

THE SIXTEENTH ANNUAL SIR DAVID WILLIAMS LECTURE

The Lion Beneath the Throne: Law as History

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Like most undergraduates in the Cambridge English school in 1960, I used to attend Dr Leavis's lectures. They veered between penetrating insights into texts, splenetic assaults on his critics and grand generalisations about literature and culture. One of the latter has stayed in my mind:

"There is no literary history," said Leavis, who himself had once been a historian. "There is only literature."

Albert Venn Dicey, although he too knew a great deal of history, was similarly anti-historicist when it came to understanding law.

"Let us eagerly learn all that is known, and still more eagerly all that is not known, about the Witanagemót," he wrote¹. "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."

On he goes²:

"The struggles of the seventeenth century, the conflict between James and Coke, Bacon's theory of the prerogative, Charles's effort to substitute the personal will of Charles Stuart for the legal will of the King of England, are all matters which touch not remotely upon the problems of actual law."

Tom Bingham, with characteristic charity, was prepared to blame at least some of Dicey's obscurantism on the fact that the Oxford law school had only recently been separated from the modern history school, leading Dicey to try to stake out a distinct terrain for the study of law. But even Bingham

¹ *The Law of the Constitution* (5th ed., 1897), p.14.

² *Ibid.* p.16-17

felt compelled to call Dicey's approach "not only anti-intellectual but plainly misguided".

"A lawyer without history, as well as literature," Bingham wrote³, quoting Walter Scott, "is a mechanic, and probably" he added "not a very good mechanic at that."

I want in this lecture to explore a little of the terrain between an anti-historicism which denies the law's past any role in its present or future, and what has been called the imperialism of the present – the pressing of yesterday into the service of today without regard to the passage of time.

A recurrent example of the latter, highlighted last year on the 800th anniversary of Magna Carta, is the urge of many lawyers and some historians to co-opt the limited undertakings extracted by a group of aggressive barons from a beleaguered feudal monarch into the modern constitutionalisms of Britain and the United States. But this is a long way from saying, as Dicey's myopic historiography would have said, that Magna Carta has no bearing on our own legal culture. If, instead of squinting at the document through the prism of modernity and discerning what appear to be the underpinnings of jury trial and legal aid, one looks at what has happened over the intervening eight centuries, a different function of Magna Carta begins to emerge: the nourishment of a deep-lying and long-term consensus that no power stands outside law and that there exist fundamental rights which no government, whether monarchical or elective, has power to deny.

To say this is, of course, to say both everything and nothing: everything, because in one grand sweep it encapsulates the entirety of the rule of law; nothing, because until you know what power, and what law, and what rights are meant, you are talking in a void. It has been the historic task of the common law to fill this insatiable maw, never forgetting Bacon's admonition that the judges, although they may be lions, are lions under a throne occupied in his time by a monarch but since the revolutions of the 17th century by a legislature whose sovereignty the judges have at least so far not disputed.

In looking now at some of the ways in which the law of England and Wales has over the centuries reinvented itself, I am not speaking of anything as self-conscious or self-serving as the invention of tradition. In his introductory essay to the celebrated collection *The Invention of Tradition*⁴,

³ 'Dicey revisited', *Lives of the Law*, p.44

⁴ Ed. E.J.Hobsbawm and T.Ranger, Cambridge, 1983

Eric Hobsbawm made a worthwhile distinction between tradition and custom.

“Custom,” he wrote, “is what judges do; tradition (in this case invented tradition) is the wig, robe and other formal paraphernalia and ritualised practices surrounding their substantial action.”

Let me try to illustrate the adaptability, the inventiveness, of common-law custom – of ‘what judges do’ - by looking first at a legal doctrine which has conditioned my working lifetime: the amenability of all administrative bodies, tribunals or decision-makers to the supervisory jurisdiction of the High Court for errors of law, whether substantive or procedural and whether jurisdictional or not.

By the 1960s judicial review of administrative acts had become entangled in a web of subtle and largely impressionistic distinctions. One was between those acts which were quasi-judicial and those which were merely administrative. The former, broadly speaking, were open to challenge for procedural impropriety; the latter in general were not. Over and above this distinction lay the difference between errors of law which went to jurisdiction and those which had occurred in the exercise of a properly assumed jurisdiction. This was a meaningful distinction which had developed over the course of the 19th century from cases decided in the 18th and 17th centuries, as Parliament sought to protect its proliferating administrative bodies by means of privative or preclusive clauses - provisions forbidding judicial review of their decisions by way of certiorari. To this the judges had responded by holding that a decision made without jurisdiction was no decision at all and hence was not shielded by these clauses. The decision in the *Anisminic* case, handed down by the law lords in December 1968⁵, added nothing to this well-established rule of the legal game⁶. What it did instead was move the goalposts.

The Foreign Compensation Act 1950, under which a commission of 10 lawyers had held that *Anisminic Ltd* was not entitled to compensation for the loss of some of its assets in the 1956 Suez crisis, laid down in black and white in s. 4(4):

⁵ Reported [1969] 2 AC 147. See in particular the speeches of Lord Pearce and Lord Wilberforce.

⁶ Counsel for the appellant company were Roger Parker QC and Patrick Neill QC; for the Commission, Sydney Templeman QC and the Treasury devil Gordon Slynn. Parker opened by accepting that if the Commission’s decision was not a nullity, he had to fail (see 152).

“The determination by the commission of any application made to them under this Act shall not be called in question in any court of law.”

It was difficult to see why the Commission’s determination that neither *Anisminic Ltd* nor its Egyptian successor was eligible for payment out of the Foreign Compensation Fund, even if it was wrong, was not precisely the kind of determination which s.4(4) was designed to keep away from the courts. That was certainly how it had looked to a unanimous court of appeal which included Lord Justice Diplock⁷, and how it still looks to a number of commentators.

But the law lords by a majority characterised the finding of ineligibility as an error going to the panel’s jurisdiction, rendering its determination void. There were – indeed there still are – sharp intakes of academic and professional breath at the intellectual legerdemain of Lord Reid’s reasoning to this effect. But there was nothing of obviously historic consequence in the decision itself: indeed it had been anticipated by the neglected first-instance judgment of Mr Justice Browne⁸. What created legal history was what the profession itself, both bench and bar, set about making of the law lords’ decision.

It would have been neither forensically unacceptable nor intellectually dishonest for Treasury counsel in the years after 1968 to submit, and for the courts to hold, that the *Anisminic* decision was confined to a single, arcane statutory régime, bounded by the Foreign Compensation (Egypt) (Determination and Registration of Claims) Order 1962, within which the law lords had positioned a well-established test of justiciability – the jurisdiction test – in an unexpected place. The question is why this is not what happened.

What happened was that it became the experience of counsel (of whom I was one) appearing during the 1970s in judicial review cases against government departments or official bodies to be told by Treasury counsel that no point was to be taken on the applicability of *Anisminic*. In other words, if the applicant could establish an error of law, it was not going to be argued by the Crown that it was justiciable only if it vitiated the decision-maker’s jurisdiction. It was accepted in effect that if the tribunal’s error in *Anisminic* truly went to its jurisdiction, as the law lords had decided it did, then the

⁷ [1968] 2 QB 862: the argument took 13 days in Jan-Feb 1967, Sydney Templeman QC leading Nigel Bridge (the then Treasury devil) for the Commission.

⁸ [1969] 2 AC at 223

old divide between jurisdictional and non-jurisdictional error had collapsed. The goalposts had become the corner flags.

This was not a *trahison des clercs*. It was a recognition that the orderly development of public law required a comprehensive approach to arguable abuses of power in place of the hair-splitting distinctions which had come to disfigure the law in the inter-war years; and it should be placed on record that it was from the successive standing counsel to the Treasury – first Gordon Slynn⁹, then Harry Woolf¹⁰, then Simon Brown¹¹, then John Laws¹² – that these initiatives came.

Lord Woolf in his 1989 Hamlyn Lectures noted without rancour that the string of celebrated public law cases which he lost as Treasury counsel over little more than a year – *Tameside*¹³, *Congreve*¹⁴, *The Crossman Diaries*¹⁵ and *Laker Airways*¹⁶ – had (in his words) all contributed to the development of administrative law. One of the great strengths of public law in my years both at the bar and on the bench was that Treasury counsel would if necessary put the development of a principled body of public law ahead of the need to win a particular case. It happened in *R v Greater Manchester Coroner, ex parte Tal*¹⁷, where Simon Brown as Treasury counsel supported my submission that a recent authority¹⁸ refusing to apply the *Anisminic* principle to coroners' courts ought not to be followed; and again in *Leech*¹⁹, where John Laws declined²⁰ to invite the House of Lords to reverse the High Court's landmark decision in *St Germain* that the procedures of prison boards of visitors were justiciable – a reversal that would have won him the case – and instead undertook the sisyphian task of attempting to carve out an exception for adjudications by prison governors. The work of Treasury counsel is now more widely diffused, but it is to be hoped that this culture of candour continues.

For their part the judges continued after 1969 to weave between jurisdictional and non-jurisdictional error²¹. But as time went by they

⁹ 1968-1974

¹⁰ 1974-1979

¹¹ 1979-1984

¹² 1984-1992

¹³ [1977] AC 1014

¹⁴ [1976] QB 629

¹⁵ [1976] QB 752

¹⁶ [1977] QB 463

¹⁷ [1985] QB 67

¹⁸ *R v Surrey Coroner, ex p. Campbell* [1982] QB 661

¹⁹ [1988] AC 533

²⁰ *Ibid.* 544 F-G, 556H-557C

²¹ See Craig, *Administrative Law* [7th ed. #16.023 - **check newer ed**]

responded to counsel's invitations to build on *Anisminic* rather than to marginalise it. In 1974 (not sooner) Lord Diplock, delivering the de Smith Lecture in Cambridge declared that *Anisminic*

“renders obsolete the technical distinction between errors of law which go to ‘jurisdiction’ and errors of law which do not.”²²

One notes Diplock's dismissive description of the historic distinction as ‘technical’, which it most certainly was not: although erratically applied, it was a distinction which gave substance to the division of powers between the legislature and the courts. But a collaborative – some might say collusive – process of reconfiguring public law was now under way.

It did not reach fruition until, in the summer of 1980, in *Racal Communications*²³, Lord Diplock, now seated in the chair of the House of Lords' appellate committee, repeated almost verbatim what he had said in his Cambridge lecture seven years earlier (though this time he declined to dismiss the old distinction as merely ‘technical’); and what Diplock said in *Racal* about *Anisminic* has become canonical despite the fact that, since *Racal* concerned the jurisdiction of the higher courts and not of inferior tribunals, it was entirely obiter.

It was nevertheless from this makeshift platform that, two years later, Diplock felt able in *O'Reilly v Mackman*²⁴ to announce that *Anisminic*

“has liberated English public law from the fetters that the courts had theretofore imposed upon themselves ... by drawing esoteric distinctions ...”

This was the moment at which Diplock, with the assent of the rest of the Judicial Committee, threw open history's door. Years later, in 1996, Lord Cooke of Thorndon, delivering one of his Hamlyn Lectures at All Souls, spoke of Diplock having at that moment

“possibly with a degree of daring and certainly with a *coup de maître*, ... extended *Anisminic* by treating the reasoning there as having abolished ... what he justly called the esoteric distinctions between errors of law going to jurisdiction and errors of law within jurisdiction ...”

The law lords, as every student knows, have since then endorsed as established law the proposition that no tribunal has power to get any material point of law wrong, whether or not the error touches its

²² [1974] CLJ 233, 243 (the 1974 de Smith Lecture)

²³ [1981] AC 374, 383

²⁴ [1983] 2 AC 237, 278

jurisdiction²⁵; and I do not argue that there is anything wrong with this. It has lain at the foundation of the modern recognition that public law is not about ultra vires acts determined by tick-boxes devised in 1948 by Lord Greene, but is about the misuse and abuse of power. What interests me here is how this has come about. It has come about, or so I have suggested, neither by legislation nor by precedent but by an organic process in which the law's practitioners and its exponents have agreed on which way the common law should be travelling and have found a serviceable if not particularly suitable vehicle to transport it.

This kind of professional murmuration is not unique. To take another instance, the House of Lords in *DPP v Smith*²⁶ decided in 1960, in the days of capital punishment, that a defendant charged with murder, whatever his intelligence and state of mind, was presumed to have intended the natural and probable consequences of his actions. Trial courts simply declined to apply the ruling. Judges would ask prosecutors: "Do you propose to address the jury on the basis of *Smith*?" and, when prosecuting counsel said "No", would direct their juries as if *Smith* had not been decided. They were right to do so, and Parliament in due course agreed: in 1967 it passed s.8 of the Criminal Justice Act, making intent and foresight once again a matter of evidence and not of presumption. And some years later, the Privy Council, on conjoint capital appeals from the Isle of Man, held that *Smith* had been wrongly decided in the first place²⁷.

Before I am accused of advancing a Panglossian version of legal history in which judicial or legislative dross repeatedly gets spun by the collective wisdom of the profession into jurisprudential gold, let me give a couple of opposite instances.

One is the final abandonment last month of strict criminal liability for homicide in the course of a joint enterprise²⁸. The doctrine that each participant in a joint enterprise – frequently a spontaneous pub brawl – was guilty of murder if it was a foreseeable possibility that another participant would inflict serious or fatal harm, even though the accused had no knowledge or forewarning of it, was devised on an appeal to the Privy Council from Hong Kong in 1984²⁹. The courts of England and Wales were

²⁵ *R v Hull University Visitor, ex p. Page* [1993] AC 682; *Boddington v British Transport Police* [1999] 2 AC 143.

²⁶ [1961] AC 290

²⁷ The Privy Council later held, on conjoint appeals from the Isle of Man, that *Smith* had been wrongly decided: *Frankland v R, Moore v R* [1988] Crim LR 117.

²⁸ *R v Jogee; Ruddock v R* [2016] UKSC 8; UKPC 7

²⁹ *Chan Wing-Siu v R* [1985] AC 168

not even bound by the doctrine of precedent to follow it, but follow it they did with the deplorable consequence that people have repeatedly gone to gaol when they should not have done. You will find one of many examples chronicled (as it happens, from real life) in Ian McEwan's recent novel *The Children Act*. To describe the eventual reversal of the cruel Hong Kong decision as historic is perhaps to miss the point that it was not last month but thirty years ago that the law of this country refashioned its own history in the shape of the colonial noose.

Secondly, a quite different example: the abandonment two centuries ago, for ideological reasons, of a set of criminal sanctions designed to protect the poor and to keep civil order without force. The sanctions were the old market crimes of engrossing, regrating and forestalling – creating scarcity and forcing up prices by cornering supplies before or after they reached market. These activities had been criminalised by statute since the reign of Edward VI – a time when, as Keith Thomas notes in *The Ends of Life*³⁰, the view that the pursuit of self-interest was both ineluctable and socially beneficial first began to be articulated; and John Baker records prosecutions for regrating and engrossing, evidently at common law, even earlier than this³¹.

Adam Smith, although he was alive to the dangers of monopoly, contended that such market crimes were comparable to “the popular terrors and suspicions of witchcraft”³²; but when in 1772 Parliament repealed the statutes which created them³³, the judges held that they were still crimes at common law. In more than one prosecution in the years that followed, Adam Smith's writings were cited to the court as arguments for acquittal. For a time the more conservative judges held out against this. Lord Kenyon CJ, trying a regrater named Rusby at the London Guildhall in 1800³⁴, said to his jury:

“A very learned man, a good writer, has said you might as well fear witchcraft. I wish Dr Adam Smith had lived to hear the evidence today.... If he had been told that cattle and corn were brought to market and then bought by a man whose purse happened to be longer than his neighbours, so that the poor man who walks the street and earns his daily bread by his daily labour could get none but through his hands, and at the price he chose

³⁰ p. 144

³¹ J. Baker, *Oxford History of the Laws of England*, VI, 272

³² Adam Smith, *The Wealth of Nations*, Bk. IV, ch. 5 (1776).

³³ 12 Geo. III, c.71. The statutes against engrossing dated from the reign of Edward VI.

³⁴ *R v Rusby* (1800) Peake Add. Cas., 189; 170 ER 241: “though in an evil hour all the statutes ... were at one blow repealed, yet, thank God, the provisions of the common law were not destroyed...”

to demand, ... would he have said that there was no danger from such an offence?”

Kenyon went on to tell his jury:

“It has been said that in one county, I will not name it, a rich man has placed his emissaries to buy all the butter coming to the market: if such a fact does exist, and the poor of that neighbourhood cannot get the necessaries of life, the event of your verdict may be highly useful to the public.”

With Erskine leading Garrow for the prosecution, and egged on by Kenyon’s not entirely dispassionate summing-up, the jury convicted Rusby on the spot.

The unnamed county Kenyon was speaking about in his charge to the Guildhall jury was almost certainly Oxfordshire. When in September 1800 the Vice-Chancellor of Oxford University, acting without consulting the local magistrates, had cavalry sent in to suppress disorder over an engineered inflation of the market price of butter, the town clerk wrote on behalf of the mayor and magistrates to the Secretary of State at War, the Duke of Portland, to assure him that the city was able to control discontent over market abuse by prosecuting speculators. He got a long and pompous answer criticising the city for failing to prosecute the rioters rather than the speculators and commending a laissez-faire approach to markets. Controlling prices, said the Duke,

“necessarily prevents the Employment of Capital in the Farming Line”³⁵,

and he wrote to the Vice-Chancellor in support of

“those who instead of being denominated Engrossers are correctly speaking the Purveyors and provident Stewards of the Public”³⁶.

By the time of Kenyon’s death in 1802, Eldon, who suffered from no such scruples, was Lord Chancellor, and judicial policy was falling into line behind ministerial policy. In 1814 the Statute of Artificers, which enabled magistrates to set minimum wages, was repealed. The following year the legislation enabling the justices to control bread prices in London was also repealed. By the end of the Napoleonic wars grand juries were no longer being asked to indict speculators for market crimes, and judges were no longer inviting petty juries to convict.

³⁵ E.P.Thompson, ‘The moral economy of the English crowd in the 18th century’, 50 *Past and Present* 76, 129-131 (1971).

³⁶ *Ibid.* fn 147

The centuries-old market offences look Canute-like today; but the judges who had tried to maintain them at a time when conventional wisdom was shifting steadily in favour of unregulated markets were not ideological or jurisprudential dinosaurs. They were trying to preserve a legal paternalism which formed part of what E.P.Thompson called the moral economy of the eighteenth-century crowd, a paternalism which sought to maintain living standards and civil order in communities where livelihood was dependent on the integrity of markets, and where the hardship caused by rigged markets was driving rural families into England's proliferating factories and slums. For these people, the alternative to properly invigilated local markets was not, as the Duke of Portland supposed it was, agricultural prosperity. It was the poor-house, enlistment for foreign wars and, when they protested, Peterloo. Both the enforcement and the abandonment of market crimes may today appear to be part of what Alexander Bickel described as "the sediment of history which is law"³⁷ – but Bickel's dismissive description overlooks the proactivity of which law is also capable.

It's in the eighteenth century that you find the foundations of two of the grandest of the common law's edifices: the exclusion of political ministers from the administration of criminal justice, and the anathematisation of slavery. The first of these was far from being supported by clear-cut jurisprudence, but Lord Camden's protean judgment in *Entick v Carrington* became accepted – not unlike *Anisminic* in the twentieth century – as solid authority for what its audience wanted to hear. The second, Lord Mansfield's holding in *Somerset's Case* that the state of servitude was unknown to the common law, was the exact opposite: a perfectly clear-cut decision, albeit extempore and brief, which ran into a factitious morass of political, economic and moral self-interest, some of it Mansfield's own

The raid provoked by issue number 45 of Wilkes' ferociously anti-government paper *The North Briton* in April 1763 spawned a celebrated clutch of lawsuits, principally against the King's Messengers who had executed the Home Secretary's general warrant to search for and arrest the authors, printers and publishers of the paper. These cases established that ministers of the Crown had no judicial powers as conservators of the peace; that the general warrants they had been in the habit of issuing were unlawful; and that they were answerable to the ordinary courts for the consequent trespasses committed by their agents.

³⁷ Alexander Bickel, *The Least Dangerous Branch*, p.236.

It is probable that these decisions would have had a lasting impact without the separate lawsuit brought by John Entick, whose magazine *The Monitor* had been raided late the year before. But Entick bided his time and then brought his own action against the King's Messengers. Since the warrant used against him had not been a general warrant, he limited his claim to trespass to his house and goods; but it turned out to be the opportunity that Chief Justice Pratt (shortly to become Lord Camden) had been waiting for to bring all the issues of ministerial power together in a researched and comprehensive judgment³⁸.

Pratt's judgment is a *tour de force* of legal scholarship. In it he rebuts the claim, familiar and more than once successful in the course of the 17th century³⁹, that the state could commit wrongs under a shield of necessity:

“[W]ith respect to the argument from state necessity, or a distinction that has been aimed at between state offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of such distinctions.”⁴⁰

This being so, ministers enjoyed no extra-judicial powers of arrest or seizure. But did they possess judicial powers to investigate and suppress sedition, so that both they and their officers enjoyed the same statutory protection as constables whatever the outcome of their warrants? Again Pratt said no.

The problem, as Pratt was compelled to acknowledge, was that there was clear authority to the contrary - the decision of Chief Justice Holt in 1696⁴¹ that the monarch's secretaries of state possessed general powers of committal – that is, arrest – as conservators of the peace. The case had been treated as sound law and followed in at least two subsequent cases⁴². Yet -

“I ... am satisfied,” said Pratt, “that the secretary of state hath assumed this power as a transfer, I know not how, of the royal authority to himself; and that the common law of England knows no such magistrate. At the same time I declare, wherein my brothers do all agree with me, that we are bound to adhere to the determination of the Queen against Derby and the King against Earbury; and I have no right to overturn these decisions, even

³⁸ *Entick v Carrington* (1765) 19 St. Tr. 1029

³⁹ See S.Sedley, *Lions Under the Throne*, p. 216-7

⁴⁰ *Ibid.* 1073

⁴¹ *R v Kendal and Rowe* (1696) 1 Ld. Raym. 65

⁴² *R v Derby*, cited in full at 19 St. Tr. 1014-1016; *R v Earbury* (1722) 8 Mod. 177; (1733) 2 Barnard 293. Holdsworth, whose treatment of the case in his *History of English Law* has acquired canonical status, took Pratt, despite this, to have overruled these authorities by demonstrating the weakness of their premises.

though it should be admitted, that the practice, which has subsisted since the Revolution, has been erroneous in its commencement.”⁴³

There is something Denningesque about Pratt’s candid acknowledgment of contrary authority and his equally candid refusal to follow it. It might be possible by the use of advanced casuistry to find a thread of consistent jurisprudence in the passage, but history has not bothered with this. It has taken the Court of Common Pleas to have brushed aside the authority of the King’s Bench – a court of co-ordinate jurisdiction with the Common Pleas and therefore not able formally to bind it - and to have laid down a bright line segregating criminal justice from political governance. It is a line which in recent decades has come under growing stress (a stress first scrutinised half a century ago by David Williams) with the statutory enlargement of ministerial powers of investigation and control. But when in 1993 the Crown in *M v Home Office*⁴⁴ argued that, as a minister of the Crown, a Home Secretary who had defied an order of the court was not answerable in contempt for his conduct, the rebuff delivered by the law lords was justifiably described by Professor Wade as the most important judicial decision for over 200 years – meaning, as he more than once made clear, since *Entick v Carrington*.

Somerset’s Case, decided by Mansfield seven years after Pratt decided *Entick v Carrington*, was in some ways an equal and opposite phenomenon. Mansfield, an experienced politician and a shrewd investor, was not an abolitionist. Not long before he had told John Dunning, counsel for the West African seaman Thomas Lewis whose employer, Stapylton, had purported to sell him into slavery in England, that the legality of slavery would be best left an open question:

“for I would have all masters think them free, and all Negroes think they were not....”⁴⁵

But Granville Sharp, who had prosecuted Stapylton for kidnapping Lewis and secured a verdict that Lewis had never been Stapylton’s property, would not let it rest there. In November 1771 he learned that a West African re-named James Somerset was being held in irons aboard a ship at anchor in the Thames, awaiting transportation to Jamaica where he was to be sold. Within two days Sharp had obtained from Mansfield a writ of habeas corpus calling on the ship’s captain to justify Somerset’s detention. The widely held

⁴³ At 1058

⁴⁴ [1994] 1 AC 377

⁴⁵ Oldham, *The Mansfield Papers*, p.50

belief that Mansfield deliberately delayed a hearing is incorrect: he adjourned it once in the express hope of a settlement, but in June 1772 he sat *in banc* and, with his fellow judges, heard out the arguments. Albeit under pressure of time, Granville Sharp had been able to assemble a formidable team, led by Serjeant Davy and Serjeant Glynn, with a future chief justice of the Common Pleas, James Mansfield, and the scholarly Francis Hargrave as their juniors, all of them appearing without fee; while the slave-owners bankrolling the ship's captain had briefed Dunning, the former solicitor-general who had appeared on Hargrave's instructions for James Lewis and who in his submissions acknowledged the unpopularity of his cause and took refuge in his duty to his client.

Mansfield's judgment was not quite the rhetorical *tour de force* that legend has made it. The stirring line "The air of England has long been too pure for a slave, and every man is free who breathes it" was shoehorned in by Lord Campbell when he came in the following century to write his *Life of Mansfield*. But what Mansfield did say, although inelegant, was unequivocal:

"The state of slavery ... is so odious that nothing can be suffered to support it but positive law. Whatever inconvenience therefore may follow from a decision, I cannot say this case is allowed or approved by the law of England, and therefore the black must be discharged."

In other words, the return to writ had no foundation in English law. As a commercial lawyer Mansfield knew very well what the inconveniences were that would follow from his judgment, which had been given (it should not be forgotten) with the assent of the other three judges of the King's Bench. Not only would the 14,000 black men and women held in servitude in England and Wales become instantly free; it was probable that the same had to follow in all Britain's ceded or conquered colonies, where – in contrast to the settled colonies, as Mansfield himself was to hold two years later – the common law had direct force⁴⁶.

That this did not happen, and that instead the judges, with Parliament's acquiescence, continued for decades to endorse or at least tolerate colonial slavery, is an embarrassing example of the law's capacity for moral cowardice in the face of political and economic pressure. Many MPs had interests in slave plantations; slaving voyages, in which many of them had stakes, could return a profit of 2000 per cent. Mansfield himself in the *Zong* case, some eleven years after *Somerset's Case*, unblinkingly treated

⁴⁶ *Campbell v Hall* (1774) 1 Cowp. 204

jettisoned slaves as insurable cargo⁴⁷. As late as 1827 Lord Stowell held that a slave who had lived in Britain and so had become free could be enslaved again on her return to the West Indies⁴⁸. And as late as 1860 the English courts were prepared to enforce contracts for the sale of slaves in Brazil⁴⁹. Although abolition bills were introduced pretty well every year from 1782, it took Parliament until 1807 to outlaw slave trading and until 1833 to formally abolish colonial slavery⁵⁰ – the latter at a monumental price in compensation to the slave-owners, raised by taxes on goods which fell mostly on the domestic working class. Not a penny was paid to the ex-slaves.

Here too the law can be seen making its own history, not in the simplistic sense that as time goes by one decision or statute succeeds another, but in the sense that the judges from time to time, and not necessarily collusively, determine what trajectory of the law is to follow. If the trajectory followed by the judges on the issue of slavery was hesitant and unprincipled, it was not, as is frequently suggested, because Mansfield’s judgment had been unclear or equivocal. It was the lawmakers both on the bench (Mansfield himself among them) and in Parliament who equivocated.

Their pusillanimity contrasts with what followed elsewhere in the Empire. Here, according to Mansfield’s own doctrine in *Campbell v Hall*⁵¹, the laws of ceded or conquered colonies were required to conform to the fundamental principles of the common law. Each of the American colonies took the opportunity of the War of Independence to legislate either to abolish or to institutionalise slavery within its borders. But the practice of slavery also came in question in Lower Canada, which – unlike the settled American colonies – had become a British possession by conquest. A petition to the Canadian parliament in 1799 asserted that slaves in Lower Canada had recently

“imbibed a refractory and disobedient spirit under pretext that no slavery exists in the Province”

The petition went on to recite that the Canadian court of King’s Bench, plainly in reliance on *Somerset’s Case* and on *Campbell v Hall*, had begun granting writs of habeas corpus to liberate not only two runaway slaves who had been apprehended but, as the chief justice had announced,

⁴⁷ *Gregson v Gilbert* (1783)

⁴⁸ *The Slave Grace* (1827) 2 St. Tr. (NS) 273

⁴⁹ *Santos v Illidge* (1860) 8 CB (NS) 861

⁵⁰ It was succeeded first by a bogus system of ‘apprenticeship’ and then by the tyrannous system of indentures.

⁵¹ (1774) 1 Cowp. 204

“every negro, indented apprentice and servant who should be committed to gaol under the magistrates’ warrant in the like cases.”⁵²

Let me turn lastly to a quite different way in which legal history is made: by treating inconvenient events as simply not having happened. It is one thing - and not a mere pretence - to hold a measure to be devoid of legal effect; quite another to treat a historical legal fact as never having occurred. Yet that is how my generation (and I suspect others too) were taught legal history: our lecturer at the Inns of Court School of Law stopped at 1649 and moved directly to 1660 because everything that had happened between those years was, he said, a legal nullity.

This was not one teacher’s idiosyncrasy. In 1660, on the restoration of the monarchy after 18 years of republicanism, the public hangman was ordered to make a bonfire in Westminster Hall (safety regulations not being then quite as stringent as they are now) of every copy of a number of republican enactments, and a search was ordered to be made for every copy of “the traitorous writing called the Instrument of Government”.

The Instrument of Government, enacted in 1653, was Britain’s first and only written constitution. Not only did the Protectorate which it created foreshadow the American model of presidential government, with a parliamentary override of any measures promulgated by the Protector; it was palpably the source of a number of provisions of the Bill of Rights adopted 35 years later by another Parliament which, for all its protestations of legitimacy, had once again unseated a monarch and was setting its own terms of governance. We all know that the Bill of Rights in 1689 declared the regal practice of suspending or dispensing with laws enacted by Parliament, and the raising of revenue without Parliament’s authority, to be illegal. How many of us know that 35 years earlier the Instrument of Government had provided:

“That the laws shall not be altered, suspended, abrogated or repealed, nor any new law made, nor any tax, charge or imposition laid upon the people, but by common consent in Parliament...”⁵³

⁵² House of Assembly of Lower Canada, minutes 23 March-3 June 1799.

⁵³ The article continued: “save only as is expressed in the thirtieth article.” The thirtieth article, echoing the constitutional issue which had led to the Petition of Right in 1628, gave the Protector an emergency power to raise military and naval taxes until Parliament could assemble.

We all know that it was the Act of Settlement that in 1701 created the secure tenure of judicial office which still underpins the separation of powers. Who knew that it was in 1642 that the Long Parliament first extracted this principle from Charles I⁵⁴, and in 1648 confirmed it by statute⁵⁵? While many of us were taught at school – inaccurately – that the Puritans had abolished Christmas, none of us as law students were told that in the years of the Interregnum, Parliament had stopped the use of Latin and French in the courts, had instituted civil marriage, had transferred the criminal, probate and divorce jurisdiction of the ecclesiastical courts to temporal courts, and had stopped the routine gaoling of debtors.

You will not discover any of this from the statute book. The *Statutes at Large* stop short in 1641, the year before Parliament, on the eve of the Civil War, began to legislate without royal assent. The next page is dated 1660, “the twelfth year of the reign of our most gracious sovereign lord Charles the Second”. It was not until 1911 that the *Acts and Ordinances of the Interregnum* – the Civil War, the Commonwealth and the Protectorate – were finally published⁵⁶.

There is more. Who knew that it was under the Protectorate that the origins of a salaried civil service were to be found? Or that it was the criminal courts of the Commonwealth which first recognised the privilege against self-incrimination and stopped the use of paid informers? Or that, as chief justice of Munster in the 1650s, John Cooke, the Commonwealth’s former solicitor general, authorised his judges to administer law and equity together, with the result, Cromwell told Edmund Ludlow, that the Munster courts were deciding more cases in a week than Westminster Hall in a year? Or that the law commission set up under Sir Matthew Hale had drafted sixteen bills to codify large areas of law and procedure, and by the time it was dissolved in 1653 had on its agenda the regulation of lawyers’ fees; a ban on MPs moonlighting as lawyers; the establishment of small claims courts; abolition of the sale of offices and of benefit of clergy; public registries of deeds; the right of accused persons to be defended by counsel, to give evidence and to call witnesses; and (at Cromwell’s instigation) modification of the death penalty.

These might perhaps have been written off as foolish essays in doomed idealism, as irrelevant to the modern legal world as the Witanagemót, were it

⁵⁴ S. R. Gardiner, *History of England 1603-1642*, cited by Veall, op cit, p.199 fn.1

⁵⁵ Firth and Rait, i, 1226-7, appointing a number of judges to the bench “*quamdiu se bene gesserint*”. Since 1700, see the Act of Settlement (now the Senior Courts Act 1981, s. 11(3))

⁵⁶ *Acts and Ordinances of the Interregnum*, ed. C. H. Firth and R. S. Rait.

not for the fact that almost every reform of the Interregnum, although annulled at the Restoration, has since become a reality. In 1731 English was again made the language of the law. A deeds registry was opened in 1703, and a land registry in 1875. Civil marriage was reinstated in 1836. The remarriage of law and equity was finally solemnised by the Judicature Acts of 1873-5. Between 1697 and 1898 criminal procedure slowly crept back towards where it had been in the Interregnum. And 313 years after Matthew Hale and his commissioners first set about codifying and reforming the law, England and Wales again acquired a standing law commission. Only the refusal of Parliament to stop its elected members taking other employment while collecting their parliamentary salaries has proved unshakable both then and now.

If there is a moral to these heterogeneous stories, it is, I suppose, that the law, like other subcultures, has its own versions of truth and habitually recasts itself in their image. The late Geoffrey Wilson wrote:

“The courts do not operate on the basis of real history, the kind of history that is vulnerable to or determined by historical research. They operate on the basis of an assumed, conventional, one might even say consensual, history in which historical events and institutions often have a symbolic value.”⁵⁷

These versions of history may derive, like the jurisprudence derived from *Anisminic*, from what lawyers perceive as the law’s intrinsic logic; though the larger history of the twentieth century, which I have not had space here to explore, suggests deeper reasons of which the lawyers themselves may not have been wholly conscious. They may derive from the opposite: the law’s fear, following a decision like *Somerset’s Case*, of what it has itself unleashed. Here the judicial casuistry tends to be more visible. They may be dictated more or less overtly by changes in political and economic philosophy, as happened both with the old market crimes and with the perceived modern need to crack down on gang violence; or more subtly but more radically by the slow growth of a newly autocratic mode of government, like the one which provoked the great showdown between the Hanoverian monarchy’s judges and its ministers over state necessity and personal liberty.

⁵⁷ G.Wilson, postscript to M.Nolan and S.Sedley, *The making and remaking of the British constitution* (the Radcliffe Lectures) (1998), p. 128-9

Lastly, the law's version of truth may simply be derived from a dominant historiography in which there are good guys (royalists) and bad guys (republicans), and it's not comfortable to accept that history was in a great many respects on the side of the latter. If so, there may be something after all to be said for reading yesterday through the lens of today. But it would be naive simply to reverse Leavis's aphorism and to say there's no such thing as law, only legal history. What it is possible to say - and I think Tom Bingham would have agreed, though Dicey would not - is that without history there is no law.