Chapter 3

Law and the Use of History

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What is it that transmutes the past into what we dignify as "history"? What makes a belief as to previous time any more than a tradition or, indeed, merely a myth or legend? These are matters of debate about which there can never be, and, perhaps, should not be, clear responses commanding general assent. Yet they play their part in any consideration of the use of history in the law.

Take, for example, myth expressed as normative tradition. The memory of the common law is said to run from the accession in England of Richard I in 1189 on the death of Henry II. But it seems that the reason for this lay in the significance later given to a particular circumstance. This was the fixing of 1189 by the First Statute of Westminster,[1] passed in 1275, as the time of the limitation for bringing certain real actions.

We understand the past, not least the past of the law, in light of the material available and of what is selected as probative evidence from that material. The temptation then is to conclude that the past is settled, even simple, because we understand a selective body of evidence.

The system of adjudication

The Canadian historian, Margaret MacMillan, has described the use of history in terms which accommodate what we think of as legal method. She concludes that history is a process which is not directed to the production of definitive and permanent answers. But she prefaces that conclusion by observing:[2]

> History, by giving context and examples, helps when it comes to thinking about the present world. It aids in formulating questions, and without good questions it is difficult to begin to think in a coherent way at all. Knowledge of history suggests what sort of information might be needed to answer those questions. Experience teaches how to assess that information. As they look at the past, historians learn to behave rather like the examining magistrate in the

1 3 Edw I c 8.

2 M MacMillan, *The Uses and Abuses of History* (Random House, New York, 2009) at 167.

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