

Time Present and Time Past: Legal Development and Legal Tradition in the Common Law

The Neill Law Lecture 2022

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The title of my lecture, “Time Present and Time Past”, is the opening line of T.S. Eliot’s *Burnt Norton*, the first poem in his *Four Quartets*. The poems make clear the importance which Eliot attached to history and tradition in understanding the world and our place in it. He is far from alone in that view. Our bestseller lists, our cinema and television all reflect the importance that we attach to our sense of the past, and of our connection to it.

English law has a particularly strong relationship with the past. Although it is often presented as a set of rules which can be subjected to logical analysis, that conception does not explain a number of aspects of the law: for example, how common law rules and principles came into being, how they have come to be regarded as legitimate, and how they have the capacity to develop over time. Nor is it a realistic account of how, in practice, judges and lawyers often reason about the law.

As ours is a common law system based on the application of precedent, the primary source of its rules and principles is the historical body of cases decided in the past and collected in the law reports. Each precedent concerns an individual human story which arose at some point in the past, and resulted in a legal dispute which came

before the courts for decision. In deciding the case, the judge may have articulated a legal principle which he (until recent times, it always was a man) understood himself to be applying, or later judges may arrive at a principle by a process of induction from a series of judicial decisions in individual cases.

The process of development of the common law reflects the nature of its sources. Judges find in the sources the principles which they apply, as I have explained, but as new cases continually come before the courts, and society evolves, the principles which are inferred from the cases are refined or qualified, and the law develops. Older cases may be re-interpreted or superseded. Usually, the sources do not speak with one voice, but with different voices from different periods and sometimes different places. Differences between the views expressed allow scope for the courts to find a legitimate basis for legal development, while remaining faithful to the tradition which they have inherited. Achieving coherence between different rules, sometimes laid down in cases decided at different times and in different circumstances, is another basis for legal development. In so far as the principles to be applied are shared with other jurisdictions, as is often the case, it is also legitimate to have regard to the development of the principles in those jurisdictions when considering how they might be developed in our own system.

There are many theories of the legitimacy of the law, but I think most people would regard it as important that the law governing our society has developed continuously over many centuries, reflecting the development of our society over that time. Our constitutional law, for example, does not derive its authority from the adoption of a constitutional document at a point in time marking some sort of break

with the past, as in most countries, but from its development over the centuries, in response to changes in our society, as a set of rules and principles regulating our governing institutions and the relationships between them.

It follows that the common law, far from being an abstract set of rules, is embedded in the history of our society, and also has a relationship with the legal systems of other societies. Far from being static, it is characterised by both continuity and change. Far from being a logically coherent scheme, it contains contrasting and sometimes contradictory strains of legal thought, partly as a consequence of the historical nature of its sources, dating from different periods with different intellectual outlooks, and partly because its sources are judgments written by individual judges according to their personal understanding of the law. Its method of analysis is not purely logical, although logic forms a central element. It requires a form of reasoning by which judges manage an engagement between the present and the past. Ultimately, the courts are pragmatically concerned with what justice requires here and now; but any development of the common law in order to meet the needs of the present time has to remain faithful, at some level of generality, to principles derived from sources from the past. Furthermore, the principles currently found in the law usually make little sense without understanding how they came into being and have been applied over time. That understanding is not only the clue to their meaning but can also provide guidance in deciding how they should be applied or adapted in new circumstances.

So the judge is interested in materials from the past, but not in the same way as a historian. Consideration of previous cases is not so much a charting of the law's past as an external observer, as a living engagement with the approaches adopted by judges

in the past, so far as they remain relevant to the present. If the historian is searching for the best and most original records, with a view to understanding and describing the events of the past in all their detail and complexity, the judge has a different task, which is focused on the normative significance of the judicial decisions of the past to the resolution of present-day disputes. In one sense, it might be said that the long-dead judges who decided the cases in the law reports are still talking to us, perennial speakers in a continuous conversation. But they have to be located in their own time, and their decisions must be treated as products of their own era, if anachronism and stasis are to be avoided.

It follows that there is a sense in which the application of the common law is an historical exercise. To give an example, the Supreme Court recently had to decide a case concerned with whether the NHS had a right of action under the common law against a pharmaceutical company which charged it high prices for patented drugs, as the monopoly resulting from the grant of the patent enabled it to do. The NHS alleged that the patent had been obtained by the fraudulent deception of the patent authorities.¹ Assuming that that was true, the question arose whether the deception of the patent authorities conferred any right of action on the NHS. The cases we considered included one concerned with the tactics employed by commercial rivals in the stone quarrying trade in Jacobean Oxford;² another case concerned with the eighteenth century slave trade, where an English trader had fired cannon at a canoe with natives of Cameroon on board so as to deter them from selling slaves to his competitor;³ and another concerned

¹ *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24; [2021] 3 WLR 370.

² *Garrett v Taylor* (1620) Cro Jac 567; 79 ER 485.

³ *Tarleton v McGawley* (1794) Peake 270; 170 ER 153.

with the poaching of Wagner's niece, the Kirsten Flagstad of her day, by the Royal Opera House from one of its competitors.⁴

Why were the judges interested in decisions taken long ago on different facts? The NHS was seeking damages from the pharmaceutical company for having caused it to suffer economic loss by unlawful means: a recognised basis of liability in the law of tort. The pharmaceutical company argued in its defence that it was an essential ingredient of the tort that the defendant must have used unlawful means to affect a third party's freedom to deal with the claimant: an ingredient which was not present even if, as was alleged, the company had obtained its patent by deception, since the deception had not affected anyone's freedom to deal with the NHS. That argument was supported by the previous cases. The stone supplier in Oxford had used threats and violence to deter members of the public from buying their stone from his rival's quarry in Headington; the slaver had used his cannon to deter the natives from trading with his competitor; and so on. So the history of the law supported the pharmaceutical company's argument; and the court concluded that the traditional approach continued to be justified in the modern age, where competition is primarily regulated by legislation, and the scope of common law constraints on competition has to be kept within limits.

As the cases concerned with Jacobean Oxford, the eighteenth century slave trade and Victorian opera houses illustrate, every reported case is a fragment of our history. Some concern individuals or events of national importance. But the great majority of

⁴ *Lumley v Gye* (1853) 2 El & Bl 216; 118 ER 749.

the cases to be found in the law reports are concerned with the accidents of ordinary life, experienced by men and women who are otherwise forgotten. So, quite apart from their significance as sources of law, the reports of these cases can also be significant as historical documents, providing an insight into the social life and attitudes of the past.

Historians often use law reports as historical sources, finding in them a contemporary record of historical events, or evidence of the social life and attitudes of the past. But historians do not usually confine themselves to those sources: the materials which are relevant to their purpose will usually be of a wider ambit. Judges do not use law reports in the same way: they generally go to them, when deciding a case which raises a novel or difficult question, in order to understand the principles underlying the development of the law to date. They read law reports in order to understand the legal problem which the judge saw himself as addressing, to understand what he actually decided, and to understand the circumstances which influenced him in deciding the case as he did.

So, in order to understand the nature of the common law, and its development over time, it seems to me to be important to grasp that its sources were designed to resolve particular problems at a particular time and place. Judges have to consider whether the present context is materially different, as there is otherwise a risk that a precedent-based system may result in the ossification of the law. That risk can only be avoided if they read precedents with sensitivity to the historical context in which they were decided. Their task is to find the legal answer for their own time, and they therefore need to take account of changes in attitudes and conditions since the case in question was decided.

The point can be illustrated by a remark made by the philosopher and ancient historian Robin Collingwood. He described reading some modern philosophers, who argued that the ancient Greeks had an inadequate understanding of moral obligations, as being like a nightmare in which a man insists on translating the Greek word for a trireme as “steamship”, and then complains that Greek theories about steamships were all wrong.⁵ To look for solutions to twentieth century problems about the design of steamships in Greek writings about triremes would evidently have been misguided. Of course, Collingwood understood perfectly well that modern philosophers are working in a tradition which originated with the ancient Greeks. His point was that today’s society and culture are so different from those of ancient Greece that the views of the Greek philosophers about the issues which confronted them in their own time may not necessarily assist contemporary philosophers in addressing the issues which confront us in ours, unless, at least, due allowance is made for those differences.

Three points follow from what I have said so far. First, the common law is inherently rooted in our national history. It is not an abstract set of rules. Its principles have a history, which can be traced by reading judicial decisions in chronological order.

Secondly, each successive generation of judges inherits a tradition which has been developed over a very long period by its predecessors. Through that tradition, the wisdom of the judges of the past has been continuously tested, elaborated, and adapted to the needs of current times from one generation to the next. Judges have a responsibility to preserve, repair and renew that tradition as necessary, and to pass it on

⁵ *An Autobiography* (Oxford, 1978), p 64.

to those who succeed them. Rather like the scriptwriters of a long-running radio serial, they make their own contribution during the period when they are in post, but they have to write in a way which is both continuous with what has previously been written and a development of it.

Thirdly, although each generation of judges tries to apply the law in a coherent way, legal reasoning in difficult cases is not solely a process of logical analysis. As Oliver Wendell Holmes remarked in his book on *The Common Law*, 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.⁶

Let me turn now to consider two cases to illustrate what I have said already and to provide a foundation for some additional remarks. I have chosen two very well-known cases in constitutional law, as they may be of general interest, but I could equally have chosen cases from almost any area of the law.

The first is a case from the 17th century, a period of constitutional struggle between the Crown and Parliament, which was of vital importance in the development of Parliamentary sovereignty and judicial independence, exemplified at the end of the century by the Bill of Rights 1689 and the Act of Settlement 1701. The case in question, the *Case of Proclamations* of 1610,⁷ is treated as authority that, as the judges stated, “the King hath no prerogative, but that which the law of the land allows him”, indicating that the limits of prerogative powers are set by law and are therefore justiciable by the courts. It is also treated as authority that any attempt to alter the law of the land by the

⁶ *The Common Law* (1881), p 1.

⁷ (1611) 12 Co Rep 74; 77 ER 135.

use of the Crown's prerogative powers, rather than through Parliamentary legislation, is unlawful. It is thus a case which is fundamental to our democracy, in establishing the legal principle of the supremacy of Parliament, and the role of the courts in enforcing it. The case is also fascinating as a historical source. The history of the courts' treatment of the case is also of interest in showing how the courts sometimes make use of precedents.

The case was not, properly speaking, a case at all: there was no hearing in court, no adversarial argument. The report is rather of an advisory opinion. Nor is the report of the case, by Sir Edward Coke, a report in the modern sense.⁸ It reads like an entry in his diary. It begins:

“Memorandum, that upon Thursday, 20 Sept. 8 Regis Jacobi, I was sent for to attend the Lord Chancellor, Lord Treasurer, Lord Privy Seal, and the Chancellor of the Duchy; there being present the attorney, the solicitor, and recorder”.

These were leading figures in the government of the day. The Lord Treasurer, for example, was Robert Cecil, Earl of Salisbury. Coke continues:

“... two questions were moved to me by the Lord Treasurer; the one if the King by his proclamation may prohibit new buildings in and about London, &c; the other, if the King may prohibit the making of starch of wheat.”

⁸ Even his more conventional reports are more like compendiums of the law bearing on a case, with personal comments and remarks.

The first of the proclamations in question, issued in 1605, was an early measure of planning and environmental law, which required new houses in and around London to be built of brick, so as preserve stocks of timber for shipping and the navy, and to be of a uniform appearance ordered for the street in question by the magistrates, acting on the recommendations of a Royal Commission. The second proclamation, issued in 1610, was designed to address a shortage of wheat for bread-making, and the correspondingly high price of bread. The shortage resulted from the use of wheat to produce the starch needed to keep the collars and ruffs of the gentry looking smart. Breaches of these proclamations were punishable as contempts.

It appears from Coke's memorandum that the House of Commons had petitioned the King, complaining that these proclamations were "against the law and justice". The King replied that he would confer with his Privy Council and his judges, "and then do right to them". Coke, who was at the time the Chief Justice of the Common Pleas, asked for time to discuss the issues with his brother judges, saying that "I did not hear of these questions until this morning at nine of the clock". The ministers were reluctant to allow him time, and expected Coke to agree there and then with the lawfulness of the proclamations. The Lord Chancellor said "that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be no more than the Duke of Venice". The Lord Privy Seal, Henry Howard, Earl of Northampton, said "that the physician was not always bound to a precedent, but to apply his medicine according to the quality of the disease". "All concluded", as Coke records, "that it should be necessary at that time

to confirm the King's prerogative with our opinions, although that there were not any former precedent or authority in law: for every precedent ought to have a commencement.”

Coke states that he responded that “the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament”, but that “at this time I only desired to have a time of consideration and conference with my brothers”. The Solicitor General, Sir Francis Bacon, Coke’s nemesis, pointed out that Coke had himself passed sentence in several cases for breaches of the proclamation against building, but Coke dug his heels in, and it was agreed that he could consider the issue together with the two other most senior judges⁹ and a third judge who was a friend of Bacon’s and reputedly hostile to Coke.¹⁰

The next half page of the report contains Coke’s notes of his research into the constitutional question, going back to the reign of Henry IV. He concluded that “the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm”. He says nothing about his discussion with the other judges but records the conclusions which they reached in their discussion with the Privy Council, including that:

“the law of England is divided into three parts, common law, statute law, and custom; but the King’s proclamation is none of them ... Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him.”

⁹ Sir Thomas Fleming (Chief Justice of the King’s Bench) and Sir Lawrence Tanfield (Chief Baron of the Exchequer).

¹⁰ Sir James Altham was a Baron of Exchequer.

It followed both that the limits of prerogative powers were justiciable, and that such powers could not be used to alter domestic law. As a consequence, the Crown could not lawfully exercise its administrative powers so as to deprive individuals of their rights under statute or the common law: otherwise, ministers would be changing the law, which the *Case of Proclamations* decided that they cannot do. In other words, this case – among others – establishes that the government has to obey the law of the land.

Although the judges' conclusion was politically controversial at the time, and proclamations continued to be issued for some time afterwards, it was decisively confirmed by the settlement arrived at between Parliament and the Crown at the end of the century, and by subsequent political and legal developments.¹¹ By then, the exercise of the Monarch's prerogative powers had passed to ministers of the Crown, but the same principle, that prerogative powers could only be used consistently with legislation and the common law, was understood to apply, as the House of Lords confirmed during the First World War in the case of *The Zamora*, when they rejected the contention that the government could alter the law by an Order in Council.¹²

The history of the *Case of Proclamations*, as a legal authority, illustrates some of the points I wish to make. In the first place, as I have explained, it is not a conventional record of a judicial decision, but a memorandum recording advice given by senior judges to the Privy Council. Secondly, it is a matter of contingency that the

¹¹ These are illustrated by the Bill of Rights 1689, which prohibited other executive encroachments on Parliamentary sovereignty, and by Locke's *Essay on Civil Government* (1689), para 131 ("... whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees."). Locke influenced not only subsequent political thought, but also Blackstone's treatment of the subject (*Commentaries* (1765), vol 1, p 25), and judicial approaches to the prerogative, down to relatively modern times: see, for example, *Earl Fitzwilliam's Wentworth Estates Co Ltd v Minister of Town and Country Planning* [1951] 2 KB 284, 312 and *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 74, 117.

¹² [1916] 2 AC 77, 90 per Lord Parker of Waddington.

report has come down to us. Coke did not include the case in the eleven volumes of reports which were published during his lifetime. The memorandum was among the papers which were confiscated by the King's officers in 1633, although they were later returned to the family, following a vote in Parliament in 1641, after Coke had died. So one finds the case reported in volume 12 of Coke's Reports, published in 1657, during the Commonwealth, long after his death. Thirdly, there is a question whether the report is a historically accurate account of the events in question. Its accuracy was questioned long ago in the light of manuscripts held at Hatfield House, built in the year of the case by the Earl of Salisbury.¹³ But that divergence between sources, although important to a historian wanting to arrive at an accurate understanding of the events in question, has no real bearing on the legal significance of Coke's report, which is important as a record of the thinking of someone who has long been acknowledged as one of the most eminent judges in our history. As Chief Justice Sir William Best said in 1824, "The fact is, Lord Coke had [often] no authority for what he states, but I am afraid we should get rid of a great deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is".¹⁴

Fourthly, it took a long time for the case to gain its present eminence in constitutional law. It appears to have been Dicey who brought the case to prominence in the late nineteenth century, citing it as "a solemn opinion or protest of the judges"

¹³ Usher, R, "James I and Sir Edward Coke" (1903) 18 English Historical Review 664.

¹⁴ *Garland v Jekyll* (1824) 2 Bing 273, 296-297; 130 ER 311, 320.

which “established the modern doctrine that royal proclamations have in no sense the force of law; they serve to call the attention of the public to the law, but they cannot of themselves impose upon any man any legal obligation or duty not imposed by common law or by Act of Parliament”.¹⁵ The case does not appear to have been cited in any judgment, as far as legal search engines disclose, until 1951, when it was relied on by Lord Justice Denning in a dissenting judgment, in support of the view that a government department could not lawfully use compulsory purchase powers given to it by Parliament in order to enforce a policy which Parliament had not authorised, since that would amount to making law without Parliamentary consent.¹⁶ Lord Denning cited it again 26 years later, in the *Laker Airways* case, as establishing that prerogative powers are subject to justiciable limits.¹⁷ It is characteristic that it should have been cited by Lord Denning, as he was a judge who combined a profound knowledge of the history of the common law with a willingness to use that history selectively and purposefully in the service of the present. Since those judgments were given, the case has become a firmly established authority, cited repeatedly in cases concerned with prerogative powers.¹⁸

A historian might view Lord Denning’s approach to the *Case of Proclamations* as an example of the Whig interpretation of history: that is to say, the approach which

¹⁵ A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 1st ed (1885), p 53 (p 34 of A V Dicey, *The Law of the Constitution (The Oxford Edition of Dicey, Vol 1)*, ed JWF Allison (2013).

¹⁶ *Earl Fitzwilliam’s Wentworth Estates Co Ltd v Minister of Town and Country Planning* [1951] 2 KB 284.

¹⁷ *Laker Airways Ltd v Department of Trade* [1977] QB 643.

¹⁸ See eg *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 407, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] QB 365, paras 31 and 111, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, para 149, *Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc v Attorney General of Trinidad and Tobago* [2009] UKPC 17, *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 and *R (Miller) v Prime Minister (Lord Advocate and others intervening)* [2019] UKSC 41.

Herbert Butterfield criticised, in his book of that name,¹⁹ for interpreting the past in the light of the present, and assuming a false continuity in events. But, as I have explained, a judge's approach to the past is necessarily oriented towards the present and is therefore focused on the aspects of the past which are of particular significance in the present. Continuity between the past and the present, as well as change, is the assumption on which legal reasoning in a common law system is based.

So it seems to me to be legitimate, if the common law requires to be developed, within the proper limits of such development,²⁰ for judges to look for precedents which, properly understood in their context, support the approach which they are minded to take, even if that may not necessarily have been the approach which prevailed at that time. This is one of the ways in which the development of the common law can be consistent with the maintenance of a legal tradition. Although the common law's adherence to the principle of Parliament's legislative sovereignty, as recognised by Coke and his colleagues, may not have prevailed in 1610, their opinion or advice nevertheless demonstrates the deep historical roots of that principle, and thereby contributes to its constitutional legitimacy.

The other case which I would like to discuss illustrates an aspect of the use of authorities which I mentioned earlier, namely that the attitudes and beliefs, and the social circumstances, underlying a judicial decision taken at some point in the past may be significantly different from our own, with the consequence that the persuasiveness of the decision as a source of current legal principle may be diminished.

¹⁹ H Butterfield, *The Whig Interpretation of History* (1931).

²⁰ See *R (Elgizouli) v Secretary of State for the Home Department* [2020] UKSC 10, para 170.

The case in question is *Entick v Carrington*,²¹ decided in 1765, at a time when the Government was greatly concerned about seditious publications. John Entick was a schoolmaster and writer who wrote in a political paper called the *Monitor*, published every Saturday, and aimed at readers in the City. Each issue of the paper comprised a single essay, usually in the form of a letter. Entick was the author of a number of these essays; another writer for the paper was John Wilkes. The paper was financed by William Beckford, whose family wealth came from sugar plantations in the West Indies. The issues in question, which Entick was alleged to have written, were critical of the Government's conduct of negotiations with France and Spain to bring the Seven Years' War to an end. The *Monitor* was stridently opposed to a peace treaty, and its readership, with commercial interests in the colonies, favoured a more aggressive policy, aimed at Britain's obtaining as much as possible of the French and Spanish empires.

On 3 November 1762 preliminary peace terms were agreed, and fell to be debated in Parliament before the end of the year. The Secretary of State, the Earl of Halifax, received the provisional treaty that day, and immediately sought advice from the Law Officers about how to deal with the *Monitor*. On 6 November he issued a warrant in the name of the King to the King's messengers to search for Entick and "to seize and apprehend [him] and bring [him] together with his books and papers ... before the Earl of Halifax to be examined". Nathan Carrington, the King's chief messenger, arrived at Entick's house with other messengers at 11 o' clock in the morning on 11 November 1762. They went in, arrested Entick, and carried out a search over a period of four hours, taking away a quantity of pamphlets and papers. Entick brought

²¹ (1765) 19 St Tr 1029.

proceedings in trespass against Carrington and the other men, and in their defence they relied upon the warrant issued by the Secretary of State as lawful authority for their actions.

The Chief Justice of the Common Pleas, sir Charles Pratt, shortly to become Lord Camden, gave judgment for Entick, holding that the Secretary of State had not been authorised either by statute or by common law to issue a warrant for the search and seizure of personal property,²² and that it followed that he therefore had no power to do so. In a famous passage, Pratt said:

“The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole ... By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing ... If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be

²² The judgment was interpreted by Sir WS Holdsworth, *A History of English Law*, vol x, pp 667 and 672, and by Lord Diplock in *Inland Revenue Commissioners v Rossminster* [1980] AC 952, 1009, as also holding that the Secretary of State had no power to issue a warrant to arrest, but it is questionable whether that interpretation is correct. There are difficulties in interpreting parts of the judgment concerned with the Secretary of State’s power of committal, which are discussed in Hickman, “Revisiting Entick v Carrington: Seditious Libel and State Security Laws in Eighteenth-Century England”, in *Entick v Carrington: 250 Years of the Rule of Law* (2015), Tomkins and Scott eds, pp 72-80.

found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.”

In an equally important passage, Pratt rejected an argument based on state necessity:

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

Pratt also emphasised the importance of exact compliance with the terms of any lawful warrant, against a background where, as he explained, warrants had been used exorbitantly, and with few safeguards against their abuse.

This was another case of historic significance. Its importance as a landmark in establishing the rule of law and Parliamentary supremacy is beyond question, and it has also been treated by the United States Supreme Court as a critical milestone in the protection of privacy.²³ It is interesting to see how Pratt began his reasoning by setting out a Lockean theory of the fundamental importance of property rights to society, so as to establish common law rights of property as the default position, before giving effect to the constitutional principle that interferences with common law rights can only be authorised by Parliament: an idea which, as we have seen, goes back to Coke, whom Pratt cited.

²³ *Boyd v United States* [1886] 116 US 616.

The judgment is reported in two different versions. One report, by Mr Serjeant Wilson, is that of a contemporary lawyer who was probably present when judgment was delivered. It does not include the passages which I have quoted, although some of the same ideas are expressed in a summary form. The report which I have cited, in Francis Hargrave's collection of State Trials, was not published until half a century later, in 1816. It refers at the beginning to Wilson's report, and states that "instead of his short note of the Judgement of the Court, the Editor has the pleasing satisfaction to present to the reader the Judgment itself at length, as delivered by the Lord Chief Justice of the Common-Pleas from written notes". Hargrave explains that Pratt had burned his own notes, but that he, Hargrave, had obtained a copy from one of Pratt's friends. Neither report can be assumed to be an exact record of the terms in which judgment was delivered.

This case was also cited by Dicey.²⁴ It seems to have begun to be cited by judges at about the same time, in the 1880s and 1890s.²⁵ Predictably, Lord Denning was the first judge to cite it in modern times, in a case where police officers had lawfully entered private property in the execution of a warrant to search for specified stolen goods, had found no goods answering the description, but seized other goods which they reasonably believed to be stolen.²⁶ The chief constable was sued for damages. Lord Denning sought to derive from *Entick v Carrington*, and some later cases, a principle which would cover

²⁴ *Lectures Introductory to the Study of the Law of the Constitution*, (supra, n 16), p 194 (*The Oxford Edition of Dicey*, Vol 1, p 100).

²⁵ *Dillon v O'Brien* (1887) 20 LR Ir 316; *Jones v German* [1896] 2 QB 423, [1897] 1 QB 374.

²⁶ *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299. Lord Denning also cited *Entick v Carrington* in several later cases.

the case at hand. In their judgments in the same case, Lord Justices Diplock and Salmon expressed scepticism about that approach. Lord Justice Diplock said:

“From general observations to be found in various judgments ranging over two centuries to which we have been referred, it is possible to discern where, upon this matter, various judges would have thought the balance lay between the inviolability of private property and the pursuit of public weal in a society of the kind in which they lived. But it is worth while remembering that until *Sommerset's Case* in 1771 the balance lay in favour of private property in slaves. This was six years later than *Entick v Carrington*, a case to which we have been referred, whose reasoning we have been urged to follow. The society in which we live is not static, nor is the common law, since it comprises those rules which govern men's conduct in contemporary society on matters not expressly regulated by legislation.”²⁷

Lord Justice Diplock went on to explain how society had changed since the time of *Entick v Carrington*, both in its institutions, such as the establishment of police forces, and in its values, such as the weight attached to the protection of private property.²⁸ As a result, notwithstanding the support which *Entick v Carrington* gave to the idea that searches going beyond the terms of a warrant were necessarily unlawful at common law, a different conclusion was reached.

The two cases I have discussed illustrate that the law reports can be of interest as historical documents. They also illustrate some points to which, as it seems to me,

²⁷ At 315.

²⁸ See also at 318-319 per Salmon LJ.

judges and legal scholars need to pay attention. The first is that judicial decisions are not timeless. They occur in chronological order, and are embedded in the culture of their time. Secondly, their current relevance and application have to be considered in the light of the circumstances of the present time, which may be materially different. Understanding authorities in their context not only helps us to see them from the perspective of those responsible for deciding them, but also helps us to understand how they may best be applied or adapted in our own time. It can also help us to understand some broader truths about the law: that some problems are incapable of definitive solution, and that the answers given to legal questions are often time-bound and contextual.

One can, I think, conclude that, while the derivation of answers to the most difficult legal problems is based on legal reasoning, it is not simply a matter of logical deduction. As Coke famously told James I, according to the report of another case, “causes ... are not to be decided by natural reason but by the artificial reason and judgment of law ... which requires long study and experience, before that a man can attain to the cognizance of it.”²⁹ It can call for creativity, and requires the exercise of judgment as to the approach which is likely to work best.

An account of the common law as a set of rules cannot therefore be definitive. A degree of uncertainty is an inherent consequence of its methodology: the obverse of its flexibility and adaptability. Tensions and conflicts between the ideas it espouses are an unavoidable aspect of its nature as an evolving and pragmatic response to specific problems thrown up by life at specific times and places. The degree to which the

²⁹ *Prohibitions del Roy* (1607) 12 Co Rep 63; 77 ER 1342.

meaning of concepts employed in legal discourse is contested or unsettled can also give legal propositions a polyvalent character. Legal reasoning is therefore not to be understood as simply the analysis of a set of rules, but is better understood, at least from the perspective of a judge deciding difficult cases, as a process of creative reasoning about legal sources, involving a range of possibilities, constantly rolling forward.

Drawing these remarks to a close, I will finish with an observation made by the late Benjamin Kaplan, an American judge and professor at Harvard, which encapsulates much of what I have been saying, and provides an explanation of why the work of judges and legal scholars alike is so difficult and so compelling. A legal rule, he said, cannot be expected “to solve its problems fully and forever. Indeed, if the problems are real ones, they can never be solved. We are merely under the duty of trying continually to solve them.”³⁰ From that perspective, although TS Eliot did not have the law in mind, his words are apposite to the development of the common law:

“Time present and time past
Are both perhaps present in time future,
And time future contained in time past.”

³⁰ “A Prefatory Note”, (1969) 10 *Boston College Law Review* 497, 500.