The modern use of legal history

John McKenna QC*

As has been aptly observed, historical legal analysis should properly be approached as a form of comparative law. It involves approaching the past as if it were a foreign country—and exercising appropriate care when seeking to use historic materials to assist in the resolution of contemporary legal problems.

I

A striking feature of the modern law is its complexity. Never before has our statute law been so extensive, detailed and changeable. Never before have we been confronted by such a large volume of caselaw explaining the meaning and application of statutes and restating and refining the common law. In these circumstances, it is not surprising that the focus of modern legal education is in providing a systematic and comprehensive account of the modern law—rather than dwelling in any detail upon its historical origins and rationale.

It is a pity that such a pragmatic approach is taken. As any perusal of the law reports reveals, modern courts continue to find it helpful to look back into the history of the common law to seek a principled basis to resolve current legal problems. However, this kind of historical analysis requires a measure of specialised knowledge and skill. When studying historic cases, the factual matrix is often difficult to grasp, as it arises from the social or business practices of the past. The procedural context may also be unfamiliar, because the structure of the courts and the law of procedure have both changed so dramatically over time. More significantly, the analysis adopted in older judgments often bears a Delphic character—based upon unstated assumptions or methods of reasoning which would not necessarily be adopted by modern courts.

As has been aptly observed, historical legal analysis should properly be approached as a form of comparative law. It involves approaching the past as if it were a foreign country—and exercising appropriate care when seeking to use historic materials to assist in the resolution of contemporary legal problems.
The purpose of this year’s Australian Selden Society lecture series is to assist modern legal practitioners who wish to add an historical dimension to their analysis of contemporary legal problems. This first lecture is intended to provide an introductory overview of the historic legal materials which are conventionally considered by Australian courts and the uses which may appropriately be made of them. The following lectures will build upon this introductory foundation by considering in more detail three classes of historic legal materials: the nominate law reports and their digests and abridgements (1535–1865); the modern authorised reports and their digests and abridgements (from 1865); and legal treatises.

II

Not every case calls for a regression into legal history. Some insight into the extent to which modern courts find historical analysis useful can be found through a statistical study of recent volumes of the law reports.

**Citation of early English cases in modern Australian law reports**

*(Six volume sequences, 2010–12)*

<table>
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<th>Era</th>
<th>1500s</th>
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<th>1700s</th>
<th>1800–64</th>
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<td>224   (89%)</td>
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<td>6</td>
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<td>5</td>
<td>27</td>
<td>54</td>
<td>209</td>
<td>428</td>
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The data in this table was drawn from six-volume sequences of four sets of modern Australian authorised law reports. These volumes published judgments delivered in the same broad period (around 2010–12). From each set of reports, the total number of historic cases cited in the judgments has been calculated and distributed amongst the various eras from which they were drawn. For this purpose, the 19th century was divided into two periods—with the second period commencing with the publication of the modern English authorised reports (1865).

In the bottom row of the table, the total number of cases cited from each era is shown. For comparison purposes, these totals are also expressed as a percentage of all historic cases cited in this sample. Thus the table records that, in this sample of judgments, the High Court cited a total of 141 cases from the late 19th century—with all courts citing a total of 428 cases from this period. This comprised 59% of all historic cases cited.
In the far right column of the table, the total number of historic cases cited in the judgments of each court has been identified. Using the High Court’s total as a base, the totals from each of the three relevant state Supreme Court courts are also expressed as a percentage of this base. Thus the table records that, in this sample of data, the Supreme Court of New South Wales cited a total of 224 historic cases—being 89% of the number cited in the judgments of the High Court.

Whilst the data in this table is a relatively small sample—and derives only from cases which were of sufficient importance to be reported in the authorised reports—it conveys a number of important insights into the use of legal history in modern courts.

First, it demonstrates that modern Australian courts continue to obtain useful guidance from caselaw which is more than a century old. In this sample of 24 volumes of law reports, a total of 700 cases from this period were considered. It is noticeable, however, that the frequency of citation is markedly different amongst the courts. It is to be expected that the High Court, as the final court of appeal, would lead the field. However, using the High Court as a base, it is interesting that the Supreme Court of New South Wales appears to operate at 89% of that base. By contrast, the Supreme Court of Victoria operates at 48% and the Supreme Court of Queensland at 35%. There may be many explanations for these variations, but it does suggest a different level of importance attributed to historical analysis amongst the profession and courts in different Australian jurisdictions.

Secondly, the data confirms that the caselaw which modern courts find most helpful is drawn largely from the latter part of the 19th century. The caselaw from this era comprised 59% of the historic cases cited. The reasons for this preference are apparent from any reading of the caselaw from this era. The disputes from this era were of a distinctly modern character, as a result of the rapid urbanisation and industrialisation of Victorian England. With the benefit of the *Judicature Act* reforms, this litigation also began to be conducted in a more familiar procedural framework. More significantly, however, the litigation of this era was conducted against the background of a growing body of legal literature of the highest quality, which sought to organise, explain and rationalise existing caselaw. This systematic approach is also to be found in judicial decision-making during this era, producing a body of carefully reasoned judgments of a distinctly modern flavour.

Thirdly, the data demonstrates how sharply the practical relevance of historic caselaw declines as one goes back beyond the 19th century. It is true that in cases such as *Workcover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420 and *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283, the courts have found some utility in seeking to trace the origins of common law rules back to 1500s and 1600s. However, as the statistics demonstrate, only about 4.4% of historic cases cited within the sample group are drawn from this era—with no citation of caselaw from earlier eras.
III

The reluctance of courts to seek to investigate the early history of common law rules is understandable. The utility of such a task is often questionable—and the practical challenges and dangers in doing so are substantial. In a small number of cases, however, modern courts have sought to understand the full history of particular legal rules—by tracing them back to very origins of the common law. So it is appropriate to commence this lecture series with a brief overview of the materials which are available for this purpose.

The notion of a ‘common’ law of England stems, of course, from the establishment of a system of royal courts—courts which applied common laws throughout the realm, rather than simply applying local laws and customs. These courts were established as part of the system of government which developed in England in the first century or so after the Norman conquest of 1066. The records and materials we have inherited from the early years of the common law are extensive in volume, obscure in origin and very difficult to follow.

What is clear is that, by the 1600s, legal publishers were producing a standard 11 volume printed sets of law reports which related to the period from about 1300–1535. These volumes are largely written in an adapted form of French (sometimes called Law French), which had been conventionally used in oral argument in English courts. The cases in these volumes were generally arranged in chronological sequence, by reference to the years of each sovereign’s reign—but with certain gaps and overlaps in the sequence. These printed sets of the ‘Yearbooks’, as they came to be called, are now regarded as the standard set of law reports from the earliest period of the common law.

**Yearbooks—the standard set**

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<td>1–22 Edward IV (1461–83)</td>
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<td>10</td>
<td>5 Edward IV (1465–66)</td>
</tr>
<tr>
<td>11</td>
<td>Edward V, Richard III, Henry VII and Henry VIII (1483–1535)</td>
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The case notes contained in the Yearbooks give little clue as to their origins. It is not obvious
who prepared these reports, why the cases commence in only about 1300, how these cases were selected and why they cease at about 1535. Amongst legal historians, the conventional view is that the Yearbooks represent a communal effort by the emerging legal profession in England, over many years, to create their own record of the law and practice applied in the royal courts.

The position seems to have been that, by the late 1200s, a largely centralised system of royal courts, based in London, had become firmly established. As a consequence of its centralised nature, a legal profession began to develop in London to represent litigants before these courts. This profession in turn began to provide a ready source of judges—producing for the first time a cohort of judges who were experienced common lawyers.

The courts themselves maintained records (in Latin) of the writs, pleas and judgments entered. These records, to a large extent, still exist. However, there was no official record of the oral argument or any judicial reasons which may have been given. In these circumstances, long before the introduction of printing to England, the practice appears to have developed amongst the profession of making their own notes to record the legal arguments, rules and practices applied in the courts. Manuscripts of this kind then began to be circulated and copied.

Some manuscripts sought to summarise contemporary legal rules and practices. Others contained notes of cases argued before the courts. Collections of case notes were sometimes arranged by topic. More commonly, however, they came to be organised by year. It was not the practice for these manuscripts to record the name of the original author (unlike the later nominate law reports). Nor was it conventional to record the parties involved in the case being reported, so most cases are anonymous.

After printing technology became available in England in about the 1470s, these professional materials became an obvious candidate for mass publication in a printed format. From the various manuscripts which were in circulation, the publishers seem to have extracted a selection of the case notes for publication, with separate volumes being published for separate regnal years. Over time, these volumes came to be consolidated into the eleven volumes of the standard set of Yearbooks.

There does not seem to have been any particular event which caused this series to come to an end in 1535. Whilst anonymous manuscript notes of cases continued to be prepared and circulated, a trend seems to have developed in favour of case notes which were known to have been prepared by respected judges or practitioners. Some of these case notes were never intended by their authors for public circulation, some being published long after the author’s death. Of more significance in the longer term, however, were the case notes which were specifically prepared by their authors for publication in a printed format. Sets of named or ‘nominate’ reports, such as those prepared Edmund Plowden, began to be published by the mid-1500s, and became the preferred form of law reports until 1865.

To convey some idea of the contents of the Yearbooks, a page from the 9th volume of the standard set appears opposite. This page includes the reasonably well-known Case of Thorns, which is still cited in Fleming on Torts and in modern caselaw as a leading authority for the proposition that a trespass
to land is not excusable simply because it is beneficial (e.g. the removal of thorn cuttings from a neighbour’s land). This page also neatly illustrates a number of features of the Yearbooks.

First, the Yearbooks are generally arranged by regnal year, and by law term within that year. As the header of this page records, it contains the reports from the 6th year of the reign of Edward IV (Anno vi E iiii). An earlier page of this volume also records that this section contains the cases from the Michaelmas Term of that year. On this page of the reports (which is folio 7), two cases are reported. They are not described by reference to the names of the parties, but by case number (being pleas 17 and 18). Based on this system of arrangement, the conventional citation of the Case of Thorns is:

Anon (1466) YB Mich 6 Edw IV fo 7, pl 18

This citation conforms to a general system of describing cases by the following categories of information: Casename (Anon); Year (1466); Yearbook (YB); Law Term (Mich); Regnal Year (6 Edw IV); Page or Folio (fo 7); Case or Plea number (pl 18).

Secondly, the text of these cases presents obvious difficulties to modern readers. The text is written in Law French—with the font itself being quite difficult to read. These reports are not reproduced in the English Reports, and there is still no complete English translation of the Yearbooks. By the time that legal works began to be routinely published in English, it seems that there was no market demand for a translated version of the standard set of Yearbooks, as much of the caselaw was even then regarded as being of no practical relevance. To the extent that propositions from the Yearbooks were of any potential relevance, they were usually summarised in various encyclopaedic legal works (the abridgments)—and it was the abridgements which came to be published in English. It was only in the 19th century that legal historians showed renewed interest in the origins of the common law, and efforts were made to find the original manuscript sources and seek to publish (with English translations) the surviving case notes from this period (only some of which were to be found in the standard 11 volume set of the Yearbooks). These efforts, primarily by the Selden Society and the Ames Foundation, are ongoing. In the meantime, however, translations and explanations of some of the key cases from this era can be found in a number of sources.
Thirdly, even when translations of these cases are available, the arguments and judicial analysis which they reveal is often quite foreign to the modern lawyer. In procedural terms, the only cases of interest to the modern lawyer are likely to have arisen in the context of a dispute about pleadings. That is because the court procedures of the time did not usually contemplate that, after a jury’s verdict had been delivered, there would be any further opportunity for questions of law to be argued at trial or by some form of appeal. As in modern strike-out applications, these disputes about pleadings were capable of resolving questions of law. However, the reasoning adopted by the courts in such cases has a distinctly medieval character. These points are again illustrated by the Case of Thorns. In that case, in response to a claim for trespass, the defendant sought to plead that, in cutting a thorn hedge on his own land, certain branches had fallen against his will onto the plaintiff’s land and that he had entered that land merely to retrieve them. The court upheld a demurrer to this plea. Whilst a modern court may well have reached the same result, it is difficult to see it following the logic of Choke J’s analysis:

I am of the same view; for where the principal thing was unlawful, then anything which depended on it was unlawful. When the defendant cut the thorns and they fell onto my land, this falling was unlawful, and consequently his coming to take them out was unlawful.

Because of these difficulties with the Yearbooks, it is no surprise that cases from the medieval period (prior to 1535) are so rarely cited in modern courts. Whilst the data about citation practices is not easy to collect, it seems that there were only 16 citations of caselaw from the Yearbooks in Australian judgments in the period 2000–14. More commonly, the courts have relied upon the works of specialist legal historians for a reliable account of this period of the common law.

References to Medieval Law in modern Australian caselaw (2000–14)

<table>
<thead>
<tr>
<th>Reference</th>
<th>Citations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Citations of Medieval caselaw (Yearbooks)</td>
<td>16</td>
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<tr>
<td>Citations of Bracton On the Laws and Customs of England (1230s)</td>
<td>21</td>
</tr>
<tr>
<td>Citations of Medieval references from Sir John Baker Introduction to English Legal History</td>
<td>11</td>
</tr>
<tr>
<td>Citation of Medieval references from Professor Theodore Plucknett Concise History of the Common Law</td>
<td>12</td>
</tr>
<tr>
<td>Citations from Sir Frederick Pollock and Frederick Maitland History of English Law Before the Time of Edward I (2 Vols)</td>
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</tr>
<tr>
<td>Citations of Medieval references from Sir William Holdsworth A History of the English Law (17 vols)</td>
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</table>
In later lectures, the legal materials from 1535 to the modern era will be considered in detail. To lay the groundwork for these lectures, however, it is necessary to briefly set these periods in some historical context. The 1500s fell within the Tudor period of English history. It was the time of Henry VIII and Elizabeth I, of Sir Thomas More and William Shakespeare. England was essentially an agricultural and craft based society. The population of England was still relatively small. The estimated population of England at the end of this century was still only about 4 million people, with London having a population of only about 200,000. There were three common law courts—King’s Bench, Common Bench and Exchequer—served by a total of only about 8–12 judges.

In contrast to the earlier periods, the common law courts by the 1500s had developed a number of procedures to allow rulings to be made on questions of law. These decisions were, in turn, reported in a more sophisticated way in the new series of nominate law reports which were beginning to be published (e.g. Plowden’s Reports). However, the content of these reports continued to reflect the nature of the society, with many reported cases concerning rights and duties in relation to land.

The Court of Chancery was also active during this period. However, the court was essentially the province of only one judge—the Lord Chancellor—and the practice of appointing common lawyers to this office was only in its infancy. So the Court of Chancery during this period was still very much a jurisdiction of individualised justice, without a regular system of law reporting.

All the courts were based at Westminster Hall, which still stands today adjacent to the Houses of Parliament at Westminster. For modern practitioners, it is helpful to have some idea of the physical environment in which court work was conducted, because it is so very different to the present. This can most easily be appreciated by reference to a contemporary image of Westminster Hall (following page) with the benefit of the following description provided by Sir John Baker:

On the far side is a flight of steps which used to divide the Court of King’s Bench from the Court of Chancery. On the west side of the hall, near the door, was the Court of Common Pleas. The Exchequer was a large adjacent chamber which connected with the hall through a passage. Each court occupied a space marked out by a wooden bar at which counsel stood, and in the centre was a massive oak table covered with green cloth at which court officials sat and spread their records. Against the wall, on a raised platform or bench beneath tapestries with the royal arms, sat the judges. Until the eighteenth century there were no seats for counsel, nor any walls to divide the courts from the open thoroughfare; each court was scarcely out of earshot of the others, and speakers had to compete with the noise made by the throng of suitors, lawyers, shopkeepers, cutpurses and sightseers in the body of the hall. This arrangement seemingly impracticable to modern eyes, was a feature of English public life for six centuries. It survived two civil wars, and even in times of rebellion the judges and counsel kept up their attendance, sometimes with armour beneath their robes. Only in times of plague or flood did the courts leave Westminster Hall, and then only after a formal adjournment by proclamation.10
With some physical changes and with the assistance of other courtrooms, Westminster Hall continued to be the home of the English courts until the opening of the Royal Courts of Justice in the Strand in 1882.

In the 1500s, three languages had a role in legal practice. As noted above, oral proceedings in common law courts had originally been conducted in Law French. By the 1500s, however, it seems that English had become the conventional language used.

The written records of the common law courts were originally kept in Latin, and generally remained so until about the 1700s. Law reports, treatises and similar legal materials were generally written in Law French, with this practice continuing until the middle of the 1600s.
The legal materials of the 1500s were still largely circulating in manuscript form, but began to include a number of categories of printed material which would be familiar to the modern lawyer. There were law reports—comprising the older Yearbooks and the newly produced volumes of nominate law reports. Most of the nominate reports from this era are still readily accessible (in English translation) through the *English Reports* reprint. There were encyclopedic works, called abridgements, which sought to extract key propositions from the caselaw and arrange them under a series of convenient headings. There were also a limited number of legal texts (e.g. *Littleton's Tenures*).

The 1600s were a time of political instability in England, including the English Civil War (1640s), a short-lived republic under Cromwell (1650s), the restoration of Charles II (1660) and then the Glorious Revolution (1688). There was also the beginnings of colonial expansion and a growing seaborne trade, accompanied by the growth of London as a trading centre. During the 1600s, the estimated population of England rose to about 5 million—with London now a city of about 600,000 people.

In the 1600s, law reporting was still somewhat haphazard, but more ambitious attempts to publish analytical descriptions of the common law had commenced (e.g. *Coke's Institutes*). The Court of Chancery, under Lord Nottingham LC, also sought to develop a more principled approach to the intervention of equity—with these decisions being regularly reported for the first time. Whilst the caselaw from the 1500s and 1600s is very much removed from the modern era, cases from this period continue to be referred to by modern courts to explain the origin of many fundamental elements of the common law—particularly in the area of land law.

During 1700s, however, a series of inter-related movements transformed England. Developments in technology led to the birth of a manufacturing industry and the further growth of cities and towns. Accompanying this development was a sharp rise in international trade. This growth in commerce, in turn, led to a greater dependence on the insurance and financial sectors of the economy. These developments were reflected in the subject matter of the caselaw from this period, with the courts being increasingly required to deal with modern commercial issues. By the time of Lord Mansfield’s judicial tenure (1756–88), lines of authority dealing with a number of categories of commercial issues were developing which proved to be influential in the later development of the law.

The influence of the authorities from this period was promoted by further advances in the quality of legal abridgements (e.g. *Viner's Abridgment*), legal treatises (e.g. *Blackstone's Commentaries*) and a more systematic approach to the publication of regular law reports (e.g. *Term Reports*). Until the 1800s, however, the corpus of published legal materials (reported cases, treatises and abridgements) remained relatively modest.

The 1800s were a period of rapid intellectual and economic development in England, with rising industrialisation. The population of England grew from about 7.7 million in 1800 to about 30 million in 1900. The population of London, over a similar period, grew from about 1 million to about 6 million. In this period, there was not only a rapid rise in the volume and range of
litigation, but also a growing desire by the judges to reconcile and harmonise individual strands of authority within more generalised legal doctrines. This approach was reflected in legal publishing, as a large number of specialised texts also sought to harmonise and explain the caselaw governing specific topics (e.g. the law of contract). It was also reflected in law reporting, as the proliferation of nominate reports came to an end with the creation of a Council of Law Reporting to take responsibility for the publication of a single set of authorised reports. It is for this reason that the caselaw of the later 1800s, with its attempts to harmonise earlier caselaw under clear and concise statements of principle, has so much attraction to the modern lawyer.

V

Having provided a brief overview of some of the source materials available, it is necessary to identify the principal dangers involved in using these materials. As Sir William Holdsworth once said, when considering the decision of the House of Lords in *Admiralty Commissioners v SS Amerika* [1917] AC 38:

The House of Lords attempted to justify its decision by an appeal to legal history. But the display of historical knowledge which was made on this occasion is an object lesson both in the dangers of hastily acquiring such knowledge for a special occasion, and in the consequences of the neglect of this branch of learning.11

There are four main dangers. The first may be called the danger of irrelevance. The practice of delving into the ‘dusty recesses of black-letter law’ for no real purpose is properly regarded as ‘mere antiquarianism’. It is a distraction and an unnecessary indulgence ‘for our only interest in the past is for the light it throws upon the present.’

The second may be called the danger of ahistoricism. This is the fallacy of treating all caselaw—from any era—as if it were decided by a modern court, using language in its modern sense and adopting the same background assumptions about legal principles and legal method which would be adopted by a modern court. It is also the fallacy of ‘reading history backwards’, where earlier cases are understood in the light of explanations or principles which only later emerged.

To avoid this fallacy, it is necessary to keep firmly in mind that all judgments were written in the context of their time. In 1700, for example, the principles of contract, tort, restitution and estoppel were all yet to be articulated in their modern form. So it would be wrong to assume that a reference to any of these concepts, in a judgment from this era, is a reference to these principles as they are currently understood. To properly understand the reasoning in historic cases, some effort must be made to seek to return the reader to the position of the deciding judge—shorn of any modern assumptions—so as ‘to learn to think the thoughts of a past age’.

A fallacy of this nature was exposed by the High Court in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. In that case, one of the parties was seeking to rely upon the judgment in *Dimes v Proprietors of the Grand Junction Canal*13 as an application of the ‘reasonable apprehension of bias’ test for the disqualification of a judge. The difficulty with this approach, as noted by
Kirby J at [120]-[121], was:

The relief granted in _Dimes_ was not based upon the reasonable apprehension of bias test or the ‘real danger’ test. Those tests were not developed in England until the 20th century … Attemps now to reinterpret _Dimes_ by reference to new considerations are ahistorical and divert attention from what the decision, at the time and since, has been taken to lay down as a matter of law …

To properly understand the judgment in _Dimes_, it was necessary to put aside modern principles and seek to understand the language of the judgment in the context of the law as it was understood at that time.

The third main danger may be called the convergence fallacy. It is the fallacy of reading all authorities on the assumption that they lie upon a convergent path to produce the modern law. The reality is that a substantial part of the history of the common law involves courts adopting divergent approaches—paths which often seemed promising for a time but which were subsequently blocked or abandoned by later authority.

In _Coulls v Bagot’s Executor and Trustee Company Limited_ (1967) 119 CLR 460, for example, the High Court was considering the privity rule in the law of contract—the rule that a promise is not enforceable by a non-party to the contract. In argument, this rule was sought to be undermined by an appeal to caselaw from the 1600s. However, this authority was found to be of little assistance, as it dated from a time when the relevant legal principles were still in the course of development and divergent approaches were being taken. Once the choice between divergent paths was made after 1861, by the decision in _Tweddle v Atkinson_14 and the cases which followed it, the earlier authority was of little avail. As Windeyer J explained at 496:

> The history of much of our law is a story of development over centuries. The process still goes gradually on. The law of today is a living law. I would not suggest we should arrest its growth. But is a rule, which for a century or more has been said to be a fundamental principle of the common law and which has been asserted as such upon the highest authority, to be now condemned as a mistaken aberration because at some earlier stage in the history of our law a different rule prevailed? I think not. The common law develops, but not by looking back to an assumed golden age … Statements made by courts hundreds of years ago about the doctrine of consideration ought not I think to be taken as pronouncements of the law today, ignoring all that has been said in the meantime, ignoring all changes in social conditions and men’s ways.

The fourth danger is simply the danger of misreading or misunderstanding historic authorities. This is a serious problem. Historic judgments are often quite brief in nature. They were conventionally delivered orally—and usually without elaborate discussion of matters which were common ground. The difficulty for the modern lawyer is that such cases often arise in a procedural context which is unfamiliar to the modern lawyer but critical to the court’s approach to the case. They may involve fact situations which are equally unfamiliar, but which involve legal characteristics which are unknown to the modern lawyer. The cases may also have been decided against the background of substantive or procedural rules which have long since been abandoned. Taken out of their proper context, statements in these judgments may be easily misunderstood.
An example of this is to be found in the line of Australian authorities which have applied the principle recognised by Lord Atkinson in *Lagan Navigation Co v Lambe Bleaching Company* [1927] AC 224 at 244 that ‘abatement of a nuisance is a remedy which … destroys any right of action in respect of the nuisance’. As John Sheahan QC has explained, this observation appears to have been founded upon the headnote to *Baten’s Case* (1610) 9 Co Rep 53b. However, as has since been pointed out, it seems to be based upon a misunderstanding of the procedural context:

I am conscious that it requires some temerity to differ from Lord Atkinson but it does appear that the bar to action after abatement applied only to the assize of nuisance and the action quod permittat prosternere in both of which the plaintiff was essentially asking the court for what would now be a mandatory order of abatement… I would think it no bar to an action for damages …

VI

How should a modern practitioner seek to avoid these pitfalls? The first step is to seek to identify precisely how a resort to legal history can usefully contribute to the resolution of the problem at hand. Whilst, in most cases, an extensive and consistent body of modern caselaw will provide the only relevant legal framework to be considered, there are at least five categories of case in which legal history can potentially serve a useful role.

First, and most commonly, an historical analysis can help to provide the context required to resolve disputes of principle about the common law. These are disputes about whether to extend, to qualify, or to fill gaps within the fabric of existing legal principle. To answer questions of this kind, it is often useful to trace the relevant lines of authority to their modern origin—and thereby seek to understand the principles upon which the authorities are based and the historical rationale for the distinctions which are drawn. As the joint judgment in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 explained at [43]

Legal thought and reasoning has a temporal dimension. It is a well-recognised method of legal reasoning to return to authority which is said to control the formulation of presently applicable principle, and to ascertain the conditions and problems of earlier times to which that authority responded, and the legal institutions which then controlled the formulation of principle. With the appreciation of such matters which is then acquired, ‘a measure of reconceptualisation’ may provide a better foundation for the present development of the law.

Secondly, an historical analysis may assist in the construction of statutes. It is a fundamental principle of statutory interpretation that ambiguities in statutes may be resolved by having regard to the legal context in which they were enacted. Whilst many statutes are of recent origin, there are some (such as the *Commonwealth Constitution*) which were made more than a century ago—and others which can be traced to the 1600s (e.g. the provisions derived from the *Statute of Frauds 1677* (Eng)). To the extent that context matters, the proper interpretation of these historic statutes may be assisted by a resort to legal history. This approach proved of assistance in *Attorney-General (NT) v Emmerson* (2014) 307 ALR 174 at [15]–[16] (HC). In that case, the question arose
whether legislation for the confiscation of profits from crime contravened the *Commonwealth Constitution*. To assist in answering this question, a joint judgment of the High Court considered the extent to which legislation of this kind was a familiar feature of the law prior to Federation, noting at [15]-[16] that:

The statutory scheme in question exemplifies the acceptance by legislatures in Australian and elsewhere of the utility of the restraint and forfeiture of property … as a means of depriving criminals of profits … Forfeiture or confiscation of property, in connection with the commission of serious crime, has a long history in English law …

Thirdly, an historical analysis may assist in properly analysing the weight to be given to specific cases—old and new—which appear to be applicable. This may involve looking again at historic cases which are said to be a source of modern principle to test whether they really do stand for the proposition attributed to them. As was observed again in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at [43]:

A well-known example of this common law technique is the analysis by Dixon and Fullagar JJ in *McRae v Commonwealth Disposals Commission* of the decision … in *Couturier v Hastie*. Their Honours demonstrated that the earlier decision provided no basis for a principle, later attributed to it, respecting contracts rendered void for mistake.

It may also involve testing the continuing authority of early cases (such as the 17th century privity decisions considered by Windeyer J in *Coults*) to examine the extent to which they were followed or overtaken by divergent lines of authority. Alternatively, it may involve testing the weight of authority which has historically accepted a proposition, to determine whether it is now too well-accepted to be reversed.

Fourthly, an historical analysis may be used to help reconsider the pattern of individual decisions to derive new generalisations of principle and so reformulate legal doctrines. This use of legal history was more common in the creative period of the 1800s, but has most notably been used in recent years to reformulate the principles of restitution. As was observed in the judgment of Mason and Wilson JJ in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 227:

Since then the shortcomings of the implied contract theory have been rigorously exposed (see Goff and Jones: *The Law of Restitution* 2nd ed (1978) pp 5–11) and the virtues of an approach based on restitution and unjust enrichment, initially advocated by Lord Mansfield and later by Fuller and Perdue (see ‘The Reliance Interest in Contract Damages’ (1936–37) 46 *Yale Law Journal* 52, 373, esp at 387), widely appreciated (Goff and Jones, op cit at 15 et seq; and see *Degelman v Guaranty Trust* [1954] 3 DLR 785 at 794–5). We are therefore now justified in recognising, as Deane J has done, that the true foundation of the right to recover on a *quantum meruit* does not depend on the existence of an implied contract.

Fifthly, legal history may be used to overturn established lines of authority—as it may reveal that these authorities were founded upon a principle which has itself been overturned. As was observed in the joint judgment in *PGA v R* (2012) 245 CLR 355 at [29]:

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QUEENSLAND LEGAL YEARBOOK 2014
... where the reason or ‘foundation’ of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the caselaw, is no longer maintained, the first rule has become no more than a legal fiction and is not to be maintained.

Having identified the purpose to be served by an historical analysis, the next step is to develop the necessary contextual knowledge to properly identify and analyse the caselaw. For practitioners, this knowledge is most efficiently obtained from secondary sources.

There are a number of general histories of English law which may assist. These include multi-volume works, such as Sir William Holdsworth’s History of English Law and the more recent Oxford History of the Laws of England. The latter work, which is only partially complete, is the work of numerous contributing authors. There are also single-volume works, such as Sir John Baker’s Introduction to English Legal History. There are also specialist histories of various areas of the law. The law of contract is particularly well served in this regard, including by Professor Simpson’s History of the Common Law of Contract and Professor Warren Swain’s Law of Contract: 1670–1870.

Historic treatises, digests and abridgements are also of great assistance. Just as modern practitioners look to standard texts or encyclopedic works to obtain an overview of the law, previous generations of judges and practitioners approached their tasks in a similar way. So a useful way of obtaining insight into the intellectual framework of earlier generations is by examining the digests, abridgements and treatises (including treatises on procedure and evidence) which they would have consulted to help resolve the matter. These materials are apt to identify the caselaw which was considered relevant and to understand how that caselaw was understood and analysed at the time.

Fortunately, many of these historic secondary sources have been digitised by Thomson Gale and are available online, in a searchable and printable form, in collections known as Eighteenth Century Collections Online and Making of Modern Law: Legal Treatises 1800–1926. By tracing through successive editions of standard works, it is possible to chart the evolving trends in approach to almost any area of the law—and to obtain references to the key historic authorities.

With the benefit of this contextual knowledge—and the citations of what appear to be the key authorities—it is then possible to read the language and reasoning of the caselaw not as a modern lawyer but from a truly historical perspective.

In reading historic authorities, four points should be borne in mind.

First, most judgments were delivered orally and were recorded only in the notes taken by practitioners or others present in court. For this reason, the same judgment may appear in different law reports in differing terms. So there is often some utility in seeking to identify the various published forms of the judgment. One useful source of this information is the English and Empire Digest (1st Edition).

Secondly, there are recognised differences in reliability between the various parallel sets of law reports. Even during the period of the nominate reports, some law reports were recognised as ‘authorised’, and were regarded by the courts as providing the preferred source of citation.
By contrast, other reports had a reputation for unreliability. Discussion of these matters can conveniently be found in Sir William Holdsworth’s A History of the English Law Vol XIII at 425 ff.

Thirdly, as in the modern law, the weight of authority carried by an historic case is affected by the status of the deciding court, the reputation of the deciding judges and the characterisation of the relevant passage as either ratio or dicta.

Finally, as in the modern law, the weight of authority carried by an historic case is affected by the extent to which it was accepted as authoritative by subsequent authorities and treatises—and by the extent to which it was unaffected by any relevant changes in underlying or associated legal principles.

VII

In seeking guidance from published legal histories about the origin and rationale of particular legal rules, there should be no expectation that the state of existing scholarship will be either complete or satisfactory. The establishment of the Selden Society in 1887 was itself a response to concerns that studies of legal history were in desperate need of encouragement and assistance. Whilst a great deal of work has been undertaken since then, a great deal more remains to be done. In the meantime, practitioners and courts may well find themselves undertaking the original research required to resolve questions of this nature.

* John McKenna QC is a Brisbane-based barrister and a member of the Supreme Court Library Queensland Committee. He is also chairman of the Incorporated Council of Law Reporting for the State of Queensland, president of the University of Queensland Law Graduates Association and an Adjunct Professor of Law at the University of Queensland. His publications include Supreme Court of Queensland: A concise history (UQP, 2012).

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1 This data is drawn from Volumes 240–45 of the Commonwealth Law Reports.
2 This data is drawn from Volumes 75–80 of the New South Wales Law Reports.
3 This data is drawn from Volumes 29–34 of the Victorian Reports.
4 This data is drawn from volumes [2000] 1 Qd R to [2010] 2 Qd R of the Queensland Reports.
5 Where the court, in its joint judgment, sought the rationale of the common law rule that a cause of action in tort died with the person in whom it was vested, by reference to cases extending back to the 1500s and 1600s ([35]).
6 Where French CJ traced the origin of the bias rule in English law from Bracton into the 1600s and beyond ([34]).
7 Sappideen and Vines (eds), Fleming’s The Law of Torts (Thomson Reuters, 10th ed, 2011) 50.
8 E.g. Nolan v Warne [2001] QCA 537, [12].
9 E.g. English translations of the Case of Thorns—from a manuscript version as well as from the standard Yearbooks—can be found in Baker and Milsom Sources of English Legal History (Oxford University Press, 4th ed, 2010), 369.
13 (1852) 3 HLC 759; 10 ER 301.
14 (1861) 1 B & S 393; 121 ER 762.
16 Tate & Lyle Food Distribution Ltd v Greater London Council (Forbes J, QBD, 15 May 1980, unreported).
There is no doubt about the continued vitality and relevance of at least some of the decisions contained in the nominate reports.

Thank you to John McKenna QC for inviting me to address you. May I also thank Professor Warren Swain for valuable references to the nominate reports, and Miriam Moss and Yvette Brown of the Supreme Court Library for allowing me access to the treasures from the rare book collection of the Supreme Court Library. The books form part of the history of the nominate reports. We will turn to some in the course of the paper.

This is the second part of a four-part lecture series. The first lecture by John McKenna QC provided an overview of legal institutions and procedures in Medieval England, and of the mysterious Yearbooks. This lecture concerns the phase of law reporting that followed the Yearbooks, now known as the ‘nominate reports’. The third lecture by Roger Derrington QC will consider the third phase of law reporting, the authorised reports. The fourth lecture in the series is by Professor Warren Swain, and treats the historical evolution, and importance, of the legal treatise.

I wish to start by saying something about what the nominate reports are.

WHAT ARE THE NOMINATE REPORTS?

The ‘nominate reports’ are the haphazard, privately produced, printed reports of decisions in the Royal Courts of Justice in England and Wales, published over 300 years ago, between about 1550 and 1865. They are sandwiched between the 300 years of the Yearbooks, which were produced from the mid-1200s to mid-1500s, and at the other end, by the advent of the ‘authorised’ law reports produced by the Incorporated
Council of Law Reporting in England from 1865 onwards.

The title ‘nominate reports’ is typically English. The reporters of the Yearbooks were unknown; the cases are cited by reference to terms in particular regnal years. By contrast, the nominate reports are characterised by the report being identified by the name of the reporter—for example ‘Plowden’, ‘Espinasse’, ‘Campbell’, and so on. They are called ‘nominate’ reports because the reports are identified in that way—‘nominate’ in the sense of ‘name’.

The nominate reports share with their predecessors the Yearbooks, and their successors the authorised reports, one important common feature. In all cases, the reports are produced by and for the practising profession, and not by or for the state. We will return to this point later.

Today, the nominate reports are found mostly in a reprinted form, in the 178 multi-coloured volumes of the *English Reports*, which are to be found in most large law libraries, and in many chambers here in Brisbane.

There is no doubt about the continued vitality and relevance of at least some of the decisions contained in the nominate reports. Practically every significant English and Australian textbook on the law of contract, tort, equity or restitution will contain references to decisions in the nominate reports. The substratum of the principles of common and equity applied each day in our courts are almost entirely to be traced to decisions within the nominate reports.

In coming to grips with the nominate reports, we should at the outset bear in mind what I have divided up into seven key ideas:

1. First, we need to remember that during the 300 years of the production of these reports, all argument in court was oral, and the court’s reason for decision was delivered orally. The modern practice of the courts in delivering written reasons was unknown.

2. Second, at this time, there were no shorthand writers in court, and no court reporters of the kind we have today with the State Reporting Bureau, and now Auscript.

3. Third, there was no ‘Incorporated Council of Law Reporting’ that is familiar to us today in Queensland, and in the other Australian states. The Incorporated Councils are modelled on the Incorporated Council of Law Reporting in England. It came into being very late in the history of common law, in 1865.

4. Fourth, the reporters of the nominate reports were judges, barristers or court officials, and they reported cases alongside their main occupation.

5. My fifth point is the key importance of remembering why these early barristers and judges were taking notes of cases—of the facts, arguments and court’s decision. There were two quite different reasons:

   a. One reason for early barristers and judges to record decisions in cases was for their own private use, to keep abreast of the law, given the absence of any regular printed reports. Indeed, historians are finding now that the great gaps in the printed
nominate reports (some courts were not reported at all), and the great delay that often accompanied decision and publication (that is, years rather than months), meant that it was normal practice for judges and barristers to keep their own, private, manuscript notes of cases, to stay up to date—and this continued right up until the late 18th century.¹

b. A second reason for reporting, although mainly after the middle of the 18th century, was for a young barrister to take notes of cases to sell to a law printer, in order to make money, or to raise their profile in the hope of attracting work (a notable example being John Campbell, later Lord Campbell LC, whom we will touch upon later²). Later, in the 19th century, there emerged reporters who did this almost as a full-time occupation.

The first point is particularly significant, because most of the earlier nominate reports that we have were printed and sold by a third party, based upon manuscript reports of cases that had been compiled by a barrister or judge for their own private use many, many years earlier—as we will see, sometimes even 100 years later. The problem was that these notes had abbreviations and comments of the kind that each of us will make in court during a trial, that only the author could understand. There was, as well, the inevitable problem of deciphering the handwriting many years later. In such a process of production, mistakes were inevitable.

6. Sixth, related to the last point, often the provenance of the manuscript report coming in the hands of the printer was dubious—and in at least one case, the manuscript was stolen by a servant and then sold. Moreover, many of the early reports were translated from Law French to English, and this was done very badly. This all led to some printed reports being mangled and unreliable versions of the original. As we will see, this in turn led to a great deal of learning about which reports were good and authoritative, and which were bad and unreliable.

7. The seventh point is that, as can be imagined, we often find the same case reported by more than one reporter. As where the reports are different, the status of the reporter might be important in determining which report to accept. We will see an example of this in the celebrated contract case of Stilk v Myrick, which we will come to shortly.

To get a grip on these rather fascinating law reports, I propose to firstly provide a ‘bird’s eye’ view of the production of these reports over time. After that, I want to delve a bit deeper into the reports by looking at particular topics including the emergence of the nominate reports in the 1500s, manuscript and printing, legal education, legal practice, report vs record, who were the reporters, why the reports were produced, licensing, reports of common law and Chancery, abridgments and more. I then want to briefly discuss the Australian experience and some practical issues.
OVERVIEW CHRONOLOGY

A bird’s eye view of the 300-year-reign of the nominate reports looks something like this:

a. 1535
   • the date usually associated with ‘the last Yearbook’

b. 1550 to 1650
   • start of the ‘nominate’ law reporting: Plowden, Dyer, Coke
   • reports in Law French
   • oral and manuscript tradition, and limited printing

c. 1650 to 1750
   • reports mostly in English
   • restrictions on printing removed, some very bad reports produced

d. 1750 to 1865
   • start of the ‘modern’ reporting: Burrow, Cowper and Douglas (Lord Mansfield)
   • advent of regular reporting: Term Reports (King’s Bench, 1785–1800, Durnford & East);
     *Henry Blackstone* (Common Pleas, 1788–96); *Vesey Junior* (Chancery, 1789–1871);
     *Anstruther* (Exchequer, 1792–97)
   • emergence of ‘authorised’ nominate reports; creation of ICLR as a response to the problems
     of the nominate reports, especially the multiplication of reports needed to keep abreast of
     the law

e. 1865
   • advent of the authorised reports produced by ICLR

WHY DID THE NOMINATE REPORTS EMERGE WHEN THEY DID?

This is an interesting and difficult question. We need to go back to the last 1500s. We are in Tudor
England. Henry VIII has introduced a new church for England. There is much trouble between his
successors to the throne, and religion is a lightning rod for rival interests. The Catholic Queen Mary
is replaced by Protestant Elizabeth I, who rules from 1558 to 1602. This is the time of the Spanish
Armada, Francis Drake and William Shakespeare.

To understand the emergence of the nominate reports during this time of change we need to
start with legal education. In Tudor England, the training of English lawyers centred on the Inns
of Court in West London (sometimes called the “Third University” of England). The universities
(Oxford and Cambridge) only taught canon law and Roman law, not the English common law (or
English statute-law).
Those attending the Inns were mostly sons of the gentry. The young men lived at the Inns, where they ate, slept and worked. During the day they would attend court, where they would listen to argument from experienced barristers. The student would take notes in their ‘common place book’, including notes of cases, which they would write up in their chambers in the Inns of Court at night time. When not listening and watching in court, an important part of the barrister’s training was engaging in ‘moots’, where the oral pleading required of a barrister would be practised before other students, and lectures were given. Starting life as an ‘inner’ barrister, after seven years or so, the student would become admitted as an ‘utter’ barrister, and for a very few, this may later be followed by appointment by Royal patent to the office of serjeant. These were the most senior barristers, and there were very few of them. Only serjeants could plea at the Bar of the Court of Common Pleas, and they had their own Inn—the Serjeant’s Inn.

An engraving of the window at Serjeants’ Inn Hall, Fleet Street, as recorded by William Burton of the Inner Temple of 1599 (Illustration 1) is of considerable interest.

You will see some some famous legal names there, known to us by the abridgments, law reports, or treatises still associated with their names today—see, for example, Brooks, Fitzherbert, Spelman, Carrill and Littleton. Of particular interest is the first name on the window. That is ‘More’, the arms for which appear to be identical to those of Sir Thomas More.

At this time, Law French was the language for pleading (which was principally oral), Latin was the language of the court rolls, and English was spoken otherwise. The student needed familiarity with all three languages, and to be able to read each of them.

The subject matter of litigation at this time principally involved what one historian has described as ‘interminable squabbles about feudal land rights’—especially between the nobility who owned most of the land.

At this time, manuscript notes of cases circulated freely. This is unsurprising, given the way in which barristers were educated, and even though we see only a very weak, if any, doctrine of precedent at this point in time.
However, there occurred critical changes in legal procedure in the late 1500s. There was a break from the procedures described by John McKenna QC in the first paper in this series, and which was the system that gave us the Yearbooks.

The effect of these changes was that the Queen’s judges began to provide opinions on agreed facts, or upon actual facts, after a jury trial, rather than before a trial, and this in turn led to a greater focus on the actual decision of the judge, and their reasons. This may seem elementary to a modern lawyer, but it was novel at the time when argument in court before a judge had hitherto concerned what questions could properly be placed before a jury for decision at a future trial (and where, of course, the jury’s deliberations and reasons were unknown).

This change, in turn, altered the focus of those learning the law by attending court and listening to argument. The focus shifted toward understanding the actual or agreed facts of the matter, and the decision of the court as to those facts. This was different from what had gone before—where the student’s interest was on how oral pleadings were to be correctly argued before the judge (that is, oral and ‘tentative’ pleading), in order to refine a question to be put to the jury at a future trial.

It was this change in procedure that Sir John Baker tells us explains the rise of what became the nominate reports—where we see, for the first time, a statement of the facts, the pleading, the argument and decision, and which was quite unlike the form of the Yearbooks.

Sir John Baker has emphasised that whilst the last year for the Yearbooks was 1535, if one goes back to the original manuscripts of these reports, many of the first so-called nominate reports were little different in substance from the Yearbooks, save that the reporter was identified. Sir John says that this is true even of the famous Dyer and other Elizabethan reporters.

**EDMUND PLOWDEN**

However, Sir John Baker, and practically every other historian of law reporting, is agreed that one reporter stands apart from the others at this time, and who can fairly be regarded as the very first law reporter in a modern sense of the term—setting out the facts, the pleading, the argument and decision and the reasons (and all with great care and skill)—adopting a methodology that was entirely new from what had gone before.

This reporter was Edmund Plowden. Abbott says that ‘In practically every respect the Commentaries constitutes a break with tradition.’ Wallace says that ‘In every sort of professional excellence, Plowden’s Reports (or Commentaries, as he styles them) rank among the best Reports of every age.’ Lord Coke spoke of the reports as ‘exquisite and elaborate’, and the evidence is that he had manuscript copies of them.
We are fortunate to have a fine portrait of Plowden.


The portrait you see (Illustration 2) is taken from Abbott’s book, published in 1973, and Abbott records the following permission: ‘By permission of W F G Plowden, Esq. Plowden Hall’. Plowden Hall dates from the 1300s, and the existing buildings date from the 1600s. It seems that the family have lived in Plowden Hall for some 700 years, and apparently remain there today—exhibiting a peculiarly English continuity and stability that can be said to characterise also the English common law itself.

Abbott says that Plowden’s contemporaries said that he studied so assiduously that he never left the precincts of the Temple for three years after he went into Middle Temple. He began reporting in 1550. Abbott explains that Plowden’s uncompromising adherence to the Roman Catholic faith was a decisive factor in his career.6 There was little doubt that his ability and learning justified his appointment to serjeant, and to the Bench. Under the Catholic Queen Mary, Plowden received the Queen’s writ in 1558 to become serjeant the following Easter, but on Mary’s death the writs abated and his name was not among those called by Elizabeth the following year.7
It has been suggested that after Bacon’s death Queen Elizabeth offered the chancellorship to Plowden on condition that he conform, but that he refused. Historians are unsure if this is so. The fact remains that he never obtained any office under Elizabeth.

Plowden’s preface records why he permitted his manuscript reports of cases, produced for himself, to be printed. The preface states that Plowden found that copies of his reports were circulating and that a printer was about to start publishing them, and out of concern that they would be misreported, he gave his reports to the publisher Totell, who published a first volume in 1571.

The title page of the book so published appears as follows:

Illustration 3 is a photograph of the copy of Plowden’s Commentaries in the Supreme Court Library’s rare book collection, published in 1594. You will note the red stamp on the top right—of the Supreme Court Library, Brisbane!

Illustration 4 is of a page from the original of Plowden’s Commentaries, written in Law French, and with manuscript annotations from, presumably, a contemporary owner of the book whose name is now lost.

The next image (Illustration 5) is of the English translation of the same page from Plowden’s Commentaries, published in 1659, and also in the Library’s rare books collection.

The date of 1659 is significant. In Tudor times and thereafter, all law reporting was done in Law French. However, with the Revolution in 1650, an Act was passed requiring the use of English instead. Legal works began to be translated, and this included the nominate reports.

Probably the most celebrated case reported by Plowden was Lady Hales case. Sir James Hales was a respected judge of the Common Pleas. Though a Protestant, he supported Mary’s claim to the throne. However, he fell foul of Lord Chancellor Gardiner, and after months of imprisonment he was forced to recant his interpretation of certain religious legislation then in force (or, perhaps, to conform). Soon after his release from prison in 1554, Sir James Hales died by drowning, apparently in a river or stream near Canterbury.

It was found that he had committed suicide, and the Crown promptly seized his estates in Kent that he held with his wife, Lady Hales. The claim of the Crown was that Sir James had forfeited his estate with the felony of killing himself. However, if the forfeiture occurred after the death of Sir James, the estate would pass by survivorship to Lady Hales. If the forfeiture occurred in the life of Sir James, the estate would pass to the Crown. The court found against Lady Hales.
The reasoning in Plowden’s report on the point is shown in Illustrations 6 and 7, in the original Law French, and also in the English translation (both taken from the books that we looked at earlier).

This passage has become famous because it is said to have formed the basis for part of the gravediggers’ scene in Hamlet, where the two gravediggers ridiculed the law thus:

First Clown: It must be se offendendo; it cannot be else: for here lies the point: if I drown myself wittingly, it argues an act, and an act has three branches; it is, to do, and to perform: argal, she drowned herself wittingly.

Second Clown: Nay, but hear you, goodman delver.

First Clown: Give me leave. Here lies the water; good: here stands the man; good: if the man go to the water and drown himself, it is will he, hill he, he goes, mark you that; but if the water come to him and drown him, he drowns not himself: argal, he that is not guilty of his own death, shortens not his own life.

Second Clown: But is this law?

First Clown: Ay, marry, is’t; crowner’s ‘quest law.

Plowden died in about 1584 and was buried at the Temple Church, which remains in situ today within the Inner Temple. You may be amused by Wallace’s story of his visit to Plowden’s effigy in what he called the clerestory loft of Temple Church, in 1850 (see J M Wallace, The Reporters (4th ed, 1882), 146)

Having touched upon the great Plowden, we will pass over his contemporaries more quickly.
Other reporters in the ‘first phase’ of the nominate reports (1535 to 1650)

William Bendelowes is of some interest because his private manuscript reports were translated and published posthumously, and were much mangled in the process. His image is shown in Illustration 8, along with the English translations of his reports (Illustrations 9–15) that were published some 100 years after he prepared them.

A feature of the law reports published after the English Civil War was the presence of endorsements to the reader from the publisher or translator, extolling the virtues of the work, including the reliability of its provenance. Bendelowes’ reports.

Most, but not all, of these interesting endorsements have been cut from the versions of the nominate reports reprinted in the English reports.

Other well-known reporters from this era were Sir James Dyer (a serjeant and judge who tended to focus upon his own arguments), and the celebrated Lord Coke, whose reports were distinctive because they included his own views of the law, and which later became regarded as statements of English
common law. A painting of Dyer is reproduced as Illustration 16, together with a reproduction of the Supreme Court Library’s copy of Dyer’s reports (Illustration 17), published in Law French in 1609.

I want to turn next to what I have described as the second phase of reporting in the nominate reports, 1650 to 1750. The date of 1650 has been chosen because of the great changes that occurred in law reporting in the 1650s. I wish to discuss this next.

THE CHAOS OF THE 1650s

The overthrow of the English monarchy in the Civil War (1642–51) was accompanied by a release upon Tudor-era restrictions on the printing of law books, as well as a requirement (later itself changed) that all reports should be written in the English language, rather than Law French. This saw an explosion in the production of printed legal literature, including law reports, by publishers wishing to turn a profit.

As was mentioned earlier, this publishing free-for-all saw the publication of law reports that were
found to be incorrect and misleading. Set out in Illustration 18 is Wallace’s analysis of some of the nominate reports published in this period (plus Dyer). Wallace notes that the books in the second, lower section, do not name an editor and contain no account of the original manuscript of the report, and concludes that ‘[e]very book in the upper bracket possesses authority; scarcely one in the lower.’

At this time there also appeared, unsurprisingly, condemnation of the nominate reports regarded as inferior. Some of the language used at the time is, to modern ears, in equal parts outrageous and amusing. For example, Wallace gives us a few sentences of the address of Sir Harbottle Grimston, 2nd Baronet, later Speaker of the Commons and Master of the Rolls, styled ‘Address to the Students of the Common Laws of England’ and published in 1657. It reads:

A multitude of flying Reports, whose authors are uncertain as to the times when taken, have of late surreptitiously crept forth. We have been entertained with barren and unwanted products, infelix lolium et steriles avence, which not only tends to the depraving the first grounds and reason of the young practitioners, who by such false lights are misled, but also to the contempt of divers our former grave and learned justices, who honoured and reverend names have, in some of the said books, been abused and invoked to patronize the indigested crudities of these plagiaries; the wisdom, gravity, and justice of our present justices not deeming or deigning them...
at least approbation or countenance in any of their courts.

Equally colourful language can be seen in the exhortations of the editor of *Gouldsborough’s Reports* of 1653 (also in the Library’s collection), who entreats his readers thus:\(^{13}\)

Though hast not here, a spurious deformed brat, falsely fathered upon the name of a dead man, too usual a trick played by the subtile gamester of this serpentine age.

Similar exhortations of authenticity can be seen, for example, in the reports of Popham (*Illustrations 19–21*), which Wallace has on his lower list of unreliable reports, as follows:

Popham is regarded as of very doubtful authority because the provenance of the reports is uncertain. Similarly, it is said that Freeman’s reports were published after a servant stole the manuscript and published it for profit.\(^{14}\)

**THE RELATIVE AUTHORITY OF THE DIFFERENT REPORTS**

Particularly because of what happened during the 1650s and 1660s, there developed a great deal of learning on the relative authority of different reporters and their reports.

In his article on the reporting of *Stilk v Myrick*,\(^{15}\) Luther explained that discrimination between different reporters was a necessary function for both the Bar and Bench to perform. He says that ‘[a] vast body of lore grew up concerning which reporters could be trusted, and which should be treated with caution. Much of it is collected in J M Wallace’s classic work *The Reporters*’.\(^{16}\)

We have mentioned James William Wallace several times so far. He was a Philadelphia librarian, and his life and work is discussed in an interesting article by Hewitt published in 1923.\(^{17}\) For those of us who have not yet dipped into it, I thoroughly recommend Wallace’s book—it is readable, interesting, and in many places very amusing. Wallace notes that the received wisdom of 18\(^{th}\) and 19\(^{th}\) century judges that certain reporters were of no authority, should be treated with caution. In a style that typifies his book, Wallace expresses himself thus:\(^{19}\)

> Numerous, indeed, might be the proofs that judges have been content, in this matter, to draw from the stagnant reservoir of their predecessors’ learning, rather than at the spring of their own research and thought; and hence we may say, as a general rule, that with regard to the character of the old reporters, statements earliest made are more deserving of attention than those more late, confirming or enlarging them … But even the statements earliest made are not to be received with a blind reliance. Much of their value depends upon circumstances; much, especially, upon the person from whom they come. Some men deal largely in these small things—the curiosities of legal literature; the mint, anise, and cumin of the law: but such men
are not always profound in their knowledge, nor comprehensive in their views …

Luther also reminds us that in some cases, a judge would condemn a reporter as an easier way of circumventing a decision with which they did not agree.

The quickest way to assess the reliability of any particular nominate reporter is probably consulting an article published in the December 2013 edition of the *Australian Law Journal*. It summarises the received wisdom on the relative authority of different reporters—from excellent to entirely unreliable. The article condenses what is found in Veeber’s two longer articles in the early *Harvard Law Review*, which is itself largely taken from the authoritative study by Wallace.

THE BEGINNING OF THE THIRD PHASE: 1750–1865

**Lord Mansfield’s era**

A judge, who became notorious for not permitting certain reporters to be cited in court because of their alleged unreliability, was William Murray, Lord Mansfield (*Illustration 22*). Lord Mansfield was Chief Justice of the King’s Bench from 1756 to 1788, and was followed in that office by Lord Keynon and then Lord Ellenborough (1802–18). We will return to Lord Ellenborough shortly.

One of the reporters whom Lord Mansfield ‘absolutely forbade’ to be cited was Serjeant Barnardiston, who had practised at the Bar when Lord Mansfield was also a barrister. Barnardiston reported both Chancery decisions, and also those from the King’s Bench. The preface to his Chancery reports contains language that again evokes a bygone era (*Illustrations 23 and 24*).

Despite the high-minded language of this dedication, Barnardiston’s reputation as a reporter was not good. Wallace cites a note in Douglas’ reports that ‘Barnardiston was a careless dog, and his Reports … were for a long time but little esteemed.’ As to his Chancery cases, when Preston cited a case from them, Lord Lyndhurst, Lord Chancellor from 1834, is said to have exclaimed: ‘Barnardiston, Mr Preston! I fear that is a book of no great authority; I recollect, in my younger days, it was said of Barnardiston, that he was accustomed to slumber over his note-book, and the wags in the rear took the opportunity of scribbling nonsense in it’.22

Later, however, Lord Eldon was reported to
have said that there was value in this reporter’s Chancery reports, and implied that Lord Mansfield may have been motivated by personal feelings stemming from his time at the Bar, appearing against Barnardiston.23

The other side of Lord Mansfield’s strong adverse views about some reporters was that he also, it seems, took steps to ensure the very finest reporting of his own judgments. This was done through Sir James Burrow. He was a protégé of Lord Mansfield, and apparently in awe of the Earl, whose decisions in the King’s Bench Burrow’s reports focussed upon.

From 1724 until his death 58 years later in 1782, Sir James held the office of Master of the Crown Office. Wallace explains that this office gave Burrow access to the records of the court, and also a place immediately before and under the bench, from where he could hear all that was said in court. Burrow’s reports are said to be the start of modern law
reporting, Wallace says that Burrow’s reports ‘mark an epoch in law reporting’, 25 and describes them, reverentially, as ‘works of art’. 26

Burrow made his reports for the purpose of publishing them, and did so regularly for many years. Wallace says that Burrow was the first to prefix reports with a statement of the case that he had prepared himself, and in a form separated from the opinion of the court; the argument of counsel would follow next; and then the opinion of the court, without further restatement of the facts, and focussed on the issues. 27

Burrow’s reports were, as well, notably accurate and authoritative. His method of reporting was followed by his successors, Cowper, Douglas and Durnford & East. 28 Also—and importantly—Burrow’s reports were the first of the 18th century that did not have the formal approval of the judges. Until then, this was still apparently necessary.

Stilk v Myrick

We may contrast the praise heaped upon Sir James Burrow with the reception given to one of his successors, poor Isaac Espinasse. Born and educated in Ireland, he was called to the Bar by Gray’s Inn in 1787, elected a bencher in 1809 and treasurer in 1809. A prolific writer, he produced a range of texts in addition to his Espinasse’s Reports. He began publishing reports in 1796, and by 1807 had published five volumes of reports, especially the Nisi Prius cases (which some judges said should never be reported, because the judgments tended to be less deeply considered).

Espinasse’s Reports subsequently came under sustained criticism. Mr Justice Maule, himself formerly a reporter when at the Bar, is reported to have said that ‘he did not care for Espinasse or any other ass’. Chief Baron Pollock’s great-grandson claims that Pollock said that Espinasse ‘heard only half what went on in court and reported the other half’. Perhaps the most significant blow came from Lord Denman CJ, in a reported report in a case called Small v Nairne in 1849, where his Lordship said this:

I am tempted to remark, for the benefit of the profession, that Espinasse’s Reports, in days nearer their own time, when their want of accuracy was better known that it is now, were never quoted without doubt and hesitation; and a special reason was often given as an apology for citing that particular case. Now they are often cited as if counsel thought them of equal authority with Lord Coke’s Reports.

These comments were quoted verbatim by Coleridge J in another case six years later (Lady Wenham v Mackenzie). The final nail came in an oft-quoted comment of Mr Justice Blackburn in Redhead v Midland Railway Company in 1867, saying of Espinasse and two later Nisi Prius reporters (Carrington and Payne) that ‘neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood’. Mr Justice Blackburn himself, when a barrister, had reported both Small v Nairne and the later decision of Coleridge J.

To modern ears this criticism of professional colleagues, and the interest in the quality of their reporting, may seem somewhat mystifying. However, it makes some sense when we remember that by the 18th and 19th centuries the doctrine of precedent had taken hold as part of the cement of English law,
and in a world where argument and reasons for judgment were oral, and law reporting was a private
and ad hoc endeavour, it therefore became essential to discriminate between reliable and unreliable
records of judicial decisions.

For the history of the law of contract, it was important that at the time Espinasse was reporting, in the
very early 1800s, a competitor emerged as a *Nisi Prius* reporter. This was a young man named John
Campbell, described by Luther as a 'young and brief-less barrister'. He determined to move into *Nisi
Prius* reporting to help build a reputation, and to thereby obtain work.

Like Espinasse, Campbell also wrote and published widely, including *Lives of the Lord Chancellors*
and *Lives of the Chief Justices*. In time, eventually, Campbell rose to the position of Lord Chief Justice
and Lord Chancellor of England. Part of John Campbell’s strategy in reporting cases was to report
well, and to be respected. The Chief Justice of the King’s Bench at the time was Sir Edward Law, Lord
Ellenborough, and Campbell’s private letters reveal that before he sent his reports off to the press:
'[h]e … carefully revised all the cases I had collected for it, and rejected such as were inconsistent with
former decisions or recognised principles. When I arrived at the end of my fourth and final volume, I
had a whole draw full of “bad Ellenborough law”’. The contents of this drawer were apparently burnt,
and so we will never know what decisions were in it.

Of course, the fact that the report was written by someone in the court, and listening to the oral
argument and oral reasons, meant that there were inevitable differences between two reports of the
same case.

The most well-known example of divergent reports, and where it made a real difference, is found in
the reports by John Campbell and Isaac Espinasse of the decision in *Stilk v Myrick*, reported in (1809) 2
Camp 317, 170 ER 1167 (*Campbell’s Report*) and in 6 Esp 129, 170 ER 851 (*Espinasse’s Report*). This is the
subject of the article by Peter Luther in the reading guide.29

Stilk was a merchant seaman who signed articles to sail from England to the Baltic and back for five
pounds a month. The master was Myrick. Two of Stilk’s fellow seamen deserted. Myrick promised
Stilk and the other seaman that if they stayed on and worked the ship home, he would divide the deserters’
wages between. Upon arriving back in England, Myrick refused to pay the bonus, and Stilk sued him in
assumpsit to recover it.

Lord Ellenborough held that the sailor could not recover the bonus promised to him, even though he
had duly stayed on and worked the ship safely home. The question was, however, the reason for the
decision. Espinasse’s report indicated that Lord Ellenborough held that the sailor Stilk could not recover
on grounds of public policy, the policy being the need to prevent sailors coercing their masters into
promising extra pay. Espinasse was junior counsel for the sailor, led by the Attorney-General.

John Campbell was not in the case at all. However, he reported that the grounds for the decision was
the absence of consideration for the master’s promise to pay the extra wages. If this was so, the decision
was potentially applicable outside the special context of sailor’s wages, and applied to all contracts.
Campbell’s report also allowed that the decision might have decided something fundamental about the
law of contract. Campbell’s report has since been accepted as correct, and the case has become received
as authority for the proposition that a promise to undertake an existing contractual duty cannot be
good consideration. Indeed, the true reason for the decision, and the differing reports of Campbell and
of Espinasse, was later considered by the English Court of Appeal in *Williams v Roffey Bros* [1991] 1 QB
1, and in other cases about economic duress.

A couple of points of interest emerge, I suggest, for this brief foray into the reporting of *Stilk v Mayrick*.

1. First, the subject matter of the reported decision is of interest. It reflects the vastly different
economy that had emerged by the late 18th century in England. This economy was dominated
by the huge seaborne trade at which England was the centre, and which provoked much
litigation involving seamen, shipping and sales of goods. This led also to the development,
in the late 1700s and early 1800s, of principles of the law of insurance, sales of goods, and of
negotiable instruments, which were at the heart of this trade.

That context can be contrasted, for example, with the much earlier decision in Lady Hales’
case that we discussed earlier, reported by Plowden. It was a decision typical of its time, in that
it concerned competing claims to land by the nobility. This focus was in turn a product of the
agrarian economy and late-feudal society within which disputes arose.

2. Second, *Stilk v Myrick* underlines how the reputation of the reporter was of practical
importance. Campbell’s report was accepted particularly because of the authority attached to
John Campbell as reporter, in contrast with that of Isaac Espinasse.

3. Third, for the student of legal history, it is another example of that peculiar dynamic vividly
described by Sir Henry Maine, who said that the development of the substantive law was
‘secreted within the interstices of procedure’.

We see that in *Stilk v Myrick*, in that a rule determining whether the form of action for assumpsit for
work done would lie in a given set of facts came to be received as adding to the principle of substantive
rules of law, about what counted as good consideration sufficient to create a binding contract.

**REGULAR REPORTING FROM THE LATE 1700S**

After the arrival of Sir James Burrow, the next major change was the emergence of regular reporting.
This began in the late 1700s with the *Term Reports* (of the King’s Bench, 1785–1800), *Durnford & East,*
*Henry Blackstone* (Common Pleas, 1788–96), *Vesey Junior* (Chancery, 1789–1817) and *Anstruther*
(Exchequer, 1792–97).
AUTHORISED NOMINATE REPORTS

Thereafter, the story in outline is that the courts began to accept certain nominate reports as ‘authorised’ reports. But these were slow, and very expensive, and the privilege was later withdrawn. It was withdrawn in 1832 for the King’s Bench by Lord Denman CJ, and later in the two other common law courts.

MULTIPLICATION OF REPORTS FROM 1830 ONWARD AND THE CREATION OF THE ICLR

The withdrawal of a requirement that reports be authorised by the court, led, in time, to the emergence of new nominate reports, and new and very timely reports in journals and magazines. Examples of the latter include the Law Journal, Legal Observer (1830), The Jurist (1838), Law Times (1843) and The Weekly Reporter (1852).

These new publications severely eroded the sales of authorised reports from thousands to hundreds. But it also led to serious problems for lawyers and judges, caused by the proliferation of reported cases (and the need to subscribe to many different reports), the reproductions of the same decision in different reports, and discrepancies between the different reports. This was occurring at a time when the volume of litigation and judicial decision-making was increasing.

The serious problem that had arisen by the middle of the 19th century was tackled not by parliament, but by the Bar. Just as the nominate reports themselves were privately produced, but and for the profession, so it was the lawyers themselves who found a solution to the multiplication of reports. The solution was the Incorporated Council of Law Reporting. Its creation and success is, however, a story for another day, and one that will be told by Roger Derrington QC in the next lecture in this series.

AUSTRALIA

I wish to turn now, briefly, to Australia. In Queensland, we did not ever have our own nominate reports. One early volume of reports, sometimes called ‘Beor’ was produced, but by the Law Society and not privately, and it was overtaken by the establishment of the Queensland Law Journal Company, which began to publish law reports of Queensland courts.

However, in older and larger colonies of New South Wales and Victoria, nominate reports did emerge. These include Legge and Knox in the colony of New South Wales and Wyatt, Webb & Beckett in Victoria.

Mention should also be made of the late Justice Dutney’s collection of nominate reports. His Honour collected original nominate reports of various provenance, some from the ancient Westminster Hall, and others marked as coming from particular courts in the current Royal Courts of Justice in London. His Honour had these reports bound into a uniform calf-skin cover, presumably at vast expense. Upon his Honour’s death, the collection was acquired by Justice Fraser, and they have since passed on to John McKenna QC.
USING THE NOMINATE REPORTS

The English Reports

The readily available copies of the nominate reports are not found in the original books that we have been looking at in this lecture, many of which are now hundreds of years old. Instead, the reports are to be found reproduced in the English Reports, the multi-coloured collection published between 1900 and 1932 by Stevens and Sons of London, and William Green & Sons of Edinburgh.

The English Reports run to 178 volumes. They have an index chart cross-referring the particular nominate report to a volume in the English Reports, and maintain two sets of numbering: the original numbering from the nominate report, as well as page numbers for the English Reports themselves. The reporter’s notes are usually kept, and these are often very useful. However, the English Reports do not include all of the nominate reports, and the editors ‘topped and tailed’ the original reports, removing prefaces, tables of cases, and subject indexes from the original (in what Luther has described as editorial misjudgement).

The English Reports are available online, as follows:

1. HeinOnline—a digitised, word-searchable electronic version (although editing still remains to be done on some imperfect digitisation). This is available through the Supreme Court Library
2. Justis—this service has ‘PDF’ versions of the English Reports
3. A free online service—http://www.commonl ii.org/int/cases/EngR/

The Revised Reports

These were published in 1891 and were the brainchild of Sir Frederick Pollock. Only cases after 1765 are reproduced and only decisions that were thought by editors to be relevant. The project did not succeed, and the Revised Reports are not often seen today. A short article in the Law Quarterly Review discusses the failure of the Revised Reports to gain traction. However, the Revised Reports include nominate reports not included in the English Reports, including several of the journal reports that were mentioned earlier.

Citators

There is no dedicated case citatory for the nominate reports. The best we have is probably the first edition of the English and Empire Digest, published in 1995. This was a mammoth undertaking of the Victorian era. It includes tables of cases including many nominate reports, and that shows subsequent consideration of the case. This valuable table was cut from the second and subsequent editions of the Digest. It is therefore the first edition only that is of interest as a citatory for the nominate reports.

Abridgements

Abridgements can also be useful. Viner’s Abridgment is particularly good. The second and third editions of Bullen & Leake also provide useful references for common law in the middle of the 19th century.
Citing nominate reports

The usual convention is to cite both the nominate report and the *English Reports* reference. So, for example, *Stilk v Myrick* is cited as (1809) 2 Camp 317, 170 ER 1168. That citation refers to volume 2 of Campbell’s reports at page 317, and also to volume 170 of the *English Reports* at page 1168. It is not usually necessary to cite all of the different reports of the case. It would, for example, be acceptable to omit Espinasse’s report of the case (6 Esp, 170 ER 851) when citing it—unless there was some reason for including it.

CONCLUSION

In conclusion, I hope that this brief survey has shown that the nominate reports occupy a rather important place in the story of the development of our common law. Of interest, I think, is how they were produced entirely privately, and not by the state, and how they were produced in an unplanned and even haphazard way: not by some guiding hand, but promoted by the ad hoc needs of the participants in the legal process—barristers, judges and court officers.

It is one of the fascinating aspects of our work that, within the toolkit of a modern solicitor, barrister or judge, is a set of law reports stretching back to the time of Shakespeare, and that are not merely of historical interest, but which provide almost all the bedrock for the contemporary principles of law and equity that are applied in our courts today.

Thank you very much for your attention.

* Dr Dominic O’Sullivan QC is a Brisbane-based barrister. He is a co-author of *The Law of Recission* 2nd edition (Oxford University Press, 2014) and a contributor to *Singapore International Arbitration: Law and Practice* (LexisNexis, 2014).

1 See e.g., J Oldham, ‘Introduction’. *Case Notes of Sir Soulden Lawrence 1787–1800* (Selden Society, 2013) xiii-lxi (re the use of private manuscript reports and the limits of printed reports in the 18th century).
2 See e.g., P Luther, ‘Campbell, Espinasse and the sailors: Text and context in the common law’ (1999) 19 Legal Studies 526–51.
3 Argent, a chevron engrailed between three moorcocks, sable.
6 Above n 4, 199.
7 Ibid 201.
8 Details of which were at 29 of the booklet, available at the lecture.
10 Cf. the name ‘Hales’ on the second last line of arms on the Serjeant’s Inn window.
11 Wallace, above n 5, 16.
12 See also what appears at pp 16–17 of Wallace, above n 5. Sir Harbottle translated the reports of his father in law, the Judge Sir George Croke, several editions of which were later printed and published.
13 Wallace, above n 5, 15.
14 V V Veeder, ‘The English Reports, 1292–1865’ (1901) 15 HLR 1, 15.
15 P Luther, above n 2, 530.
16 Ibid.
18 Wallace, above n 5, 27.
20 Veeder, above n 14, 109–17.
22 Ibid 424.
23 Ibid 26–7.
24 Ibid 451.
25 Ibid 446.
26 Ibid 449.
27 Ibid 447; also Veed, above n 20, 21.
28 Wallace, above n 5, 450.
29 Luther, above n 2.
31 I am indebted to John McKenna for drawing this to my attention.
The modern authorised law reports and their digests

Roger Derrington QC*

So it was that on the first day of the Michaelmas Term in 1865 … the reporters for the law reports took up their positions in the superior courts of England. As history shows, the law reports were a resounding success from the beginning.

INTRODUCTION

The title page to Volume 1 of the Chancery Appeals Cases of 1866, reveals that its editor is one Mr G W Hemming. He was one of the first paid editors of the Council of Law Reporting on its commencement of operations. Later, as G W Hemming QC, he became the first editor of the Chancery Division Reports as well. That was somewhat ironic as earlier history shows that it was Mr Hemming, an ardent and vitriolic opponent of the establishment of the Council of Law Reporting, who fought most vigorously at all stages to prevent its birth. Indeed, at one important meeting of the Bar prior to the council’s establishment, he put a motion which, had it passed, would have prevented its establishment at all. However, despite his passionate opposition, once the Bar had passed the motion proposing a new scheme for law reporting under a Council of Law Reporting controlled by the Bar, he fully supported it and became one of its best early editors and reporters. His response to the introduction of the new system was not unique. There was much vigorous debate around the proposal, and the advances which the Council of Law Reporting was able to introduce were, indeed, very nearly lost.

This paper discusses the development of the system of modern law reporting which arose out of the quagmire which was the nominate reports. Among other things, it identifies those factors which necessitated a change in the manner of law reporting, the evils of the nominate reports system, the attempts by various persons and bodies to bring about change, the attempts by vested interest groups to resist the change, and the tortuous path to the establishment of the Council of Law Reporting and its publishing of reports.
THEMATIC ISSUES

The historical development of the modern system of law reporting in the 18th and 19th centuries included a number of important issues which have re-emerged, in a slightly different form, in the modern digital age. They include the following:

- History and, indeed, the maintenance of the rule of law show that the business of the promulgation of the judgments of the courts of law is not a proper commodity for trade and commerce. Knowledge of the law by the legal profession and the public—for whom ignorance of the law is no excuse—should not be the object of commercialisation to be bought and sold for profit.

- Consistently with this, it was the view of many, that it was the government which should be responsible for publishing the decisions of the courts of law. There has been a constant view throughout history that the public’s right to be informed of the common law should be protected by the government’s providing access to the decisions of the courts at a moderate cost.

- A countervailing view, which I share, is that governments of any kind cannot be trusted for the promulgation of the decisions of the courts. The odious monopoly which would emerge and the consequences of inevitable patronage would be ruinous of the whole system. Indeed, the history of the law reports demonstrates that the monopoly of the authorised reporters of the 18th century and early 19th century, led to some very poor practices.

- That the legal profession generally undervalues the importance of the decisions of our courts. They are more than merely dispositive of a particular matter, and should be accorded proper respect and recognition, and be appropriately recorded for the benefit of the public and the profession. This omission of appropriate respect is, perhaps, more a reflection on the Bar. In the 18th and 19th centuries, as it is now, it was divided between, on the one hand, those who see that it is their professional duty to contribute to the public good and, on the other, those who regard the practice of law as a mere pathway to private wealth. When the need arises, the former will often labour hard to ascertain and develop ways to improve the system of justice. The latter, from no particular position of knowledge, will in enthusiastic tones denounce any attempt to amend any flaws in the current system, without offering any alternative remedy. So it was that William Daniel QC, the father of the modern system of law reporting, who over many years strove to expel the many ills within the nominate reports, suffered unjustified vituperative abuse from those who wished only to protect their own interests. It is a salutary lesson of the history of human nature, that they were not able to proffer any suitable alternative scheme.
THE SYSTEM OF THE NOMINATE REPORTS

Prior to the first day of Michaelmas Term on 2 November 1885, being the day that the first reporters for the law reports attended court to report cases, the nominate reports dominated law reporting in the United Kingdom. Until that time, it was almost universally regarded as deplorable. It is curious that even those who opposed any new system did not disagree that the existing system was grossly deficient.

At least on one view, the existing system had been the result of the transmogrification of the processes which led to the publishing of the Yearbooks. It was believed that they had been prepared by public functionaries, but had somehow ceased at the time of Henry VIII; and that thereafter the reports of the court proceedings had fallen to private enterprise, and free trade and competition had effectively defeated the ability of any person to ascertain the common law on any topic. Both Holdsworth and Maitland disagreed with the proposition that the Yearbooks were in some way an official publication, prepared by paid public officials, and were of the opinion that they were prepared by privateers as well. This debate has endured over centuries, but it is not a topic for further consideration in this paper. In any event, it appears to be undisputed that, since the time of Henry VIII, the Yearbooks were no longer extant and that task, so said Lord Coke in the latter part of the 16th century, fell to reporters whom he described as ‘certain grave and sad men’.

Whatever the origin of the difficulties, the problems of law reporting were well recognised by the mid-18th century. In William Blackstone’s Commentaries in 1765, he said that the problem was that the task of law reporting was ‘executed by many private and contemporary hands, who, sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination’.

In essence, there was no organised system. Free trade and competition had thrown up a plethora of reports of starkly varying quality, many of which were inaccurate. However, some were more highly regarded than others. At the commencement of the 19th century there existed, in effect, two types of reports, unsurprisingly described as the ‘regular’ or ‘authorised’ reports on the one hand, and the ‘irregular’ or the ‘unauthorised’ reports on the other.

The ‘regular’ or ‘authorised’ reports dominated in the 18th century and early part of the 19th century. They were the reports of the authorised reporters, sometimes referred to as the ‘Children of Privilege’, because their reports enjoyed the privilege of ‘exclusive citation’ in the courts in which they were appointed. They were known to and approved of by the judges of the court, they were given free access to the papers needed for the preparation of the reports, and the judges often revised the reports of their judgments. Usually, there were two authorised reporters in each court and they would check each other’s work. When it became necessary for a reporter to be replaced, the replacement would have to be approved by the reporter who was departing and by the judge of the relevant court. The reporters were relatively well paid, and consequently this work was undertaken by the better lawyers of the day.

In the early part of the 19th century the popularity of authorised reports was paramount, making it difficult for other reporters to compete. They covered all superior courts of common law and equity although not those in the nisi prius jurisdiction. As at 1863, there were 16 sets of authorised reports,
although other series of such reports had terminated previously. Some of the names of the earlier reporters of the authorised reports remain familiar today; including Alderson, Maule and Cresswell.

However, the monopolistic position of the authorised reports produced the usual sequelae of monopolies. As Daniel QC recognised in The History and Origin of the Law Reports, the commercial monopoly had the consequence that the interests of the reporters and the publishers prevailed over the interests of the profession and the public. The chief difficulty was the delay between the handing down of the judgment and its reporting. As an example, the last volume of De Gex, Macnaghten & Gordon's Chancery Reports, which came out in 1864, reported cases determined in 1857. It should be noted, however, that some of today's authorised reports regularly publish the decisions of their courts well beyond two years from the date of the handing down of the judgment.

The authorised reports also became extremely expensive, and their publication was irregular. There was also a want of continuity. If a reporter died, as he would usually be a few years behind in his reports, it would be the result that a couple of years of decisions would simply not be reported. Another commonly perceived problem was that because there was no competition, there was not enough discrimination as to the fitness or usefulness of the cases which were reported. There are many recorded complaints that they were often filled with much irrelevant pleadings and argument which was unnecessary.

The consequence of the dissatisfaction with them was the rise of the unauthorised reports, which appeared to fill the gaps left by them. The reporters of the unauthorised reports had none of the advantages of the authorised reporters, but in some respects they were able to meet the needs of the profession. They were produced quickly, with the result that they could be used by practitioners if there was no authorised report of the case in existence. They were cheap and were regularly produced and, unlike the authorised reports, they reported a wide range of cases. One of the new breed of unauthorised reports was the well-respected publication, The Law Journal.

In 1832, Denman CJ removed the privilege of exclusive citation of the authorised reports in his court, and other courts quickly followed suit. This was in line with the dominant dogma of the time. John Locke and John Stuart Mill had left an indelible impression on English society and its economy and the prevailing Zeitgeist was the freedom of the market and laissez faire politics. It was apparently thought that competition would resolve the difficulties of the odious monopoly of the authorised reporters.

To an extent that belief was correct, at least for a while. After the removal of the authorised reports' exclusivity, a number of new sets of reports quickly appeared. By 1863, a number of respected unauthorised reports had appeared, including The Jurist, established in 1837, the Law Times, established in 1843, the Weekly Reporter, established in 1852 and merging with The Solicitors' Journal in 1856, and the New Reports, established in 1862.

In the period from the early 1800s to 1863, there were numerous ephemeral sets of unauthorised reports, which were launched but then failed under the fierce competition. They included reports such as The Legal Observer and The Law and Equity Reports. Within these emerging nominate reports were various series which were devoted to specific topics, such as practice cases, criminal cases, sessions cases and railway cases and the like, though such cases were freely reported in other places.
So it was that there was an explosion in unregulated law reporting. There was fierce competition between the respective publishers and reporters. As the only requirement for a report to be cited in court as a binding authority was that it was under the hand of a barrister, any barrister could join with a publisher to publish another series of reports. This resulted in a vast array of material of varying quality and, more importantly, varying accuracy. Perhaps some evidence of the deplorable state of the system is the mysterious case of *Bird v Brown* which is reported in, inter alia, (1849) 4 Exch 789. Of it Lord McNaughton in *Keighley Maxsted & Co v Durant* observed:

> The case is instructive, I think, and useful, because it tends to shake one's confidence in the infallibility of reporters, whose words always seem to carry the more weight the less opportunity there is of testing their accuracy. *Bird v Brown* (4) was heard by four judges. Only one judgment was given. The report at 4 Exch 786 attributes the judgment to Rolfe B. The report at 19 LJ Ex 154 ascribes it to Parke B and that at 13 Jur 132 puts it in the mouth of Pollock CB. No one gives it to the fourth judge, but then there were only three sets of reports current at the time. The *Weekly Reporter* did not begin till the next year.

In fact, there was a fourth set of reports at the time, namely, *The Law Times*. It also reported the case. It agreed with the *Law Journal* in identifying Baron Parke as the author of the judgment and it, too, omitted the passage appearing in the *Exchequer Reports* of which in *Keighley Maxsted & Co v Durant* Lord McNaughton disapproved.

### THE PROBLEMS ASSOCIATED WITH THE EXISTING NOMINATE REPORT SYSTEM

The proliferation of reports had serious consequences for the profession, the public, and even the publishers. For the publishers, one of the great difficulties was the maintenance of continuity. By the mid-19th century, many of the nominate reports had been discontinued. That a series would be started, last some years and then fade away through either the reporter's moving on or passing on was a recurring theme.8 The circulation of those series that managed to continue decreased significantly to the extent that the cartel of the leading legal publishers, meeting under the name, ‘The Associated Law Booksellers’, called a crisis meeting in 1853 to record their alarm that they would be annihilated if something were not done.9 However, they had brought the crisis on themselves, and of greater moment was the damage they had done to the administration of justice, the profession, and the public good.

In this respect a number of significant difficulties had arisen. First, a clear knowledge of the law was passing beyond the ability of the profession and judges. The reports were so numerous that no one could acquire them all and in a trial, counsel might produce a note of a case in an obscure report of which no one else was aware and which overruled a substantial line of cases. This situation moved the author of Watkins’ *Principles of Conveyancing* to say in the preface to his book, ‘Is the law of England to depend upon the private note of an individual and to which an individual can only have access?’ He postulated the notion of judges determining cases by reference to notes of other cases kept in their pocket, and the content of which was unknown to all but the judge.
Secondly, there was no obligation on the reporters to report cases within any particular time frame. The delay could be months, years or even a quarter of a century. The decisions of Lord Hardwick from between 1736 to 1739 were first published in the latter editions of the *Wett Reports* in 1828.¹⁰ There are many other examples. Most at fault here was the ‘regular’ or ‘authorised’ reports. Their higher standing meant that the reporters were less pressed to produce timely reports. In relation to this, in 1863, Daniel QC compared them with the ‘irregular’ or ‘unauthorised reports’:

> This nomenclature has become singularly inaccurate. The *Regular Reports* are published at the most irregular intervals, according to the private convenience of the reporter, sometimes with the discontinuance of the set, destroying the continuity of the series. The *Irregular Reports* on the other hand are published most regularly—regularity of publication being essential to their commercial success.

Thirdly, the cost of the quality reports such as the authorised reports remained high, whereas the poor quality reports, which were often inaccurate, were relatively cheap. The unauthorised reports were often produced by reporters of little skill and learning, who sought to gain a competitive edge by publishing their reports relatively rapidly. It followed that a good proportion of the profession used them. At the time, the better reports cost practitioners the exorbitant sum of £30 per year, were they to acquire all of the series to be certain that they had all relevant cases.

Fourthly, despite the substantial cost of the unauthorised reports, their reporters were poorly paid.

Fifthly, there was a common complaint that the publishers engaged in the practice of ‘book-making’, a pejorative term describing the practice of including many cases of little or no value and pages of irrelevant material so that profits could be made on the sale of additional volumes. This precise problem has again arisen in this century.

Sixthly, the consequence was that there were often numerous versions of the same case and not all concurring in what was actually decided.

These consequences of the free market production and sale of law reports led to significant uncertainty for the profession and in the administration of justice, for it struck at the heart of the common law system. Because of the flaws in the reporting of precedent, it was not readily ascertainable and, to the extent that it could be ascertained, it was inconsistent and ambiguous. This led to much professional and public disquiet concerning a substantial cause, namely, the state of law reporting.

**THE MOVE TO MODERNISE LAW REPORTING**

Several attempts were made in the early 18th century to identify a suitable system of law reporting which would serve the courts, the profession and the public. In about 1843 some zealous law reformers formed the Verulam Society (presumably with deference to Francis Bacon also known as Baron Verulam) with the avowed intent of devising a scheme for the exercise of professional control over law reporting. Unfortunately, it was not able to provide a solution and it quickly dissolved and passed into oblivion.
The Law Amendment Society was formed in 1844. One of its most energetic and enthusiastic members was Mr Serjeant Pulling, who later became one of the inaugural members of the Council of Law Reporting and one of its long-serving members. The society was not confined to members of the legal profession, and included a wide range of civilians. It recognised that the public good could be advanced through legislation, and undertook consideration of what improvements might be made to the process of law reporting. In 1849, a committee chaired by Serjeant Pulling produced the first report suggesting the reforming of the system. It asserted that ‘in order to secure uniformity in the administration of justice, it was indispensable that the reports of the judicial exposition of the law at the fountain head should be accurately and expeditiously published and in such a form as to secure their being generally accessible to all who are either officially or professionally engaged in administering it.’ After considering the deficiencies in the existing system, it concluded:

To sum up in a few words the evils and inconveniences of the existing system of Law Reporting, there is no guarantee afforded to the public that the judicial expositions of the law will be reported at all, or reported correctly—or in time to prevent mistakes—or in such manner with respect to conciseness, form, and price, as to be accessible to those whom it vitally affects.

Its tentative proposed remedy was to levy the profession a small annual fee for the purposes of establishing and continuing under a professional body a structured series of reports prepared by official reporters appointed to the court. Although the report was widely distributed, it did not excite the attention of the profession or of the public, largely, it was thought because it lacked any substantive, workable proposal.

Undeterred, in 1853 the society commissioned a second report which again was produced by a committee under the chairmanship of Sergeant Pulling. In it, the committee abandoned the previously suggested voluntary association to regulate law reporters and produced standardised reports. Its central focus was that, as the common law affects the individual and society as much as does statute law, the government should promulgate the common law in much the same way that parliament’s legislation was published. The committee’s view was that publication of the law declared from the Bench should be no less publicised than the law as made by the legislature.

Therefore, it recommended, an official board should be created and invested with the power and duty of publishing the law reports in an authorised form. It proposed that the cost of operating the scheme be defrayed by a small levy of £3 per annum on each member of the profession. The board would be appointed by the Crown and, with the agreement of the judges, the board would appoint suitable reporters. Cases were to be published at regular intervals and as soon as possible after the judgments were handed down.

Whilst this second report of the Law Amendment Society provoked additional thought and discussion, as well as an occasional debate in the parliament, there was no strong appetite for a law reporting authority controlled by the state.
ENTER WILLIAM DANIEL QC

Towards the latter part of the 19th century, William Daniel QC, a silk of Lincoln’s Inn, entered the fray. Through his persistent and indefatigable work and diligence, and despite many hurdles, a new system of law reporting was developed under the control of the Council of Law Reporting, which ultimately became the Incorporated Council of Law Reporting. Twenty or so years after the establishment of the council, and after Daniel QC had retired as a county court judge, he had the foresight, for historical purposes, to collect the papers relating to its establishment. He then provided much insightful commentary on them in his work, *The History and Origin of the Law Reports: Together with a Compilation of Various Documents Shewing the Progress and Result of Proceedings Taken for their Establishment, and the Condition of the Reports on the 31st December 1883*.

It is interesting to consider his work. He was the driving force for the establishment of the council. He developed and propounded the scheme. He bore the brunt of its many critics. However, he lavishes praise on others who tangentially participated and, very modestly, minimises his own role. Other historians unhesitatingly credit him as the main driving force for change. It is probably fair to say that without him, the law reports would not have commenced as they did. It is not possible, in this paper, to discuss in detail the difficulties which he encountered. He was pilloried by many and attacked by the publishers. However, for no personal benefit to himself, he pursued the issue for the betterment of the profession and the public good.

DANIEL QC SUGGESTS CONTROL OF LAW REPORTING BY THE BAR

After the failure of the committee, reports of the Law Amendment Society to attract support for the proposed scheme of a government-controlled body for law reporting, Daniel QC turned his mind to whether an official set of reports could be produced through the agency of the Bar. At an early stage he reached the view that it could establish a body which was independent of all government assistance, managed by the Bar, supported and accepted by the judges, and be self-supporting through the sale of reports. In order to test the level of support for such a scheme, he privately wrote to the members of the Bar on 8 May 1863. He made two salient points. First, whilst the promulgation of law might be the obligation of the state, it would not do so in relation to the common law and, in any event, there are many problematic issues in having it control what is reported as the definitive declarations of the common law. Secondly, it was the members of the Bar who were most suitably qualified to report cases and, in particular, to identify those which should be reported. He proposed that the members of the Bar who were or wished to be reporters should form a body of associated reporters to prepare their own reports of the decisions of the superior courts. He proposed that they would be expeditious, efficient and inexpensive, and that, being superior reports, they should be accorded exclusivity of citation in the courts. He also proposed that the scheme might be funded by a publisher or, if no publisher agreed to support it, by a subscription from the profession.
This letter, albeit private, was widely circulated, and apparently elicited some significant support from the profession. At around that time, Lord Westbury, the Lord Chancellor, had made a strong statement in the House of Lords about the confusion in which the caselaw of the United Kingdom stood. However, when asked to support the scheme proposed by Daniel, he declined to be actively involved. He apparently expressed the view that the Bar, through the reporters, had got the state of the reporting into the state that it was, and that it was now up to the Bar to put its shoulder to the wheel to overcome its own difficulties.

**DANIEL QC’S FIRST LETTER TO THE SOLICITOR-GENERAL**

Daniel QC, seeing that there would be no assistance from the government, sought to advance the scheme by writing an open letter to the Solicitor-General, Sir Roundell Palmer MP as the leader of the Bar, setting out the evils of the system and suggesting an avenue for reform. Sir Roundell Palmer gave his consent to such a letter being written and circulated. It is widely accepted that this letter of 12 September 1863 was the catalyst for the events which culminated in the establishment of the Council of Law Reporting and the modern authorised law reports.

The letter was long and detailed and was published in a pamphlet form, and distributed widely amongst the profession. It was officially entitled, ‘A letter to Sir Roundell Palmer KNT., MP., Her Majesty’s Solicitor-General on the Present System of Law Reporting, its Evils and the Remedy’\(^1^4\), but it was, of course, an address to the public and to the profession. In it, Daniel QC identified in detail the issues surrounding the existing system, some of which were:

- The common law was as important and as binding as statute law and it needed to be authenticated and preserved as much as statute law.
- A singleness of the authentic decisions of courts was needed. There cannot be differing versions of the same judgment of the court as that would lead to uncertainty, a hindrance to the doctrine of *stare decisis*, and would be injurious to the administration of justice and the suitor.
- Without reports which are produced by persons of skill and learning, and which are quickly provided at a moderate cost, the public interest suffers.
- Law reports should be available at a moderate cost which excludes commercial profit.

He questioned the notion that law reporting was the proper subject of commercial enterprise which may be conducted on the principles of free trade, the only fetter being that the product be prepared by someone from a privileged class. He observed that at that time there was a free market in which anyone could publish a set of reports with the name of a barrister appended and, under the law, the court was required to take them as evidence of the unwritten law. The consequence he noted was that there were then six sets of reports all claiming to be complete collections of the unwritten law. He concluded that law reporting should be in done in the public interest and not in the pursuit of private profit.\(^1^5\) It ought not legitimately be the subject matter of trade, but
the promulgation of the law should be a function of the state, which it had regularly neglected. He supported that by identifying the farrago which competition had created in law reporting over the previous 75 years.

The remedy which he proposed was radical. Its aim was to secure the existence of one set of reports which were prepared accurately, expeditiously and cheaply and which were fit to be accepted as the only authentic evidence of the unwritten law. He postulated certain requirements:

1. that the Bar restrict the right of barristers to exercise their right of privilege to authenticate the decisions of courts so that only appointed reporters would be entitled to report cases
2. that the Bar, as an institution of the state, should undertake the appointment and management of the reporters, who should be officers of the court in the conduct of their reporting
3. that they should be full-time reporters and be paid accordingly
4. that the draft reports should be submitted to the judges who delivered judgment for their approval and rectification as necessary
5. that the new reports should have exclusivity of citation in court
6. that the reports would be sold at a very moderate cost with no view to commercial profit.

In his letter, he exhorted the then Attorney-General, Sir William Atherton, to call a meeting of the Bar for the purposes of passing a resolution to put the scheme into practice. As it happened, Sir William Atherton was not in favour of any change to the existing state of affairs, and it was unlikely that he would have called such a meeting. However, by a somewhat serendipitous course of events, shortly after the letter was sent, Sir William Atherton died, and the very supportive Sir Roundell Palmer was appointed Attorney-General in his stead.

CALLING A MEETING OF THE BAR

On 30 October 1863, Daniel wrote to Sir Roundell Palmer, as Attorney-General, inquiring whether he would be prepared to call a meeting of the Bar for the purposes of considering the scheme, if there were sufficient interest. Sir Roundell’s response on 31 October 1863, was to the effect that, if there were a strong expression of interest in the matter, in both number and character, from the Bar, he would call such a meeting.

Daniel went to work, obtaining the signatures of members of the Bar to a request for the calling of such a meeting. On 14 November 1863, he presented them to the Attorney-General who, after considering them, thought that the names present did not sufficiently represent the members of the common law Bar. Daniel immediately proceeded to Westminster Hall where he met with Serjeant Pulling and other leaders of the common law Bar, and they enthusiastically gave their support to a meeting. They took the petitions which, when returned to Daniel, contained the names of 26 of the leaders of the common law Bar. That was sufficient for the Attorney-General to call a meeting as requested, and he did so on 21
November 1863. It was to be held on 2 December 1863, in the Dining Hall of Lincoln's Inn.

The calling of a meeting of the Bar, which would occur only in relation to matters of importance, attracted the attention of the press. Although it supported a change to the manner of law reporting, it was suspicious that control would be in the hands of the Bar. The reporting of cases in the papers was an important part of their business, not that it competed with the law reports.

At the meeting of the Bar, a committee of 22 members was appointed for the purpose of considering and reporting on a scheme for the preparation, editing and publishing of reports of judicial decisions. It included many leaders of the Bar and others who were later to become leaders of the Bar and subsequently to hold judicial office. Importantly, it included Serjeant Pulling who had been so active in the Law Amendment Society. It also included Daniel QC.

It went straight to work and sought comment from the members of the profession about the embryonic proposal detailed in Daniel’s widely circulated letter. It would come as no surprise to anyone to know that there was no hint of unanimous agreement from the Bar as to either the nature of the problems which existed or the remedy that might be had. Nevertheless, throughout 1864 there were many meetings of the committee, and incrementally the outline of a scheme began to take shape.

On 14 June 1864, the committee finalised a proposal to which 15 of the 22 members of the committee would append their name. It was to the effect that:

1. there be a Council of Law Reporting constituted by members of the various Inns as well as the Attorney-General and Solicitor-General as ex officio members
2. the members of the council would be two appointed by Lincoln’s Inn, two by the Middle Temple, two by the Inner Temple, one by Gray’s Inn, one by Serjeant’s Inn and two by the Incorporated Law Society
3. the council be incorporated by Charter or Act of Parliament
4. there be a guarantee of the editors’ and reporters’ fees from the various Inns
5. the reports be prepared by reporters under the supervision of editors
6. the reports be divided amongst appellate cases, equity cases and common law cases, with such further divisions as the council may think appropriate
7. the equity and common law cases were to be published every month
8. provision was to be made for the payment of the editors and the reporters
9. the reporters and editors were to be appointed by the council and the existing authorised reporters would have a right of first refusal in relation to positions as reporters
10. there was to be no restriction on the right of a reporter to practise, but it should be a fundamental requirement that the duties of the reporter be faithfully and punctually discharged
11. the judges of the various courts be requested to appropriate sufficient space in the court for the reporters to occupy and allow them to be provided with the papers under their control
12. the entire set of reports were to cost £5 per annum.
Immediately, the Attorney-General, Sir Roundell Palmer, called a further meeting of the Bar on 1 July 1864, for the purposes of considering the proposal of the committee.

**MEETING OF THE BAR ON 1 JULY 1864**

This second meeting of the Bar also occurred at Lincoln’s Inn. It was put to the members of the Bar that there was a pressing need for a change and the only real question was whether the new body was to be under the control of the Bar or of the government.

It was, perhaps, not surprising that at this meeting the existing reporters voiced strong opposition to the proposed Council of Law Reporting. Mr Best, one of the leading reporters of the day, vigorously objected to the ability of editors to alter the reports prepared by the reporters. He was of the opinion that they engaged in mutual supervision of each other’s work so that no editor was required. This was supported by another of the authorised reporters, Mr Miller, who went so far as to oppose the creation of a Council of Law Reporting at all. At that point there was a successful motion to adjourn the meeting on the basis that the members of the Bar had not had sufficient time to consider the scheme and it was important that they do so, given that it would interfere with the vested rights of the reporters.

**INTERREGNUM BETWEEN THE BAR MEETINGS**

The period between this first meeting of the Bar to consider the proposal of the committee and its resumption was quite unusual. During that interval there were a number of vitriolic attacks on the committee and Mr Daniel. Anonymous members of the profession engaged in cowardly attacks in the press. Whilst Daniel accepted that there may be occasions when keeping anonymity in speaking publicly might be acceptable, he did not think that it was so on this occasion. Some of the attacks suggested that the scheme was promoted by Daniel for his own personal benefit and advantage. That, of course, was completely untrue. Like all persons involved in law reporting apart from commercial publishers, then, as now, it costs either time or money to undertake. As far as can be ascertained, Daniel’s pursuit of a better system of law reporting cost him much in terms of time and his own funds.

**DANIEL’S SECOND LETTER—29 OCTOBER 1864**

The issues which arose at the first meeting of the Bar and the following events, prompted him to compose a second letter to Sir Roundell Palmer. It was entitled ‘A Letter to Sir Roundell Palmer Knt Her Majesty’s Attorney-General having particular reference to the Scheme Recommended by the Committee of appointed at the meeting of the Bar held on December 2 1863’. It was a spirited defence of the work of the Bar committee and its proposal for a Council of Law Reporting. It emphasised that:

1. the Bar should prevent the abuse of the privilege of barristers in relation to the reporting of cases where it impacts upon the public good
2. the composition of the committee covered all sections of the Bar
3. the committee was motivated only by the public good and not self-interest, which was the motivation of the commercial publishers.

This letter analytically undermined the arguments against the proposal and returned to the theme that the reporting of law was not the legitimate subject matter of free trade or commerce, and that history had shown that competition did not improve the quality of law reporting, but in fact, had the opposite effect. He argued that laissez faire policies did not serve the public good in this instance, since it was quality rather than quantity that was the essence of good law reporting. He also dismantled the arguments supporting a government-controlled system, pointing out that it had failed in the past and that the danger of professional or political patronage in the appointment of editors and reporters was too great. As had been the lesson of the authorised reports, such patronage destroys the value of the reports.

He then went on to consider the attributes of the system which he and the committee were proposing. First, he noted that any restriction on the privilege of barristers to report cases should come from the profession itself and not from government. Secondly, he pointed out that the proposed Council of Law Reporting would be ‘a body of professional men who, animated by zeal for the common interest of the profession, superintend and manage the matters of the gravest professional importance in a manner in which the profession and the public approve’. Thirdly, he again outlined to the profession the important benefits of the law reports as produced by the council:

1. there should be one set of reports
2. they would be produced expeditiously
3. they would be published regularly
4. they would be published at a moderate cost
5. they would be accurate and complete
6. they would be a standard authority.

These advantages, he said, were best achieved by the establishment of permanent editors and the system being proposed would be self-funded through subscriptions, and any profits made would be applied toward the advancement of the law. As to the suggestion that the issue was not sufficiently important for the creation of a Council of Law Reporting, he poetically replied:

But are not these purposes very important? The Several Courts of Justice may be regarded as the living fountains, from whence daily and hourly well forth those tributary streams which, conjoined, make up the current of the Law. Is it not of the greatest importance that these should be drawn as pure as possible from the fountain-head?

His letter was circulated widely amongst the Bar and, shortly after, the Attorney-General set 28 November 1864 as the date on which the Bar should further meet. Again the meeting took place in Lincoln’s Inn Hall.
SECOND MEETING OF THE BAR TO CONSIDER THE COMMITTEE’S REPORT—28 NOVEMBER 1864

At the resumed meeting on 28 November 1864, Mr Amphlett, who had been the chair of the committee, was not able to be present, and so it fell to Mr Daniel QC to move the motion that the proposed scheme be adopted by the Bar. When speaking to the motion, he did not dwell on the merits of the proposal which he said had been fully ventilated. Instead, he discussed the scheme’s projected financial arrangements and the calculations that had been done by the committee to estimate the number of persons who might subscribe, the approximate cost of subscribing, the cost of editors and reporters and of printing and distribution, etc.

It is fair to say that the debate which followed was a torrid and unpleasant affair. The attack was largely led by the authorised reporters who could correctly foresee the end of their privileged position. Mr Hemming, who has been referred to earlier, asserted that some of Mr Daniel’s views were attributable to his ‘fervid and rhetorical temper of mind’, that the authorised reporters were being driven out by zealous reformers and that that should not occur unless the scheme was shown to be sound.

He then moved a motion which Daniel, in his historical account, regards as having nearly brought the whole scheme to an end. Hemming moved that the committee be required to circulate to the Bar the financial data on which the scheme was based and the results of their appeals for subscriptions. The motion was put. The chairman could not decide on the voices and a division was called for. It was narrowly lost 111 votes to 128. In his work Daniel notes that some of the leaders of the Bar who supported the scheme, were actually absent from the Hall and in the benchers’ Room. When the division was called they rushed back into the Hall to vote but the chairman ruled that they were too late.

Daniel regarded the result as critical because the committee had undertaken substantial work to test the commercial viability of the scheme and those particulars had been fully stated at the meeting. Had the meeting determined to require the committee to disclose all of its calculations and deliberations, Daniel was convinced that the members would not have submitted and would have taken the motion as a reflection on them with the consequence that the scheme would have died then and there. In 1883, some twenty years later, he remarked:

And mark how lamentable would have been the consequences, and how irreparable! The public would never have realised the benefit which they have now for twenty years enjoyed from the learning, skill, the ability, and the unflagging energy with which Mr Hemming has discharged his duties as Editor of the Equity series of ‘The Law Reports’… “There’s a Divinity that shapes our ends, rough-hew them how we will”.

It is not clear whether this remark was sarcastic or not. Reading the whole of his work, one would conclude that he was not prone to sarcasm and, it might be taken that his comments were sincere and he was merely commenting upon the irony of the events. In any case, the motion that the report of the committee be adopted was passed by a majority on a show of hands. On this occasion, the benchers had come back into the Hall and the vote was such that there was no need for a division.
As a result, Sir Roundell Palmer, Attorney-General, thereupon communicated the resolution of the Bar to the Lord Chancellor, the Law Lords, Her Majesty’s judges of the Court of Law and Equity, the benchers of the several Inns, the Society of Serjeants and the Council of the Incorporated Law Society with a request that they would be pleased to further the objects of the scheme. Despite that strong support, there were still hurdles to overcome.

THE AGREEMENT OF THE INNS

It then fell to the Inns to appoint members to the Council of Law Reporting and to provide a guarantee for the funding of the first year’s production of reports. This also created difficulties. It first came before the benchers of Lincoln’s Inn whose members were some of the most ardent supporters of the scheme. On 11 January 1865 a motion was put that the members agree to providing a guarantee to the Council of Law Reporting and, in the event of the other Inns of Court concurring, appointing two members to the council.

Edward Sugden, the first Lord St Leonard, who was about 84 years old at the time, complained that the scheme smacked of trading, said that he believed that it would prove to be an abortion and pressed that the Inns should have nothing to do with it. That was an unusual and surprising stance, having regard to the strong support given to the scheme by the Attorney-General and Vice Chancellor Wood, both of whom were present. It appears that, out of deference to Lord St Leonard, the meeting adjourned before any resolution was put and the motion was put over. Shortly after, Lord St Leonard wrote to the treasurer of the Inn, observing that he had not been aware that the scheme had been approved by a meeting of the Bar presided over by the Attorney-General, and for that reason he withdrew his opposition to it and desired it to be dealt with by the other benchers. A special meeting of the benchers was hastily convened on 16 January 1865. Lord St Leonard did not attend, and the Inn agreed to provide the guarantee in support of the Council and to appoint two members to it.

Other Inns followed suit. Middle Temple passed a resolution supporting the scheme on 20 January 1865, and The Inner Temple passed the necessary resolutions on 27 January 1865. However, on 25 January 1865, Gray’s Inn determined that it did not have sufficient confidence in the scheme and would not provide the guarantee requested or nominate members to the council. Serjeant’s Inn did not respond to the request to be a party to the scheme. Despite the refusal of Gray’s Inn, the others resolved to continue and all appointed members to the council. Needless to say, Lincoln’s Inn appointed Daniel as one of its representatives.
**THE FIRST MEETINGS OF THE COUNCIL OF LAW REPORTING**

The inaugural meeting of the Council of Law Reporting was held on 25 February 1865. At it, Sir Fitzroy Kelly PC KC was appointed the permanent chairman and William Daniel QC was appointed the permanent vice-chairman. Although there was optimism for the future there were difficulties still to be encountered.

At the second meeting of the council on 4 March 1865, it was proposed to send an address from the council to the members of the profession concerning the establishment of the council, inviting the authorised reporters to seek employment as reporters for the new series, and inviting subscriptions. However, Mr Karslake, one of the members appointed by Middle Temple, claimed that the council was invalid and not competent. He took the point that the Bar scheme was premised on all of the Inns’ participation in the council, and as Gray’s Inn had not agreed to nominate any members, he argued, the council was not validly constituted.23 Despite his strong logic, no other member agreed with him. However he continued to press his objection, with the result that the address to the members of the profession was dispatched under the name of the chairman rather than that of the council.

It was not until January 1867, that Gray’s Inn agreed to appoint members to the council and it was not until May of that same year that Serjeant’s Inn appointed their representatives.24 However, by this time the activities of the council had proven to be successful, so that all need for a guarantee from Gray’s Inn had passed.

**PRINTING AND DISTRIBUTION OF THE NEW REPORTS**

Yet another difficulty on the birth of the Incorporated Council was to find someone to print and publish the reports. The commercial publishers were approached and invited to join in the venture as a group. Though several would publish individually, they would not agree to act collectively, and, indeed, implored the Bar to abandon the scheme. However, if the Bar intended to persist with it, they sought an entitlement to sell the books through their distribution chains. That kind invitation was rejected by the Bar.

Instead the council, through the efforts of Daniel QC, arranged with W M Clowes and Sons, a small printing firm, for printing and distribution. This was rather favourable to the council, for the printer was taking on a substantial risk if the reports were not a success. When it became apparent that the number of initial subscribers would not reach the number estimated by the Bar committee as sufficient to make the venture worthwhile, W M Clowes and Sons agreed to underwrite it by accepting liability for the remaining necessary subscriptions. As it transpired, that commercial risk was extremely fortuitous for Mr Clowes, for the business immediately flourished and his firm retained the contract to publish the law reports for the next 30 years.
A LEAP OF FAITH

The Incorporated Council met again on 26 October 1865, just a few days before the reporters were due to take up their seats in court on the first day of the Michaelmas Term on 2 November 1865. It was intended to be a formal meeting to authorise and direct the reporters. However, a letter was received from an authorised reporter who had not agreed to work for the council. He argued that as the number of subscriptions had not reached the level required to secure fees in the amount of £10,000, it followed that the council was not authorised by the resolutions of the Bar to proceed with its operations. This objection necessitated the calling of an urgent meeting of the council in the presence of the Attorney-General. For reasons which are not explained and may not be explicable, the Attorney-General expressed the view that the objection was not sustainable. All other members of the council agreed, save for Mr Karslake, who withdrew from the committee while predicting that the scheme would prove a failure. Of this episode, Daniel expresses the opinion that, were it not for the Attorney-General’s firmness, it is not too much to say that the scheme may have failed at the last hurdle. At the last minute the whole venture became somewhat of a gamble, both legally and commercially. Nevertheless, the council maintained its faith in the scheme and proceeded undaunted.

THE EDITORS AND REPORTERS

Of course, the most important feature of the scheme was enticing the well-respected reporters to bring their skills to the benefit of the council. Because it was a fledgling venture, there was concern that the reporters would not abandon their certain income for an uncertain one. That was so, though W M Clowes and Sons had agreed that a moiety of the income received from sales would be charged first with the payment of the reporters.

It also fell to some of the members of the Bar to provide guarantees in amounts not exceeding £30 per year for a period of three years to satisfy the demands of some of the reporters. Sufficient guarantees were obtained by Daniel and others. Lord Chancellor Cranworth provided a guarantee of £50 per year, which was widely regarded as the seal of approval from the Lord Chancellor and a strong enticement for others to do likewise. Without these guarantees it is likely that none of the authorised reporters would have signed up to the new venture.

The council secured 10 of the 14 then authorised reporters, and until the very last minute it left open certain places in the hope that the others would agree to work for it. In particular, it retained the hope of having the services of Messrs Hurlston and Coltman, who were respected reporters of the Exchequer Chamber. Unfortunately, they did not consider that the scheme had much hope of success, and refused, so Messrs Charles and Anstee were appointed in their stead only a few days before the opening of the court year. This was unfortunate for Mr Hurlston who, a year later, wrote to the council that, as it was now sufficiently funded, there was no longer any obstacle to his appointment as the reporter for the Exchequer Division. However, as the positions had been filled, his offer could not be accepted.

Fortunately, the council was able to convince G W Hemming to be the editor and reporter in equity despite his former strident opposition to the scheme.
COMMENCEMENT OF THE LAW REPORTS

So it was that on the first day of the Michaelmas Term in 1865, being 2 November 1865, the reporters for the law reports took up their positions in the superior courts of England. As history shows, the law reports were a resounding success from the beginning. Subscriptions quickly exceeded the £10,000 threshold, and indeed doubled. The profits of the council continued to grow year on year and, on accumulating a substantial reserve, it reduced the subscription fee by 20% from the original £5 to £4.

The effect was devastating for both the authorised reports and the unauthorised reports, with many series quickly terminating. For a very long period thereafter, the dominance of the law reports made the ascertaining of the common law a much simpler affair.

INCORPORATION

The Council of Law Reporting was incorporated on 28 July 1870, under the Companies Act as a company limited by guarantee. Its objects, as set out in clause 3 of its memorandum of association, are faithful to the purposes pursued by the committee in 1864. Amongst the objects set out therein is the following:

1. The preparation and publication in a convenient form, at a moderate price, and under gratuitous professional control, of reports of judicial decisions of the superior and appellate courts in England.

HISTORY REPEATS ITSELF

The difficulties which confronted the profession and the public in the 19th century have some modern parallels. Over time, the commercial legal publishers have struck back. In many instances, they have taken control of some of the authorised reports and they produce multiple series of reports of questionable quality. Once again, one can find multiple versions of the same case which is reported over many different platforms, and there is a lack of discrimination in much that is reported. Every week there is a myriad of first instance decisions which do not advance the law one iota by being reported or referred to in court. There are many cases which, because they are not useful, are not reported although that does not prevent them from being cited in court. Further, the cost of reports has once again reached undesirable levels. Some of the authorised reports are the worst offenders here, and some, particularly those authorised reports under the control of the commercial publishers, have fallen woefully behind in their reporting.

It may be time to return to a focus on quality of reporting rather than quantity. It may be that the steps being taken by the Incorporated Council of Law Reporting for the State of Queensland for the establishment of a database of the Australian Authorised Reports which will be available at a minimal cost will be the appropriate reaction to the present circumstances. If that be the answer, as appears likely, history will probably be repeated and the commercial publishers will fight all the way to prevent its occurring.
Roger Derrington QC is a Brisbane-based barrister. He is an adjunct professor of the T C Beirne School of Law, University of Queensland and a senior editor of the Queensland Reports.

1 The Oxford History of the Laws of England (Oxford University Press) vol 11 (1212) observes that the origin of the authorised reporter is not clear.

2 Ibid 1213.


5 Holdsworth, above n 3, 427.

6 Daniel, above n 4, 37.

7 Ibid 10.


9 Ibid. It is to be noted that the existence of the unauthorised reports diminished the circulation of the authorised reports.

10 Ibid 17.

11 Ibid 4.

12 Ibid 5.


14 An original copy of the letter, owned by Mr J McKenna QC, the chairman of the Incorporated Council of Law Reporting for the State of Queensland, was on display in the Supreme Court Library on the evening of the presentation of this paper. That copy was sent by Mr Daniel QC to Joshua Williams Esq. It is noted that on the title page the author has amended the title of the letter to read, ‘and a suggested remedy’, rather than the demonstrative, ‘and the remedy’. Mr Joshua Williams was subsequently a member of the committee appointed to consider a scheme for law reporting, although ultimately he did not agree to the scheme that was recommended by the committee.

15 Daniel, above n 4, 36.

16 Ibid 53.

17 Ibid 55.

18 This was Lord Westbury’s assertion to the parliament in 1863 which was unchallenged and which is usually regarded as authoritative.

19 Daniel, above n 4, 224

20 Ibid 231.

21 The last line is a famous line from Hamlet. That quote always reminds one of the story of Sir Lawrence Olivier who was strolling around the lanes of Stratford back in the 1960s or thereabouts. While having a chat with two men who were trimming the hedges he asked them, ‘But tell me, why does it need two of you?’ One of the men answered, ‘I rough hews them, and he shapes the ends’.

22 Within a few months after the law reports commenced, Lord St Leonards apologised for his opposition to the scheme and became an ardent supporter of the council until his death some years later.

23 Daniel, above n 4, 251.

24 Mr Serjeant Pulling was appointed as one of the representatives of Serjeant’s Inn. That was only fitting, given his work on the Law Amendment Society in pursuit of the idea of an official set of reports.

25 Daniel, above n 4, 275.
Since these laws and customs are often misapplied by the unwise and unlearned who ascend the judgment seat before they have learned the laws and stand amid doubts and the confusion of opinions, and frequently subverted by the greater [judges] who decide cases according to their own will rather than by the authority of the laws, I, Henry de Bracton, to instruct the lesser judges, if no one else, have turned my mind to the ancient judgments of just men, examining diligently, not without working long into the night watches, their decisions.1

This passage, which appears at the beginning of the book commonly known as Bracton On the Laws and Customs of England in the mid-13th century, captures one purpose of a legal treatise: to instruct. A good treatise will also do more than that. It will at least attempt to impose some order on what Thomas Wood would, five hundred years after Bracton, describe as the ‘heap of good learning’ which has always made up the common law.2 The late Brian Simpson identified two further characteristics of the legal treatise. A treatise, he argued, has a narrow focus on one subject rather than being a comprehensive work and it is not concerned with legal procedure.3 Because they are comprehensive works, Bracton and Sir William Blackstone’s Commentaries on the Laws of England fall outside Simpson’s definition of a treatise. As Simpson concedes as a result, ‘for considerable periods of its history the common law system produced hardly any treatises at all’.4 Nevertheless, these are two of the most significant law books in the entire history of the common law. Their inclusion can be justified on the basis that they exhibit some of the key characteristics of a treatise. These books were designed to both instruct and to present the law in a structured and coherent way.

Through the centuries, the writers of legal treatises have reflected the current state of the common law. It is more difficult to conclude with any certainty that these works also influenced the direction of the law.
way. The subject of legal treatise is an important one. They both reflect current legal practice and help to shape it.

THE LEGAL TREATISE, BRACTON AND BEFORE

The surviving law books from Anglo-Saxon England are either concerned with the canon law or collections of the secular codes. The most significant collection of codes post-dating the arrival of the Normans is known as *Quadripartitus*, but actually consisted of two parts. The missing sections, probably by the same author, make up the *Leges Henrici Primi*. Even this title is slightly misleading. The work was more ambitious than a simple account of the legislation introduced by Henry I. It was intended to describe the law then in force and as such can lay claim to be the first English legal treatise. Written in Latin, it dates from around 1120. The author, described by Maitland as ‘a queer being’, was once thought to be a royal justice, though many modern scholars are unconvinced. Having begun with the traditional formal tribute to the King, followed by Henry I’s coronation charter, the author then proceeds to speculate on the nature of law. He follows that with a brief discussion of canon law. Most of the book is concerned with secular law relating to questions of jurisdiction beyond the royal courts along with the criminal law of the day. It has been described as ‘an untidy and disorganised book’. These flaws may be a result of later interpolations and reordering in the hands of others rather than a failing on the part of the author. The work is also criticised as anachronistic but may actually reflect the current practice in the local courts which the author may have intended to describe.

The next major milestone was a rather different type of treatise. Rather than concerning itself with the local courts, its main focus was on the royal courts. It reflects the growing importance of the royal courts and the emergence of a truly strong and centralised legal system. *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvil* takes its name from Henry II’s justiciar Ranulf de Glanvill, who died in 1190. It cannot actually be proved that the author was Glanvill. But whoever he was, like Glanvill himself, he was clearly familiar with the workings of the royal court in the late 12th century. The work was completed between 1187 and 1189.

The intended audience is another puzzle. The traditional view is that it was written for the justices and clerks of the royal court. Brand has doubted whether those who were already familiar with the basics of the writ system would need such an introductory book, and has suggested instead that *Glanvill* may have been written for those who used the royal courts, namely, litigants and their agents. A passage at the beginning of *Glanvill*, which states that the author is ‘adopting intentionally a common place style and words used in court in order to provide knowledge of them for those who are not versed in this kind of inelegant language’, gives credence to this argument. Either view is plausible.

*Glanvill* is largely concerned with the writs needed to bring a claim in the royal court. But it is much more than just a simple work of procedure. As with the *Leges Henrici Primi*, the work begins with some speculation on the nature of law. The influence of Roman law on the terminology, arrangement and content of the work is very clear. *Glanvill* is also the first English...
work to discuss issues of substantive law notably in relation to dower. This is an important breakthrough. Glanvill is a more structured work than the Leges Henrici Primi. The author makes wide use of dilemmatic reasoning. A large number of manuscripts survive which suggests that there were plenty in circulation. Although it was never updated, the work enjoyed a later revival that coincides with the first printed edition of 1554. This wasn’t just a matter of judicial citation. Glanvill was also utilised by both sides to bolster their causes during the English Revolution. One of those who would owe a debt to Glanvill was the author of Bracton.

Bracton was the most significant legal treatise of the Middle Ages. It continues to be cited. In the last 20 years it has appeared in the judgments of the High Court on a number of occasions. Bracton was around ten times the length of Glanvill. From the earliest times the work was thought to have been written by Henry of Bracton. Bracton or Bratton was probably born at Bratton Fleming near Barnstaple in Devon. His date of birth is unknown, but it is recorded that he died in 1268. Bracton first comes to attention as a clerk of William of Raleigh, a justice in the royal court. He received various benefices on Raleigh becoming a bishop. In 1245 he became a justice in eyre. By 1247 Bracton himself had become a justice in the royal court. He retired in 1257. Maitland believed that Bracton was the author. Modern scholars are more doubtful. One of the main problems with attributing authorship to Bracton is that the internal evidence seems to show that
significant portions of the work were written by the mid-1230s at which time Bracton was still a young man. William of Raleigh, who died in 1250, is a more plausible author of the majority of the treatise. Bracton may simply have added smaller amounts later on.

Maitland believed that Bracton presented a reliable picture of the practice of the royal court of the day. Barton is more sceptical. Several passages do appear to accurately describe legal doctrine or practice of the royal court. There was certainly a strong Roman law influence pervading through the work. As Thorne noted, 'Roman law supplied [the author] not only with a number of concepts under which the English matter could be subsumed, and thus fashioned for the first time into an articulated system of principles, but with more precise technical vocabulary … with which to describe and analyse it'.

Aside from some jurisprudential musing at the start of the treatise, the structure of Bracton was modelled on the fundamental division in Justinian’s Institutes between persons, things and actions. Bracton did not always faithfully follow Justinian. The law of things is subdivided into a section on the division of things and a section on the acquisition of things a modification. The Roman classification of corporeal and incorporeal things was abandoned. The discussion of obligations, which in Roman law was treated under the heading of things, was moved into actions. This was much the longest section of the three. It reflects the writ system as it was emerging. The order may be significant. Substantive law comes before procedure. As Plucknett has observed, 'The faculty of seeing law as principles, with procedure strictly subordinate, is a decisive step toward legal maturity'.

Brand has suggested that Bracton may have been designed as an instructional manual for law students. He points to a royal mandate of 1234 ordering the sheriff of London not to allow the teaching of ‘laws’ in London. Maitland argued that it was referring to Roman law. Brand speculates that it was possible that a synthesis of Roman and common law had been taught in London up to this time. It would provide a convenient explanation as to why almost all the authorities in Bracton pre-date 1234. More than a desultory attempt to keep the work up to date would surely have been made in a book aimed at practitioners. With his Romanist learning however unreliable, Bracton was not well-designed for practitioners or those wanting to become one. Whilst not without faults, Bracton was a magnificent achievement and far superior to anything else that had gone before.

The 13th century also saw the emergence of a series of short tracts on writs and pleading. Whilst these works should not be ignored, they are not really treatises except in the broadest sense as works of instruction. The most enduring of these books was the Old Natura Brevium, a primer on original writs. It seems likely that these manuscripts originated in some sort of formal lectures given to the apprentices who wished to learn the serjeant’s art of pleading. Evidence exists of the teaching of the criminal process. An introduction to land law, the Old Tenures, was also circulated.

The century that followed saw the founding of the Inns of Courts. By the late 14th century, readings had become a feature of life in the Inns. Many of these were written down and handed
around. Collectively, the readings were a significant body of literature. Baker has argued that ‘the readings can properly be regarded as anonymous treatise’. But the readings did not begin life as written texts. They were also narrow in scope—nearly all took the major property legislation of the 13th century as their subject matter. Alongside the moots, the readings were the main method of instruction until the 17th century. The parallel history of the legal treatise properly so called is rather less propitious. Nevertheless, some significant treatises were produced. The most celebrated was Thomas Littleton’s New Tenures.

LITTLETON TO HALE: A BARREN PERIOD FOR THE LEGAL TREATISE

Sir Thomas Littleton’s New Tenures, more commonly known as Littleton, was written around 1460 and published, in Law French, just after Sir Thomas’s death in 1481. After a successful career as a serjeant whose clients included the Earl of Wiltshire, the Duke of Buckingham, Lord Clinton, Sir William Trussel, and the Duchy of Lancaster, Littleton was appointed a justice of the Common Pleas in 1466. Littleton was the first English printed law book and one of the most successful treatises ever produced. It ran to over ninety editions, first in Law French, and from the 16th century in an English translation. As late as 1824, Roger North would proclaim that ‘the text of Littleton is accounted law, and no other book hath that authority’.

Until the mid-19th century, Littleton was the standard work for those learning the law. Sir Edward Coke, who produced a gloss, described Littleton as ‘the most perfect and absolute work that ever was written in any human science’. The strength of the treatise lay in its simplicity. It was a work of first principles that avoided detailed discussion of the complexities of pleading. Few authorities were cited. Instead, the underlying principles of land law were revealed in easy stages, with examples and reasoned explanations. The work was divided into three books. Only the second book deals with tenures. The first is concerned with estates in land. The third—and longest—book deals with miscellaneous matters relating to real property.

The advent of printing made a book like Littleton affordable for students. Printing brought about more profound changes as well, as English law moved from an oral to a written culture. Perhaps surprisingly, these developments still failed to stimulate new legal writing. Law printing was soon a monopoly activity under patent from the Crown and this cannot have helped. The other major law book of the Renaissance was an unusual one, certainly not a treatise and not really a law book at all. Instead, it gave a lawyer’s viewpoint on moral philosophy. St German’s Doctor and Student consisted of two dialogues between a doctor of divinity and a student of the common law. Because the book covered questions relating to the place of the ecclesiastical jurisdiction and the relationship between equity and conscience, it had strong contemporary relevance.

Baker has described ‘a torrent of new law books, many of them badly written and of little value’, which appeared in the 17th century. Most of the books in this period were not treatises. Collections of rules or maxims were a popular new form of literature. The Natura Brevium was updated by Sir Anthony Fitzherbert in 1534 as the New Natura Brevium. Works like this were
the literature of practice and precedent rather than principle. They reflected the growing weight attached to authority, which also saw the emergence of the abridgements and the printing of the Yearbooks.64

William Sheppard’s *Actions upon the Case for Slander*65 and *Actions upon the Case for Deeds*66 were novel because they were concerned with personal actions. These works were an attempt to do for the action on the case what Littleton had done for tenures. The treatise begins with a definition and some attempt to place order on the material, but in the end, as Simpson has observed, ‘Sheppard’s inability to arrange his material in a coherent manner has reduced the book to a disorderly abridgment of cases’.67 Sheppard was not the only writer of this period who failed to see the trees of principle through the woods of precedent.68

A few authors in this period were attempting to achieve something more interesting. Sir William Blackstone commented on Sir Henry Finch: ‘Sir Henry Finch’s discourse of law is a treatise of a very different character; his method is greatly superior to all that were before extant; his text is weighty, concise and nervous; his illustrations are apposite, clear and authentic.’69

Finch’s *Nomotechnia*70 and *Law or a Discourse thereof*71 were heavily influenced by the use of dialectical ideas.72 The fact that Finch failed to make a more significant impact may be as much to do with his poor standing amongst lawyers as the merits of his work. It is fair to say that he was overshadowed in this regard by his contemporary Sir Edward Coke. Coke produced his massive *Institutes of the Laws of England* in the early decades of the 17th century.73 The first part, his *Commentary on Littleton*, was published in 1628.74 The remaining *Institutes*—comprised of a commentary on statutes, a treatise on criminal law and an account of the courts—were published after Coke’s death.

Another judge, Sir Matthew Hale, who died in 1676, was perhaps the first truly modern legal author. All of his treatises were published posthumously. One of them appeared as recently as 1976.75 *His History of the Pleas of the Crown* was his most influential work.76 It was originally designed to consist of three books. The first on capital offences was the only one that was completed. This work combined history, theory, and the law. It was regarded as a work of highest authority. No less a person than Sir James Fitzjames Stephen described ‘a depth of thought and comprehensiveness of design’ in this work, which he thought outshone anything written by the great Edward Coke.77 Hale’s opinions on the criminal law are still occasionally cited by the courts.78 This treatise, along with his *History of the Common Law and Analysis of the Laws of England*, explicitly adopted an analytical methodology which, like *Bracton*, was influenced by European and Roman ideas.79 The new natural law philosophy that was just starting to become popular also made a mark on his writing.80 Both Hale and Finch would be an inspiration to the most significant writer of the next century, Sir William Blackstone.
BLACKSTONE AND THE REVIVAL OF LEGAL LITERATURE

Sir William Blackstone was born in London in 1723 and died in 1780. Although he sat as a judge—mainly in the Common Pleas—he is largely remembered today for *The Commentaries on the Laws of England*, which was based on lectures that he delivered in Oxford in the 1750s. The common law was not formally taught in Oxford at the time. Blackstone saw these lectures as a means of reviving his flagging legal career, collecting a fee of six guineas for admission and establishing himself as a strong candidate for the Vinerian Chair, which was about to be established and to which he was duly appointed in 1758. The *Commentaries* comprised four books: the rights of persons, the rights of things, private wrongs, and public wrongs. In addition to the English law of his own day, Blackstone’s treatment was influenced by Hale, Finch, and Justinian’s *Institutes*. There was also a clear thread of natural law running through the *Commentaries*.

Blackstone’s greatest problem was to reconcile his structure with that of the common law. The common law was organised around the forms of action rather than a division between ‘rights’ and ‘wrongs’. This put a strain on the whole scheme. As a result, the *Commentaries* ended up as a largely accurate description of the current law, featuring the forms of action forced into an unfamiliar framework. The content of the work reflected Blackstone’s own interests and that of his audience of aristocratic young men. Blackstone described the English as a ‘polite and commercial people’, but commerce and contract does not feature very much in the *Commentaries*. It should not be deduced from this that the subject was unimportant. It was increasingly central. Yet it was never Blackstone’s intention to give a detailed account of English law as opposed to a ‘map’. In setting out the contours of the common law within an ordered framework, Blackstone made a significant contribution to the development of legal literature.

The *Commentaries* proved immensely popular. By 1854, 23 editions had appeared in England. They sold in enormous numbers. The first American edition in 1771 attracted over a thousand subscribers. The *Commentaries* also played a major role in the early Australian colony and they are still cited today. Sir William Jones described the *Commentaries* as ‘the most correct and beautiful outline’. Jeremy Bentham was less complementary.

Without doubt, Blackstone produced the most sophisticated attempt to systematise the law since *Bracton*. It is only necessary to look at the efforts of his successors to appreciate Blackstone’s achievement. One, Robert Chambers, was content to plagiarise Blackstone, whilst the other, Richard Wooddeson, abandoned the analytical division between ‘rights’ and ‘wrongs’ altogether in favour of a simple description of the forms of action. Blackstone is still celebrated in Australia. His name appears on the front of the Forgan Smith Building at the University of Queensland alongside Bacon, Coke, and Hobbes and flanked by statues of Plato and Justinian.

The 18th century witnessed the so-called ‘Intellectual Enlightenment’. In a whole range of areas, there was a greater interest in philosophy and ideas than at any point since the Renaissance. It was also a time when the search for order was much in vogue. For example, the writings of the Swedish botanist, Linnaeus, were enormously influential in England. Although these trends...
should not be exaggerated, the courts became more open to civilian and natural law ideas, and judges drew on this literature too. The old restrictive practices in the book trade also began to fall away. Treatises began to appear covering a wide variety of subjects from wills to bills of exchange and insurance. Some of the treatises, like Sir William Jones's *An Essay upon the Law of Bailment*, were highly polished. Something of Jones's approach is evident from the fact that he wrote that '[i]f law be a science, and really deserve so sublime a name, it must be founded on principle, and claim an exalted rank in the empire of reason'. The idea that a treatise should be founded on principle would be the main characteristic of legal writing for the next century. The best illustration of this movement is provided by the law of contract.

**THE LAW OF CONTRACT AND THE LEGAL TREATISE: THE PRACTITIONERS**

The first true treatise on contract law was written by Jeffrey Gilbert in 1724. Gilbert seems to have intended to write an institutional work structured according to persons, things, and actions. Contracts were presented as a species of personal property. A contract, he wrote, is 'the act of two or more person concurring, the one in parting with and the other in receiving some property, right or benefit'. His definition was borrowed from Thomas Hobbes but his approach was novel in other respects. The fact that he portrayed contract as a coherent whole, with a distinct theoretical rationale comprised of detailed rules, was a vital breakthrough. He rejected the view of natural lawyers that a mutual declaration of promises was enough to create a contract. A serious intent as evidenced by consideration was also required. In this respect, Gilbert's analysis could be reconciled with the common law of the time.

Gilbert's work on contract was never published. The first published treatise was the misleadingly titled *Treatise of Equity* of 1737, which is attributed to Henry Ballow. A further edition, edited by John Fonblanque, included extensive notes and ran to five further editions—the last of which was published in 1820. Dr Johnson described Ballow as a 'very able man' but like Gilbert, he was, to a large extent, happy to copy from others. Whilst his attempts to blend Pufendorf's version of natural law and the common law cannot be regarded as an unqualified success, Ballow would not be the last English writer to struggle to reconcile a theoretical framework with the realities of the common law, but it showed that Gilbert was not a one-off. A whole host of other writers from Joseph Priestley, the dissenter, to Adam Smith, the philosopher, and the clergyman William Paley also began to take notice of the law of contract. They were not treatise writers, but were interested in the nature of contractual obligations. The writers of contract treatises were a different type altogether.

Many of the treatise writers of this period were unknown legal practitioners. The publication of a treatise was a way of gaining professional advancement. A lucky few, like Sir John Bayley and Sir James Park, were elevated to the Bench. Blackstone's *Commentaries* made him a wealthy man. This was not the norm. Joseph Chitty senior, a prolific treatise writer whose son wrote
the famous treatise on contract, died destitute. John Joseph Powell was a transitional figure. His Essay Upon the Law of Contracts and Agreements published in 1790 is often, if erroneously, described as the first contract treatise. Powell explained in his introduction:

All reasoning must be founded on first principles. The science of the Law derives its principles either from that artificial system which was incidental to the introduction of feuds, or from the science of morals. And, without a knowledge of these principles, we can no more establish a conclusion in law than we can see with our eyes shut, measure without a standard, or count without arithmetic.

This was hardly a novel insight but it helps to emphasise that the momentum was moving away from dependence of the forms of action as an organising concept. There was a growing belief that legal writing should reflect scientific principles. In An Introduction to the Science of Law, Frederick Ritso explained that ‘[t]he law is not a mere series of unconnected decrees and ordinances but in the strictest sense of the word a science founded on principle, and claiming an exalted rank in the empire of reason’. In his attempts to strike a more scientific tone, Powell turned to the natural lawyers. His views were reflected in his definition of contracts, which were binding because ‘there is a mutual consent of the minds of the parties concerned in them’. Much of the first volume was concerned with factors which negative assent. At the same time, like earlier writers, Powell was forced to concede that assent was not sufficient. There must also be a deed or consideration. This was English law showing through the natural law gloss. Powell’s Essay was a significant work but not a comprehensive one. Some recent authorities, like Pillans v Van Mierop, were mentioned, but Powell largely concentrated on decisions that pre-dated the 1750s. Most of these were taken from the equity reports. The second volume is almost entirely concerned with equitable remedies. These features of Powell’s work meant that he had more in common with his 18th century contemporaries than those who followed him.

The writers of the 19th century contract treatises largely fell into two groups. The first were mainly legal practitioners. Later in the century, writers like Pollock and Anson were products of the universities. Of the first group, Joseph Chitty junior published A Practical Treatise on the Law of Contracts not under Seal in 1826. A second edition appeared in 1834. The treatise is still in print and now in its 31st edition. It aimed to be a complete text on the substantive law of contract, and one which would be useful to the nisi prius practitioner; it was well organised and became popular at a time when the doctrines of English contract law were developing rapidly. Other treatise writers of the time like John Newland, Samuel Comyns and Charles Addison were in the same mould.

Henry Colebrooke was a treatise writer of a very different stripe. His Treatise on Obligations and Contracts was intended as an introduction on contract for the Indian service, but as his son and biographer conceded, it attracted little attention and was ‘perhaps too succinct, and it is wanting in practical examples and illustrations’. Colebrooke may have intended to remedy this defect in the second volume, which was never finished. As it stood, it was of little value for lawyers bringing a claim in contract.
As the most theoretical work then in existence, Colebrooke's *Treatise on Obligations and Contracts* was an impressive achievement. His marginal notes contain references to a large range of sources from common law writers like Blackstone and Comyn, through Erskine, the natural lawyers, Justinian, the *Code Civile*. One name stands out from the rest—that of the Frenchman Robert Joseph Pothier. Pothier is mentioned nearly 30 times in the first 10 pages alone. Along with Roman law, he was Colebrooke's main inspiration. As with Ballow the century before, this left the author with a tricky blending process. When he defined an agreement as 'an aggregation of minds; where two or more minds are united in a thing done or to be done, or where a mutual assent is given to do or not to do a particular act', Colebrooke cited Pothier. But significantly, he also felt it necessary to refer to a similar 16th century English definition. These tensions were also evident when it came to the doctrine of consideration. Colebrooke conceded, as others had before, that a contract was 'an agreement upon sufficient consideration'. At the same time, his definition of consideration hints at a subtle shift: 'A consideration is the material cause of a contract. It is the motive of the act which becomes the cause of the obligation … The will of a party to engage, his assent to become bound, is the essence of a voluntary engagement. The consideration is required only as evidence of his will.'

This differs from the traditional position where the contract was generated by an exchange to one where the contract is generated by agreement and consideration is evidence of that agreement. In this form, consideration was closer to the Continental idea of *causa*. Writers of this period were increasingly downplaying the reciprocal element of consideration. The courts were soon doing the same, and this may be one area in which legal literature helped to influence the direction of legal practice.

Colebrooke was not the first English writer to recognise the value of Pothier. Sir William Jones had urged his readers to consult Pothier nearly 40 years earlier. Pothier cropped up several times in legal writing in the late 1790s. By the turn of the century, there was the odd reference to Pothier in the law reports. He was evidently of sufficient renown to feature in John Aikin's work on 'eminent persons', where he was described as 'an estimable French writer on legal subjects'. Lord Ellenborough said that Potheir was 'a most learned and eminent writer upon every subject connected with the law contracts, and intimately acquainted with the law merchant in particular'. Pothier was probably not widely known in England until a translation by Sir William Evans appeared in 1806. Evans acknowledged that some attempts had already been made towards a more scientific exposition of English law—he recognised the contribution of writers like Blackstone. At the same time, he had a more ambitious agenda: 'It (meaning English law) has been too generally estimated as a mere collection of positive rules, the knowledge of which was no otherwise desirable than as it might be conducive to immediate interest or security, or technical forms, the instruments of professional employment.'

Whilst Evans recognised the value of the common law, he argued that legal writers were underemployed in England and criticised English lawyers for being too insular. One of the attractions of Pothier's *Treatise*, then and later, was that his central definition of a contract was appealingly simple: 'A contract is a kind of agreement … An agreement or a pact … is the assent
of two or more persons, to form an engagement between them, or to dissolve or modify one already formed’.

It has long been thought that Pothier, through what was known as ‘will theory’, was hugely influential in shaping the direction of the common law of contract in the 19th century. His work is used as an example of a legal treatise as a tool of legal change. Clearly Pothier did have some impact on other writers. It is only necessary to compare the first and second editions of Chitty’s contract treatise. Later in the century, some of his ideas would be taken up by the likes of Pollock and Anson. The evidence is, however, complicated. Some of the more strident claims of influence are exaggerated. The law of contract developed by a process of evolution rather than revolution in the 19th century. What happened owed as much to pragmatism as to principle. Nevertheless, the will theory was at its most important where the common law was silent. The best example is provided by the doctrine of mistake.

THE LAW OF CONTRACT AND THE LEGAL TREATISE: THE ACADEMICS

The first of the new generation of treatise writers, Henry Leake, came from legal practice just like his immediate predecessors. His work, The Elements of the Law of Contracts, published in 1867, was a very different book. In common with earlier writers, Leake adopted a ‘scientific’ approach, but he went much further. The work was much more theoretical and drew on such diverse sources as the German pandectists and John Austin’s Lectures on Jurisprudence. Leake’s treatise, unlike Colebrooke’s earlier attempt to rationalise contract law, had obvious practical application too. The author was well versed in the common law and cited a wealth of authority. He was one of the first writers to recognise that, what might now be termed restitution, is not the product of a contract. Colebrooke had derived a doctrine of contractual mistake from a combination of Pothier and the Roman jurist Ulpian. But Leake was the first mainstream English writer to address contractual mistake in any detail. Mistake, alongside duress and fraud, was presented as one of the ‘causes which may ... qualify the legal effect of an apparently valid agreement’. Leake took the underlying premise—if not the substance—of his discussion, from Pothier. 19th century lawyers needing to construct a doctrine of contractual mistake were hampered in this task by the absence of a clear, unified, and coherent doctrine of mistake in the caselaw. There was no legal doctrine of mistake at common law because it was typically just one of the questions for the jury under the blank general issue of ‘non assumpsit’. In the process of the decline of the jury and the hardening of the boundary between law and fact as the century progressed, all of this changed. In the process, veracity was sacrificed on the altar of doctrinal coherence. In the hands of the legal writers, decisions such as Raffles v Wichelhaus Boulton v Jones came to be treated as cases of mistake whereas they were decided on the more traditional lines that the parties had failed to agree. Mistake provides the clearest illustration of the influence of the Will Theory on English law as distilled through the legal treatise. This was not the only impact of the contract treatise.
Writing in the preface of his *Principles of the Law of Contract*, William Anson explained that:

The main object with which I have set out has been to delineate the general principles which govern the contractual relation from its beginning to its end. I have tried to show how a contract is made, what is needed to make it binding, what its effect is, how its terms are interpreted, and how it is discharged and comes to an end.\(^{172}\)

The idea that the law of contract could be reduced to a set of basic principles was ubiquitous in legal writing of the period.\(^{173}\) It reached its apotheosis in the writings of Fredrick Pollock. Pollock, who held the Corpus Christi Chair in Jurisprudence at Oxford from 1883, had already published his *Principles of Contract at Law and in Equity*\(^{174}\) in 1876. In addition to a companion volume, *The Law of Torts*,\(^{175}\) Pollock had wide jurisprudential interests which drew in comparative law, legal history and legal theory.\(^{176}\) His writing on contract law was erudite, comprehensive and informed by theory. Anson's treatise, which was heavily influenced by Pollock's larger work, was, in contrast, a book for beginners. He explained that '[t]his book is an attempt to draw such an outline of the principles of the law of Contract as may be useful to students, and, perhaps, convenient to those who are engaged in the teaching of law'.\(^{177}\) The book influenced generations of law students, legal writers and judges. By the end of the 19\(^{th}\) century, 20,000 copies had been sold.

Writing in the 1880s, Anson and Pollock's contemporary and fellow Oxford jurist, A V Dicey, contrasted the earlier generation of treatise writers such as Chitty as men who have 'learnt law without mastering its principles'.\(^{178}\) The distinction was recognised by practitioners themselves. Writing just after Pollock's death, Lord Wright claimed that 'Leake's book was for practitioners, while Pollock's book was for students of principles and legal thinkers'.\(^{179}\) The influence of their treatises was felt beyond the universities. For a period from around 1850 to the end of the century, legal writers on contract law exerted more influence than before and probably since. It was not just individual doctrines such as mistake that were influenced but sometimes it went right to the heart of how contract law was perceived. In *Foster v Wheeler*,\(^{180}\) Kekewich J said that 'Definitions of contract are to be found in the text-books, and I have consulted several of them ... They are all founded on, and many of them simply adopt, the definition given by Pothier'. He also made specific reference to Pollock and the American writer Theophilus Parsons.\(^{181}\) In the 1880s, Pollock, describing his philosophy of legal education, stressed that the most important thing was to help the student to 'fix in his mind that there are such things as general principles of law; that the multitude of particulars in which he must inevitably be versed ... are not really a chaos'.\(^{182}\) Superficially at least, the law of contract is particularly well suited to this sort of analysis. The life of the contract has a clear beginning, middle, and end. The reality is much messier, but one legacy of these writers was to present English contract law in such a way that sometimes over simplified and found degrees of coherence that were missing. It is only necessary to compare the fate of the law of tort of the same period. In the relative absence of overarching theory it remained atomised.\(^{183}\) The legacy is still felt today.
THE LEGAL TREATISE: WHERE ARE WE NOW?

Through the centuries, the writers of legal treatises have reflected the current state of the common law. It is more difficult to conclude with any certainty that these works also influenced the direction of the law. A healthy dose of scepticism is required before assuming that judges were, and are, widely influenced by legal literature. Modern studies show that the impact of legal literature on judges is rather sporadic.184 But perhaps if any form of literature is likely to be consulted, it is the treatise. Some judges will be more receptive than others. There are some areas where a link can be drawn between the treatises and legal development. The Will Theory of contract in the 19th century was not entirely novel. It built on what was already there. All the same, the legal literature of the day helped to induce a certain kind of mind-set. The law of contract in the 19th century is one obvious case. But even this largely came about because there was a gap to fill. More recently, another example in England is the influence of academic writers on the law of unjust enrichment.185 As the 20th century progressed, a distinctly Australian treatise literature also emerged alongside the development of a system of legal doctrine which in important respects has broken free from its English moorings. There are a number of outstanding examples.186

The future for the legal treatise may be less bright. As a simple repository of authority, it is now surpassed by the electronic database. There have also been concerns expressed particularly, but not exclusively in the United States about the decline of doctrinal scholarship in law schools. Some judges have argued that a disjunction has grown up between legal practice and what academics write about.187 There is probably some truth in this. Doctrinal scholarship is difficult and often boring work. From a career point of view, it is better for a young academic to engage in quasi-sociological musings about fashionable and accessible subjects expressed through the conventional platitudes of the left of centre.188 This is where grant income is also available. Some of this work of course has merit. Much of it is little more than glorified journalism. A great deal of modern academic writing descends into pretentious pretend profundity. In fact, we may have gone full circle. The next generation of treatise writers may once again be legal practitioners. It would be a shame if the academic perspective was lost. At a time when lawyers face an overload of information, the treatise is as arguably important as ever.189

Warren Swain is Professor of Law at the Faculty of Law at the University of Auckland. He is Director of the University’s Research Centre for Business Law. At the time of presenting this lecture, he was Associate Professor and Director of RHD Programs at the T C Beirne School of Law, University of Queensland.

2 An Institute of the Laws of England in their Natural Order, 2 vols (Nutt, 1720) vol 2, ii.
4 Ibid 634.
6 For a variety of perspectives see the essays in Angela Fernandez and Markus Dubber (ed), Law Books in Action: Essays on the Anglo-American Legal Treatise (Hart, 2012).
7 Patrick Wormald, ‘Law Books’ in Richard Gameson (ed), The Cambridge History of the Book in Britain Volume 1: c.400–1100 (Cambridge University Press, 2011) vol 1, 525. These Codes were not legislation in the modern sense: rather they are better seen as an ‘index of governing mentalities’. The nature and purposes of the Anglo-Saxon codes is explored by Patrick Wormald in The Making of English Law: King Alfred to the Twelfth Century (Blackwell, 1999)


L J Downer (trans), Leges Henrici Primi (Oxford University Press, 1972). On the relationship between the two, see Wormald, above n 9.

Downer, above n 10, 34–7.


H G Richardson and G O Sayles, Law and Legislation from Aethelberht to Magna Carta (Edinburgh University Press, 1966); Nicholas Karn, ‘Rethinking the Leges Henrici Primi’ in J Jurasinski et al (eds), English Law Before Magna Carta (Brill, 2010) 199, 215–18. Karn suggests that textual evidence and the focus of the work points to the fact that the author was probably someone who presided over the Hundred Court.

The author draws heavily on Saint Isidore’s Etymologies in this section. The best modern translation is Stephen A Barney (trans), The Etymologies of Isidore of Seville (Cambridge University Press, 2006).

T F T Plucknett, Early English Legal Literature (Cambridge University Press, 1958) 29.

Karn, above n 13, 200–15.


For a discussion of this issue, see: R V Turner, ‘Who was the Author of Glanvill?: Reflections on the Education of Henry II’s Common Lawyers’ (1999) 8 Law and History Review 97.

Ibid, 100.


Hall, above n 19, Prologue.

R C van Caenegem, Royal Writs in England From the Conquest to Glanvill (Selden Society, 1958) 379–82.

In Books VI, VII and discussed by Hall, above n 19, xxiii–iv.

John Hudson, ‘From the Leges to Glanvill: Legal expertise and legal reasoning’ in Jurasinski (ed), above n 13, 221, 235–43.


Pollock and Maitland, above n 29, 209.

Barton, above n 31, 18–19, 24, 45–7; Brand, above n 30, 85.

Thorne, above n 1, vol 2, xxxii.

Thomas Sandars (trans), The Institutes of Justinian (Longmans, 1948) 1.3.12: ‘All our law relates either to persons, or to things, or to actions’. Justinian was possibly filtered through the work of Azo: F W Maitland, Selected Passages From the Writing of Bracton and Azo (Selden Society, 1894).

Thorne, above n 1, vol 2, 29.

Plucknett, above n 15, 59.

Pollock and Maitland, above n 29, vol 1, 122 fn 5.

Brand, above n 22, 57. For some wider speculation on legal education in London at this time, see Sir John Baker, Legal Education in London 1250–1850 (Selden Society, 2007) 6.

Maitland, above n 36, xviii, xix. Plucknett warns that, given that the text was probably corrupted by subsequent
copyists, care needs to be taken in drawing conclusions about the author’s learning; see Plucknett, above n 15, 54.

42 These are considered by Plucknett, above n 15, ch 5.

43 For an attempt to revive the Mirror of Justice, see David Siepp, ‘The Mirror of Justice’ in Bush and Wijffels (eds), above n 22, ch 5. A version of this work was published by the Selden Society: W J Whittaker (ed), The Mirror of Justice (Selden Society, 1893). See also Patrick F Philbin, ‘The Exceptiones Contra Brevia: A Late Thirteenth-Century Teaching Tool’ in Bush and Wijffels (eds), above n 22, ch 7.

44 The 1518 edition was reprinted as M S Arnold (ed), The Old Tenures and The Old Natura Brevium (Professional Books, 1980).


47 The 1515 edition was reprinted as Arnold, above n 44.


50 Baker, above n 5, 187.

51 T Littleton, Tenores Novelli (1481).

52 Littleton also began writing a larger work on the laws of England which was incomplete on his death: J H Baker, ‘The Newe Littleton’ (1972) 30 Cambridge Law Journal 145.

53 William Caxton had introduced the printing press to England in the 1470s. For the early history of printing in England see SH Steinberg, Five Hundred Years of Printing (Penguin, 3rd ed, 1974), 100–11.

54 Roger North, A Discourse on the Study of the Laws ( Baldwyn, 1824).

55 E Coke, First Part of the Institutes of the Laws of England or a Commentary on Littleton (Society of Stationers, 1628) v.

56 For a brief account, see Simpson, above n 3, 634–5.


60 Baker, above n 5, 189.

61 A well-known example is F Bacon, The Elements of the Common Law of England (Robert Young, 1630).

62 La Novel Natura Brevium (Berthelet, 1534).

63 Baker, above n 5, 181–82, 184–86.

64 (Adams, Starkey and Basset,1662).

65 (Hills, 1663).

66 Simpson, above n 3, 638.

67 Sir William Staunford, who wrote Les Plees del Coron (Totell, 1557) and An Exposition of the Kinge’s Prerogative (Totell, 1567), is another representative example.


70 (Society of Stationers, 1613).

71 (Society of Stationers, 1627).


74 Above n 55.

75 D E C Yale (ed), Hale’s Prerogatives of the King (Selden Society, 1976).

76 (1736).


78 He was extensively discussed in PGA v The Queen (2012) 245 CLR 355.


81 The recent biography by Wilfred Prest, William Blackstone: Law and Letters in the Eighteenth Century (Oxford University Press, 2008) is full of rich detail about the man and his work.

82 These were published between 1765 and 1768.

For a discussion of the foundation of the Chair and Blackstone’s part in it, see D J Ibbetson, ‘Charles Viner and his Chair: Legal Education in Eighteenth Century Oxford’ in Bush and Wijffels (eds), above n 22, 315.


From an English perspective, see Roy Porter, Chambers’s lectures remained unpublished until more than two hundred years after his death: Thomas Curley.


A Treatise on the Law of Bills of Exchange, Cash Bills, Promissory Notes and Checks on Bankers, Promissory Notes, Bankers’ Cash Notes and Banknotes (Brooke, 1799).


From an English perspective, see Roy Porter, Enlightenment (Penguin, 2000).


R S Roper, A Treatise on Legacies (Butterworth, 1799).


The life of Jones see Michael Franklin, Orientalist Jones (Oxford University Press, 2011).

Baloch, above n 93, 123.


Part of the surviving manuscript is held at Columbia University, Singleton MS: J H Baker, English Legal Manuscripts in the United States of America: A Descriptive List (Selden Society, 1985) 46–7. A copy of the section of the manuscript concerned with contract is available in the British Library as BL MS Hargrave 265, 266.

BL MS Hargrave 265, ft 39–40, 43.
114 (Nutt, 1737).
115 NJ Jones, 'Ballow (Bellewe), Henry', Oxford Dictionary of National Biography discusses the question of authorship.
117 A Treatise of Equity (5th edn, Clarke, 1820).
118 Bruce Redford and Elizabeth Goldring (eds), James Boswell, The Life of Samuel Johnson, (Edinburgh University Press, 1999) vol 2, 294 cited by Jones 'Ballow'. Johnson also confirmed that 'I learned what I know of law chiefly from Mr Ballow', though he admitted that since that time he had only met Ballow once.
119 Ibbetson, above n 112, 218–19.
120 Joseph Priestley, An Essay on the Course of Liberal Education (Johnson, 1765).
121 For a summary of Adam Smith’s work on law see David Lieberman, 'Adam Smith on Justice, Rights and Law' in Knud Haakonssen (ed), The Cambridge Companion to Adam Smith (Cambridge University Press, 2006) 214.
122 Paley was a theologian but he often attended the law courts in his youth and it is said that a 'legalistic approach' was evident in the 'method and literary style of his biblical criticism', see D L Le Mahieu, The Mind of William Paley (University of Nebraska Press, 1976) 26.
123 Lobban, above n 103, 81.
124 (Johnson, 1790).
126 Powell, above n 124, vol 1, vi.
127 (Clark, 1815).
128 Powell, above n 124, vol 1, xliii.
129 Ibid vii.
130 Ibid 9.
131 Ibid 330–33.
133 For these figures see, Baloch, above n 90, 416: out of 507 cases only 63 post-date 1750 and 192 were from the 17th century or before.
134 (Sweet, 1826).
135 Treatise on Contracts within the Jurisdiction of Courts of Equity (Butterworth, 1806).
136 A Treatise of the Law Relative to Contracts and Agreements not under seal (Butterworth, 1807).
137 A Treatise on Contracts and Liabilities Ex-Contractu (Benning, 1847).
138 Colebrooke was something of a polymath: see Rosane Rocher and Ludo Rocher, The Making of Western Ideology Henry Thomas Colebrooke and the East India Company (Routledge, 2012).
139 (1818).
140 T E Colebrooke, The Life of H T Colebrooke (Trüber,1873) 297.
141 Ibid 345.
142 Ibid 279.
143 Colebrooke, Treatise on Obligations and Contracts (1818) 2.
144 In Reniger v Fogossa (1550) Plo 1, 17.
145 Colebrooke, above n 139, 2.
146 Ibid 38.
147 Rather than reciprocity causa reflected the idea that a contracts should be an agreement that was seriously intended. For an overview of the history of causa, see R Zimmermann, The Law of Obligations (Oxford University Press, 1996), 549–56.
149 Jones, above n 93, 29. As a letter to Viscount Althorp in late 1780 reveals, Jones was anxious to make Pothier better known in England: G Cannon (ed), The Letters of Sir William Jones (Oxford University Press, 1970) vol 1, [251].
150 The editor of Ballow’s treatise was an early champion of Pothier, John Fonblanque (ed), A Treatise of Equity (Whieldon and Butterworth, 1793) vol 1, 3, 28, 115, 121, 341, 380, vol 2, 420. For another early reference to Pothier: Chitty, above n 105, 10.
151 For examples in argument, see: Duke of Melan v Fitzjames (1797) 1 B & P 138, 140; Cooth v Jackson (1801) 6 Ves Jun 12, 23; Beale v Thompson (1803) 3 B & P 405, 413–14; M’Carthy v Abel (1804) 5 East 388, 392; Richie v Atkinson (1808) 10 East 295, 304, 305; Christie v Row (1808) 1 Taunt 300, 308; Bell v Carstairs (1811) 14 East 374, 386; Green v Royal Exchange Assurance (1815) 6 Taunt 68, 69; M’Iver v Henderson (1816) 4 M & S 576, 581; Young v Rowe (1816) 5 M & S 291, 293; Taylor v Curtis (1816) 6 Taunt 608, 614; Busk v Royal Exchange Assurance (1818) 2 B & Ald 73, 77. For examples in judgments, see: Raper v Birkebeck (1811) 15 East 17, 20 (Lord Ellenborough); Birley v Gladstone (1814) 3 M & S 205, 216 (Lord Ellenborough); Butler v Wildman (1820) 3 B & Ald 398, 402 (Abbot CJ) 406 (Best J).
152 J Aikin, General Biography: or Lives, Critical and Historical of the most eminent persons of all ages countries, conditions, and professions (Robinson, 1813), vol 8, 318.
153 Hoare v Cazenove (1812) 16 East 391.
154 Sir William Evans (trans), R J Pothier, A Treatise on the Law of Obligations or Contracts (Strahan, 1806). An even earlier English translation was published in America in 1802 by Francois-Xavier Martin as, A Treatise on Obligations Considered in a Moral and Legal View (Small, 1802). Pothier’s best known work apart from his Traité des Obligations (1761) was probably his Traité du Contrat de Vente (1762). The later work was also translated into English, L S Cushing (trans), R J Pothier, Treatise on the Contract of Sale (Little and Brown, 1839).

155 Ibid, 75, where Blackstone’s, Commentaries were described as ‘a more beautiful specimen of elegant literature than has in any other instance been applied to a professional subject’

156 Ibid 35
157 Ibid 58, 65.
158 Ibid 76.
159 Ibid 76–77.
160 Simpson, above n 125; Ibbetson, above n 112.
161 The second edition of 1834 was much longer and made much greater use of Pothier’s writings.

163 (Stevens & Sons, 1867).

155–166 Henry Colebrooke, Treatise on Obligations and Contracts (1818) 46. The relevant texts are Sir William Evans (trans), R J Pothier, A Treatise on the Law of Obligations or Contracts (Strahan, 1806) 1.1.3.; Alan Watson (ed), The Digest of Justinian (University of Pennsylvania Press 1985) D 30.17.166.2 (Ulpian).
167 Leake, above n 165, 168.

170 (1857) 2 H & N 564, 27 LJ Ex 117; 6 WR 107.

173 (Stevens and Sons, 1876).
174 (Stevens and Sons, 1887).

176 Henry Colebrooke, Treatise on Obligations and Contracts (1818) 46.


179 The late Professor Peter Birks was a hugely influential figure. For this story see Warren Swain, ‘Unjust Enrichment and the Role of Legal History in England and Australia’ (2013) 36 University of New South Wales Law Journal 1030.

181 Harry Edwards, ‘The Growing Disjunction between Legal Education and the Legal Profession’ (1991–92) 91 Michigan Law Review 34; Bryan Gardner, ‘Interviews with United States Supreme Court Justices: Chief Justice John G Roberts Jr’ (2010) 13 Scribes Journal of Legal Writing 5, 37. ‘What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law’. I am grateful to Professor Ross Grantham for alerting me to this special issue of the journal.
182 This is not entirely the fault of academics. The publish or perish attitude in modern universities particularly in the UK and Australia has produced vast mountains of rubbish most of which is quite rightly forgotten almost as soon as it appears.
189 Richard A Danner, 'Oh the Treatise!’ (2012–13) 111 Michigan Law Review 821, 833–34. I am grateful to Dr Dominic O’Sullivan QC for drawing this article to my attention.