SOME THOUGHTS ON LEGAL HISTORY.

It is now widely recognised that the great modern increases in knowledge in the field of science are making the task of preparing manageable university courses in the many branches of scientific study a very difficult one; for a full understanding of any one subject there is a surfeit of material to be studied in the time normally available for a degree course. It is less often recognised that academic teachers of law are increasingly required to face the same problem, their task being made more difficult by the claims of a practising profession as well. Among other proposals, suggestions have been made that the pressure on the lecturer's and student's time may be eased by lengthening the period of study by another year, or by discarding the teaching of certain subjects. In the meantime the desirable course of requiring students to engage in some preliminary or consolidating work during the extensive Long Vacations has not yet been generally adopted. At all events, it is at this point that the teacher of legal history may be forgiven for becoming a little uneasy. Criticisms of the teaching of this subject come from a number of directions—from the social scientists, from the practising lawyers and at times (most unkindly) from academic staffs. Though, of course, it is still widely taught in Australian Faculties of Law, the extent to which its value is questioned demands some re-examination of its place in the scheme of things, which in any case, as in other matters, may be a very salutary exercise.

The complaint that legal history is no help to students intending to practise as solicitor or barrister is a not unfamiliar one. Many would say that what they need to know is the legal system as at present established, that the law in 1954 is all that really concerns them and that that, to their minds, is the end of it; what happened, then, in 1485 is a rather pathetic piece of archaism which can have no connexion with their legal practice. It is hoped that one kind of answer to charges of this kind will be provided by the wider arguments to be put forward later. At this point it may be enough simply to observe, without any originality but with necessary emphasis, that this attitude involves a fundamental misconception of the primary purpose of university studies. It is a pity too that the predominant desire of many students to obtain quickly and as painlessly as possible a technical qualification has concealed from them the cultural value of a university education, in which respect legal history is not to be denied its due. One can perhaps be forgiven for feeling rather apprehensive in making this latter assertion, since the pursuit of culture

is not necessarily an attraction for many of those seeking a professional qualification, whether in law or anything else. Though it is desirable to record it with approval in passing, it is not intended to pursue further the cultural argument, for other equally cogent grounds of defence can be adduced.

The objection which might detain us the least is that flowing from certain of the less enlightened non-lawyers. One of the best illustrations of the attitude in question is to be found in an address of Professor Marcus Oliphant, of the Australian National University.[1] There Professor Oliphant claimed that the demands of science and technology for Australian development were so great that students should be diverted to technical studies from the arts and humanities, where presumably they were merely wasting their time. It is easy to see the fate of a subject like legal history if academic butchery of this kind were to be permitted. But Professor Oliphant added to this reprehensible suggestion the extraordinary one that this would only be a "temporary expedient", and when the physical resources of the country had been adequately developed the students of the arts and allied subjects might be released to pursue once again their pleasant occupations. Apart from the objection that temporary expedients have a remarkable tendency to become permanent, Professor Oliphant might well be asked to explain how the humanities would during this interregnum maintain their scholastic continuity. This kind of attitude is uncomfortably reminiscent of the traditional political argument that the time is *never* opportune for the endowment of worthy projects, whether in peace or war, in economic boom or depression.

With the increased understanding in recent years of the nature of human society, more emphasis has been placed on social science, that is, on studies concerned with the characteristics and needs of society and with the appreciation of its functioning. The emphasis indeed is very strong. It appears to be the case, for instance, that the study of law is tolerated at the Australian National University only by including it in a School of Social Studies. But without going further into the rights and wrongs of this, it is convenient to state here the burden of this article, which is. that legal history—and by this is meant the study of the earlier English origins as well as subsequent Australian developments—has such a relevance to social science that it may properly find a place in that field of study. It is not suggested, of course, that this is the whole story. Legal history casts its net very wide, and in some of its aspects must claim much closer affinity

[1] Sydney Morning Herald, 19th March, 1953.

with the humanities. In many cases it is difficult to know where to draw the line; perhaps in the end it is undesirable to insist too rigidly on division into categories.[2]

Legal history, however, has its appropriate place among the social sciences, and, of course, it is precisely on this argument of sociological value that the critics of legal history take their stand. We are interested, they say, in law for twentieth century human beings—why tell us about Henry I? And of course from time to time there will be the massive pronouncement that the learning of past centuries is "useless". This, of course, is a term of protean diversity of meaning, but it is an admirable retort in argument since it can cover so much in one sweep. It is, however, worth a little enquiry, and it is hoped to demonstrate that legal history, apart from any other claim it may have to universal respect, has a very pertinent "use" for modern lawyers, that its study is indispensable for the proper pursuit of the law. The utilitarian argument, in short, which can be advanced in support of legal history shows that it is possible to answer the critical social scientist on his own ground. It should be mentioned too that it is not sufficient to say that all this is recognised and that the re-statement of the argument is therefore unnecessary. Experience points manifestly to the contrary. There may be a higher percentage of historians who have seen the light. But lawyers are a more difficult proposition; even in England where one is, of course, much closer to the sources of legal history, it will be found that the usual response by lawyers to an admission of interest in twelfth century legal texts is a cold stare—though to this there are admittedly some rare (and notable) exceptions. In Australia naturally enough one's position is even more difficult to maintain. This is more than unfortunate. The origins of our law amply repay detailed study and lawyers could make a significant contribution to legal history if more were prepared to apply their own special skill and knowledge to the subject. It seems regrettable that researches in legal history are for the most part left rather scornfully to the historians and philologists.

The kind of opposition to the historical approach which is so frequently met with is suggested briefly in a review of Professor R. W. Millar's *Civil Procedure of the Trial Court in Historical Perspective*.[3] There the reviewer (Judge C. E. Clark of the United States Court of

2 It is interesting to observe that the Rockefeller Foundation is unable, for its purposes, to regard legal history as belonging either to humanities or to social science. This means that it is excluded from the Foundation's programme of financial assistance for research workers.

3 (1952) 47 N.W. U. L. Rev. 739.

Appeals[3a]) suggests that "history and the broad survey . . . serve to kill off realistic knowledge of modern courts", though he admits that in the present case the method of attack has been successful. In view of the prevalence of beliefs of this kind it is clearly still necessary for the claims of legal history to be actively defended. This is a fitting point therefore to refer shortly to a related matter. There cannot be too strong a repudiation of the argument that the more one defends a case, the more it is weakened. There are times, and this is one of them, when constant reiteration of an attitude is a necessity brought about by the nature of the criticisms which are made. Repetitious defence may become tiresome, where uncalled for; but legal historians should not allow themselves to be defeated by the argument which has in all seriousness been put forward that frequent defence is to be interpreted as a mere excuse, an admission in the face of the enemy of the weakness of one's position. Legal history needs to be frequently defended because it is frequently attacked. The only legitimate question is whether the defence propounded is true or false.

How then are the heretics to be discomfited and brought to repentance? The reply which one would like first of all to make to them is this, that their criticisms reveal a very limited vision. It is, one would have thought, a commonplace observation on the obvious to say that if attention is confined simply to an account of the law as it is, one's understanding of it will suffer; it is impossible to appreciate its present ordering without some familiarity with its past. The nature of modern law would be grossly distorted if one were to be deceived into taking the stand that it began only to-day, or at the earliest the day before yesterday. The truth is that the traditions of the past have made our modern legal system what it is, and still live on in it. We can ignore them only at our peril. It is not too great a claim to say that however far our legal history goes back, it partakes of the nature of social studies quite as legitimately as research into the 1954 Hansard or the investigation of the property ownership of the Sydney slums They are simply different ways of advancing and promoting the same study What the legal historian is concerned to emphasise is that the modern scholar is the heir of what has gone before, and that his appraisal of the present will be heightened by a realisation of what has gone towards making it. To shut oneself off from history is a thoroughly narrow attitude, and a conservative one. For it should not be forgotten that there is another conservatism in addition to the reactionary kind which subsists in an uncritical adherence to the

[3a] for the Second Circuit.

standards of the past; the other is the conservatism which refuses to admit the relevance of the past or learn any lessons from it.

But it is, of course, just at this point that the legal historian needs to tread carefully. If his researches are to have the special value which he claims for modern law (apart from other justifications), then they are to be conducted with the interests of the present in mind; he must relate his investigations to the modern world. In this way his ancient studies will come alive. And his task here should not be a difficult one. It is not really a matter of struggling desperately to dig up something from one's particular period—say the 12th century—which may prove to be relevant. It is contended on the contrary that we are so much inheritors of the centuries past that the relevances and the significant parallels will leap out unbidden. It is important then that the legal historian, being aware that he is concerned with society, with the story of men in their relations with each other, should take care to see that when he does bury himself in the 12th century, he will consider the institutions and laws and judicial systems in which he is interested, in their social context. This is his primary task and it will often require a genuine effort of imagination. He must not forget, that is to say, that he is concerned with evidences of human behaviour, and it is the human situation to which he must always give his attention. If he remembers to approach his subject in this way, then he will enable himself to do it full justice, he will show how his chosen period really can be of significance to modern life, and he will above all satisfy the demands of those skeletons at the feast, the social scientists.

Perhaps it is as well to elaborate on the suggestion that these far-off things which so captivate the legal historian's heart can be of significance for modern life. In an article entitled *The Study of Legal History*,[4] Professor K. O. Shatwell, of the University of Sydney, referred to the element of continuity in human institutions, which is simply a different way of admitting our dependence on a knowledge of the past. This knowledge he describes as the record of experience, and it is this accumulated experience which, in the present, will help us to choose our proper line of conduct. The actual first-hand experience of any human being, he points out, is very small indeed, and he must therefore rely on the scholar historian to investigate the past and reveal the lessons to be learned there. Fortified with this knowledge, modern lawyers can then proceed to interpret adequately, and criticise, their modern law. Professor Shatwell goes on to suggest that there should be some division of function in this historical re-

[4] (1951) 2 U. WESTERN AUST. ANN. L. REV. 103.

search—that one kind of scholar should be the investigator, concerned solely with producing the facts, and that the conscious interpretation of these facts of history should be left to those better qualified to understand and evaluate them. One can, of course, appreciate very much Professor Shatwell's point. The demands on the research worker's time are very great indeed, and the mass of material to be investigated grows apace. How to handle it all is a problem which daily becomes more difficult of solution, particularly in the midst of many other pressing duties. But it is suggested, with respect, that Professor Shatwell's approach carries with it some difficulties. It would seem far better that both functions—of producing facts and weighing their significance—should proceed simultaneously; they should not be separated if the research worker is really to understand his subject and produce anything of value. The discovery of facts will itself depend to a large extent on one's tentative appreciation of the situation which is being investigated, and the picture will only be distorted by, so to speak, eliciting facts *in vacuo* with the intention that someone else should have the task of determining whether they *are* significant. This is simply to say that when the legal historian is engaged on his research he must examine the facts and legal rules which he comes upon in their context; so far as his experience allows him he must be prepared at the moment of his investigation to evaluate the things he finds in terms of their contemporary significance. Professor Shatwell is, of course, very clearly aware of the necessity of treating legal history as a sociological study; but his suggestion of the establishment of a body of fact-finders might not in the result serve this desirable aim. There is, no doubt, a place for assistance in one's researches, but it seems clear that it must be used with caution and deliberation, and with an understanding of its limitations.

It may be said then that legal history is important for the light that it sheds on modern rules of law, and we have the testimony of Oliver Wendell Holmes as to the contribution which legal historians can make. He has said that a liberal view of one's legal subject can best be obtained by, among many other things, discovering from history how it has come to be what it is. Thus he says, "The rational study of law is still to a large extent the study of history. History must be a 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 toward an enlightened scepticism, that is, towards a deliberate reconsideration of the worth of those rules."[5] He then proceeds to draw attention to the fact that

[5] COLLECTED LEGAL PAPERS 186.

many of our rules of law have no other justification than an historical one, that is, that they were established at some distant point of time to meet the then prevailing conditions, and although these conditions have changed, the rule of law has not, and so is inappropriate for modern application. Thus it is that the doctrine of consideration, for instance, is merely historical; and Holmes gives other illustrations "of the way in which tradition not only overrides rational policy, but overrides it after having been misunderstood and having been given a new and broader scope than it had when it had a meaning."[6] This kind of thing is, of course, well understood and one can therefore appreciate Holmes's warning of the danger of over-stating the importance of history. History should teach us when and why changes in the law are necessary; it has ceased to instruct when we conservatively accept it in such a way as to perpetuate a traditional attitude which, in fact, is in need of reform. It is for this reason that his statement is acceptable that "I look forward to a time when the part played by history in the explanation of dogma shall be very small."[7] This is a recognition of the need to base our laws on contemporary social requirements, and not to accept them as *presently* valid by reference to their *past* validity. But this cannot mean that it will ever be possible to ignore history. The present is continuously passing into history, and any rule of law, however legitimate and reasonable at the moment of its creation, must thereafter constantly be questioned in its later application.

The truth is that the stage will never be reached when lawyers will no longer be able to learn anything from the past operation of laws and customs. It is the most obvious of statements to say that, properly conducted, research in legal history can best be regarded as in the nature of a comparative study; the aim should be to examine laws at other times and in different places with reference to those times and places. Our legal researches must of necessity be related to the social environment of the subject under review. We are concerned always with the activities of men; it is their response as human beings to a particular situation, or to a particular law, which must be discovered. Our historical excavations will be quite meaningless as guides to present action unless it is remembered that we are dealing with what was once a living society. It is necessary to understand the operation of law in that human society—its aims, its effects, its failures; in Sir Maurice Powicke's words, "the thoughts of men in the past must once more become thinkable to us." Modern law is claimed as

[6] *Op. cit.*, 192.
[7] *Op. cit.*, 195.

one of the social sciences, and there is no reason why the study of *mediaeval* law in *mediaeval* society should not be entitled to be so classified, particularly when it is studied with the hope that it may point a moral. This would truly be social science in its comparative aspect, though there may be many who would regard this suggestion as an intolerable heresy in an age devoted to political science. But, of course, it ought not to be. It should not require too great a mental strain to see that if we know how a particular law worked in a certain community at a certain time, we are thereby provided with a lesson to guide us in our appraisal of the law to-day, or to help us in deciding what action should be taken in the situation now facing us. All that is needed is a clear head and a steady hand in making the comparison; we must beware of pressing analogies too far, particularly where the events of centuries past are concerned. But it is surely true that no knowledge is in the end ever lost, and the more we know about human beings in the past the better equipped we are to understand them in the present. It would be the purest folly to cut ourselves off from influences which have played a leading part in establishing our modern world; it would only do violence to the present to attempt to isolate it from the past where it found its birth.

This suggestion of the comparative value of historical research could, if necessary, be developed further, but there is perhaps no call on this occasion to press the point. The really astonishing thing is that it should still be necessary to re-state the kind of argument here submitted. In this connexion attention must be drawn to another statement made by Oliver Wendell Holmes, namely, that the habit of teaching Roman Law is quite unreal. Putting aside for one moment the question whether Roman Law in particular is desirable, Holmes's general argument is worth examining; for he says that the way to gain a liberal view of a subject is not to read something else, but to get to the bottom of the subject itself. This proposition is surely unacceptable. It seems—at least in the bald way in which it has been expressed—to amount to a denial of the value of comparative studies; yet legal history which, from one point of view, might fairly be called a comparative study, is also one which in Holmes's own terms will help the lawyer to get to the bottom of his subject. It might be that Roman Law, too, could help in this way (the *quantum* of Roman Law which should be taught in a Faculty of Law is another problem), and some recognition of the truth of this seems to be indicated by a renewed interest here in this subject, after a period of disfavour following the mortal blows dealt in recent years at classical learning.

It is agreed then, with Holmes, that we should no longer be content to acknowledge a rule of law whose *raison d'être* is simply an historical one, but that this rule should be shaped to meet the ends of social justice. Yet legal history can never be dispensed with. Even if the whole corpus of our law were revised so that every rule served a presently accepted social principle, we should still want to know, for our better understanding, why this change was effected, what kind of system was replaced and whether under the new régime any improvement has in fact been achieved. In order to satisfy ourselves, we should have to compare the operation of the new law with the old. Legal history will help to point out where the law is wrong, and how it must be improved.

This is not the place to examine the further question of the legitimacy of engaging in ancient studies for their own sake, that is, without the immediate purpose of seeking a fuller explanation of the modern rules of law. There would indeed seem to be no valid objection to antiquarianism in itself, provided that it is recognised as such and makes no pretence to be anything else. But since we are now concerned with what researches can yield of value for the present, Holmes's warning about antiquarianism, and the advice that *for our particular purposes* interest in the past must rest in its relevance for the present, can be accepted.

In seeking, however, to learn lessons from the past, the limitations of the study must be continuously and carefully borne in mind. Perhaps the greatest difficulty is that it can never be known for certain how incomplete the records are, or what really vital information is missing. For that reason conclusions must be drawn and judgments pronounced with reserve; the injunction that a document must be interpreted in its social context is by all means to be observed, but with what success it will not always be easy to judge. One cannot help being constantly and uneasily aware of the presence of the Unidentified Guest. The less there is known of contemporary conditions the harder it will be to determine the full significance of the text in hand, and generally speaking these difficulties will increase the further back in time one goes. But this cannot mean that as a consequence less attention should be paid to these matters.

Before ending, it may be interesting to provide some modern developments with mediaeval comparisons, to observe present day institutions of one kind or another with one eye on the past. Consider, for instance, the question of freedom to dispose of one's property by will. In the thirteenth century in England there were restrictions on a man's right so to dispose of his property. In the case of movable

property the wife and children had rights to appropriate shares, and a testator might dispose only of what was left after these interests had been satisfied. The story thereafter is one of the gradual removal of restrictions in the course of the centuries, though at different times in different parts of the country. In the case of land there was no right of disposition by will (except by way of use) until the Statute of Wills in 1540. Yet although this freedom to dispose of one's property exactly as one wishes, without regard to the needs or claims of dependants, was eventually obtained, it is once again being challenged, and there is evident a gradual return to this particular mediaeval idea of the obligations to one's family. In England the *Inheritance (Family Provision) Act 1938* and in the Australian States the various *Testators' Family Maintenance Acts* have now restricted the right to make a will to the extent of allowing maintenance grants out of the estate in favour of dependants where they have not been sufficiently provided for by the testator. So far this is merely what Professor Plucknett has called a timid step, recognising anew the importance of the family,[8] but the lesson from legal history should be clear enough. It might be noted, too, how heavy death duties, particularly in England, are restricting freedom of disposition, this being done in the interests of the State which is thus succeeding more and more to the property of deceased persons. The State in this way is regarded as being better able to apply property to useful social purposes.

Not only may interesting analogies of this kind be adduced, but it is also possible for a little reading of legal history to correct many false ideas about our institutions. A simple and very familiar illustration at once springs to mind. The argument, largely an emotional one, in favour of trial by jury in criminal cases as an ancient right, is quickly demolished when the true story of that institution (as applied in those cases) is revealed—as a method of trial which the Crown, by actual or threatened torture, might compel the accused to accept. And perhaps a more careful study of legal history might have led the House of Lords in *Admiralty Commissioners v. S.S. Amerika*[9] to avoid application, in the way it did, of the doubtful rule that in a civil action the death of a human being cannot be complained of as an injury.

There is a lesson, too, to be learned in the case of real property law. The feudal system of holding land directly or indirectly of the king by some particular tenure, after centuries of change and develop-

[8] A CONCISE HISTORY OF THE COMMON LAW 707 (4th ed. 1948).

[9] [1917] A.C. 38; see also 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 676-677.

ment, finally passed away, and the modern system of, in effect, direct and complete ownership was established. Yet there is now a tendency —to be observed in some of the Australian States—to introduce a new system of tenures, whereby land is held under a kind of Crown leasehold, with various obligations of service attached, such as payment of rent, improvement of land, or personal occupation. In addition, there may be restrictions on the right to alienate, and various obligations, the failure to observe which could entail forfeiture. Of this kind of development it has been said by the late Dr. T. P. Fry, formerly of the University of Queensland, that "in the feudal era in England, as also in Australia to-day, Parliament and the Crown (as advised by the magnates of the realm in past times and by Cabinet ministers in modern times) imposed upon Crown tenants such tenurial incidents as were best calculated to advance the policies thought at any particular time to be appropriate for the purposes of ensuring the safety and prosperity of the realm."[10]

Instances of this kind will serve, it is hoped, to emphasise the potentialities of legal history, and to drive home the lessons to be learned by making us feel, in the words of Mr. A. L. Rowse, that we have "been there before."[11]

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10 T.P. FRY, FREEHOLD AND LEASEHOLD TENANCIES OF QUEENSLAND (unpublished thesis in the Queensland Law School Library). I am indebted to Mr. W. B. Campbell, of the Faculty of Law, University of Queensland, for supplying this reference.

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