Knowledge and Approval

The complex interplay between statute and judge-made law

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Lindsay Ellison probably had in mind the judgment in *Lewis v Lewis* [2021] NSWCA 168 when he asked me to present on this topic, although the subtitle is (predictably) my own. His choice represents a curious phenomenon often observed in barristers, heard as they talk about their days in court. They seem mostly to talk about their victories, leaving their failures shrouded in silence.

Whilst Lindsay Ellison succeeded in having the appeal dismissed, the litigation may have been something of a Pyrrhic victory. Ellison's client was an accountant who later qualified as a solicitor, who accepted that he had knowingly procured false attestations on an earlier will. The trial judge found that the executor's conduct had been completely unsatisfactory, and in a later judgment referred the papers to the Law Society.[1] But focussing on the issues on appeal, his estranged younger brother was found to have been in substance responsible for the drafting of many of his mother's numerous wills and codicils, which conferred substantial benefits on the younger brother at the expense of the older brother. Significantly, they did so in a very complex manner.

The complexity of the wills and codicils was the result of a tax minimisation scheme devised by the late Bryan Pape, involving the inter vivos transfer of assets built up by the parents and held in a company they controlled to the trustee of a newly established discretionary trust. The primary judge summarised the position neatly:[2]

> "The testator seems to have subscribed to the popular superstition that by putting assets or income into a trust, tax liabilities can be made to disappear. There is no evidence that she had any understanding of trusts, or how they actually work."

* Judge of Appeal, Supreme Court of New South Wales.

1 *Lewis v Lewis (No 2)* [2020] NSWSC 1519 at [42]-[43].

2 *Lewis v Lewis* [2020] NSWSC 1306 at [394].

By the way, in case you are wondering, there is nothing so far as I can see to suggest that even if the steps advised had been carried out, there would have been any taxation advantage, to offset the certainty of substantial capital gains crystallised by the inter vivos transfers.

Initially both brothers agreed to implement the scheme, but then, when the father lost capacity, it appears that the mother, purporting to use a power of attorney and with the assistance of the younger brother, transferred the assets in the family company to be held on trust. There was heavy litigation in the Equity Division brought by a liquidator appointed on the application of the older brother who sued (among others) the mother and the younger brother, culminating in a judgment of White J.[3] The result was very substantial costs incurred and, it seems likely, very substantial animosity between the brothers.

The issue in the probate proceedings turned on a series of wills and codicils, substantially drafted by the younger brother although cut and pasted into an appropriate form by a solicitor, which gave ever increasing powers by setting off losses incurred by the litigation to alter the equal distribution which seems always to have been intended by the parents between the children. The chronology revealed that each later will or codicil responded to adverse rulings (and adverse costs orders) in the equity litigation. These long and complicated clauses were read out to the testatrix by the solicitor, without their effect being brought home to her.[4]

Lindsay's opponent, Raoul Wilson SC, who had not appeared at trial, prudently made no challenge to any of the findings of primary fact. He also accepted, very properly, that there was much that was suspicious about the way the wills and codicils came into existence, and that he bore the onus of establishing that the mother knew and approved them. However, he submitted that the fact that the testatrix had executed a will after it had been read out loud to her was sufficient. In a manner familiar to all appellate litigators, he cut his cloth by reference to the findings dealt to him by the outcome of the trial.

There is a fundamental ambiguity in what is meant by "knew and approved". Is it a reference to the words in the document? Or is it a reference to their effect? After all, every day people sign documents without reading them, and without understanding them, and they are bound. When Sir

3 *Thomas v Arthur Hughes Pty Ltd* [2015] NSWSC 1027.
4 There was a dispute about this, but that was what the Court of Appeal held the trial judge had said.

Thomas Scrutton said in *L'Estrange v F Graucob Ltd* that "[w]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not",[5] he was affirming a general principle which had been settled for centuries,[6] and is foundational in the Australian legal system.[7] But are wills different from contracts? In *Lewis v Lewis*, the primary judge said in order to satisfy the requirement of knowledge and approval, the testatrix needed to appreciate the *effect* of conferring a power of appointment upon the younger son.

On appeal, the submission was that a testator who knows and approves the content of the will is taken to have appreciated its effect. Reliance was placed on a range of English decisions, and a passage in the reasons of the Queensland Court of Appeal to the effect that "the required knowledge and approval is of the contents the will rather than a knowledge of its legal effect".[8]

Now, as it happens, this is not the first time a series of talks on legal subjects has been presented in the aftermath of a pandemic (or so I sincerely hope). In February 1921, the Yale Daily News reported that the lecture had to be removed to a larger venue, because of its popularity.[9] The lecture series was published shortly thereafter as *The Nature of the Judicial Process.* The main theme of the four lectures delivered by Judge Benjamin Cardozo is how judge-made law is developed. The themes in the chapter names give the flavour: "The Method of Philosophy", "The Methods of History, Tradition and Sociology", "The Judge as a Legislator" and "Adherence to Precedent". Many things combine when a court is asked to resolve a novel question of law, or to depart from an existing legal proposition. The second lecture commenced with the significance of history:

> "I do not mean that the directive force of history, even where its claims are most assertive, confines the law of the future to uninspired repetition of the law of the present and the past. I mean simply that history, in illuminating the past, illuminates the present, and in

5 [1934] KB 394 at 403.

6 See the speeches of Lords Reid, Wilberforce and Pearson in *Gallie v Lee* [1971] AC 1004 dealing with the limitations upon the plea of *non est factum*.

7 See for example the unanimous decisions of the High Court in *Petelin v Cullen* (1975) 132 CLR 355 at 359-360; [1975] HCA 24 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [42]-[47].

8 *Dore v Billinghurst* [2006] QCA 494 at [63].

9 See A Corbin, "The Judicial Process Revisited" 71 *Yale L J* 195 at 197-198 (1961) ("The next day, each student much have brought a friend. The hall was jammed, with many more pushing to get in; and we transferred the lecture to the near-by Lampson Lyceum, with some 500 seats:"); J Goldstein, "The Nature of the Judicial Process: The Enduring Significance of a Legal Classic" 34 *Touro L Rev* 159 at 162-163 (2018) and Yale Daily News, 16 February 1921, p 2; 17 February 1921, p 2; 18 February 1921, p 4, viewable at https://web.library.yale.edu/digital-collections/yale-daily-news-historical-archive. Contrast the front page story for 22 January 1920 concerned the possibility of a return of the influenza epidemic of 1918, albeit in a milder form, and avoiding crowds.

> illuminating the present, illuminates the future."

He then quoted from Maitland:

> "Nowadays we may see the office of historical research as that of explaining, and therefore lightening, the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."

As one reads the lectures, one cannot help but appreciate that the lecture series was, in part, an oblique response to the criticisms of so-called progressive decisions of the New York Court of Appeals shortly earlier, notably *MacPherson v Buick Motor Co*[10] and *Wood v Lucy, Lady Duff Gordon*.[11] This must have been much clearer to the audience of 1921. The former made available a claim in negligence against a manufacturer which provided a defective product, although without any direct contractual relationship with the consumer; the other reformulated and relaxed the law of consideration. Both were controversial.

I do not think it is wise to talk about the dispositive reasoning in cases in which one has participated. The dispute between the parties is resolved, and the reasons expressed as they are, for better or worse, take on a life of their own. And it may be unduly optimistic to expect of a generalist Court of Appeal to display much by way of great insight into particular areas, which specialists have studied, or practised in, or taught and written about, for decades, especially when the court's task is, above all else, to resolve the particular submissions advanced in the particular case at Bar. There is, at least to my mind, a very important ongoing debate – it would be fashionable to call it a dialogue – between professional and academic commentary and criticism, and the ad hoc decisions of courts. The most readable metaphor about this is that of Lord Goff, who wrote in *Spiliada Maritime Corp v Cansulex* of the assistance of academic writing that "jurists are pilgrims with us on the endless road to unattainable perfection; and we have it on the excellent authority of Geoffrey Chaucer that conversations among pilgrims can be most rewarding",[12] a passage recently cited by Chief Justice Kiefel.[13] That remains so notwithstanding that, as Lord Neuberger has observed, there is much more academic enjoyment and fame to be gained by

10 217 NY 382 (1916).
11 222 NY 88 (1917).
12 [1987] AC 460 at 488.
13 S Kiefel, "The Academy and the Courts: what do they mean to each other today?" (2020) 44 *Melb ULR* 447.

adversely criticising judicial reasoning than by praising it.[14] But it is one thing to write judicially, and another to speak extra-judicially, and the latter is not the occasion for explaining the former. With that in mind that I shall focus on the historical dimension of the topic. To my mind it is the opposite of dull, although of course you will have to judge that issue for yourselves.

Where did the requirement of knowledge and approval come from? It is surprisingly difficult to say.

I start with probate of wills issuing from ecclesiastical courts prior to the *Probate Act 1857*. In the famous case of *Barry v Butlin* (1838) 2 Moo PC 480; 12 ER 1089, Pendock Barry died aged 76, widower, leaving the appellant as son and heir. Five years earlier he executed a will appointing Butlin executor, and leaving £3000 to his attorney, £2000 to Butlin and £3000 to his butler. The son challenged the will, but failed in the Prerogative Court at Canterbury, and in the Privy Council on appeal, where it was listed for 5 days. Cresswell QC argued the appeal for the son. The case is frequently associated with a requirement of knowledge and approval, but it is unclear to say the least that the decision contains a separate requirement to that effect. It seems probable that later texts have read it with eyes shaped by the pleading requirements introduced in 1866. But in the old ecclesiastical courts, there was no requirement to specify by plea the precise ground of every objection which was taken to a will. I'll explain how that changed in a moment.

I mentioned Cresswell QC. When the Court of Probate was established in 1858, Sir Cresswell Cresswell was appointed its first judge. According to the Dictionary of National Biography, his family came from Northumberland, in a small village of – Cresswell. Wikipedia will tell you that it is a bleak village on the North Sea coast, not too far from the Scottish border, with good bird-watching, one ice cream shop in summer, and a single cafe. I have been there in July. On that occasion it was very cold and wet. It is perhaps enough to say that it is in that part of England to the north of Hadrian's wall, which that Emperor chose not to bother to bring within the area of Roman domination.

Cresswell's decisions were inconsistent with there being a separate requirement of knowledge and approval. He said that “a man might make a good will without knowing anything of its contents”, and gave the hypothetical example of a capable testator who executed a will drawn by another

14 D Neuberger, “'Judge not, that ye be not judged”: judging judicial decision-making”, in (2015) 6 *UK Supreme Court Yearbook* 13 at 20.

without reading it: see *Middlehurst v Johnson* (1860) 30 L J (P M & A) 14 and *Cunliffe v Cross* (1862) 3 Sw & Tr 37 at 38; 164 ER 1185 at 1186. Cresswell may have thought that this coincided with the result he had sustained in *Barry v Butlin.* Whether or not that be so, this illustrates a conception of will-making power with an emphasis on form, perhaps reflecting the unaccommodating bleakness of the family home in Northumberland. But even the most formal of legal systems must have some limits. Suppose the trusted other person makes a mistake and provides the wrong will? Or suppose the trusted other person did so because of accepting a bribe? The question to which every legal system must provide an answer is what level of knowledge of the particular will which is to deal with his or her property on death is required, assuming testamentary capacity.

Sir Cresswell Cresswell died unexpectedly in 1863 (he was struck down by Lord Aveland's horses who bolted when the carriage they were pulling collapsed on Constitution Hill).[15] His more formal approach was rejected by his successor Sir James Wilde. In December 1865, in *Hastilow v Stobie* (1865) LR 1 P & D 64, his Lordship dismissed a demurrer to a plea "That the deceased, at the time he signed the said pretended will, did not know and approve of the contents thereof". Procedurally, what this meant was that an issue was left for determination at trial in the Court of Probate based on the defendant's claim that the testator did not know and approve the contents of the will. Substantively, it meant that the plea gave rise to a distinct defence. His reasoning was based in part on the court's practice (reflected in the rules) concerning the need to be satisfied that a blind testator had knowledge of the contents of a will, and in part upon the meaning of the ancient language of "testament" and "sound disposing mind". Once he had concluded that there was a requirement of knowledge on the part of the testator, the judge considered that "it cannot be doubted that he must also approve" the contents of the will.

The following January, Sir James Wilde amended the rules applicable to contentious matters in his court. New r 40a limited the grounds of pleas allowed without leave to five, the last of which was "That the deceased, at the time of the execution of the said alleged will [or codicil], did not know and approve of the contents thereof".[16]

Thereafter Sir James Wilde applied the test he had written into his court's rules. In *Cleare v Cleare*

15 See *The Lancet*, 1 August 1863, p 141.

16 See *The Jurist*, 20 January 1866, pp 28-29; the superseded rules made on 30 July 1862 may be found H Coote, *Practice of the Court of Probate* (5th ed, London, Butterworths, 1866) p 456; see also R Kerridge, "The Vulnerable Testator" (2000) 59 *Cambridge Law Journal* 310 at 316-317.

(1869) LR 1 P & D 655 at 657-658, he said, "That the testator did know and approve of the contents of the alleged will is therefore part of the burthen of proof assumed by every one who propounds it as a will". That this amounted to a departure from the previous law was recognised at the time. For many years, successive editions of Williams, *The Law of Executors and Administrators* stated that "it may be doubted whether the view taken by Sir C Cresswell is not more correct". The authors held out through 4 editions over some 40 years until in the 11th ed 1921 (with a new editorial team) they observed, without a hint of the *volte face* which was being performed, that "it is now well established that the testator's knowledge and approval of the contents of the alleged Will is part of the burden of proof assumed by every one who propounds the document".

Such processes happen all the time. Of course it is extremely common for rules of court – a peculiar form of delegated legislation made by judges – to pick up the words of judgments. Consider the rules governing preliminary discovery, or notices to produce, or a host of topics. But primary legislation also regularly picks up the words of a rule formulated in a judgment. Especially in property law. Consider the exceptions for part performance, or resulting and constructive trusts, in ss 23C and 54A of the *Conveyancing Act.* There are now express statutory exceptions to rules forbidding the enforcement of contracts for the sale of land, or governing the creation of equitable interests in land, without writing, based on the exceptions to the unqualified commands in earlier forms of the statute. The statutory exceptions recognise the judge-made law. Or consider the concepts of "present entitlement" and the "net income of a trust estate" which are to the taxation of trusts (and fundamental to the advice giving rise to *Lewis v Lewis*) which were considered by the High Court in *Commissioner of Taxation v Bamford* (2010) 240 CLR 481; [2010] HCA 10. A compressed passage in the joint judgment at [17] which warrants reading and rereading identifies the way in which "rules" (which were often no more than presumptions) developed in chancery largely took the form of presumptions. It also highlights the difficulties in translating the principles of judge-made law to the statutory text, and above all bearing in mind the caution expressed by Lord Wilberforce in *Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617, in turn echoing Viscount Radcliffe's speech in *Commissioner of Stamp Duties (Queensland) v Livingston* [1965] AC 694 at 712, that words such as "interest" have to operate in several quite different legal contexts to express rights of very different characters and that to transfer a meaning from one context to another may breed confusion. Words are, after all, clumsy tools, as Felix Frankfurther once observed,[17] and "it is very easy to cut one's fingers with them, and they need the closest attention in handling".

17 F Frankfurter, "Some reflections on the reading of statutes" 47 *Colum L Rev* 527 at 546 (1947).

There is nothing special to equity or trusts, or the law of succession, in this respect. The daily bread and butter of civil work governed by the *Civil Liability Act* reflects a statute closely connected with notions of judge-made law, as I sought to explain in *The Statutory Foundations of Negligence*.[18] Last week we heard an appeal in which one issue was the extent to which the entitlement to "damages" in ss 271 and 272 of the Australian Consumer Law in a claim against a manufacturer picked up aspects of the common law of damages such as the rule against double recovery. It would be easy to multiply examples.

In New South Wales, there was considerable delay in adopting the reforms of 1857, as is explained in J Bennett, *A History of the Supreme Court of New South Wales* (Law Book Company, 1974), ch 8. The ecclesiastical jurisdiction derived from cl xiv of the Charter of Justice continued until the *Probate Act 1890* (NSW). At least from 1899, a rule which was substantially equivalent to r 40a was r 67(iii) of the *Regulae Generales* made on 25 July 1899.[19] Rule 68 of the Probate Jurisdiction Rules made on 30 November 1936 was to similar effect, authorising five defences one of which, r 68(3), was materially identical with r 40a:[20]

68. In a suit for probate, the statement of defence shall consist of the following defences alone, unless by leave of the Court, obtained on summons:—

(1) That the paper writing, bearing date, etc., and alleged by the plaintiff (or defendant) to be the last will and testament (or codicil to the last will and testament) of A.B., late of, etc., deceased, was not duly executed as required by law, in manner and form as alleged.

(2) That A.B., the deceased in this cause, at the time his alleged will (or codicil) bears date, to wit, on the, etc., was not of sound mind, memory, and understanding.

(3) That the deceased at the time of the execution of the said alleged will (or codicil) did not know and approve of the contents thereof.

(4) That the execution of the said alleged will (or codicil) was obtained by the fraud of C.D. and others acting with him (setting out the fraud alleged).

(5) That the execution of the said alleged will (or codicil) was obtained by the undue influence of C.D. and others acting with him.

18 Federation Press, 2019.

19 See W Walker and H Bignold, *Wills, Probate and Administration Act 1898* (Law Book Company, Sydney, 1903) p 132.

20 See the Probate Rules published in New South Wales Government Gazette, 15 January 1937 at 127.

That rule continued in force when the *Supreme Court Act 1970* was enacted.[21] However, an amendment gazetted on 30 June 1972 repealed the 1937 Probate rules and introduced something much simpler.[22] The new rule required contentious proceedings to be commenced by way of statement of claim,[23] but did not contain any restriction on the nature of the defences. However, Pt 78 r 16 provided that where a will was signed by a blind or illiterate testator, or by another person at the testator's direction, or importantly where "there are circumstances which raise doubt whether the testator, at the time of execution of the will, knew and approved of the contents of it", then "the plaintiff shall furnish evidence on affidavit which establishes that the testator, at the time of execution of the will, knew and approved of its contents." The rule, reflecting an *evidentiary* requirement of knowledge and approval, continued until 21 January 2013, when the current form of the rule, now found in Pt 78 r 27, only applies to blind or illiterate testators or those executing the will at the testator's direction.[24]

That explains how a requirement of knowledge and approval arrived on the scene. But at around the same time that Sir James Wilde introduced the requirement, he limited it, holding that there was a conclusive presumption of evidence that, at least in the absence of fraud, where a will was read to a capable testator who then executed it, the testator not only knew but also approved it: see *Guardhouse v Blackburn* (1866) LR 1 P & D 109 at 116 and *Atter v Atkinson* (1869) LR 1 P & D 665 at 670. The same judge, now Lord Penzance, addressed the point in *Fulton v Andrew*, where a jury determined that the deceased knew and approved of the contents of the will, but did not know and approve of the contents of the residuary clause, in circumstances where the testator was habitually drunk, mentally unwell, and the will was in the handwriting of the executor to whom the residue of the estate had been left. The plaintiffs sought to set aside the verdict and for there to be a new trial. Lord Penzance, it must be said bizarrely, entered a verdict in favour of the plaintiffs on the sixth question and directed that probate should be given of the will as a whole. It is interesting to speculate whether that reflected a clash between the traditional civilian approach to appeals, and the then-unfamiliar introduction of juries to determine questions of fact. Whether or not that be so, all members of the House of Lords noted that the relief which issued had not been sought by the plaintiffs, and that there was no power on the part of the Court to reverse (as opposed to quash) the

21 See Fourth Schedule, cl 4(2) and Schedule B. Although enacted in 1970, the *Supreme Court Act* did not commence until 1972 (in this respect, its legislative history resembled that of its United Kingdom counterpart, the *Judiciary Act 1873*).

22 See NSW Government Gazette, 30 June 1972, p 2631.

23 See new Pt 78 r 36.

24 This was brought about by the Supreme Court Rules (Amendment No 421) 2012 which repealed and remade Part 78, noted in *Re Estate of Wai Fun Chan* [2015] NSWSC 1107 at [50].

jury's verdict on the sixth question. Those were the unpropitious circumstances for speeches on the correctness of the line of decisions holding that reading out loud to a testator of sound mind would necessarily satisfy the requirement of knowledge and approval. Lords Cairns and Hatherley rejected this, saying it might be necessary also to "bring home to the mind of the testator the effect of his testamentary act" (Cairns) and to establish "not only that it was read over to him, but that it was read over in such a manner as that the discrepancy between the instructions and the will was brought before the consideration of the testator" (Hatherley). A third former Lord Chancellor, Lord Chelmsford, agreed. The former Chancellor of Ireland, Lord O'Hagan, refrained from expressing a definitive view.

Subsequent English decisions have confirmed that reading out the will to a competent testator was not conclusive, notably, *Crerar v Crerar* (an important an unreported decision of Sachs J noted and extensively quoted in "Knowledge and Approval" (1956) 106 *Law Journal* 694)*, Fuller v Strum* [2001] EWCA Civ 1879; [2002] 1 WLR 1097 and *Gill v Woodall* [2011] Ch 380. The same is true in New Zealand and Australia: see the decisions at [146]-[148] of *Lewis v Lewis* in the Court of Appeal. There is a clear account in I Hardingham, M Neave and H Ford, *Law of Wills*, a work which is long out of print but nonetheless very useful.[25]

Drawing these strands together is quite interesting. A requirement of knowledge and approval was controversially introduced in the 1860s, reflecting a different approach between Sir Cresswell Cresswell and his successor Lord Penzance to a fundamental question in the law of wills. The new requirement was derived from the pre-existing rules of court, but then was introduced as one of a small number of bases for defending a grant, and in that form was imported in terms into the Colony and State of New South Wales. At almost precisely the same time, a rule was developed by Lord Penzance that the requirement of knowledge and approval would be conclusively satisfied by reading the will out loud to a competent testator, but that requirement was overturned in 1875 by the two former Chancellors in the House of Lords, Cairns and Hatherley. Ever since then, the law has remained relatively stable. But its origins may seem precarious, not to mention contingent upon an unlikely series of circumstances.

Generations of undergraduates have been told that law is divided into judge-made law and statute law. But how to answer the question I started with: where does the requirement of knowledge and approval come from? The origins of the requirement are in the rules of court relating to blind

25 Law Book Co, 1977, pp 39-43.

testators. The rules were then expanded to reflect a development of judge-made law. We know fairly precisely how and when this occurred.[26] But the content of the rule was almost immediately shrunk by the judge who invented it, only to be expanded by a later decision of the House of Lords. And although for most of the 20th century, the Supreme Court contained the same rule as that which was introduced by Sir James Wilde in January 1866, nominating knowledge and approval as one of five grounds for opposing a grant, since 1972 the rule has ceased to apply, and we have come a full circle, with "knowledge and approval" surviving in the rules since 2013 only in relation to blind and illiterate testators. This shows the development of the law through decisions on pleadings, bearing in mind that it was the opaque and unreported verdicts of juries which would determine at trial whether the testator knew and approved the will, and is an example of Maine's aphorism that substantive law is secreted in the interstices of procedure. And it also indicates how elusive the distinction between statute law and judge-made law can be, for it is difficult to give any concise answer which is wholly accurate to the question whether the requirement of knowledge and approval arose from statute or the decisions of courts.

You will be forgiven if you have been thinking "None of this seems especially practical". You would on one view be correct. I am not especially apologetic; I don't see why a lecture series such as this should be confined to issues of purely practical concern. But on another level, the craft of advocacy has many dimensions, and what I have been saying illustrates what I am increasingly coming to regard as one of its important and under-appreciated aspects.

One mode of advocacy might be styled that of the bowerbird, where the task of persuading the court on a point of law is satisfied by collecting as many passages from judgments as one can which appear to support the proposition in issue, in much the same way that a bowerbird will collect as many things that are blue, not much caring whether they are pegs, straws, or bits of rubbish, so long as they are blue, on the basis that the more blueness there is, the more attractive its bower will seem. It is not without effect, to construct an edifice of decisions all of which directly or indirectly support the proposition of law.

However, it is vastly more effective advocacy if one can place that favourable passage from a judgment in its context. That will normally turn on the issues presented in the pleadings, the

26 Cf Sir George Jessel's famous statement in another context, contrasting the position in equity to that at common law, "It is perfectly well known that [the rules of equity] have been established from time to time – altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them": *Re Hallett's Estate* (1880) 13 Ch D 696 at 710.

evidence adduced, the submissions that were exchanged, and especially the legal context presented by the legislative regime. Then, and often only then, is there a contextual understanding of the effect of the judgment, and then and only then will the court be in a position to use the method of history in an informed way. It can be quite hard work to do this, although you may have little choice if your opponent in some case adopts the bowerbird strategy. But ultimately considering the law in its full context is the means by which the most effective advocacy, in the interests of one's client, can be advanced. To return to the words offered to that crowded lecture room at Yale a century ago, this is precisely what Maitland meant when he said that historical research would explain, and therefore lighten the pressure that the past must exercise upon the present, and the present upon the future.