peculiar specimen of the genus whose ubiquity became apparent in recent times. It was said by lawyers for centuries, at least since the time of Coke and his famous colloquy with King James, that reason had a place in the law, indeed was "the life of the law". A reasonable price for goods sold, and a reasonable time for the doing of some act, are old ideas. More recent, however, is the reasonable man as the arbiter of conduct and behaviour in an infinite variety of circumstances. He does not lay down fixed rules; for what he would say of one case does not necessarily govern the next, for always circumstances differ and reasonable conduct may differ accordingly. I shall not cite leading cases that every lawyer knows. Instead I go to one of Sir Alan Herbert's *Misleading Cases*. Our cheerfully persistent litigant and friend Mr. Albert Haddock was not a party in this one.

Mrs. Fardell was the plaintiff. I refer to it because the legendary Master of the Rolls there well observed that:

> The common law of England has been laboriously built about a mythical figure —the figure of 'The Reasonable Man'. In the field of jurisprudence this legendary individual occupies the place which in another science is held by the Economic Man, and in social and political discussions by the Average or Plain Man. He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen.

That was a sententious and discerning judicial statement by a fictitious judge. There could be no law of negligence today if it were not for the reasonable man. He came into prominence with the products of the industrial revolution. Railways gave him a good field in which to operate. Motor cars and industrial machinery enlarged it. But workmen's compensation laws have reduced his province. And it is likely to be reduced still more as compensation for harm suffered, rather than attribution of blame for harm done, becomes a dominant element in the law concerning personal injuries. To some people that may be seen as a reversion to early law of strict liability. But, if the wheel is coming now full circle, the hub on which it revolves is insurance, becoming both compulsory and universal. Here social and economic and legal history become mingled—and law reformers and legislators have a hunting ground for the future.

In what I have said to you tonight, I have, here and there, mentioned some names of great men—lawyers, writers and statesmen. But the place that law has in history has not been conferred simply by men with well remembered names. Rather, it is the result of their labours, in thought and words, when aided by others, who worked with them or who patiently and diligently carried on their work—unnamed men, who devotedly served the state or their clients or a cause they had espoused, or citizens who, like Lord Mansfield's jurymen, provided raw materials from which rules of law could be built.

The concluding sentences of the great history that Pollock and Maitland wrote are eloquent. Their two volumes tell the story of English law up to the time of Edward I, the period when the common law of England had its beginning in royal writs and the forms of action they begat. They wrote that it was:

> The grand experiment of a new formulary system. Nor can we part with this age without thinking once more of the permanence of its work. Those few men who gathered at Westminster round Pateshull and Raleigh and Bracton were penning writs that would run in the name of kingless commonwealths on the other shore of the Atlantic Ocean. They were making right and wrong for us and for our children.

That is the place of law in history.

This is the third and last of the lectures that I have been privileged to give in memory of Dean Weir. May I say in conclusion that it has been a great pleasure for my wife and me to come here from Australia, to learn much about your country and to enjoy in great measure the friendship of new friends that we have made. For that we are most grateful. And the longer we have been among you the more I have appreciated the honour of helping in a tribute to the work of John Alexander Weir. I have learned, from all who knew him whom I have met, of the appreciation they had of his work as a great teacher of the law that is our inheritance. By such teaching it is kept alive to serve men in the future as it has in the past.