THE REPORTING OF NISI PRIUS CASES: ORIGIN, REPUTATION AND EFFECT

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A thesis submitted to the Department of Law at the London School of Economics and Political Science for the degree of PhD

A miniature portrait, thought to be of Isaac Espinasse, currently in the possession of Jane Espinasse, Isaac's great-great-great-great-granddaughter

DECLARATION

I certify that the thesis I have presented for examination for the PhD degree of the London School of Economics and Political Science is solely my own work.

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2 October 2024

ABSTRACT

For some seventy years, rulings made by judges sitting at nisi prius were regularly reported, despite those reports being held in low esteem by the legal profession and such rulings being regarded as of little value as precedents by the judges of the time. This thesis explores the origin and persistence of these reports, explaining why they first came to be reported and identifying their principal purposes as the introduction to new members of the profession of the practicalities of preparing cases for trial, and the provision of some authority, however slight, to cite in court. The poor reputation of the reports is also considered, with specific reference to the first regular nisi prius reporter, Isaac Espinasse. The thesis investigates the criticisms of Espinasse's reports and shows, by putting those criticisms into context, considering his reports' contemporaneous standing and comparing his reports with other reports of the same cases, that the poor reputation of his reports is unwarranted. As to the effect of the nisi prius reports, the thesis explains that, whilst nisi prius rulings on substantive law were cited by nineteenth century judges, they were used differently to decisions of courts in banc. The greater authority of such rulings on points of evidence, at least up to the mid-nineteenth century, is also explored. The thesis concludes by examining the tendency of more recent judges to ascribe greater weight to nisi prius rulings than their nineteenth century counterparts, due to the modern profession's ignorance of the former difference in the treatment of nisi prius rulings and the decisions of courts in banc.

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CONTENTS

Thesis summary 6

SECTION 1: ORIGIN AND PERSISTENCE

1. Introductory Issues 11
2. The Commencement of Regular Nisi Prius Reporting 32
3. Why did the Nisi Prius Reports Survive? 54

SECTION 2: REPUTATION

4. The Judicial Assassination of Isaac Espinasse 63
5. Were the Criticisms Justified? 78
6. Why was Espinasse so Criticised? 88

SECTION 3: EFFECT

7. The Treatment of Substantive Law Rulings at Nisi Prius in the Nineteenth Century 106
8. Nisi Prius Reporting and the Modern Law of Evidence 121
9. The Modern Approach to Nisi Prius Cases 152

General Conclusion 176

Appendices

1. A Chronology of Nisi Prius Reporting 178
2. Official Statistics on the Duration of Nisi Prius Trials 187
3. A Comparative Evaluation of Espinasse's Reports 194
4. A Survey of Treatises 245

Bibliography 249

And that Nisi Prius nuisance, who just now is rather rife,
The Judicial humourist - I've got him on the list!

As Some Day It May Happen,
from *The Mikado*, libretto by W.S. Gilbert.

The fellow taks doon ma' very words.

Reaction of Lord Eskgrove (Lord Justice Clerk 1799-1804) to the work of Robert Bell, the first independent Scottish law reporter.

THESIS SUMMARY

Despite being a central part of the English civil justice system for more than 600 years, nisi prius cases were largely ignored by the law reporters from the time of the Year Books until the end of the eighteenth century. During that period, reporters concentrated on cases heard in the superior courts sitting in banc in Westminster Hall, as those courts were regarded as the exclusive forum for decisions on legal principles. By contrast, the nisi prius process was focused on the fact-finding role of the jury, so that reporters considered that little of future interest or use to the profession could be gleaned from the rulings made and directions given to the jury by judges on any substantive legal principles necessary for the determination of the matter in issue.

Despite this, law reports dedicated to nisi prius rulings began to appear in the mid-1790s and continued thereafter to be published on a more or less regular basis until the mid-1860s. However, these reports were not predicated on, nor did they lead to, any greater judicial recognition of the authority of nisi prius rulings on matters of substantive law. On the contrary, just as law reporters had earlier eschewed the reporting of nisi prius cases for their lack of worth, judges at the time those cases came to be regularly reported refused to treat the legal principles arising from them as determinative of anything unless the matter had been reviewed and decided upon by a court in banc.

The paradox between the regular reporting of nisi prius cases and their low standing as authorities is at the heart of this thesis, and is explored by reference to three sets of questions.

The first set of questions relates to the origins of regular nisi prius reporting. Why did those cases come to be regularly reported when they did? Who were the reports for and what was their purpose? Why were they bought and read in sufficient quantities to sustain their publication for so long?

The second set of questions focuses on one of the most prominent early nisi prius reporters, Isaac Espinasse. His reputation as a reporter was so thoroughly destroyed by a series of criticisms from Victorian judges that his name has become a byword for incompetent law reporting. But if nisi prius reports were of so little value as authorities, why did the judiciary feel the need to denigrate the quality of this particular reporter? Was their assessment of Espinasse's quality as a reporter justified? Or was there a different, more personal reason for their derogatory remarks?

The final set of questions concerns the fact that, despite the poor regard in which nisi prius rulings on matters of substantive law were held by judges, those cases were nevertheless regularly referred to by the courts and continue to be quoted up to the present day. Why did nineteenth century judges cite nisi prius rulings notwithstanding their lack of authority? Why do modern courts still do so? Does this require a reconsideration of their value? Has their use had any particular effect on the development of the common law?

Each of these sets of questions forms the basis for the three principal sections of this thesis.

Section 1 introduces the thesis and discusses the origins and persistence of regular nisi prius reporting.

Chapter 1 contains an introduction to law reporting and the nisi prius system before laying the foundations of the analysis in the subsequent Chapters. First, the treatment of nisi prius cases as authorities is considered, in the context of how the doctrine of precedent was applied at the time those cases came to be regularly reported. Having established the low regard in which they were held by the judges, there follows an explanation of why this was the case, in terms of the practical and procedural constraints imposed on the proper treatment of legal issues at nisi prius.

Chapter 2 considers why nisi prius cases came to be regularly reported at the end of the eighteenth century, noting the likely influence of earlier reporters who included nisi prius rulings in their reports. The personal and professional lives of the early reporters – Espinasse, Thomas Peake and John Campbell – are briefly considered with a view to assessing whether their particular circumstances motivated them to report nisi prius cases. There then follows an analysis of a number of more general reasons which go to explain why such cases came to be reported at that time, in particular: the increasing importance of evidence law in trial litigation; the healthy state of law reporting in general; the need for reporters to look beyond the Westminster Hall courts because of the de facto monopoly of the authorised reporters; the rise of commercial litigation; the relaxation of the strict pleading rules encouraging more legal principles to be ventilated at trial; and the potential pecuniary and professional advancement that law reporting could generate for the ambitious barrister.

Chapter 3 looks at how the nisi prius reports were received by the profession, and considers why, despite the largely negative reception given to them, the reports were bought and cited. The Chapter identifies a principal purpose of the nisi prius reports as introducing new members of the profession to the practicalities of preparing cases for trial, which explains their popularity with law students of the time. There follows an explanation of the remainder of the market for these reports, which included barristers - whose need for authority to cite in court made the reports required reading - and perhaps also merchants, given the increased prominence of legal principles in the more sophisticated commercial practices of the early nineteenth century. The Chapter concludes by looking at how some of the legal commentary of the time appreciated the value of the nisi prius reports.

Section 2 of the thesis concerns the destruction of Isaac Espinasse's reputation as a reporter of nisi prius cases.

Chapter 4 identifies Espinasse's judicial critics and examines their criticisms, noting that they consisted of mere assertions, unsupported by evidence or reasoning, and that some amounted to little more than personal insults. Further context is given to those criticisms which operates considerably to reduce their force, not least the occasional citation by the critical judges of cases reported by Espinasse without any qualification as to their accuracy. The unsubstantiated nature of the judges' comments leads on to a consideration of the more general question of how judges should go about justifying the criticisms they make of the quality of law reporters.

Chapter 5 considers whether there is any justification for the judicial criticisms of Espinasse's reports and concludes that there is nothing that clearly and conclusively points to his incompetence as a reporter – if anything, the contrary is the case. Having already noted that the comments were made long after Espinasse's death, an analysis of the contemporaneous evidence, from judges, legal journals and other reporters, yields no substantial support for those criticisms. But most importantly, the Chapter summarises the results of an evaluation of the accuracy of Espinasse's reports, by comparison with a number of sources who either reported

or were otherwise involved in the cases reported by him. This evaluation concludes that there were very few material inconsistencies between Espinasse's reports and those other sources, from which it can be judged that Espinasse's reports were broadly accurate.

Chapter 6 deals with the question that arises from the conclusion in Chapter 5: if there is no evidence that Espinasse's reports were particularly inaccurate, why did his reports – and indeed he – receive so much criticism? A number of possible reasons are explored: the influence of Espinasse's rival reporters, most notably Campbell; Espinasse's publication late in life of a series of remarkably candid and often offensive portraits of the leading judges and barristers of his time; possible personal antipathy because of his Irish heritage; a professional distaste for his abbreviated style of reporting; and the misuse of his reports on issues of substantive law.

The judicial attacks on Espinasse's reports suggest that nisi prius cases were held in greater judicial esteem than is suggested by their general treatment as authorities: otherwise, why would the judges have bothered to attack their quality? Section 3 of the thesis looks at how nisi prius cases have been applied by the courts and considers their effect on the development of the common law.

Chapter 7 contrasts the warnings given by nineteenth century judges as to the precedent value of nisi prius cases, with the fact that those cases were regularly cited with express or apparent approval, even in relation to issues of substantive law. An analysis of how those cases were used by the judges of this era, however, shows that their effect was limited: many were cited as makeweights, only in combination with more authoritative decisions from courts in banc; others were cited, not for their inherent worth as authorities, but as examples of principles which the judges articulated independently of those rulings; and others were cited to illustrate legal principles which were regarded as so obvious that there was no need to refer them back to the full court. This forms the starting point for an examination of James Oldham's claim that there is extensive evidence of 'law-making' at nisi prius at the beginning of the nineteenth century:[1] the results of the examination challenge that claim, on the basis that there is little support for the nisi prius rulings relied upon by Oldham having any authoritative value during this period.

The analysis in Chapter 7 is limited to a consideration of nisi prius rulings on matters of substantive law. By contrast, rulings on points of evidence have often been claimed to have had much more influence on nineteenth century judges; and this has led in turn to the claim that the nisi prius reports made a substantial contribution to the development of the modern law of evidence during this period. These claims are considered in Chapter 8, which concludes that the evidence supports the former claim but not the latter. Although nisi prius rulings on points of evidence were not regarded as formally binding on either other trial judges or the full court, their influence in persuading judges of the eighteenth and early nineteenth centuries as to the correct approach to such points was undoubtedly substantial, much more so than rulings on points of substantive law; but by the mid-nineteenth century the influence of rulings on points of evidence had waned, as the courts became more concerned with the correctness of the underlying principle. Despite their influence, there are a number of reasons why the nisi prius reports did not play a substantial role in the growth of evidence law, not least because that growth was already well underway before those reports began: indeed, as identified in Chapter 2, it is more likely that the development of evidence law was the catalyst for the nisi prius reports, rather than vice versa. Moreover, there were a number of areas of evidence law whose

[1] James Oldham, 'Law-Making at Nisi Prius in the Early 1800s', 25 *Journal of Legal History* (2004), 221.

development was positively hindered by a mass of unreasoned and conflicting decisions at nisi prius. The reports of such cases also blighted treatises on evidence law, which focused more on the collection of cases rather than the systematic formulation of reasoned principles.

Chapter 9 brings the story up to date by considering how modern courts have treated the nisi prius reports. It notes a change in the treatment of such cases, with more weight being given to them than before, with no regard to the practical constraints which caused earlier judges to regard them as having little worth as authorities in their own right. As a result, nisi prius cases have had a significant effect on the development of the common law, in terms of both the attribution of legal principles to such cases, and the application of nisi prius rulings as authoritative statements of legal principle in their own right. The Chapter concludes by identifying the possible reasons for the modern treatment of nisi prius cases, the most likely of which is that modern lawyers are no longer aware of the differences between nisi prius courts and courts in banc that caused their nineteenth century counterparts to regard the former as having no real precedent value.

SECTION 1 – ORIGIN AND PERSISTENCE

CHAPTER 1
INTRODUCTORY ISSUES

REPORTING THE LAW

Judges and their judgments have always been at the heart of the creation and development of the English common law: Blackstone thus described judges as 'the depositaries of the laws; the living oracles'.[2] But if the law is what the judges say, of comparable importance is the reporting of what the judges have said: 'Judges spin and others weave'.[3] The growth of legal doctrine through judicial decisions, and by subsequent judges relying on those decisions as precedents and building upon them, depends on an accurate and reliable record of those decisions. As Edmund Burke said:

> … the English jurisprudence has not any other sure foundation, nor consequently the lives and properties of the subject any sure hold, but in the maxims, rules, and principles, and juridical traditionary line of decisions contained in the notes taken, and from time to time published … called Reports … To put an end to Reports is to put an end to the law of England.[4]

Today, there is generally a close relationship between the judge and the reporter. In England, reported cases are now based on a written transcript of the judgment which will already have been corrected and authorised by the judge, and proofs of cases reported in *The Law Reports* are sent to the judge for their comment and approval in advance of publication. However, this relationship is a modern phenomenon, and was not how law reporting worked until the late twentieth century. Before then, judgments were usually delivered orally, often ex tempore, and judges would generally have no further role in facilitating a permanent published record of those judgments.[5] It therefore fell largely to the law reporters to take down the judge's words, to edit the judgments, and to put them into context by reference to the pleadings, the facts and the arguments of counsel. The great law reporter Sir Edward Coke said that, for law reporting: 'In troth, reading, hearing, conference, meditation and recordation are necessary'.[6]

Most reporters would use longhand to record the judgment, and as a result the report would rarely be a faithful transcript of what the judge said. Indeed, the use of shorthand was discouraged as it did not give the reporter the time and space to reflect on the subject-matter

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[2] William Blackstone, *Commentaries on the Laws of England*, 1st ed., Oxford, 1765, vol.1, 69.

[3] Patrick Devlin, *The Judge,* Oxford, 1979, 180.

[4] Report made on 30 April 1794 from the Committee of the House of Commons appointed to inspect the Lords' Journals, in relation to their Proceedings on the Trial of Warren Hastings, repr. in Edmund Burke, *The Works of the Right Hon. Edmund Burke,* London, 1842, vol.2, 608-609.

[5] 'It cannot be expected that the Judges should find the Time or take the Trouble to revise [the reports]; or that they would do it, upon any Application whatsoever': Sir James Burrow, *Reports of Cases Argued and Adjudged in the Court of King's Bench*, 2nd ed., London, 1771, v. This did not mean that the judges were wholly uninterested in what was being reported: when Thomas Ellis was in the King's Bench reporting the judgments being delivered in a case, Williams J sent down a note to him from the Bench with the words: 'Don't make damneder fools of us than we are': Sir Frederick Pollock, *Personal Remembrances*, London, 1887, vol.1, 148.

[6] Sir Edward Coke, *The Reports of Sir Edward Coke*, J.H. Thomas ed., London, 1826, vol.1, xxvii.

and how it should best be presented.[7] In the preface to his reports, the sixteenth-century reporter Edmund Plowden explained his selective approach to the task;

> I have for the most Part reported Cases in a summary Way … In which Case I have purposely omitted much that was said both at the Bar and at the Bench, for I thought that there were few Arguments so pure as not to have some refuse in them, and therefore I thought it best to extract the pure only, and to leave the refuse, then and yet holding that to be the best Method of reporting.[8]

Plowden freely acknowledged the danger of this course of action, unless done by someone with 'great Understanding and Memory' and 'an excellent and distinguishing Judgment'.

More controversially, some law reporters regarded it as their responsibility to choose the cases which they considered ought to be reported, a job which required the reporter to ascertain from wider research whether the case in question was, as far as they could tell, sound law.[9] This involved the reporter rejecting for publication a decision in which the judge had mistaken the law.[10] The most notorious example of the law reporter as selector is John Campbell, who as a young barrister reported the nisi prius rulings of Lord Ellenborough CJ. Campbell described his process as follows:

> Before each number was sent to the press I 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 last volume, I had a whole drawer full of 'bad Ellenborough law'. The threat to publish this I might have used as a weapon of offence when he was rude to me; but his reputation is now secure, for the whole collection was reduced to ashes in the great fire in the Temple.[11]

Campbell was by no means the first reporter to filter out cases in this way: Plowden was recorded as saying that the reporters would deliberate on doubtful cases and smother those they deemed to be 'rickety or likely to prove mischievous'.[12]

However, this practice did not command universal approval. Recounting Campbell's anecdote, an editorial published in the *Jurist* in September 1864 said as follows:

> This story we venture to disbelieve; and if it is true, we maintain that Lord Campbell acted on an erroneous view of the functions of a reporter, which are simply to report what takes place, whether right or wrong; for, after all, right and wrong, in the absence of corruption or partiality,

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[7] Richard Whalley Bridgman, *Reflections on the Study of the Law,* London, 1804, 119-120. See also John Mews, 'The Present System of Law Reporting', 9 *Law Quarterly Review* (1893), 179 at 185; Anon., 'Reports and Reporters', 9 *Monthly Law Magazine* (1841), 20 at 23-24.

[8] Edmund Plowden, *The Commentaries, or Reports of Edmund Plowden*, trans. Broomly, London, 1761, iii-iv.

[9] Mews, 'Law Reporting', 181.

[10] "J.P.T.", 'Modern Common Law Reports of Decided Cases', 27 *Law Magazine* (1842), 320.

[11] Mary Scarlett Hardcastle, *Life of John, Lord Campbell*, 2nd ed., London, 1881, vol.1, 215.

[12] Franklin Fiske Heard, *Curiosities of the Law Reporters*, 2nd ed., Boston, 1881, 11. Campbell, in his notoriously unreliable *Lives of the Lord Chancellors*, 4th ed., London, 1857, vol.5, 376n, accused Thomas Vernon of deliberately reporting questionable decisions of Lord Harcourt C out of spite, possibly because of their political differences, but Wallace queries this, on the basis that Vernon's notes of cases, published posthumously, were probably never intended to be published at all: J.W. Wallace, *The Reporters Arranged and Characterised with Incidental Remarks*, 4th ed. rev. by Franklin Fiske Heard, Boston, 1882, 496-497.

> is only matter of opinion, and who is the reporter who sets himself up in judgment on the judge? Necessarily he is either comparatively young and inexperienced, or else he is a man who has failed in the profession, for no one would report who could be more profitably employed in business; and on what rational ground can such a man venture to set himself above a judge, who must have been a distinguished barrister, and whose opinion on a point of law would be worth that of half a dozen ordinary reporters? The reporter must, then, reject this idea, and report every case of novelty or importance.[13]

In a similar vein, in 1821 the Scottish advocate Robert Hannay said this of reporters who determined what was and was not fit to report:

> Now, how does this differ from placing the Law in their hands, and saying "Do with it as you will?" What is this power but a Censorship upon the Bench, an *Imprimatur* upon the law? And in whose hands has custom placed this magisterial power? Not the Presidents of our Courts, after the practice of our Forefathers, nor in persons pre-eminent for learning, nor in Lawyers of tried talents; but in men often unknown to those who appoint them, unknown to the Judges whose Decisions they report, unlearned in that Law of which they have become the Historians …[14]

The modern criteria for the selection of cases to be reported were laid down by Nathaniel Lindley QC in 1863:[15] to be excluded are cases which pass without discussion or consideration and cases which are substantially repetitions of what is reported already; to be included are cases which introduce, or appear to introduce, a new principle, cases which materially modify an existing principle, cases which settle, or materially tend to settle, a question on which the law is doubtful, and cases which for any reason are peculiarly instructive. These criteria are still applied by the editors of *The Law Reports*.[16]

Despite the importance of accurate law reporting, few concessions were made by the legal system to ensure that the reporters were able to carry out their duties effectively. There was no organised system of law reporting until the middle of the nineteenth century, no easy access for the reporters to study the pleadings and not even a favoured vantage point within the courtroom so that the reporters could clearly hear the arguments, testimony and judgments amongst the general din and hurly-burly of Westminster Hall, Guildhall and the assize courts.[17] As the nineteenth-century Chancery reporter Richard Davis Craig put it: 'no man who has not only been a reporter but has also had his reporting work mercilessly criticised by a colleague, can have any idea how difficult the duty is.'[18]

Another striking feature of English law reporting is the lack of any official or quasi-official control or organisation. For a long period the only requisite qualifications for a law reporter

[13] Anon., 10 *Jurist (n.s.)* (1864), 351.

[14] Robert Hannay, *Address to the Right Honourable Lord President Hope and to the Members of the College of Justice on the Method of Collecting and Reporting Decisions*, Edinburgh, 1821, 40.

[15] 'Paper on Legal Reports', repr. in W.T.S. Daniel QC, *The History and Origin of the Law Reports*, London, 1884, 63.

[16] Brendan Wright, 'Is my case reportable?', 174 *New Law Journal* (2024), issue 8071, 6.

[17] Burrow was a notable exception: as Master of the Crown Office from 1733 to 1782, he had ready access to the official records of the King's Bench and regularly sat in the middle of the court: Burrow, *Reports,* ii.

[18] Anon., 'English and Scots Law Reports', 177 *Law Times* (1934), 402.

were that they were a barrister and able to secure the services of a publisher: otherwise, 'the market for Reports is now as open as the most devoted follower of Adam Smith could desire.'[19]

These unpromising circumstances contributed to an unevenness in the quality of reports, particularly before the mid-eighteenth century, and as late as 1864 it was said that 'the great vice of the private system' of law reporting was 'a total uncertainty as to ability' of the reporters.[20] This gave judges considerable licence to refuse to follow reported cases cited to them, on the ground that they must have been misreported; indeed, even after it had become general practice for judges to follow precedent, there are numerous examples of them using the misreporting of a case as an excuse not to follow the point of principle contained in it, not because of any evidence that the report itself was bad, but because they did not believe that the principle, as reported, could have been so held. In this way, a judge could decide a case according to their own view of the law, concealing what otherwise might amount to a subversion of the precedent system.

This is an illustration of another significant role that law reporting plays in the development of the common law, namely the connection between reporting and precedent. The uneven quality of law reports before the mid-eighteenth century facilitated the more fluid system of precedent which then existed. Until reporting became more reliable, precedent could not be accepted as binding on a court and judges did not feel constrained in picking and choosing amongst earlier cases, basing their selection on the perceived authority of the reporter. Whilst some early reporters commanded respect, such as Plowden, Coke, Dyer, Moore, Leonard and Croke, many others did not, and while this lack of accepted standards continued there could not be a strict and binding theory of precedent.[21] Whilst the precise date of the formulation of the modern doctrine of binding precedent remains the subject of debate, it is surely not by chance that the establishment of a settled doctrine coincided with the development during the nineteenth century of a more regular and reliable system of law reporting, operated by generally well-respected legal professionals.[22]

THE NISI PRIUS SYSTEM

For more than 600 years, the nisi prius process was a key component of the English civil justice system.[23] All common law civil cases of substance were initiated in one of the three superior courts situated in Westminster Hall, which would then issue writs to summon juries to appear before them to try the case on a particular day 'unless before then' (*"nisi prius"*) the case came on for hearing at the local court: either on circuit at the assizes, which were held twice yearly during the Lent and Trinity vacations; or, if the cases were from London or Middlesex, at Westminster Hall, Guildhall[24] or another London venue, both during term (usually in the

[19] Daniel, *History and Origin*, 34.

[20] Anon., 'Law Reports and Law Reporting', 18 *Law Magazine (n.s.)* (1864), 270 at 276.

[21] Rupert Cross and J.W. Harris, *Precedent in English Law*, 4th ed., Oxford, 1991, 24-25; Neil Duxbury, *The Nature and Authority of Precedent*, Cambridge, 2008, 53-57; R.W.M. Dias, *Jurisprudence*, 5th ed., London, 1985, 132.

[22] Jon Davies, 'Aspects of Nineteenth Century Legal Literature', 29 *Cambrian Law Review* (1998), 22 at 26.

[23] See, generally, J.S. Cockburn: *A History of English Assizes 1558-1714*, Cambridge, 1972, ch.7; Baker John Sellon, *The Practice of the Courts of Kings Bench and Common Pleas*, London, 1796, vol.2, Appx.(O); William Forsyth, *History of Trial by Jury*, London, 1852, Ch.8.

[24] All City of London cases were tried at Guildhall, because the jurors were precluded by custom from sitting outside the city limits: James Oldham, *English Common Law in the Age of Mansfield*, North Carolina, 2004, 44.

evening) and after each term. In practice, virtually all of these cases would come on for trial at one of those venues,[25] where it would be heard by a single judge of a superior court and a jury. After the trial, the verdict of the jury would be recorded by the judge on a document called the postea and sent back to the court of origin, where judgment would be entered, either on the fourth day of the term next following the verdict,[26] or after a decision by the full court on any legal points which arose out of the trial.[27] If the case had been tried at the assizes, it was a matter of chance whether the trial judge would be present when the case returned to Westminster Hall, as the cases heard by the judge at a particular assize were not selected according to the court in which that judge sat:[28] it was therefore not uncommon, for example, for a King's Bench case to be tried at nisi prius by a Common Pleas judge.

Originally developed as a means of providing relatively regular and swift access to justice, which enabled local investigation and trial before judges with no connection with the locality,[29] the nisi prius system was credited with encouraging the uniformity of the common law and assuring litigants that they would have access to the highest quality judges.[30]

As an alternative to a trial at nisi prius, in special cases the trial might be held 'at Bar', still tried by a jury but presided over by all the judges of the superior court in which the action was brought. Although the nisi prius system was originally reserved for cases involving straightforward legal issues,[31] by the eighteenth century trials at Bar were very much the exception to the rule, as the courts jealously guarded their jurisdiction to determine what cases

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[25] Cockburn, *Assizes*, 17n.

[26] *Re Hastings (No.2)* [1959] 1 QB 358, 367 per Lord Parker CJ.

[27] Points of law arising at trial could be saved for the court in banc by a demurrer to the evidence, a bill of exceptions, a special verdict or, latterly, by the trial judge reserving the point by way of a Special Case. Points of law arising after the trial could be heard through a motion for a rule nisi, a motion in arrest of judgment, a motion for judgment *non obstante veredicto* or a motion for a new trial: see, generally, Peter Stafford Carey's 14th lecture on Practice delivered at University College, London in 1844, repr. in 4 *Law Times* (1844), 203-205; and see also C.H. O'Halloran, 'Right of Review and Appeal in Civil Cases before the Judicature Acts, 1875', 27 *Canadian Bar Review* (1949), 46; and Sir John Baker, *An Introduction to English Legal History*, 5th ed., Oxford, 2019, 91-93 and 148-149.

[28] This was first provided for in 1340 by the statute 14 Ed. 3, c.16. In London and Middlesex sittings, the judge would only hear cases from his own court, as judges from each of the Westminster Hall courts would sit at roughly the same times.

[29] *Ex parte Fernandez* (1861) 10 C.B.N.S. 3, 42 per Willes J; Blackstone, *Commentaries*, vol.3, 356.

[30] Sir Matthew Hale, *The History of the Common Law of England*, London, 2nd ed., 1716, 251-253; Richard Wooddeson, *A Systematical View of the Laws of England*, London, 1792, vol.1, 113. However, Cockburn argues that considerable doubt is thrown upon this by the frequent reference of cases, and consistent delegation of judicial powers, to local arbitrators due to pressure of nisi prius business: Cockburn, *Assizes*, 136, 150. A report of a royal commission on the practice and proceedings of the superior courts of common law, published in 1830, noted that issues relating to damages were frequently dealt with in this way: Anon., 'Second Common Law Report', 3 *Law Magazine* (1830), 396 at 471.

[31] The Statute of Westminster II (1285), c.30 provided that nisi prius trials were only available if 'small examination' of the jury was required, otherwise trial before the full court was to be the ordinary procedure.

should be tried in this way[32] and would not make such an order simply because of (for example) the length of the cause or the value of the matter in question.[33]

The duty of the judge sitting at nisi prius was to decide all questions regarding the admissibility of evidence; to instruct the jury on the rules of law, by which the evidence is to be weighed; and to explain to the jury the general principles of law applicable to the point in issue.[34] Otherwise, the role of the judge was limited: 'A judge sitting at nisi prius is not the Court out of which the record proceeds, nor does he represent that Court; he is only the instrument of the Court to try the issues raised.'[35] The judge could only proceed on the issues referred to them from the court in banc, and could not suggest any new issues;[36] they could not amend any mistake in the nisi prius record, even in an undefended cause, unless they were a judge of the court out of which the record had been issued;[37] and they did not give judgment following the trial, but merely recorded the jury's verdict to be delivered to the court in banc.[38] The nisi prius judge was therefore described as acting 'rather in a ministerial than in a judicial capacity'.[39] This restricted role, plus the usual presence of counsel on both sides of the argument to assist the court, generally made nisi prius work an easier proposition than trying criminal cases:[40] Buller J was accordingly said to regard his idea of heaven as being 'to sit at Nisi Prius all day, and play at whist all night.'[41]

By contrast, litigants were not necessarily well served by the nisi prius system. Whilst they benefitted from having their cases tried by one of the twelve judges, sending actions out for

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[32] See *R v Amery* (1786) 1 Term Rep. 363. Where Judges, Masters in Chancery or barristers were parties to an action, they were generally allowed a trial at Bar (for example, *Morton v Hopkins* (1668) 1 Sid. 407; and see William Renwick Riddell, 'New Trial at the Common Law', 26 *Yale Law Journal* (1916), 49 at 51). Whilst the Attorney General could insist on a trial at Bar in cases to which the Crown was a party (*Paddock v Forrester* (1840) 1 M. & G. 583) he could not prevent such a trial were the court considered it reasonable to try it there (*Sir Samuel Astrey's Case* (1703) 2 Salk. 651).

[33] *R v The Burgesses of Caermarthen* (1753) Say. 79. It may well be that from the practice of appointing juries for these trials evolved the system of special juries: *R v Edmonds* (1821) 4 B. & Ad. 471, 476-477 per Abbott CJ. For the appointment of special juries, see Henry Cary, *A Practical Treatise on the Law of Juries and Jurors*, London, 1826, 58-68.

[34] Anon., 'Of the Functions of the Judge as distinguished from those of the Jury', 2 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* (1845), 27 at 28-29.

[35] *Wells v Abrahams* (1872) L.R. 7 Q.B. 554, 558 per Cockburn CJ.

[36] *R v Rookwood* (1696) 13 St. Tr. 140, 165 per Holt CJ; *Robinson v Pocock* (1809) 11 East 484, 486 per Lord Ellenborough CJ; *Wooldridge v Bishop* (1827) 7 B. & C. 406, 408 per Lord Tenterden CJ.

[37] *Halhead v Abrahams* (1810) 3 Taunt. 81: this was reversed by 9 Geo IV, c.55, s.5.

[38] *Moore v Brown* (1610) 1 Buls. 92.

[39] *R v The Corporation of Helston, in Cornwall* (1713) 10 Mod. 202 per Parker CJ.

[40] Although the Crown business would often be completed earlier than the civil business, and the judge hearing the former could, on completion of his list, attend to personal matters, there being no obligation to assist the judge hearing the latter: John H. Langbein, 'Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources', 50 *University of Chicago Law Review* (1983), 1 at 32-33.

[41] Lord John Campbell, *The Lives of the Chief Justices of England*, New York, 1874, vol.3, 294. However, the strain of travel and the often dangerous conditions of the buildings used as courthouses meant that circuit business was no soft option compared to sitting in banc at Westminster Hall: for example, George Mellish QC, a lifelong sufferer of gout, refused an appointment to the Bench in 1868 because he could not face the strain of being on circuit: Patrick Polden, 'Mingling the Waters: Personalities, Politics and the Making of the Supreme Court of Judicature', 61 *Cambridge Law Journal* (2002), 575 at 594.

trial and verdict, which then returned to Westminster Hall for legal argument, resulted in the parties incurring additional costs. This practice of 'bandying the cause from court to court' was identified by Jeremy Bentham as one of the many procedural devices used for promoting the gathering of fees, to the detriment of the ends of justice.[42]

THE AUTHORITY OF NISI PRIUS CASES

The doctrine of horizontal precedent at the time of nisi prius reporting

The authority of the nisi prius judge was delegated from the common law court in which the action was commenced, so that the nisi prius court was theoretically the same as the court sitting in banc and was as much a superior court of record as the Westminster Hall courts.[43] A consideration of the authority of nisi prius rulings at the time they began to be reported must therefore be put in the context of the general extent to which one court was bound by a decision of a court of a co-ordinate jurisdiction, i.e. the horizontal dimension of the doctrine of precedent.

At the time of the commencement of regular nisi prius reporting at the end of the eighteenth century, the essence of the doctrine of horizontal precedent had become an integral part of the common law system:[44] in 1765, Blackstone spoke of 'an established rule to abide by former precedents, where the same points come again in litigation' unless the precedent was 'manifestly absurd or unjust'.[45] As stated above, the doctrine continued to develop during the latter part of the eighteenth century, by reason of the emergence of the competent, regular and roughly contemporaneous reporting of cases, so that subsequent courts could be more confident of what the previous decision had actually been before being required to follow it.

However, at the end of the eighteenth century the doctrine of *stare decisis* remained a principle of adhering to decisions, rather than a set of rules;[46] and there was greater room for judges to disregard previous decisions with which they disagreed than would be the case a hundred years later. In the absence of settled principles, individual judges could apply their own views as to what was sufficiently absurd or unjust so as to permit them to depart from previous decisions.[47] At one end of the spectrum, black-letter lawyers such as Buller J and Lord Kenyon CJ would adhere rigidly to the notion of *stare decisis*,[48] whereas other judges of the era - most notably

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[42] Jeremy Bentham, *Rationale of Judicial Evidence, specially applied to English Practice*, ed., John Stuart Mill, London, 1827, vol.4, 138-147.

[43] *R v Faulkner* (1835) 10 L.O. 228, 230 per Lord Abinger CB; *Ex parte Fernandez,* supra, 38-57 per Willes J, esp. 51: 'the judge at nisi prius is to try the cause instead of the court in banc, and that what takes place before him with reference to the trial, is of the same effect as if it had taken place in the court in banc.' See also *Duke of Beaufort v Crawshay* (1865-66) L.R. 1 C.P. 699, 706 per Erle CJ.

[44] Sir Carleton Kemp Allen, *Law in the Making*, 7th ed., Oxford, 1964, 210, 219.

[45] Blackstone, *Commentaries*, vol.1, 69-70.

[46] Jim Evans, 'Precedent in the Nineteenth Century', in Laurence Goldstein, ed., *Precedent in Law*, Oxford, 1987, 45.

[47] David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*, Cambridge, 1989, 86-87.

[48] Buller J described the concept as 'one of the most sacred in the law': *Bishop of London v Ffytche* (1801) 1 East 487, 495; Lord Kenyon CJ identified the judge's function as to 'servilely tread' in the footsteps of his predecessors: *Bauerman v Radenius* (1798) 7 Term Rep. 663, 668; see also *Ellah v Leigh* (1794) 5 Term Rep. 679, 682.

Lord Mansfield CJ[49] - regarded prior decisions as illustrations of the legal principle which justified the decision in the particular case, but which did not preclude reconsideration of that principle where it was deemed appropriate.[50]

There are accordingly plenty of cases from the late eighteenth and early nineteenth centuries in which the court sitting in banc overruled a comparatively recent decision of the same court on a point of principle, without blaming the inaccuracy of the report.[51] In 1834, the nature of precedent in English law was described, in the first published work on the subject, in the following terms:

> A precedent possesses the binding force mentioned, either if in the mind of the Court it is wholly unimpeachable, on the ground of want of principle, or otherwise; or, if impeachable, the objection to which it is so exposed, is not, in the consideration of the Court, sufficient to exclude its title to be authority.[52]

As the nineteenth century progressed, the improvement in law reporting, together with the influence of positivist jurists such as Bentham and Austin, contributed to the development of a stricter doctrine of precedent.[53] It has also been suggested that the increasing amount of commercial activity in Britain brought with it the desire for predictability and certainty in the law, so that businessmen could arrange their affairs with confidence.[54] Another, more prosaic, reason suggested for the eagerness of judges to rely on precedent was because they were overworked, and did not have time to consider every case on its merits as it deserved.[55]

These factors, combined with the falling away of the distinctions between the three superior courts of common law which had in the past caused rivalry and even conflict, facilitated a greater uniformity of decision as between the courts, which in turn led to attempts to crystallise the horizontal dimension of the doctrine of precedent into a binding legal principle. By the mid-nineteenth century, there were a number of judicial comments to the effect that an unreversed decision of one court would be followed by a co-ordinate court save in extreme cases, such as where the previous decision had manifestly emanated from mistake or inadvertence,[56] and in several cases judges in each of the Westminster Hall courts declared that they would abide by

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[49] Mansfield is recorded as saying to David Garrick that a judge should be placed between principle and precedent, just as the great actor is between tragedy and comedy: Archer Polson, *Law and Lawyers*, London, 1840, vol.1, 315-316. Mansfield was not, however, the iconoclast that he is sometimes portrayed as: for accounts of his adherence to precedent in general, see Allen, *Law in the Making*, 210-219 and Evans, 'Precedent', 36-39.

[50] In a similar vein, Lord Ellenborough CJ declared that any precedent which 'outrages all reason and sense' is of no authority at all to govern other cases: *Vere v Lord Cawdor* (1809) 11 East 568, 570.

[51] For example, *R v Clifton* (1794) 5 Term Rep. 498; *Wilde v Clarkson* (1795) 6 Term Rep. 303; *Marshall v Rutton* (1800) 8 Term Rep. 545; *Mayor of Southampton v Graves* (1800) 8 Term Rep. 590; *R v The Masters, Keepers, Wardens and Commoners of the Brewers' Company* (1824) 3 B. & C. 172. Presiding over the first four of these cases was Kenyon, despite being one of the more ardent supporters of the doctrine of precedent during this period.

[52] James Ram, *The Science of Legal Judgment*, London, 1834, 113.

[53] Evans, 'Precedent', 35, 57, 64-72. See also Patrick Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, 1985, 388-397, where it is argued that a rigid adherence to precedent, insofar as it applied to contract law, emerged during the period 1770-1870, but especially the latter part.

[54] David Vong, 'Binding Precedent and English Judicial Law-Making', 21 *Jura Falconis* (1985), 318 at 320.

[55] Anon., 9 *Jurist (n.s.)* (1863), 167 at 168.

[56] See the selection of what are described as the innumerable cases on the matter, in Anon., 'Relative Authority of Co-ordinate Courts', 5 *Solicitors' Journal* (1860), 102 at 103n. See also Evans, 'Precedent', 64.

decisions of courts of co-ordinate jurisdiction, until overruled by a court of error.[57] However, it does not appear that the quotidian practice of the courts of that time matched those sentiments: in a paper read to the Juridical Society in 1860, the barrister Walker Marshall said that, despite such pronouncements, '… in numerous instances our courts have overruled their own decisions, in cases where neither the legislature nor any superior court has intervened with a declaration of the contrary' and that each court 'exercises an independent judgment upon any case which is presented to it, uncontrolled by any decision to which any other Court of co-ordinate jurisdiction may have arrived upon the same point.'[58]

The treatment of nisi prius cases as authorities

As a matter of strict legal theory, a ruling of a judge sitting at nisi prius had the same standing as a decision made by a court in banc, and its precedent value should therefore have accorded with the approach taken to the application of co-ordinate decisions of courts sitting in banc. From the above brief description of the doctrine of horizontal precedent, as a matter of principle it was open to judges of this period sitting in the court in banc to follow the rulings of judges sitting at nisi prius as courts of co-ordinate jurisdiction, unless they were contrary to reason and justice, or had been misreported. However, the judges of the time treated the 'ministerial' rulings of their brethren very differently in this respect.

When nisi prius rulings came to be cited in hearings of the full court, which occurred with increasing frequency after those rulings began to be regularly reported, they were not treated as having the same authority as decisions of the court in banc.[59] The lack of authority accorded to nisi prius rulings became well-established and remained consistent throughout the eighteenth and nineteenth centuries.

The practice of giving less weight to nisi prius rulings pre-dated the regular reporting of such cases. In the celebrated and controversial 1662 case of *Manby v Scott*[60] a mercer brought an action of assumpsit to recover from a husband the cost of material which had been supplied to his wife. The wife had been separated from her husband for a number of years, without any maintenance being provided by him to her; and the husband had expressly prohibited the mercer concerned from supplying goods to his wife. The King's Bench was divided on the

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[57] *Bittleston v Cooper* (1845) 14 M. & W. 399, 401 per Pollock CB (*arguendo*); *Barker v Stead* (1847) 3 C.B. 946, 951 per Wilde CJ; *Edwards v Cameron's Coalbrook Steam Coal and Swansea and Loughor Railway Company* (1851) 6 Ex. 269, 272 per Alderson B; *Parkin v Thorold* (1852) 16 Beav. 59, 63-64 per Romilly MR; *Watts v Rees* (1854) 9 Ex. 696, 700 per Pollock CB; *Jefferys v Boosey* (1854) 4 H.L. Cas. 815, 921 per Parke B; *R v Aulton* (1861) 3 E. & E. 568, 573 per Crompton J and ibid. per Hill J; *Re Capdevielle* (1864) 2 H. & C. 985, 1013 per Martin and Channell BB.

[58] Walker Marshall, 'Is a Judicial Tribunal, either of the Last Resort or Otherwise, bound by the Principles Laid Down by itself on Previous Occasions?', in *Papers Read before the Juridical Society 1858-1863*, London, 1863, vol.2, 331, 336-337. See also Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law*, London, 1896, 305.

[59] See, generally, Ram, *Science*, 98; Pollock, *First Book,* 322-323; Allen, 'Precedent', 231n. A modern parallel is provided by the Masters of the Senior Courts: in *Coral Reef Ltd v Silverbond Enterprises Ltd* [2016] EWHC 874 (Ch) at [51], Chief Master Marsh held that the jurisdiction of Masters on High Court business is co-ordinate with first instance judges, and that Masters are not bound by a decision of such a judge if they are convinced that it is wrong. Whilst on appeal David Foxton QC (sitting as a Deputy High Court Judge) disagreed with the Chief Master in that respect ([2018] 4 WLR 104 at [61]-[70] (obiter)), subsequent Masters have continued to assert their co-ordinate status: see Kwan Ho Lau, 'Precedent within the High Court', 40 *Legal Studies* (2020), 397 at 400-401.

[60] Reported at (amongst other places) (1659) 1 Lev. 4 (King's Bench) and (1662) 1 Sid. 109 (Exchequer Chamber).

issue, and the case went to the Exchequer Chamber where it was extensively argued before all the judges of the superior common law courts, who concluded that the mercer's claim failed, thereby creating an exception to the general rule that a husband was liable for contracts entered into by his wife. Relevant for current purposes is the elaborate judgment of Sir Orlando Bridgman CJ in the Exchequer Chamber,[61] during the course of which he had to consider one of the first nisi prius cases ever to be reported, *Sir Nicholas Poines' Case*.[62] That case involved the trial, before Dyer CJ at Guildhall, of a claim by a mercer against a husband for material ordered without his permission by his wife. Even though the evidence showed that the husband had agreed to pay the tailor who made the dress from the material, the jury said that they would have found against the mercer, a view which Dyer found to be very doubtful. It was argued on behalf of the mercer in *Manby v Scott* that, on the strength of Dyer's doubts, the practice at nisi prius was that the mercer would recover in such a case. Bridgman rejected that argument on (amongst others) the following basis:

> … I must distinguish between the practice of Guildhall and Westminster Hall, even in those times. It was indeed the practice of Guildhall for some time, where it was made *quæstio facti, non juris*; and the practice in some cases became a grievance, whilst the business was bandied between the wife, the mercer, and the jury (who were tradesmen). But was there in that time in Westminster Hall any judgment upon demurrer, or special verdict, or any other proceeding, where the point of law came judicially before them? I know it in my own experience, in that time diverse were advised to procure special verdicts, or to demur upon the evidence, that the matter might be determined at Westminster Hall; so little did the authority of the practice at Guildhall prevail to settle the law in the point: and this very special verdict was found in that time.[63]

Thus, Bridgman rejected the authority of the nisi prius cases in favour of mercers because the fellow tradesmen on the juries were favourably disposed towards them, and defendants were advised to get the case heard by the court in banc, either following a special verdict or on a demurrer, so that the issues of law could be fully discussed and properly determined. For these very practical reasons, the position at nisi prius was disregarded by the courts at Westminster Hall.

Another early example of the lack of weight to be accorded to nisi prius decisions arose at the trial at the end of the seventeenth century of a Quaker for debts owed by his wife before their marriage. The defendant's counsel argued that there was no marriage between them, as it was not conducted according to the rites of the Anglican Church. Sir Matthew Hale CJ said that he was not willing to bastardize their children by a mere nisi prius decision, and directed the jury to find a special verdict so that the matter could be determined by the full court.[64]

As nisi prius cases began to be cited to judges during the eighteenth century, whilst some were regarded as authorities,[65] there developed a practice of treating such cases as having less weight

[61] Separately reported at (1662) O. Bridg. 229.

[62] (1563) 2 Dyer 234b.

[63] Supra, 251-252.

[64] Gilbert Burnett, *The Lives of Sir Matthew Hale and John Earl of Rochester*, London, 1820, 82.

[65] For example, *Horseman v Gibson* (1716) Fort. 32, 36; *Griffin v Scott* (1726) 2 Ld. Raym. 1424, 1426-1427 per Fortescue J; *Dorvill v Aynesworth* (1727) 1 Barn. K.B. 28, 29. See also *Lincoln v Parr* (1670) 2 Keb. 781.

than cases decided in banc,[66] which was justified on the grounds that insufficient consideration would have been given to the legal point in issue,[67] or that it was impossible to determine from general verdicts of the jury what legal principle had been decided.[68] Lord Mansfield CJ explained that, whenever a question of law arose before him at nisi prius, he would propose a case for determination by the court in banc, or grant one when asked for by counsel, to avoid the legal issue being blurred by the factual issues in the case.[69]

Judicial attitudes hardened further as more nisi prius cases came to be cited following the commencement of their regular reporting. There are numerous instances of judges rejecting the use of nisi prius cases, often in vivid terms,[70] and even more examples of judges disregarding or doubting decisions because they were "only" nisi prius cases.[71] Comments of even the most eminent of judges were not followed because they were delivered at nisi prius,[72] unless they had been subsequently acted on by judges sitting in banc.[73]

This approach is illustrated by the negative comments made about the authority of nisi prius rulings by all of the Chief Justices of the King's Bench from the mid-eighteenth to the mid-nineteenth centuries;[74] and it was no different in the other common law courts. In the Common Pleas, Best J said in 1820 that: 'I think it would have been much better for the law, if the crude opinions of judges at nisi prius had never been allowed to be quoted to those who are sitting in banc.'[75] Four years later the same judge, having been appointed Chief Justice, said of a nisi prius case cited to him: 'I wish such cases were never cited. It is not right to repeat opinions

[66] See, for example, *Coker v Farewell* (1729) 2 P. Wms. 563, 564-565 and *Montgomery v Attorney-General* (1742) 9 Mod. 388, 389 per Lord Hardwicke C, holding that trials at Bar were of greater authoritative weight than trials at nisi prius. See also *Smith v Richardson* (1737) Willes 20, 25; *Ellis v Smith* (1753) Dick. 225, 230 per Willes CJ; *Walton v Kersop* (1767) 2 Wils. K.B. 354, 355 per Wilmot CJ; *Birch v Wright* (1786) 1 Term Rep. 378, 387 per Buller J.

[67] *R v Bray* (1736) Cas t. Hardw. 358, 359 per Lord Hardwicke CJ.

[68] *Vallezjo v Wheeler* (1774) Lofft 631, 643 per Lord Mansfield CJ.

[69] *Milles v Fletcher* (1779) 1 Doug. K.B. 231, 232.

[70] See, for example, *Doe d James v Staunton* (1819) 1 Chitty 118, 121 per Bayley J (*arguendo*); *Cotton v Thurland* (1793) 5 Term Rep. 405, 409 per Lord Kenyon CJ; *Hollis v Claridge* (1813) 4 Taunt. 807, 810 per Gibbs J; *Hughes v Done* (1841) 1 Q.B. 294, 301 per Lord Denman CJ; *Mennie v Blake* (1856) 6 E. & B. 842, 848 per Coleridge J.

[71] For example, *White v Ledwick* (1785) 4 Doug. K.B. 247, 250 per Buller J; *Ball v Herbert* (1789) 3 Term Rep. 253, 261-262 per Lord Kenyon CJ; *Beale v Thompson* (1803) 3 Bos. & P. 405, 420 per Chambre J; *Nichols v Clent* (1817) 3 Price 547, 569 per Graham B; *Hawes v Watson* (1824) 2 L.J. Rep. (o.s.) 83, 85 per Best J; *Fromont v Coupland* (1824) 2 Bing. 170, 172 per Best CJ; *Garland v Carlisle* (1833) 2 Cr. & M. 31, 66 per Parke J; *Balme v Hutton* (1833) 9 Bing. 471, 510 per Littledale J; *Lumley v Gye* (1853) 2 E. & B. 216, 243 per Wightman J; *Astley v Johnson* (1860) 5 H. & N. 137, 142 per Pollock CB; *Osborn v Gillett* (1872-73) L.R. 8 Ex. 88, 96 per Bramwell B; *R v Collins* (1876) 1 Q.B.D. 336, 339 per Blackburn J; *Robb v Green* [1895] 2 QB 1, 13 per Hawkins J.

[72] For example, in *Steel v Houghton* (1788) 1 H. Bl. 51, Lord Loughborough CJ (at 53) and Wilson J (at 63) did not follow a dictum of Sir Matthew Hale delivered at Norfolk assizes in 1688, cited in Giles Duncombe, *Trials per Pais*, 8th ed., vol.2, London, 1766, 534: see also *Church v Brown* (1808) 15 Ves. Jun. 258, 262 per Lord Eldon C; *Gill v Cubitt* (1824) 3 B. & C. 466, 471 per Abbott CJ.

[73] *Parton v Williams* (1820) 3 B. & Ad. 330, 341 per Best J; *Ward v Const* (1830) 10 B. & C. 635, 653-654 per Parke J.

[74] *Smith v Bromley* (1760) 2 Doug. K.B. 696n, 697 per Lord Mansfield CJ; *Goodright d Balch v Rich* (1797) 7 Term Rep. 327, 334 per Lord Kenyon CJ; *Cook* v *Cox* (1814) 3 M. & S. 110, 116 per Lord Ellenborough CJ; *Austin v Debnam* (1824) 3 B. & C. 139, 143 per Abbott CJ; *Betts v Gibbins* (1834) 2 A. & E. 57, 75 per Lord Denman CJ.

[75] *Rowe v Young* (1820) 2 Brod. & Bing. 165, 185.

hastily formed and delivered in the hurry of trial, and the practice of referring to them has occasioned all the confusion that the enemies of our law object to.'[76] As for the Exchequer, the Barons observed in 1819 that they permitted citation of nisi prius rulings with much reluctance, on questions brought before the court for more deliberate consideration, however high the authority cited might stand in the judges' estimation; the court expressed its desire that the citing of such cases might be discontinued, on occasions requiring more elaborate research.[77]

Although reports of nisi prius cases have been criticised on the basis that it was often difficult to determine whether the report was quoting words of advice to the jury or words of absolute direction,[78] the low regard in which nisi prius cases were held generally had little to do with how well they were reported.[79] Even the citation of a case reported by John Campbell, generally regarded as the best of the nisi prius reporters,[80] drew a typically acidic comment from Gibbs CJ: 'a sad use is made of these nisi prius cases.'[81]

The lack of authority of these cases is demonstrated by the fact that nisi prius judges never regarded themselves as bound by decisions of other trial judges on a point of law:[82] as Grose J remarked: 'as Judges of Nisi Prius we do not affect to alter or make new law'.[83] Even two or more cases decided at nisi prius did not settle a point, so that it remained possible for a different result to occur at a further trial on the same issue. Thus, in *Chorley v Bolcot*[84] it was noted that the inability of a physician to maintain an action for his fees had been 'ruled several times at Nisi Prius', yet a successful claim for such fees was made at a subsequent trial at the York assizes (although this was subsequently overturned by the court in banc). By contrast, a

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[76] *Johnson v Lawson* (1824) 2 Bing. 86, 90. See also *Marsh v Smith, The Times,* 6 Dec. 1824.

[77] *Rooth v Quin and Janney* (1819) 7 Price 193, 201n. A Chancery judge summarised the common law treatment of nisi prius rulings as follows: 'Nisi prius reports are generally to be received with only a limited degree of value in courts of law': *Arcedeckne v Kelk* (1859) 32 L.T. 331, 332 per Stuart V-C.

[78] *Clouston & Co. Ltd v Corry* [1906] AC 122, 128 per Lord James of Hereford. This was a problem with law reports in general in the days before the judges approved manuscripts of their judgments before publication, where it is possible that a reported remark was intended to be a controversial comment or an inquiry, rather than a judgment for posterity: see Wallace, *The Reporters*, 29-30. When a passing remark was cited to him in *Miller v Race* (1758) 1 Burr. 452, Lord Mansfield CJ said (at 457): 'It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the Bar or Bench; and mistake their meaning.'

[79] Anon., 'Railway Litigation: The Nisi Prius Sittings', 33 *Legal Observer* (1846), 169.

[80] See, for example, *Readhead v Midland Railway Co* (1866-67) L.R. 2 Q.B. 412, 438 per Blackburn J. Peter Luther has pointed out that praise for Campbell's reports has tended to come from judges who were likely to be favourably disposed towards him: Peter Luther, 'Campbell, Espinasse and the Sailors: Text and Context in the Common Law', 19 *Legal Studies* (1999), 526 at 535. Wallace said that the brevity with which Campbell reported decisions made them unsatisfactory and dangerous to rely on as precedents: Wallace, *The Reporters*, 542n. See also the criticism of a case reported by Campbell, on the same grounds, by Maule J in *Overton v Freeman* (1852) 11 C.B. 867, 872.

[81] *Tomkins v Willshear* (1814) 5 Taunt. 431.

[82] For example, *Lewis v Sapio* (1827) Mood. & M. 39. William Cornish equates the possibility of a court in banc refusing to accept a precedent set by the same court with the possibility of a judgment given at nisi prius not necessarily being followed in a later court of the same level (W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *Oxford History of the Laws of England vol.XI: 1820-1914*, Oxford, 2010, 49); but that does not pay sufficient regard to the differences in how those cases were treated as precedents by a co-ordinate court.

[83] *R v The Inhabitants of Eriswell* (1790) 3 Term Rep. 707, 711.

[84] (1791) 4 Term Rep. 317.

judgment delivered in banc took precedence over a ruling at nisi prius on the same point, whatever the reputation or seniority of the trial judge.[85]

The reluctance to follow nisi prius decisions extended to the trial judge himself. It was not uncommon for the judge trying a case to express a different view of the law as a member of the court hearing the same case in banc;[86] and Maule J once found himself in the unusual position of wishing to overrule his own decision at nisi prius when it returned to Westminster Hall, even though the rest of the court considered it to be correct.[87] Lord Kenyon CJ refused to follow one of his own nisi prius decisions 'since I do not consider myself bound to the letter of what I then might say';[88] and Buller J said of Lord Mansfield CJ that 'no Judge ever sat here more ready than he was to correct an opinion suddenly given at Nisi Prius.'[89]

Constraints on the proper treatment of legal issues at nisi prius

It is clear from the above discussion that the low standing of nisi prius cases was justified, not on the basis of precedent, but as a matter of pragmatism. A number of features of the nisi prius process operated to preclude the rulings of the judges at trial from having any weight as authoritative statements of the law.

Time constraints

The principal practical restriction was the need to get through heavy caseloads in a limited time. Compared to the leisurely progress of cases heard at Westminster Hall, by the mid-seventeenth century the large amount of nisi prius business to be dealt with meant that trials were conducted in great haste.[90] J.S. Cockburn gives an example of an assize in 1650 having to deal with at least twenty-five cases in a working day of probably less than twelve hours.[91] Most cases would last less than half an hour, with a four-hour trial noted in 1693 as a rarity.[92]

Although business was generally transacted at a slower pace in the eighteenth and nineteenth centuries, several cases would regularly be heard each day;[93] for example, Ryder J tried thirty-

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[85] *Lickbarrow v Mason* (1787) 2 Term Rep 63, 74 per Buller J; *Doe d Martin v Watts* (1797) 7 Term Rep. 83, 85 per Lord Kenyon CJ; *Mavor v Pyne* (1826) 4 L.J. Rep. (o.s.) 36, 37 per Best CJ; *Fisher v Prowse* (1862) 2 B. & S. 770, 782 per Blackburn J; *Twycross v Grant* (1877) 2 C.P.D. 469, 487 per Lord Coleridge CJ. See also *Househill Coal and Iron Co v Neilson* (1843) 9 Cl. & Fin. 788, 809 per Lord Brougham. Although the authority of a decision in banc was reduced if the judges were not unanimous (as to which, see *Jones v Sparrow* (1793) 5 Term Rep. 257 per Lord Kenyon CJ and *Smith v Alsop* (1824) M'Cle. 622, 632 per Hullock B), there is no reported case considering whether such a decision would have taken precedence over a nisi prius ruling.

[86] For example, *Horton v Coggs* (1691) 3 Lev. 299; *Moore v Wilson* (1787) 1 Term Rep. 659; *Young v Bairner* (1794) 1 Esp. 103; *Buchanan v Rucker* (1807) 1 Camp. 63 (nisi prius), (1808) 9 East 192 (in banc); *Wells v Horton* (1826) 2 C. & P. 383; *Batthews v Galindo* (1828) 4 Bing. N.C. 610; *Kerby v Harding* (1851) 6 Ex. 234.

[87] *Martindale v Falkner* (1846) 2 C.B. 706, 718.

[88] Cited in a review of vol.2 of Campbell's reports in 1 *Legal Review* (1813), 326 at 332.

[89] *Lickbarrow v Mason,* supra, 74. See also *Warre v Calvert* (1837) 1 Jur. Rep. (o.s.) 450, 452 per Lord Denman CJ.

[90] Cockburn, *Assizes*, 136 and 143.

[91] Ibid., 137.

[92] Thomas Rokeby, *The Diary of Mr Justice Rokeby*, London, 1887, 25.

[93] See Appendix 2 for an analysis of the duration of trials from official statistics collected from 1835 onwards. Another reason for the shortness of trials was the strict rules of evidence, which led to many plaintiffs being

eight cases in an eight-day period in June/July 1755.[94] A long assize case heard in 1740 required the judge to be notified so that he might 'take a day extraordinary';[95] a case a few years earlier was specially noted as having taken fourteen hours to be tried;[96] and another trial in 1787 was notable for having lasted eleven hours.[97]

In line with the increase in civil litigation generally, nisi prius cause lists became heavier during the nineteenth century. Lord Ellenborough CJ once had a list at Guildhall of 588 causes entered for trial and under his successor Lord Tenterden CJ, it increased to between 600 and 800, having scarcely ever reached 200 in Lord Mansfield CJ's time and between 200 and 300 in Lord Kenyon CJ's time.[98] But throughout the periods in which these Chief Justices sat, trial judges faced a substantial workload. Kenyon was reported to have often decided twenty to twenty-five cases a day 'to the entire satisfaction of the parties'[99] and he and Buller J were reported to have disposed 'with ease' of twenty-six cases in a day.[100] Ellenborough was said to have once disposed of eighteen defended causes in a single day,[101] and in 1812 he conducted, on average, at least eleven trials per day.[102] Lord Denman CJ's trial notebooks record that he tried thirty-six cases in six days in February 1834.[103] The speed at which business was dispatched is illustrated by a paper delivered to the Juridical Society in 1855, in which a busy nisi prius practitioner estimated that juries retired to consider their verdicts in only one in twenty cases.[104]

As a result, rulings on legal points were intended to enable the swift dispatch of the particular case rather than to be authoritative decisions for future cases. Judges would avoid initiating

nonsuited for failing to prove their case, and many defendants being unable to mount a defence because (until 1851) they were not entitled to give evidence on their own behalf: Sir John Hollams, *Jottings of an Old Solicitor*, London, 1906, 13.

[94] Michael Lobban, 'Contractual Fraud in Law and Equity: c1750-c1850', 17 *Oxford Journal of Legal Studies* (1997), 441 at 462n.

[95] *Frost v Whadcock* (1740) Barnes 447.

[96] *Gwavas v Kelynack* (1728) Bunb. 256, 258.

[97] *Mountain v Bennet* (1787) 1 Cox Eq. Cas. 353, 354. A note to the report of the trial at Bar in *Earl of Bath v Bathersea* (1694) 5 Mod. 9 stated that: 'There was a verdict for the plaintiff in this cause after a trial from nine o'clock in the morning till nine the next day; and the Judges sat up all night long.'

[98] William Townsend, *The Lives of Twelve Eminent Judges of the Last and Present Century*, London, 1846, vol.2, 260.

[99] George Kenyon, *The Life of Lloyd, First Lord Kenyon*, London, 1873, 391. See also James Oldham, *Case Notes of Sir Soulden Lawrence 1787-1800*, London, 2011, xlviii.

[100] Peter Campbell Scarlett, *A Memoir of the Right Honourable James, First Lord Abinger*, London, 1877, 62.

[101] Anon. (attr. Lord Brougham), 'Mr Baron Garrow', 1 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* (1845), 318 at 326.

[102] Oldham, 'Law-Making', 227.

[103] Lobban, *Contractual Fraud*, 462n.

[104] W.M. Best, 'On the Policy of the Rule of English Law, which exacts Unanimity in the Verdicts of Juries', in *Papers Read before the Juridical Society 1855-1858*, London, 1858, 16. Juries would be dissuaded from taking too much time to deliberate by being denied 'meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed' (Blackstone, *Commentaries*, vol.3, 375), although the judge would usually vary this practice where the trial was very long (Cary, *Practical Treatise*, 103). The shortness of deliberation was also put down to the absence of adequate compensation for the juryman's service: 'What wonder that they will cut the knot rather than take pains to untie it, and astonish the spectator by jumping to a conclusion in five minutes upon evidence which a Parke or a Tindal would take days to consider': Joseph Brown QC, *The Dark Side of Trial by Jury*, London, 1859, 19.

legal debate[105] and would seek to curtail long legal arguments, encouraging counsel to accept their immediate impression of the law;[106] and counsel would often facilitate this by immediately deferring to the judge's opinion on legal issues without undertaking substantial argument.[107] As James Scarlett (later Lord Abinger) recalled from the start of his practice in the late 1790s: 'It was not the fashion of the Bar to make long speeches, or to occupy any time in resisting the opinion of the judge once declared.'[108]

The cursory nature of proceedings is further illustrated by the fact that, due to the need to keep the same jury throughout the trial, the judge was unable to adjourn proceedings in order to deal with any unexpected turn of events,[109] which would have been, as today, a common feature of trials, particularly where there was no obligation on a party to give advance notice of their witnesses:[110] in such a situation, the disappointed party was left to seek a new trial.[111] Similarly, where any case of particular complexity was due to be tried at nisi prius, counsel and the judge would often collude in having the case referred to arbitration, so as to take the case out of the cause list.[112]

The speed at which nisi prius trials were conducted was not generally considered to be undesirable, particularly when compared to the slow pace at which proceedings in Chancery were conducted: in 1847 Lord Brougham wished that the Masters would sit 'not *de die in diem* merely, but *de hora in horam*, as they do at Nisi Prius.'[113]

Lack of focus on legal principles

As the practice of referring difficult cases to arbitration shows, the trial phase of the civil litigation process was not well suited to determining questions of law: that was the province of the court in banc which had delegated the task of finding the facts to the nisi prius court. As C.W. Francis put it: 'The writ of nisi prius was intended only as a partial delegation. The nisi prius judge did not have original jurisdiction, nor was it formally envisaged that he would usurp

[105] Lord Kenyon CJ apparently never brought a book with him into a nisi prius court to refer to, a common practice amongst the other judges: Townsend, *Twelve Eminent Judges*, vol.1, 114.

[106] Anon., 'The Divisional Court Deposed', 89 *Law Times* (1890), 302 at 303.

[107] Henry, Lord Brougham, *Historical Sketches of Statesmen who Flourished in the time of George III*, London, 1860, vol.2, 186; Sir John Taylor Coleridge, 'My Recollections of the Circuit', 9 *The American Law Register* (1861), 257 at 260. Lord Mansfield would signify his impatience and his desire to keep cases moving by reading a newspaper or writing personal letters during the conduct of jury trials: Oldham, *English Common Law*, 14.

[108] Scarlett, *Lord Abinger*, 49. See also ibid., 79.

[109] *Wootton v Russell* (1839) 2 Jur. Rep. (o.s.) 776; Van Vechten Veeder, 'A Century of Judicature, 1800-1900' in John Henry Wigmore, Ernst Freund and William Ephraim Mikell, eds., *Select Essays in Anglo-American Legal History*, Boston, 1907, vol.1, 731. Warren Swain cites *Brough v Whitmore* (1791) 4 Term Rep. 206 as an example of a trial halted to enable investigation to be made of a case raised by a member of the jury (Warren Swain, *The Law of Contract 1670-1870*, Cambridge, 2015, 131), but the adjournment was in fact granted when the case returned to the court in banc.

[110] *Preston v Carr* (1826) 1 Y. & J. 175, 179 per Garrow B; *Bain v R Co* (1850) 3 H.L.Cas. 1, 16 per Lord Brougham; *Nadin v Bassett* (1884) 25 Ch.D. 21, 24 per Kay J.

[111] *Bright v Eynon* (1757) 1 Burr. 390, 393 per Lord Mansfield CJ. For an example of a new trial ordered because a party had been taken by surprise at trial, see *Wilkes v Hopkins* (1845) 1 C.B. 737. A statutory power to adjourn trials was provided by s.19 of the Common Law Procedure Act 1854.

[112] See *Taff Vale Rly Co v Nixon* (1847) 1 H.L. Cas. 111, 125-126 per Lord Campbell and 127 per Lord Brougham.

[113] Ibid.

the role of the court in banc at Westminster as the arbiter of questions of law.'[114]

As a practical matter, the focus of nisi prius trials would generally be on the need to identify the issues on which the jury's verdict was required, and the judge could avoid having to rule on a point of law by putting the question to be submitted to the jury in broad terms, without seeking to separate out questions of law and fact. This practice was said in 1839 to be a growing trend, and to result in almost every case depending on the view taken of it by the jury, to the detriment of legal certainty;[115] and eighty years earlier, Lord Mansfield CJ explained that orders for new trials were required because '[m]ost general verdicts include legal consequences, as well as propositions of fact: in drawing these consequences, the jury may mistake, and infer directly contrary to law.'[116]

Even where this tendency to concentrate on the factual matters in issue did not lead to legal issues being subsumed within factual issues, the law would often need to be greatly simplified so that it could be more easily understood by the jury. In this aim, judges would often be abetted by counsel, who had learnt that verdicts were more likely to be obtained by avoiding displays of legal learning and appearing as plain men like the jury.[117] As Henry Bliss QC, in his 1863 lectures on how to conduct cases at nisi prius, said: 'If you would crush your opponent, it is by your facts that you must crush him. At Nisi Prius, an ounce of fact is worth a ton's weight of law.'[118]

Accordingly, good nisi prius advocates - known as 'verdict-getters'[119] - did not require a deep knowledge of the law. One of the greatest, William Garrow, was said to be ignorant of the law and to have made no pretence to know any;[120] Isaac Espinasse said that a fund of good humour was more important to a nisi prius advocate than legal knowledge and precision;[121] and Lord Eldon remarked that eminence at nisi prius could be obtained '[b]y force of a strong natural understanding … without knowing much law.'[122] In the nineteenth century, the phrase *nisi prius counsel* became a popular description for a blustering and sophistic orator,[123] the antithesis of

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[114] C.W. Francis, 'The Structure of Judicial Administration and the Development of Contract Law in Seventeenth-Century England', 83 *Columbia Law Review* (1983), 35 at 41.

[115] Anon., 3 *Jurist (o.s.)* (1839), 1089.

[116] *Bright v Eynon,* supra, 393. See also Mansfield's statement in *R v Dean of St Asaph* (1783) 21 St. Tr. 847, 1039, that the jury had to be trusted to separate the issues of law and fact and to concentrate its judgment on the former.

[117] See the description of Sir John Holker QC in W.D.I. Foulkes, *A Generation of Judges, by their Reporter*, London, 1886, 123. See also Anon., 'Trial by Jury', 7 *Law Magazine (o.s.)* (1859), 318 at 324: '… forensic talent is debased by the necessity imposed on counsel of gaining their verdicts through the understandings and prejudices of imperfectly educated men, and these generally of a low intellectual standard.'

[118] Henry Bliss QC, *On Practice at Nisi Prius*, London, 1864, 61.

[119] Anon, 'Scarlett at Nisi Prius', 4 *Law Times* (1844), 187.

[120] Anon., 'Mr Baron Garrow', 319. Lord Campbell said of Garrow that 'He was wholly uneducated, and had never read anything but a brief and a newspaper': Hardcastle, *Life*, vol.1, 198. See also Lord Kingsdown, *Recollections of His Life at the Bar and in Parliament*, London, 1868, 39-40. Perhaps for this reason, Garrow was apparently held in low esteem by the Bar: Scarlett, *Lord Abinger*, 87.

[121] Isaac Espinasse, 'My Contemporaries: from the Note-Book of a Retired Barrister', 7 *Fraser's Magazine* (1833), 48-50.

[122] Horace Twiss, *The Public and Private Life of Lord Chancellor Eldon*, 3rd ed., London, 1846, vol.1, 222.

[123] In *As Some Day It May Happen*, an aria from Gilbert and Sullivan's comic opera *The Mikado* (1885), Ko-Ko, the Lord High Executioner, includes 'that Nisi Prius nuisance … the Judicial humourist' on his 'little list'.

a learned lawyer.[124] However, as James Scarlett's remark referred to above suggests, the general impression of nisi prius advocates may have been the result of a deliberate practice not to delay proceedings or to risk alienating the judge or losing the jury by entering into prolonged debate on legal points.

The distinction between fact and law would be further blurred by the practice of defendants pleading generally to the claim,[125] which enabled them simply to deny the allegations without having to identify in advance what their defence would be. Consequently, when the matter came on for trial, the issue for decision would not have been raised on the pleadings, and there was no obligation on the defendant to disclose whether they would be contesting the action on the facts or the law or a mixture of the two, until the close of the plaintiff's case.

The practice of pleading to the general issue placed a particularly heavy onus on the judge, who was required to extract the issue from the proofs and allegations before him, correctly sever the law from the facts, and present the facts in issue in a coherent way to the jury for their consideration. In the hurry of business at nisi prius, this series of tasks would leave the judge with relatively little time to consider the law.[126] Moreover, the general issue enabled the defendant to take the plaintiff - and the judge - by surprise as to the defence they would run at trial, thereby making it all the more difficult for the judge to deal properly with any legal issue which might arise when the grounds of the defence finally became known. This element of surprise was exacerbated by the absence of any obligation to inform the other side in advance whether a witness was being called, as referred to above.

The judge's dilemma was expressed in the following terms by Henry Brougham during the course of his 1828 speech on civil law reform, the longest speech in the history of the House of Commons:

> Now, justice is embarrassed by the disingenuousness of conflicting parties; justice wants the cases of both to be fully and early stated; but both parties take care to inform each other as little as possible, and as late as possible, of their respective merits. One tells as much of his case as he thinks good for the furtherance of his claim, and the frustration of the enemy's - so does the other, only as much of his answer as may help him, without aiding his adversary; and the judge is oftentimes left to guess at the truth in the trick and conflict of the two.[127]

In these circumstances, it is not surprising that Best CJ told a Royal Commission in 1828 that:

> A nisi prius Judge can neither think for himself, or have the benefit of the thoughts of others before he is called on to act … On complicated facts, and on contradictory testimony, he must give to the Jury his first impression, an impression made in the noise of a crowded court, and before he has had time to detect any fallacy which the ingenuity of counsel, who has an opportunity of considering the mode of putting his case most favourable to his client before he came into court may have presented.[128]

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[124] Laetitia-Matilda Hawkins, *Anecdotes, Biographical Sketches and Memoirs*, London, 1822, vol.1, 56.

[125] Baker, *Introduction*, 96-98; W.S. Holdsworth, 'The New Rules of Pleading of the Hilary Term, 1834', 1 *Cambridge Law Journal* (1923), 261 at 266-270.

[126] *Second Report of HM Commissioners on the Practice and Proceedings of the Superior Courts of Common Law*, C.123, 1830, 46.

[127] Series 2, vol.18, col. 188, 7 Feb. 1828 (HC).

[128] *Second Report*, supra, Appx.(B), 47.

Further, a failure to maintain a sharp demarcation between fact and law would make it difficult to determine from a general verdict of the jury what legal principle had been decided by the case,[129] particularly if the report of the ruling made it impossible to distinguish between the judge giving words of advice to the jury or the judge giving them an absolute direction as to the law.

The courtroom experience

The judge's ability to think deeply about difficult legal points arising in the course of a trial would also have been affected by his surroundings, in particular the physical state of the courtroom.[130]

The assize process meant that provincial justice was administered in periodic bursts rather than continuously, and as a result there was no need for the construction of buildings which served exclusively as courthouses. This meant that, with the exception of the Old Bailey in London, the accommodation of trials in England was not the only, or even usually the primary, function of the buildings used for that purpose. Accordingly, nisi prius business, even on the comparatively civilized Home Circuit, was often conducted in ancient and unsuitable buildings, insanitary and noisome, freezing in winter and boiling in summer.[131]

By the late sixteenth century, the practice was established of criminal and civil cases being dealt with by separate assize judges. This required two separate court areas, and often only makeshift solutions were provided to meet this new demand: for example, until the nineteenth century, in every assize town on the Oxford Circuit the two courts were held in the same room, without division or partition, so that one judge could see the other.[132] The shortcomings of holding two courts in the same hall was illustrated by the case of the new courts built in Gloucester between 1814 and 1816, which was said to have been precipitated by the judge in a murder trial taking exception to a juror laughing at a joke made by a barrister in the nisi prius court at the far end of the room.[133]

The courthouses could also be downright dangerous. At Nottingham in 1724, the floor of the County Hall collapsed as the public crowded in, causing general panic and several injuries. Threatened with a fine by the judge, the county promised to rebuild or at least thoroughly repair the hall, but it still had a remarkably decrepit appearance in 1742.[134] More seriously, during the Worcester assizes held in 1757 several chimney stacks collapsed into the hall during the judge's summing up, killing a number of people, including the judge's clerk, with the five counsel then in court saving themselves by sheltering under a stout table.[135]

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[129] See Lord Mansfield CJ's judgments in *Bright v Eynon,* supra*,* 393 and *Vallezjo v Wheeler,* supra*,* 643.

[130] See, generally, Clare Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914*, Aldershot, 2003.

[131] Cockburn, *Assizes*, 53-54, 66-67.

[132] Anon., 'Reminiscences of the Oxford Circuit', 2 *Jurist (n.s.)* (1856), 147.

[133] John Noake, *Notes and Queries for Worcestershire*, London, 1856, 279.

[134] Ken Brand, *The Shire Hall and Old County Goal, Nottingham*, Nottingham, 1989, 2.

[135] John Wilmot, *Memoirs of the Life of Sir John Eardley Wilmot*, 2nd ed., London, 1802, 19-20. Of those five counsel, four became judges and the fifth a King's Counsel.

Quite apart from the state of the courthouses, the tradition of 'open justice' practised in the assize courts meant that the rooms were often crowded with members of the public, eager to be entertained by the proceedings. The atmosphere of many courts would accordingly have appeared, by modern standards, disorderly, even chaotic. James Woodforde, visiting the Oxford assizes as an undergraduate in 1761, described how, in trying to get a good view, he 'jumped from two men's shoulders and leaped upon the Heads of several men and then scrambled into the Prisoners Place where the Judge said I must not stay.'[136]

The noise of the crowds, allied to the poor acoustics of many courthouses, would have challenged the concentration of the judge faced with having to consider difficult legal points arising during a trial. Lord Mansfield adjourned at trial at Westminster Hall in 1783 because it was Lord Mayor's Day, observing to counsel that 'we shall have such a noise presently you will not be able to be heard.'[137] It was not only members of the public who would be to blame: while trying a case on the Northern Circuit, Bayley J had cause to rebuke counsel in the following terms: 'Mr Gray, if ever you arrive here, which some of these days I hope you will do, you will know the inconvenience of counsel talking while you are summing up.'[138]

The letters and comments pages of the nineteenth century legal journals regularly contained criticisms of the country's assize courthouses.[139] Opening the Summer assizes held at Croydon on 3 August 1801, Grose J described the courthouse as 'the worst he had ever been in; it was no better than a barn, and in every respect unlike a Court of Justice.'[140] The sitting of the Kent assize at Maidstone on 15 March 1803 was adjourned to another venue because of the intolerable smell of the newly-painted court.[141] Other complaints included inadequate lighting, cramped retiring rooms, and desks of fixed height that were either too high for short judges or too low for tall judges.

Perhaps the most notorious example of the inadequacy of a provincial courthouse was the Corn Exchange at Guildford, built in 1818 and used as a venue for the Summer assize. The building faced the busy high street, and a second public thoroughfare ran at right angles under its portico and past the side of the courtroom at the back; the courtroom was separated from the main market area by arched openings with railings and gates which were left open at assize time; and the resulting noise made it quite unfit for purpose as a court. Following a long series of complaints from its users, at the Summer assize of 1860 Blackburn J ordered the public to be excluded because he was unable to hear what was going on. The High Sheriff of Surrey, William John Evelyn, declared they should be let back in as he considered this an arbitrary infringement of civil liberties, and he was fined £500 for contempt of court.[142]

In addition to the noise generated in the public gallery and at the barristers' table, the judge would often have been required to deal with the distractions caused by the practice of local dignitaries being permitted or invited to sit alongside him. The assizes would, for many towns, be the highlight of their social calendar, and genteel visitors of both sexes as well as the county

[136] John Beresford, ed., *The Diary of a Country Parson 1758-1802*, Oxford, 1935, repr., Norwich, 1999, 5.

[137] Oldham, *English Common Law*, 43.

[138] Polson, *Law and Lawyers*, vol.2, 359.

[139] See, for example, 21 *Legal Observer* (1841), 375-376; 40 *Law Times* (1865), 508; 64 *Law Times* (1878), 431.

[140] *Morning Post*, 5 Aug. 1801, 3 col.2.

[141] *Morning Post*, 17 Mar. 1803, 4 col.1.

[142] William Ballantine, *Some Experiences of a Barrister's Life*, London, 1882, vol.2, 196.

magistrates hoped to find a space beside the judge on the bench, perhaps assisted by the payment of a bribe to the doorkeepers. A local attorney described in verse the sight of a number of ladies on the bench during a sitting of the Wiltshire assizes in the early nineteenth century:

> Beset by elegance and grace,
> The Judge now takes his destin'd place;
> He scarcely can perform his duty,
> For lack of room – fill'd up by beauty.[143]

As for Westminster Hall, whilst, as Lord Mansfield's comment referred to above illustrates, the presence of multiple courts meant that the courts in banc could also be noisy places, at least the judges sitting there did not suffer from the same distractions that arose at assize-time.

Inadequate recourse to law books

Further important constraints, where nisi prius business was conducted on circuit, were the absence of adequate library facilities and the inability of counsel to carry around bulky law reports when riding on circuit, even if they had been sufficiently briefed beforehand so as to be aware of the relevant legal principles. This would have led either to relevant authorities not being cited during the trial, or to reliance on potentially inaccurate or incomplete digests and abridgments. Judges in that situation were realistically not expected to recollect every decided case, and it was regarded as sufficient for them to act in accordance with general principles.[144]

Even for nisi prius cases tried in Westminster Hall or Guildhall, problems arose due to the lack of recourse to law books: an 1842 report from the Select Committee on Courts of Law and Equity stated that the absence of a law library at Westminster Hall for judges or barristers was regarded as a source of great inconvenience.[145] Moreover, both Westminster Hall and Guildhall were beyond walking distance from the barristers' chambers, and evidence was given to the Select Committee of barristers arriving for court with several hackney coach loads of books.[146]

The judge as note-taker

Another practical matter which militated against a considered judicial view of the law at nisi prius was that the judge's attention would often be diverted from more important considerations by the need for him to take full notes of the evidence, which would be relied upon as the only record of the facts should the case be considered further after trial.[147] Moreover, all such notes

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[143] George Butt, *A Peep at the Wiltshire Assizes*, Salisbury, 1819, 42. Whilst the trial of Crown cases proved the bigger draw for the general populace, many of the more refined visitors – especially women - were attracted to civil litigation: for example, the Quaker novelist Amelia Opie (1769-1853) was a regular and well-known visitor to the nisi prius court at Norwich, preferring the 'bloodless fights' between counsel in civil cases to the more visceral scenes at the Crown court: Cecila Lucy Brightwell, ed., *Memorials of the Life of Amelia Opie*, Norwich, 1854, 355-362.

[144] *Anderson v Shaw* (1825) 4 L.J. Rep. (o.s.) C.P. 53, 54 per Best CJ.

[145] Anon., 'Removal of the Courts from Westminster', 29 *Law Magazine* (1842), 162 at 165.

[146] Ibid., 167.

[147] This point was made by Henry Brougham in his great 1828 speech to the House of Commons on civil law reform: 'Those who attend our Courts of Nisi Prius are aware how sorely the Judge is hampered, and his attention diverted from more important considerations, by being obliged to take such full notes of the evidence': series 2, vol.18, col. 232, 7 Feb. 1828 (HC).

had to be written in longhand, in case the judge was not a member of the court before which the case subsequently came, when his notes would have to be read out by another judge. Occasional calls for official notes to be taken of all cases remained unheeded.[148]

Return of the case to the court in banc

A final important constraint on the full consideration of legal principles at nisi prius was that the return of all such cases to Westminster Hall for the verdicts to be entered and judgment given afforded ample opportunity for any legal points to be deliberated upon in a more mature fashion, with proper recourse to the authorities.[149] Accordingly, the inability or unwillingness of judges at nisi prius to make proper determinations on legal issues did not appear to concern them unduly: their state of mind was described in 1828 in this way: 'mistakes are of little consequence as they can be set right by the court.'[150] Whether the parties to the case, having to bear the extra costs and delays associated with having the legal principles argued or reargued in post-trial proceedings, were as relaxed about the arrangement is another matter.[151]

Conclusion

The full consideration of legal principles by judges at nisi prius was undermined by a combination of the nisi prius process itself and the existence of an alternative, more appropriate forum at Westminster Hall. It is unsurprising that judges with experience of being unable properly to deliberate on the law before giving their rulings to the jury were unwilling to let themselves be bound, or even particularly influenced, by their own or other's rulings.

Accordingly, the circumstances for the reporting of cases which had no precedent value and which received such short shrift from the judiciary were, to say the least, unpromising. Yet regularly reported they were, for some sixty years. Why they were reported, what reception was afforded to them, and what effect they had on the development of the common law, are matters explored in the remainder of this thesis.

[148] See, for example, Viscount Alverstone, *Recollections of Bar and Bench*, London, 1914, 287.

[149] William Wright, *Advice on the Study and Practice of the Law: With Directions for the Choice of Books Addressed to Attorneys' Clerks*, 3rd ed., London, 1824, 118. See also *Hughes v Doane* (1841) 10 L.J. Rep. (n.s.) Q.B. 65, 67 per Lord Denman CJ.

[150] Evidence from John Evans, a Welsh Barrister, to a royal commission on the common law courts, recorded in *First Report of HM Commissioners on the Practice and Proceedings of the Superior Courts of Common Law*, C.46, 1829, 432.

[151] In 1837, it was said that, if a point arose at nisi prius of sufficient importance to induce the court to grant a rule, it would be a one and a half years before it was disposed of, which might extend to four years if a new trial was ordered and the matter heard twice in banc: Anon., 1 *Jurist (o.s.)* (1837), 12. See also W.F. Finlason, *An Exposition of our Judicial System and Civil Procedure*, London, 1877, 12: 'trial … ceased to be final, and become often only the commencement of a long course of litigation, marked by vexation, uncertainty, and delay.'

CHAPTER 2

THE COMMENCMENT OF REGULAR NISI PRIUS REPORTING

INTRODUCTION

Why, after having been ignored by law reporters for so long, did nisi prius cases come to be regularly reported at the end of the eighteenth century? Certainly, no encouragement would likely to have been forthcoming from the judiciary, whose attitude to the worth of nisi prius cases was considered in the previous Chapter. This Chapter explores the factors that drove the first nisi prius reporters to commence their work.

EARLY NISI PRIUS REPORTING

As can be seen from the chronology at Appendix 1, some nisi prius cases were included in the law reports of the two centuries prior to the 1790s, as well as in digests and treatises of the seventeenth and early eighteenth centuries. However, two sets of mid-eighteenth century reports, featuring cases collected by Lord Raymond and Sir John Strange, included a larger number of nisi prius cases. These reports merit some consideration as they provide the context for the beginning of regular nisi prius reporting a few decades later, not least because Isaac Espinasse specifically referenced them as providing the justification for his reporting of such cases.[152]

Lord Raymond's reports

101 nisi prius cases from the beginning of the eighteenth century were reported in the two volumes of reports attributed to Robert Raymond, Chief Justice of the King's Bench from 1725 to his death in 1733.[153] Despite the expression of some judicial reservations,[154] Lord Raymond's reports were generally well regarded,[155] and ran to five editions, the last being published in 1832.

As was common at the time, Raymond's reports were not published by Raymond himself: the reports were first printed in 1743, ten years after his death, and the cases were described on the title page as 'taken and collected' by Raymond. Although the reports do not disclose who originally prepared the cases for publication, and there is no preface to the first volume explaining the circumstances in which the reports came to be published, it is likely that the cases were noted by Raymond for his own personal use, and that he had no intention of making them public:[156] presumably someone in his family with access to his notes compiled them or

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[152] Isaac Espinasse, *Reports of Cases Argued and Ruled at Nisi Prius in the Courts of King's Bench and Common Pleas*, London, 1796, vol.1, iii.

[153] Lord Raymond, *Reports of Cases Argued and Adjudged in the Courts of King's Bench and Common Pleas*, London, 1743.

[154] Most notably by Lord Mansfield CJ in *Cooper v Chitty* (1756) 1 Burr. 20, 36.

[155] Wallace, *The Reporters*, 401-403. See, however, Ted Sampsell-Jones, 'The Myth of *Ashby v White*', 8 *University of St Thomas Law Journal* (2010), 40, for a critical analysis of Raymond's report of that important case.

[156] Campbell claimed that Raymond had compiled Holt CJ's notes of reports for publication (Campbell, *Lives of the Chief Justices*, vol.2, 136), but, as with much of Campbell's historical work, no great store can be set by this

else sold the manuscripts to a bookseller, either for the benefit of the profession or for personal profit – perhaps both.[157]

The nisi prius cases in Raymond's reports can be divided into three categories: eleven cases tried by Holt CJ between 1696 and 1699 appeared in the first half of volume one;[158] seventeen cases tried by Holt between 1701 and 1705 appeared in the first half of volume two;[159] and between these, at the end of volume one, seventy-three cases,[160] decided between 1698 and 1701, were collected together under the heading *Some Points Resolved by Holt Chief Justice of the King's Bench, upon Evidence in Trials at Nisi Prius*.[161]

The first point to note about the reported nisi prius cases is that they were collected during the early part of Raymond's legal career. In 1696, he was aged twenty-three and still a year away from being called to the Bar; his career progressed rapidly, and he was appearing as a junior in high profile state trials by 1704; and no nisi prius cases were included after 1705, even though his reports contained cases decided up to and after his appointment to the King's Bench in 1724. It is reasonable to infer that, after noting cases when sitting in the nisi prius courts as a student and as a fledgling barrister beginning to make his way in the profession, his notes of such cases stopped when his career took him more regularly to Westminster Hall. As will be seen, two of the first regular nisi prius reporters also produced their work at the beginning of their careers at the Bar.

Another point to note is the length and style of Raymond's nisi prius reports. The reports of cases from the King's Bench and Common Pleas in the earlier part of volume one are a mix of short and much longer reports, with each case taking up on average roughly one and a third pages: 542 cases in 717 pages. The typical report begins with an identification of the nature of the action and a description of the parties' pleas; the arguments of counsel are then summarised; and the report concludes with a precis of the judgment of the court and a short comment thereon.

By contrast, the cases collected in the nisi prius section at the end of volume one are in the main very shortly reported, with each page containing on average more than three cases: seventy-three cases in twenty-two pages. These reports say little or nothing about the facts of the case or the arguments of counsel and do not even record the verdict of the jury. Instead, they refer only to the ruling of the judge on the point of law or evidence, without providing any context, not even a reference to the form of action. An example, not untypical in form although

claim without corroboration. Holt's reports were not published until 1738, five years after Raymond's death, and they make no reference to Raymond's involvement in their production. Campbell's claim that Raymond ascribed his professional prosperity to his reporting (ibid., vol.2, 190) must also be discounted, given that his reports were not published during his lifetime.

[157] A likely candidate is Raymond's only son, also Robert, to whom Raymond left his estate.

[158] Ten of the cases were tried at Guildhall, the other at the Exeter assizes.

[159] Eight of these cases were tried at Guildhall, two at Westminster Hall, and the remainder at various assizes.

[160] Not, as Henry Horwitz has stated, sixty-four: Henry Horwitz, 'The Nisi Prius Trial Notes of Lord Chancellor Hardwicke', 23 *Journal of Legal History* (2002), 152 at 154.

[161] The heading is not particularly accurate, as five of the cases were tried by other judges (four by Treby CJ and one by Tracey B), five of the cases were tried at Bar and four were heard in banc. Of the nisi prius cases, ten were tried at Guildhall, eleven at Westminster Hall and the remainder at various assizes.

particularly gruesome in content, consists of a single dictum from Holt, shorn of any factual context:[162]

> If a man be hung in chains upon my land; after the body is consumed, I shall have gibbet and chain.

As will be seen, the early regular nisi prius reporters also adopted an abbreviated style of reporting compared to the Westminster Hall reporters, though not as truncated as Raymond's reports.

Of perhaps most relevance to the later reporters is the focus of Raymond's nisi prius reports on evidential matters: although some of the cases are reported for their rulings on substantive legal issues, many concern points of evidence, such as the competency and compellability of witnesses, the admissibility of hearsay evidence, what formal documents were required to prove certain factual matters and the sufficiency of interrogatories. These cases were cited in subsequent treatises on evidence,[163] and the potential influence of nisi prius rulings on this rapidly developing area of law will not have been lost on later reporters.

Sir John Strange's reports

The two volumes of reports compiled from the papers of Sir John Strange, Master of the Rolls from 1750 until his death in 1754,[164] contained far more nisi prius cases than any other early source – over 170, decided between 1716 and 1748, being mostly Middlesex and London cases tried at Guildhall, with the odd assize case from the Home Circuit. Strange's reports generally had a good reputation: his near contemporary Willes CJ described him as a 'faithful reporter',[165] although the reports were criticised by some for their brevity.[166]

As with Raymond's reports, Strange's reports were not published until after his death: the first edition, produced by his son, came out in 1755. However, Strange was closely involved in their compilation and expected them to be published during his lifetime. Strange himself explained, in the preface to the first edition of his reports, that his habit of lending his notes to colleagues meant that copies of them had fallen into unscrupulous hands, and that he feared they would be published in a corrupted form: he therefore wished to have a definitive collection ready for publication in such circumstances.[167]

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[162] *Spark v Spicer* (1699) 1 Ld. Raym. 738. A slightly fuller version of this case is reported at 2 Salk. 648, sub nom. *Sparks v Spicer*. Although included in the section of Raymond's reports relating to nisi prius cases, this dictum was uttered in banc on a motion for a new trial.

[163] More than a dozen nisi prius cases from Raymond's reports were cited in Sir Geoffrey Gilbert, *The Law of Evidence,* 3rd ed., London, 1769.

[164] Sir John Strange, *Reports of Adjudged Cases in the Courts of Chancery, King's Bench, Common Pleas, and Exchequer*, London, 1755.

[165] *Lynall v Longbothom* (1756) 2 Wils. K.B. 36, 38. Strange took over Willes's parliamentary seat when he became Chief Justice of the Common Pleas in 1737.

[166] See, for example, Sir Michael Foster, *A Report of Some Proceedings on the Commission for the Trial of the Rebels in the year 1746, in the County of Surry: and of other Crown Cases: to which are added Discourses upon a few Branches of the Crown Law*, 3rd ed., London, 1792, 294.

[167] Lord Mansfield CJ's criticism of Strange's reports (in *Goodtitle v Duke of Chandos* (1760) 2 Burr. 1065, 1072) on the ground that his notes of cases were for personal use only and not intended for publication, is therefore misplaced.

The catalyst for the publication of Strange's reports was the appearance, shortly after his death, of *A Collection of Select Cases Relating to Evidence, by a Late Barrister-at-Law,* a volume of reports that included a number of the nisi prius cases which subsequently featured in Strange's work.[168] Authored anonymously, the volume was produced from notes stolen by Strange's clerk, after which Strange's executors obtained an injunction from Lord Hardwicke C to restrain the publication and sale of the book.[169] The executors subsequently obtained and destroyed almost all the copies of the book, which as a result became extremely rare.[170]

As with Raymond's reports, a feature of Strange's nisi prius reporting was its concision. Whilst there is considerable variation in the length of the cases generally reported by Strange, ranging from a single line to many pages, the nisi prius reports are uniformly short, rarely taking up more than a paragraph and never extending beyond a page. Unlike his reports from other courts, his reports of nisi prius decisions focus exclusively on the principle derived from the judge's ruling, and none of them refer to counsel's arguments. Moreover, as the title of the rogue set of reports suggests, many of the nisi prius rulings reported by Strange were on points of evidence, and they too featured in subsequent treatises on evidence law.

In addition, there was a more personal connection between Strange's reports and the early regular nisi prius reporters. The third edition of Strange's reports was produced in 1795, the same year in which Isaac Espinasse began his reports, and it is not fanciful to imagine that his endeavours were influenced by the new edition of a set of reports featuring so many nisi prius rulings. Moreover, the new edition of Strange's reports was produced by the barrister Michael Nolan, who was a close friend of Espinasse,[171] and it may be that Nolan was involved in Espinasse's decision to report nisi prius cases, given Nolan's close connection with a previous reporter of such cases.

WHY DID NISI PRIUS CASES COME TO BE REGULARLY REPORTED?

The early regular nisi prius reporters

An analysis of the reasons for the commencement of regular nisi prius reporting at the end of the eighteenth century must begin with a consideration of the early reporters: Espinasse, Thomas Peake and John Campbell.

Espinasse was a descendant of a French Huguenot family, which had emigrated to Ireland after the revocation of the Edict of Nantes. His father was an army officer who later became a magistrate and served as High Sheriff of County Dublin.[172] Espinasse was born in County Dublin in 1758 and graduated from Trinity College Dublin in 1774 at the age of sixteen. He

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[168] Anon., *A Collection of Select Cases Relating to Evidence, by a Late Barrister-at-Law*, London, 1754.

[169] As explained by Lord Cottenham C in *HRH Prince Albert v Strange* (1849) 1 Mac. & G. 25, 43-44. Perhaps not coincidentally, the first edition of Strange's reports was dedicated to Hardwicke.

[170] This is explained in a memorandum contained in the copy of the book owned by Sir John Silvester, which is now in Lincoln's Inn library: see Charles Purton Cooper, *Reports of Cases in Chancery Decided by Lord Cottenham*, London, 1848, vol.2, 786-787. There is only one reported example of a case from this book being cited in argument, by Francis Buller in *Atkins v Hill* (1775) 1 Cowp. 284, 287.

[171] Espinasse, 'My Contemporaries', 7 *Fraser's Magazine* (1833), 184.

[172] Francis Elrington Ball, *A History of the County Dublin*, Dublin, 1902, vol.1, 52.

was admitted to Gray's Inn in 1780 and was called to the Bar in 1787. Espinasse was predominantly a nisi prius practitioner, which may explain why he never took silk, as the physical distinction between senior and junior counsel, in terms of the rows in which they sat, was not recognised at nisi prius.[173] He was elected a Bencher of his Inn in 1809 and became Treasurer in 1811.[174]

Peake was born in 1770 into an old Welsh family, which had settled in Denbeigh during Edward I's conquest of Wales.[175] His father was an attorney and minor court official. Peake was called to the Bar by Lincoln's Inn in February 1796, practised as a special pleader and on the Oxford Circuit and at the Worcester and Stafford sessions, and was appointed a Serjeant in 1820.[176]

Campbell was born in Fife in 1779, the son of a minister of the Church of Scotland. Having studied at St Andrews, he moved to London in 1798 to work as a tutor before becoming a student in Lincoln's Inn two years later, being called to the Bar in 1808. After a slow start, his unbounded self-confidence and ambition led him to become one of the leading lawyer-politicians of his day, and he was appointed Chief Justice of the King's Bench in 1850 and Lord Chancellor in 1859.[177]

The first point to note about these reporters is that they were all - geographically and professionally - outsiders: none of them was English, and none had any close family members already established at the Bar who could assist either with their advancement in the profession or in obtaining employment in associated offices such as commissions in bankruptcy. Moreover, they would not be likely to have had readymade connections with local attorneys to provide them with work on circuit in their early years of practice. Whilst such connections could not overcome lack of talent or effort,[178] and even barristers with good contacts would usually have to wait many years before a foothold in the profession could be established, without such assistance preferment was even more difficult; and law reporting was regarded as one way of getting ahead.[179]

This was the principal motivation for Campbell, whose decision to report nisi prius cases was made after a miserable first year in practice.[180] In a letter to his brother written in November 1807, Campbell said that '[t]he chief advantage of the scheme is gaining a little notoriety. I have a sober hope that it may introduce me to business, and lay a foundation for my professional

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173 *R v Carlile* (1834) 6 C. & P. 636n.

174 Michael Lobban, 'Isaac Espinasse', *Oxford Dictionary of National Biography*, Oxford, 2004, vol.18, 604.

175 John Burke and John Bernard Burke, *A Genealogical and Heraldic Dictionary of the Landed Gentry of Great Britain and Ireland*, London, 1857, vol.2, 1024.

176 C.J.W. Allen, 'Thomas Peake', *Oxford Dictionary*, vol.43, 276

177 Gareth H. Jones and Vivienne Jones, 'John Campbell', *Oxford Dictionary*, vol.9, 825-830.

178 David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century*, Oxford, 2000, 110. Cf. Cockburn, *Assizes*, 142.

179 '… the principal inducement to a qualified barrister to undertake the part of reporter is the reputation which his reports, if well done, will eventually secure for him': Anon., 'Law Reporting', 16 *Law Magazine and Review (3rd ser.)* (1863), 199 at 211. By contrast, Lord Denman, when a young barrister, told his father that law reporting would actively hamper his prospects because it was regarded as an inferior trade, and would restrict his attendance to one particular court: Sir Joseph Arnould, *Memoir of Thomas, First Lord Denman, Formerly Lord Chief Justice of England*, London, 1873, vol.1, 71.

180 Hardcastle, *Life*, vol.1, 193-212.

success … It was necessary to try something, as there was no prospect of my getting on at all without striking out of the common path.'[181]

Peake, like Campbell, compiled his reports as a newcomer: they were published in 1795, when Peake was aged twenty-four and still several months away from being called to the Bar. Although the publication of law reports by a student barrister was probably without precedent, there was no rule or convention in place at that time which restricted the publication of authoritative law reports to those prepared by qualified barristers.[182] By contrast, Espinasse turned to law reporting later in his career: he was aged thirty-eight when his first set of reports came out in 1795, and he had already been at the Bar for eight years. Whilst this might suggest that his practice remained at a relatively low ebb when he turned to reporting nisi prius cases, it is as likely that - as noted below - he did this because it fitted well with his earlier writings on nisi prius law.

Another feature of these reporters is that they became successful practitioners, albeit to varying degrees: Peake was appointed a Serjeant; Espinasse, according to his own account, was a busy barrister who held a not inconsiderable share of the business at nisi prius during Lord Kenyon's tenure as Chief Justice;[183] and Campbell attained the highest judicial offices. Whilst these achievements cannot necessarily be attributed to their careers as reporters, it is certainly possible that the drive and commitment they showed to create and establish law reporting in a new forum also spurred them on to achieve success at the Bar.

One factor which connected Espinasse and Peake was that they both published other works which were closely associated with the nisi prius courts. By the time Espinasse began his career as a reporter, he was already an established and successful author of a digest of nisi prius law, which was first published in 1791 and was then in its second edition.[184] As with an earlier digest on the same subject written by Francis Buller,[185] there were numerous references to unreported rulings at nisi prius, and in the advertisement to the third edition, Espinasse said that his work 'can only derive its value from Accuracy in collecting, and from Industry in compiling the whole of the Cases which comprise the Law of Nisi Prius.' [186] It is therefore likely that the production of separate reports of nisi prius cases grew out of his work in preparing and revising

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[181] Ibid., vol.1, 213. During his first year of practice, Campbell filled his time by ghost-writing a book on the law of partnerships for a barrister who promised to introduce him to leading members of the profession: ibid., vol.1, 193-194.

[182] The first formal reference to such a restriction was in an obscurely-reported 1834 bankruptcy decision of Lord Brougham C: *ex parte Hawley* (1834) 2 Mon. & Ayr. 426, 435. It was not given official recognition as a rule of practice until a speech of Lord Westbury C in the House of Lords in 1863: John Fraser Macqueen QC, ed., *Speech of the Lord Chancellor on the Revision of the Law*, London, 1863, 9.

[183] Espinasse, 'My Contemporaries', 6 *Fraser's Magazine* (1832), 417. In the preface to the fourth edition of his Digest of Nisi Prius law, published in 1812, he referred to the difficulty of producing that edition 'while the avocation of my profession and practice engaged much of my attention': Isaac Espinasse, *A Digest of The Law of Actions and Trials at Nisi Prius*, 4th ed., London, 1812, vol.1.

[184] Espinasse, *Digest*, 2nd ed., London, 1794. This work was described as being 'in extensive circulation' (Anon., review of Thomas Peake's *Compendium of the Law of Evidence*, 3 *Law Journal* (1807), 263 at 265) and eventually ran to four editions in England. It proved to be even more popular in America, where it could still be found in a lawyer's library in the 1820s: Albert Gallatin Riddle, *The Life of Benjamin F Wade*, Cleveland, 1886, 63. For retrospective praise of Espinasse's Digest, see Anon., review of Archibald John Stephens' *Law of Nisi Prius*, 25 *Legal Observer* (1842), 25 at 26.

[185] Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius*, 2nd ed., London, 1772.

[186] Espinasse, *Digest*, 3rd ed., London, 1798, vol.1, advertisement.

the digest, no doubt with the encouragement of the law printer Andrew Strahan, who published both the digest and his early reports. Peake, by contrast, published his successful and well-regarded manual of evidence law in 1801, several years after his volume of nisi prius reports,[187] but again it is likely that his interest in nisi prius reporting was associated with this work, which was heavily reliant on trial rulings and which contained, in the appendix, reports of six otherwise unreported nisi prius cases cited elsewhere in the book.[188]

In addition to these particularly personal motives, there are a number of more general reasons which help to explain why nisi prius cases began to be reported at the end of the eighteenth century, notwithstanding that they had for centuries been largely ignored by other reporters.

The development of the modern law of evidence

Chapter 8 considers the extent to which the reporting of nisi prius rulings on evidential points helped shape the development of the modern law of evidence, in particular the claim that the commencement of regular nisi prius reporting rendered possible the great strides forward made in that field during the nineteenth century. That Chapter concludes that that claim is not borne out by the evidence. Although judges in the early part of that century accorded more weight to nisi prius rulings on evidence than they did to rulings on points of substantive law, the reporting of a mass of unreasoned and often inconsistent rulings did little to clarify or explain the applicable principles, still less to systematise the law in this field. Further, more recent research has indicated that it was the increased participation of lawyers in criminal trials in the last decades of the eighteenth century, and the swift migration of their objections to untrustworthy oral evidence to civil trials, that provided the real catalyst for the development of the exclusionary rules that characterise the modern law of evidence.

This last point raises the question of whether, if nisi prius reporting did not assist in the development of modern evidence law at the end of the eighteenth century, the greater prominence accorded by trial judges of the time to rules of evidence was a reason why nisi prius rulings began to be regularly reported then.[189]

There are several indications that the commencement of regular nisi prius reporting was one of the products of the growth in the modern law of evidence. First, as noted in the following Chapter, some of those reporters expressly stated that the purpose of their reports was to educate the profession about the points of evidence being determined at nisi prius. Secondly, the increase in the number of objections made by counsel to oral and documentary evidence tendered in civil trials meant that there were more rulings on the subject, which both provided a source of material for reporters and fuelled the demand for publication of the rulings so that they could be used to prepare cases for trial and for citation should an evidential dispute be raised in court. Thirdly, the greater prominence of nisi prius rulings on evidence at this time is

[187] Thomas Peake, *A Compendium of the Law of Evidence,* 1st ed., London, 1801. This ran to five editions.

[188] Ibid., pp.172-179.

[189] This issue is reminiscent of the debate as to whether the development of a stricter doctrine of precedent during the nineteenth century was the product of the improvement in general law reporting, or whether the increasing deference to precedent during that period caused or accelerated the enhancement in the quality of the reports. For the former view, see Allen, *Law in the Making,* 222; Cross and Harris, *Precedent*, 126; Duxbury, *Precedent*, 55-57; for the latter view, see John P. Dawson, 'The Growth and Decline of English Case Law', in *The Oracles of the Law*, Ann Arbour, 1968, 80; Mike Macnair, 'On Reducing Undue Trust in Judges: Or, against the Modern Doctrine of Precedent', 31 *King's Law Journal* (2020), 41 at 46-47.

illustrated by the citation of unreported rulings in treatises on evidence law during the eighteenth century, most notably those of William Nelson and Geoffrey Gilbert:[190] this use of unreported nisi prius cases indicated that there was likely to be a ready market for reports of those rulings.

Another reason for the increase in potentially interesting and important nisi prius rulings on evidence during the eighteenth century – the relaxation of the strict rules of pleading – is considered below.

For these reasons, the growth of the modern law of evidence during the later part of the eighteenth century is a prime candidate for the reason why nisi prius cases began to be regularly reported at the end of that century.

The state of law reporting in general

From the beginning of the nominate reports era in the sixteenth century to the mid-eighteenth century, the state of law reporting in England may fairly be described as chaotic. Throughout this period, lawyers complained about the general lack of accuracy, reliability and punctuality of the reports.[191] The causes are well-known:[192] reports featured collections of cases that were almost never intended by their collectors to be published, and the manuscripts on which the reports were based would vary in accuracy and value depending on the capacity of their authors, transcribers and (when law French was in use in the courts) translators; there was no regularity in the production of reports, which were published solely in monograph form so that recently-decided cases were only rarely reported, and typically the reported cases would be many years old by the time of publication; and there was no commonly-accepted arrangement of reports during this period, so that their format differed widely from volume to volume. Save for several outstanding exceptions, the era of law reporting prior to the mid-eighteenth century was characterised by mediocre, haphazard and inaccurate reporting in a variety of styles and arrangements.

However, at the time regular nisi prius reporting began, the quality and utility of law reporting had improved substantially. A new era in reporting began in 1766 with the publication of reports of King's Bench cases by Sir James Burrow, marking the start of a regular system of reporting in England. In addition to his constant attendance at court as Master of the Crown Office, which made him well known to judges and counsel and gave him access to court records,[193] he developed a layout for his reports which marked an important evolutionary step in the technique of reporting, and set the standard for the preparation of reports by future reporters. He was the first reporter to provide headnotes and to prefix to each report a statement of the facts and issues separate from the judgment of the court, and he followed a regular pattern of setting out the arguments of counsel, the opinions of the judges, and the judgment of the

[190] William Nelson, *The Law of Evidence*, London, 1717; Gilbert, *Evidence*: see Horwitz, 'Nisi Prius Trial Notes', 154-155.

[191] See, for example, Blackstone, *Commentaries*, vol.1, 72.

[192] See, generally, Wallace, *The Reporters*, 1-55; Anon., 'Law Reports and Law Reporting', 18 *Law Magazine and Law Review* (1865), 270; Van Vechten Veeder, 'The English Reports, 1292-1865', 15 *Harvard Law Review* (1901), 1; Dawson, *Oracles*.

[193] Judges would also lend Burrow papers and notes of cases on which they sat: Wilmot, *Memoirs*, 29; and see further below.

court.[194] Burrow, and his successors Henry Cowper (who reported between 1774 and 1778) and Sylvester Douglas (who reported between 1778 and 1784), established clear and durable standards for the method of reporting and the format of reports, which hold good to this day.

Another development at this time was the first publication of law reports in serial form, rather than in single monograph volumes, which provided the opportunity to reduce delays and deliver speedy access to the most recent caselaw. Perhaps taking their lead from the announcement by *The Daily Universal Register* in 1785 that it would begin to carry a regular series of law reports, the following year Charles Durnford and Edward Hyde East began to publish the *Term Reports*, comprising King's Bench cases reported within a short time after the end of each term.[195] The venture was immediately successful, and due to demand they also published an annual bound volume of the individual parts.[196] The practice of publishing in serial form reports of recently-decided cases spread to reporters in other courts: Henry Blackstone in the Common Pleas, Francis Vesey Jr in Chancery, Alexander Anstruther in the Exchequer and Patrick Dow in the House of Lords.

These developments made the late eighteenth century a propitious time for the publication of new law reports in a form that enabled rapid access to recent cases; and the emergence of new reports of nisi prius cases in the 1790s was part of a more general trend that saw substantially more law reports printed in that decade than in any other decade of the century.[197]

Authorised reporters

From around the mid-1780s, judges started to become more formally involved in the reporting process, by appointing or recognising the reporter for their court and by giving them assistance in revising oral judgments and providing access to court papers and copies of their written notes before publication. So began the relatively short-lived era of the “authorised reporter”.[198]

Surprisingly for so relatively modern a practice, the origins, scope and content of authorised reporting remain obscure.[199]

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[194] Veeder, ‘The English Reports’, 21.

[195] Charles Durnford and Edward Hyde East, *Term Reports in the Court of King's Bench*, London, 1786, Part 1.

[196] Ibid., 1786, vol.1. There was, however, some judicial hostility to the principle of termly reporting: Henry Crabb Robinson noted in his diary that, when dining with him before the Summer assizes of 1818, Gibbs CJ spoke earnestly against the Term Reports, as ‘ruinous to the profession in the publication of hasty decisions.’ Thomas Sadler, ed., *Diary, Reminiscences and Correspondence of Henry Crabb Robinson*, London, 1869, repr. 2022, vol.2, 115. The first Dean of Stanford Law School described the Term Reports as the beginning of ‘the system of reporting for profit and not for honor’: Nathan Abbott, ‘The Law Reports’, 1 *Michigan Law Journal* (1892), 93 at 94.

[197] Forty-six sets of reports were published in the 1790s, compared with thirty in the 1780s: no other decade in that century saw the publication of more than twenty-eight sets of reports: Michael Lobban, ‘The English Legal Treatise and English Law in the Eighteenth Century’, in Serge Dauchy *et al*, eds., *Juris Scripta Historica XIII: Auctoritates Xenia R.C. Van Caenegem Oblata*, Brussels, 1997, 82.

[198] Some earlier reporters, such as Plowden, were accorded similar privileges (see Plowden, *Commentaries*, xii). Burrow was also furnished with notes from Lord Mansfield CJ (see *Goodtitle dem Holford v Otway* (1796) 1 Bos. & P. 576, 586 per Buller J; *Jones v Roe* (1789) 3 Term Rep. 88, 96 per Buller J) although there is no direct evidence that the draft reports were revised by the judge (C.G. Moran, *The Heralds of the Law*, London, 1948, 36).

[199] Henri Levy Ullman, *English Legal Tradition, Its Sources and History*, London, 1935, 119; Moran, *Heralds*, 16; Dawson, *Oracles*, 80; Cornish *et al*, *Oxford History vol.XI*, 1212.

The principal source of information on authorised reporting is W.T.S. Daniel QC, a Chancery barrister whose reforming zeal and industry contributed substantially to the establishment of the Incorporated Council of Law Reporting, and who recorded his efforts and those of his fellow reformers in his book *The History and Origin of the Law Reports*.[200] Daniel's description of the system of authorised reporting is, however, based largely on assertion. Whilst his keen interest in law reporting - and the fact that he was called to the Bar in 1830, during the heyday of authorised reporting - lends authority to his statements, the absence of any evidence or sources to support them means that care must be taken in accepting all that he said without corroboration.[201]

For example, Daniel suggests that the practice of judges revising their judgments for the benefit of a particular reporter began in 1785 with the commencement of the *Term Reports*.[202] However, C.G. Moran is more equivocal on this, simply noting that no such practice was in place in 1782, as Douglas, in the preface to his reports written in that year, did not claim to have received any assistance from the judges when discussing the steps he had taken to ensure the accuracy of his reports.[203] This observation applies equally to the *Term Reports*, as Durnford and East made no such claim in the preface to the first volume of their reports either; and there is no other evidence to suggest that those reporters were favoured by the King's Bench judges from the outset.

John Charles Fox,[204] by contrast, considers William Brown, who commenced reporting Lord Thurlow C's decisions in 1785, to be probably the earliest authorised reporter, as he mentions in the preface to his reports that he was obliged to Sir Lloyd Kenyon MR for introducing the manuscript of the first volume to the notice of Lord Thurlow, to Lord Loughborough for reading a considerable part of it, and to Ashhurst J for his notes of cases argued before the Lords Commissioners.[205]

The scope of authorised reporting in the Westminster Hall courts is also unclear. At least during the early period of the practice, it is doubtful that the judges of all the courts invariably furnished particular reporters with copies of their judgments. Had it been otherwise, it is unlikely that Henry Blackstone, who reported cases in the Common Pleas and Exchequer between 1788 and 1796, would have felt it necessary to make specific reference, at the beginning of his report of the opinions of the judges delivered to the House of Lords in *Gibson v Minet*,[206] to the fact that 'The Reporter has been honoured with Copies of the opinions of the Judges, delivered Feb.3, on the following Case, each from the highest authority.'

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[200] Daniel, *History and Origin*.

[201] A statement by Daniel, made at a meeting on law reporting in 1863, that the Year Books ceased because Henry VIII wanted for himself the money set aside for the salaries of the reporters, has been noted as having no authority to support it: Anon., 9 *Jurist (n.s.)* (1863), 463 at 464.

[202] Daniel made this suggestion in his paper 'On the Amendment of the Existing System of Law Reporting', delivered at a meeting of the Jurisprudence Department of the National Association for the Promotion of Social Science on 22 May 1865, repr. in Daniel, *History and Origin*, 263.

[203] Moran, *Heralds*, 16.

[204] Sir John Charles Fox, *A Handbook of English Law Reports from the Last Quarter of the Eighteenth Century to the year 1865, with Biographical Notes of Judges and Reporters*, London, 1913, vol.1, 32.

[205] William Brown, *Reports of Cases Argued and Determined in the High Court of Chancery during the time of Lord Chancellor Thurlow*, London, 1785, xii.

[206] (1791) H. Bl. 569.

Further evidence of the absence of such a practice in the Exchequer comes from the preface to the first volume of Anstruther's reports, published in 1796, in which he makes no reference to receiving any judicial assistance in the preparation of his reports, but instead implies that they were all his own work. Also, one of Anstruther's successors, William Price, was reported to have been treated almost as a spy in the court, with one Baron saying to another: 'What does that fellow come here – taking down what we say – for?'[207]

Daniel also alleges that the practice of authorised reporters was ended by Lord Denman when he became Chief Justice of the King's Bench in November 1832, after which the other judges followed suit.[208] Daniel again cites no authority in support of this, and there is no supporting reference in Lord Denman's biography[209] or in any journal or newspaper of the time; yet Daniel's statement has been accepted as correct by subsequent writers.[210] There is, however, corroboration in the form of Lord St Leonards' February 1864 observations on a report prepared by a Bar Committee on Law Reporting (of which Daniel was a member),[211] in which he said that:

> There has always in my time been an acknowledged Reporter, that is, a Reporter in whom the Judge reposed confidence, and to whom he allowed a copy of his written judgments to be furnished, and in many instances the Judge corrected the MS. report. This operated as a check upon rival Reporters in the same Court; but if I recollect rightly, Lord Denman, when Chief Justice, broke through the rule, and whilst there were rival Reporters in the King's Bench, allowed both to have copies of the written judgments.[212]

The most controversial aspect of Daniel's contentions about the authorised reporters relates to the way in which their reports were treated in court. Daniel called those reports the 'children

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[207] Anon., 'The Present State of the Law Relating to Tithes', 5 *Law Magazine* (1831), 181 at 186n. This is reminiscent of Lord Eskgrove's objection to the work of Robert Bell, the first independent Scottish law reporter: 'The fellow taks doon ma' very words': Henry Cockburn, *Memorials of his Time*, Edinburgh, 1856, 161.

[208] Daniel, *History and Origin*, 266.

[209] Arnould, *Memoir*.

[210] W.S. Holdsworth, *A History of English Law*, 3rd ed. rev. by A.L. Goodhart and H.G. Hanbury, London, 1952, vol.13, 427, Ullman, *English Legal Tradition*, 119; Cornish *et al*, *Oxford History vol.XI*, 1214. In fact, the concept of authorised reports continued after 1832, and was used to distinguish "regular" nominate reports from "irregular" reports of cases in newspapers and journals: Anon., 9 *Jurist (n.s.)* (1863), 195; Showell Rogers, 'On the Study of Law Reports', 13 *Law Quarterly Review* (1897), 250 at 261n. In *Langton v Higgins* (1859) 4 H. & N. 402, counsel referred to a report of a case in the Law Journal Reports, to which Pollock CB responded (at 407) by citing a contradictory passage from the same case in 'the acknowledged and sanctioned reports of Ellis and Blackburn'; in *Wellock v Constantine* (1863) 32 L.J. Rep. Ex. 285, Pollock CB (at 288) refused to place any reliance on a case which was not reported by 'the regular reporter'; in *Leather Cloth Co. v Lorsont* (1869-70) L.R. 9 Eq. 345, James V-C (at 351) ignored a dictum from a case reported in the Law Journal Reports because it did not appear in the report of that case by Hemming & Miller, explaining that: '[e]xpressions very often drop from a Judge, and appear in the shorthand notes, but he may not wish to have them recorded in the reports'; and in *Re Mowlem* (1874) 43 L.J. Rep. Ch. 353, Jessel MR (at 354) refused to permit counsel to rely on a passage from the report of a case in the *Jurist* because it did not appear in the 'authorised report'. However, the *Law Times* reported Lord Westbury C as saying, of a report in one of the journals, that 'It is of such materials the law of England is made up, and I should be denying myself much valuable assistance in ascertaining what the law is if I were to refuse to receive the citation of cases reported by barristers in that useful publication': (1865) 40 L.T. 181-182.

[211] Published in Daniel, *History and Origin*, 100-105.

[212] Ibid., 102.

of Privilege'[213] and said that they enjoyed the advantage of exclusive citation in the courts in which they were authorised, and that rival reports were stifled because 'their citation in Court was somewhat despotically forbidden by the Judges.'[214] Daniel was also reported as saying that Lord Tenterden CJ in particular would allow nothing but the authorised reporters to be cited.[215]

Again, no evidence is cited by Daniel in support of this assertion, other than to note the failure of Dowling and Ryland to establish themselves as reporters of a co-equal authority with Barnewall and Cresswell in King's Bench, and the similar failure of Tamlyn to compete with Russell and Mylne in the Rolls Court.[216] However, the fact that the reports of Dowling and Ryland, and their successors Manning and Ryland, ran to fifteen volumes published between 1822 and 1832 suggests that this venture was successful in a way which would be difficult to maintain if those reports had been uniformly disregarded in court.

Similarly, Daniel makes no mention of the nineteen volumes of unauthorised Common Pleas reports published between 1815 and 1832,[217] despite the presence of authorised reporters in that court throughout that period.[218] Again, it is unlikely that those unauthorised reports would have lasted for such a long period if they were regarded as of no authority. Indeed, the beginning of those rival reports has been identified by another commentator as marking the end of the practice of authorised reporting.[219]

The only other evidence to support Daniel's contention comes from Moran,[220] who refers to a statement from a leading article in the inaugural issue of the *Law Journal* published in January 1866, which adverted to the series of reports of the same name which had begun in 1823, in the following terms:

> The circulation of the "Law Journal Reports" has steadily increased in each year of their existence; they have by their intrinsic merits overcome the obstacles which first prevented their being cited as authoritative, and have taken rank by the side of the authorised reports as the correct exponents of judicial decisions.[221]

Moran says that the obstacle referred to 'appears to have been the rule of exclusive citation spoken of by Mr Daniel, whose testimony is thus confirmed.'[222] However, the fact that the article makes no express reference to that rule as being the obstacle in issue leaves considerable

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[213] Ibid., 35.

[214] Ibid, 265. The same point is made by Holdsworth (W.S. Holdsworth, *Sources and Literature of English Law*, Oxford, 1925, 101-102; W.S. Holdsworth, *Law Reporting in the Nineteenth and Twentieth Centuries*, New York, 1941, 1), by Dawson (Dawson, *Oracles*, 80-81), by Fox (Fox, *Handbook*, 3) and in Cornish *et al*, *Oxford History vol.XI*, 1213: but Daniel is cited as the only source.

[215] See Daniel's speech at a meeting of the Bar to discuss law reporting reform held on 2 December 1863, reported in 39 *Law Times* (1863), 53 at 54.

[216] Daniel*, History and Origin*, 265-266.

[217] The first two volumes of cases were reported by Charles Marshall, the next twelve by John Bayly Moore, and the final five by Moore and Joseph Payne.

[218] William Pyle Taunton, William John Broderip and Peregrine Bingham.

[219] Anon., 'Reports and Reporters', 9 *Monthly Law Magazine* (1841), 20 at 26-27.

[220] Moran, *Heralds*, 16-19: though note the more equivocal statement at ibid., 45.

[221] 1 *Law Journal* (1866) 1.

[222] Moran, *Heralds*, 18.

room for doubt as to whether such a rule existed, at least beyond cases reported in newspapers and journals. However, Moran could have obtained more support for the rule by referring to a leading article in the *Jurist* published in May 1863, which said as follows:

> 'At the latter end of the last century … a regular series of reports has been published ever since; not exactly under the license, but with the favour and assistance of the judges, who long refused to allow any other reports of their proceedings to be cited. This continued until about a quarter of a century ago … and at last it came to be understood, that any report authenticated by the name of a barrister might be cited.'[223]

Of greater evidential weight against Daniel's assertion of a right of exclusive citation is that there is no reference to such a right in any reported case[224] or in any published article of the era.[225] Whilst the former may be explained by a tacit acceptance of the practice by the judiciary and counsel, the latter is surprising, given that there were bound to have been members of the profession, such as actual or potential reporters of unauthorised reports, in whose interests it would have been publicly to criticise the practice. Yet the only contemporaneous and near-contemporaneous references to the authorisation of reporters speak of the assistance the judges would give in the preparation of the report, and not of any privilege of exclusive citation.[226] For example, an article published in 1832 advocated the need for a system of organised law reporting,[227] yet there was no reference to any current or recent practice of exclusive citation; and a biographer in 1846 recorded that the repeated suggestion of Sir Vicary Gibbs (Chief Justice of the Common Pleas from 1814 to 1818) that each court should recognise only one set of reporters, was not taken up at that time or thereafter.[228]

It is also notable that the first substantial treatise on the doctrine of precedent in English law, written by James Ram shortly after the practice of exclusive citation was said to have ended,[229] had nothing at all to say about this practice. This is despite the inclusion in the book of a section on the circumstances which may increase the value of an authority.[230]

Criticism of the practice of exclusive citation might also be expected to be found in the prefaces to the unauthorised reports of the period, yet there is nothing of that nature in the introductions to three of the principal sets of such reports. Thus, in the preface to the first volume of his

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[223] 9 *Jurist (n.s.)* (1863), 167-168.

[224] Whilst it is unsurprising that no reference was made to the rule in the report of the judgments, one might have expected it to be referred to in the record of judicial interjections made during counsel's arguments.

[225] The only possible exception is in a footnote to the review of a legal textbook in 6 *Law Quarterly Review* (1890), 342n. Presumably written by the editor, Sir Frederick Pollock, the note states that 'One of the Vice-Chancellors at least was in the habit of positively declining to listen to any case as reported in an unauthorised report'. Pollock does not name the judge, nor does he give any further details. It should be noted, however, that this comment was made in the context of the reviewer's criticism of the citation in the textbook of cases from the Law Journal Reports, and may reflect the practice, referred to in n.208 above, of judges (including James V-C) preferring cases in the nominate reports to cases reported in the legal periodicals.

[226] See, for example, Anon., 'Reports and Reporters', 9 *Monthly Law Magazine* (1841), 20 at 26.

[227] Anon., 'Law Manuscript Reports and Privy Council Papers, 3 *Jurist or Quarterly Journal of Jurisprudence and Legislation* (1832), 230.

[228] Townsend, *Twelve Eminent Judges*, vol.1, 293-294.

[229] Ram, *Science*.

[230] Ibid., 100-108. By contrast, Ram identified the poor quality of the report as a reason which may lessen the value of an authority: ibid., 109.

King's Bench reports, John Prince Smith made no mention of such a practice, and in the advertisement to the second volume written the following year, Smith offered thanks for 'the very kind assistance' he had received 'from the officers of the court.'[231] The address at the beginning of the first volume of Dowling and Ryland's King's Bench reports similarly said nothing which might suggest that those reports took second place to the authorised reports of Barnewall and Cresswell, other than an oblique reference to the 'disadvantageous circumstances' under which the reporters laboured.[232] Finally, in the preface to the first volume of his Exchequer reports, Robert Tyrwhitt offered his thanks 'to the Noble and learned Judges of the Court of Exchequer' for 'their courtesy and substantial assistance in this undertaking.'[233]

Perhaps the most powerful evidence against the existence of a formal practice of exclusive citation comes from the authorised reports themselves, which record a number of examples of unauthorised reports being cited to and by the courts at Westminster Hall during the relevant period - including to and by Lord Tenterden[234] - without any attempt to prevent their citation or to censure the counsel involved.[235]

Daniel's claim that there was a monopoly of citation has accordingly been challenged by P.H. Winfield, who asserts that there had never been any reports of which it could be said that judges would listen to citations from them and from no others, and that the extent of the authorised reporters' privilege was to have the monopoly of assistance from the judges, in the sense of revising drafts of the reports or supplying written copies to the reporters.[236]

The views of Daniel and Winfield can perhaps be reconciled by treating the exclusive citation of authorised reports by the judges not as a formal rule, but as a practical manifestation of their perceived superiority over other reports.[237] It would be no surprise to find that a judicial preference for reports which had been produced with the assistance of the judges whose decisions were being reported, resulted in those reports being favoured over those which had not enjoyed that privilege; which in turn would to dissuade rival reporters from trying their luck.

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231 John Prince Smith, *Reports of Cases Argued and Determined in the Court of King's Bench*, London, 1806, vol.2, iii.

232 James Dowling and Archer Ryland, *Reports of Cases Argued and Determined in the Court of King's Bench*, London, 1822, vol.1, v.

233 Robert Tyrwhitt, *Reports of Cases Argued and Determined in the Courts of Exchequer and Exchequer Chamber*, London, 1832, vol.1, iv.

234 *Clark v Le Cren* (1829) 9 B. & C. 52, 57, citing a case from Dowling & Ryland's reports.

235 By way of examples: Dowling and Ryland's reports were cited by the court in *Sandon v Proctor* (1828) 7 B. & C. 800 and by counsel in *Clark v Denton* (1830) 1 B. & Ad. 92; Tyrwhitt's reports were cited by the court in *Bowser v Austen* (1831) 2 Cr. & J. 45 and by counsel in *Nicol v Boyn* (1833) 10 Bing. 339; Moore and Payne's reports were cited by the court in *Kay v Goodwin* (1830) 6 Bing. 576 and by counsel in *Phillips v Tanner* (1829) 6 Bing. 237; Moore's reports were cited by the court in *Martin v Burton* (1819) 1 Brod. & Bing. 279 and by counsel in *Solly v Forbes* (1818) 8 Taunt. 516; Tamlyn's reports were cited by the court in *Pearson v Cardon* (1831) 2 Russ. & M. 606 and by counsel in *Mason v Hamilton* (1831) 5 Sim. 19.

236 P.H. Winfield, *Chief Sources of English Legal History*, Cambridge, Mass., 1925, 192.

237 See Pollock, *First Book*, 292. Whilst the judge's assistance in revising his oral judgment no doubt enhanced the authority of the report, the appropriateness of this practice can be questioned, where as a result the reported judgment differed from the judgment that was in fact delivered: see Anon., 'Law Reporting and the Amending Hand', 120 *New Law Journal* (1970), 423; C.F. Parker, 'Law Reporting and the Revision of Judgments', 18 *Modern Law Review* (1955), 496; Anon., 80 *Law Quarterly Review* (1964), 471; Anon., 86 *Law Quarterly Review* (1970), 299.

There is more evidence for this type of effective monopoly than for the more formal cartel identified by Daniel. Thus, a review of law reporting published in 1841 described the practice of judges supplying copies of their written judgments as 'an advantage calculated to deter any competitor, who could not secure the extension of it to himself, from contesting the field with those already in possession of it.'[238] Another commentator said in 1848 that, once a particular reporter had been recognised as the exclusive reporter of the court by way of a tacit understanding of the profession, the etiquette was for no-one else to report while that reporter continued to do so.[239] Certain judges may have added to the deterrent effect: in 1830, following a rumour the previous year that a new reporter was about to start in the Rolls Court, Sir John Leach MR was said to have taken the earliest opportunity to deprecate the intrusion.[240]

Whether or not it operated de facto or de jure, it is likely that the system of authorised reporters meant that, by the mid-1790s, there was an effective monopoly in the reporting of cases in the superior courts, shared between Durnford and East in the King's Bench, Blackstone in the Common Pleas, Anstruther in the Exchequer[241] and Vesey in Chancery. This meant that, for those who wished to follow in their footsteps as reporters but who found themselves effectively barred from those courts, alternative sources of reportable cases had to be found: the nisi prius courts provided an obvious target.[242]

The rise of commercial litigation

Civil litigation in the principal superior courts underwent a marked decline in the early eighteenth century, affecting common law and equity courts alike: in the first half of that century, fewer people were litigating disputes than at any time in either of the two preceding or two succeeding centuries. However, led by the King's Bench, levels of litigation increased steadily after 1750 and into the nineteenth century, with most of the increase coming after

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[238] Anon., 'Reports and Reporters', 9 *Monthly Law Magazine* (1841), 20 at 26. See also Anon., 'Law Reporting', 16 *Law Magazine (3rd ser)* (1863), 199 at 207-208.

[239] Anon., 'The System of Law Reports', 12 *Jurist (o.s.)* (1848), 314 at 315.

[240] Abraham Hayward, 'Reports and Statutes', 4 *Law Magazine: Or Quarterly Review of Jurisprudence* (1830), 1 at 14.

[241] Anstruther, together with his successor Robert Forrest, represented an oasis in the desert of Exchequer reporting: before Anstruther began in 1796, no reports of that court had been published since those of William Bunbury in 1755; and after Forrest finished reporting in 1801, regular Exchequer reports were not re-established until the mid-1820s.

[242] Another likely consequence of the prevalence of authorised reports was the decline in the treatment of unpublished manuscript case notes as authorities. Oldham notes this occurring by the turn of the nineteenth century but ascribes it to the increase in the quality and quantity of printed reports generally, making no reference to the contribution made by authorised reports: James Oldham, 'The Indispensability of Manuscript Case Notes to Eighteenth-Century Barristers and Judges', in Anthony Musson and Chantal Stebbings, eds., *Making Legal History: Approaches and Methodologies*, Cambridge, 2012, 30 at 51-52.

1790.[243] This was also reflected in the consequent considerable rise in the number of barristers at the end of that century.[244]

One of the reasons for this recovery was the rise in agricultural and manufacturing productivity later known as the Industrial Revolution.[245] The rapid march of trade and commercial transactions led to a substantial increase in contracts of every description, and consequently to a proportionate increase in the breaches of those contracts, which were a staple of the nisi prius reports.

Another factor in the rise of business, and the subsequent reporting of commercial cases at nisi prius, was Britain's declaration of war with Napoleonic France following the breakdown of the Peace of Amiens in 1803. Reflecting late in life on the beginning of his law reporting career, Campbell recalled that 'An opportunity for Nisi Prius reporting now opened such as will never recur.' He attributed the rise in reportable nisi prius cases to Napoleon's violations of neutral commerce, the system of licences to go to hostile ports granted by French and British governments, the blockades declared without the power to enforce them, the right of search asserted by British ships, and above all the almost universal practice of merchant ships carrying false papers to enable them to overcome regulations limiting the areas of trade and the nature of their cargo. These gave rise to a host of novel legal issues between underwriters and merchants, shipowners and shippers of goods, and foreign consigners and English factors.[246] Campbell also cited the fluctuation in the price of commodities, resulting in disputes as to the fulfilment of contracts, as a reason for the explosion in commercial cases being tried at nisi prius. In addition, the suspension of cash payments and the growing depreciation of the paper currency led to speculations and numerous failures, causing a mass of bankruptcy litigation.[247] Campbell said that, for these reasons, the business at Guildhall was ten times greater than in Lord Mansfield's day.[248]

Other nisi prius reporters noted the significant developments in mercantile law at the beginning of the nineteenth century, which fuelled an interest in decisions on such matters at nisi prius. In the 1818 preface to the first volume of his nisi prius reports, Holt remarked that such cases were 'in fact, the law of trade and commerce as seen in the practice of the Courts', and that trial judges extended existing principles to embrace the new forms of commerce, which was to be added to real property as the most powerful source of legal learning.[249]

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[243] Henry Horwitz and Patrick Polden, 'Continuity or Change in the Court of Chancery in the Seventeenth and Eighteenth centuries?', 35 *Journal of British Studies* (1996), 24 at 30; Christopher Brooks, *Lawyers, Litigation and English Society since 1450*, London, 1998, 29-33; Christopher Brooks, 'The Longitudinal Study of Civil Litigation in England 1200-1996', in Wilfred Prest and Sharyn Roach Anleu, eds., *Litigation, Past and Present*, Sydney, 2004, 33-37.

[244] Lemmings, *Professors*, 73-75. The Bar grew from around 290 in 1780 to around 730 in 1805: Penelope J. Corfield, *Power and the Professions in Britain 1700-1850*, London, 1995, 91.

[245] Brooks, *Lawyers, Litigation and English Society*, 36.

[246] Hardcastle, *Life*, vol.1, 214-215.

[247] Ibid., See also Townsend, *Twelve Eminent Judges*, vol.1, 384.

[248] Hardcastle, *Life*, vol.1, 214.

[249] Francis Ludlow Holt, *Reports of Cases Ruled and Determined at Nisi Prius in the Court of Common Pleas and on the Northern Circuit*, London, 1818, vol.1, v.

The increase in nisi prius business due to commerce and trade of course only affected urban centres, most notably London, but other factors contributed to an increase in causes in rural areas. The Oxford Circuit, which was mainly rural, saw an increase in the average yearly number of causes from 226 in 1800 to 317 in 1828, as war prices meant relative prosperity for farmers, which made litigation more valuable and gave them more time to prosecute their claims.[250] This too would have added to the number of nisi prius cases from which points considered to be worth reporting arose.

Relaxation of the strict rules of pleading

By the late seventeenth century, the process of special pleading had transformed from a simple and clear technique, originally delivered orally, to a complex and rigid written system that Sir Matthew Hale described as 'but a snare and trap and piece of skill.'[251] The slightest error in a writ would be fatal to a cause, and the possibility of error was magnified by the need to render the pleadings into Latin, which created particular difficulties where matters of everyday modern life had to be translated into a dead language.[252] Even after the requirement to use English in pleadings was introduced by legislation in 1731,[253] pleaders stuck with the grammatical constructions and syntax of the past which made pleadings read very oddly indeed.[254] It was therefore common for cases to fail at trial due to non-compliance with the strict rules of pleading, which in turn meant that relatively few nisi prius cases proceeded to a stage where points of law, evidence or practice arose that would be of general interest to the profession and therefore merited reporting.

Two developments in the eighteenth century operated to reverse this trend, and to reduce the number of causes that turned at trial on pleading points.

The first was the abolition of the "rule against duplicity", or "double pleas". Since the early fourteenth century, a special plea could only be taken by a party on one point per cause of action, so that the trial of that action would involve no more than a single issue.[255] The precise reasons for this are obscure, but the desire to keep matters relatively simple for the jury was probably one of them. However, this requirement made special pleading more difficult as well as causing potential injustice where a defendant would be limited to a single defence, even where other defences, consistent with the original defence, could be raised. This requirement was abolished by a statute of 1705 which enabled defendants, with the permission of the court, to plead several distinct pleas in the same cause of action.[256] The statute was widely used and

[250] "J.E.D.", 'The Cause Lists on the Oxford Circuit, Past, Present and Future', 14 *Law Magazine: Quarterly Review of Jurisprudence (n.s.)* (1851), 217; G. Hueckl, 'English Farming Profits during the Napoleonic Wars', 13 *Explorations in Economic History* (1967), 331. Prices were also inflated by a series of bad harvests in the 1790s: William Cornish *et al*, eds., *Law and Society in England 1750-1950*, 2nd ed., London, 2019, 397.

[251] *Anon* (1672), Middle Temple Library (MTL) MS Treby 2B 717.

[252] Baker, *Introduction*, 95.

[253] 4 Geo. 2, c.26.

[254] Baker, *Introduction*, 95.

[255] The Crown was not precluded from double pleading by this rule: *Tobin v The Queen* (1863) 14 C.B.N.S. 505, 522, 523 per Willes J.

[256] 4 & 5 Ann, c.16.

permission seems rarely to have been refused,[257] and this certainly made the special pleader's life easier.

The second development was the rising popularity of defendants pleading the general issue over special pleading.[258] This occurred because new court procedures, such as motions for new trials and reserving points of law, made it easier to have points of law decided by the full court, which in turn reduced the need to protect the jury from such points by the process of special pleading, and narrowed the matters that the jury was required to consider.[259] The courts encouraged this by relaxing earlier rules of evidence that restricted the defences that could be proved under the general issue,[260] a process aided by Parliament, which provided for pleading the general issue in over a hundred statutory actions introduced between 1600 and 1750.[261]

As the need to control the jury in advance by special pleading receded, a different method of ensuring that the jury was prevented from having undue regard to irrelevant or prejudicial material was required, which fell to the law of evidence. This in turn led to the increasing importance of evidential issues at trial, giving rise to nisi prius rulings which were of general interest and therefore suitable to be reported.[262] Further, special pleading operated to keep legal issues away from consideration by the jury, whereas raising the general issue meant that issues of fact and law were no longer separated and isolated as a matter of pleading. This increased the occasions on which points of law arose at trial, requiring rulings which again were worth reporting.[263]

Fortune and fame

An obvious reason for reporting nisi prius cases, which applied to law reporting in general, was the opportunity it created to make money, an attractive prospect particularly for young barristers beginning to make their way in the profession such as Peake and Campbell. There was, after all, a large potential market for nisi prius reports, as since the early seventeenth century most barristers regarded circuit work as their principal means of support.[264]

Law reporting at this time was a lucrative exercise, both for the reporters and the publishers. Those reports which were favoured by the profession commanded a large circulation and so yielded large profits. In 1813, Campbell noted that reporting in the King's Bench was worth more than £1000 a year.[265] Daniel reported that the yearly circulation of the Queen's Bench Reports, which began in 1840, reached and for many years was maintained at 4000, and the

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[257] Baker, *Introduction*, 96. The defendant was strictly held to the pleas for which permission was granted, and any attempt to include a different plea would render the whole defence a nullity: *Bayley v Baker* (1842) 1 Dowl. N.S. 891. Further, defendants would not be permitted by this means to raise inconsistent defences: *Jenkins v Edwards* (1793) 5 Term Rep. 97.

[258] Baker, *Introduction*, 96-97.

[259] Francis, 'Structure of Judicial Administration', 56-60, 68-73.

[260] Henry John Stephen, *A Treatise on the Principles of Pleading in Civil Actions*, 3rd ed., London, 1835, 158.

[261] Baker, *Introduction*, 97.

[262] Lobban, 'English Legal Treatise', 84.

[263] Ibid., 84-85.

[264] Cockburn, *Assizes*, 143.

[265] Hardcastle, *Life*, vol.1, 298.

annual remuneration of Barnewell and Cresswell in the 1820s was as high as £2000 per volume of their reports,[266] although this was small in comparison to the profits made by the publishers.[267] As a result, publishers were keen to exploit the market for law reports, and found barristers to be willing partners in the money-making exercise: '[w]herever there is the smallest opening, the profitable trade of law bookselling establishes a fresh series of reports.'[268]

The high cost of law reports was of great concern of the profession: the future Lord Langdale MR, in a letter to his parents written as a young barrister in 1811, said that a law book generally cost twice as much as any other book of the same size;[269] and in the mid-1830s, Sir Jonathan Frederick Pollock (then Attorney-General) spent £30 a year in the purchase and binding of law reports,[270] which would be beyond the means of most barristers of several years' call.

However, not all reporters made money from their efforts, particularly those who chose to report cases which the profession did not deem to be sufficiently important to the practice of law. One such reporter was Richard Bligh. Having begun in 1811 to take notes of arguments and opinions delivered in cases determined by the House of Lords, his intention to publish them was stymied by the unexpected appearance of a rival set of reports by Patrick Dow. On the cessation of those reports in 1818, Bligh began to publish his reports but ceased in 1827 after three volumes and part one of a fourth volume. He began to publish a new series of House of Lords reports in 1829, and in the preface to the first volume of that series, he explained that he had discontinued the old series because, although the legal profession had praised them, 'solid recompence has been wanting.'[271] He wistfully noted that, having devoted eighteen years to the collection of reports in the House of Lords, he could not be expected to publish them 'not only with a sacrifice of that age of fruitless labour, but at his own personal risk of loss.'[272] Presumably Bligh's new series of reports (which he explained were produced because 'habit is the tyrant of the mind'[273]) brought greater him reward - or at least greater peace of mind - as he produced a total of ten further volumes, and three parts of an eleventh, up to his death in 1839.

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[266] Daniel, *History and Origin*, 268.

[267] An 1849 report on law reporting by a Special Committee of the Society for Promoting the Amendment of the Law (repr. in ibid., 4) stated that the publishers would take commission on the sale of a book of between 30-40% and sometimes more, with 20% going to the retail bookseller, 9% to the wholesale bookseller and 7.5% commission to the publisher for printing and advertisement expenses: ibid., 12-13.

[268] Ibid., 9.

[269] Thomas Duffus Hardy, *Memoirs of Henry Lord Langdale*, London, 1852, vol.1, 280. For criticisms of the cost of reports, see Anon., 'Law Reporting', 1 *Legal Observer* (1831), 247 at 248; Anon., 'The Reports Reviewed', 2 *Legal Examiner* (1832), 70 at 71; "Civis", 'Expense and Delay of Law Reports', 11 *Legal Observer* (1836), 450; Anon., 'The Consolidation of the Law', 28 *Legal Observer* (1844), 33 at 34; Anon., 'The System of Law Reports', 9 *Law Magazine: Or Quarterly Review of Jurisprudence (n.s.)* (1848), 1 at 21-22; Anon., 17 *Jurist (o.s.)* (1854), 97; Anon., 'Law Reporting', 22 *Law Magazine: Or Quarterly Review of Jurisprudence (n.s.)* (1855), 292 at 298. For a defence of the cost of law books, see Anon., 'Law Reports', 11 *Law Times* (1848), 465 at 466.

[270] Lord Hanworth, *Lord Chief Baron Pollock: A Memoir*, London, 1929, 22: see also Daniel, *History and Origin*, 51, 255.

[271] Richard Bligh, *New Reports of Cases Heard in the House of Lords on Appeals and Writs of Error*, London, 1829, vol.1, iv.

[272] Ibid., iv-v.

[273] Ibid., v.

It is not clear whether nisi prius reporting made money for Espinasse, Peake or Campbell. It is certainly possible, as the prices charged for their reports were comparable to those charged for the authorised reports. In 1795, a part of Espinasse's first volume was being sold at 5s, which was the same price as a part of Henry Blackstone's Common Pleas reports.[274] In 1796, the volume of Peake's nisi prius reports was priced at 7s 6d,[275] which was the same as the sixth volume of the *Term Reports* published later that year.[276] In 1811, a part of volume two of Campbell's reports was priced at 7s 6d, compared to 5s each being charged for each part of Taunton's and Wightwick's reports.[277] However, the fact that Peake ceased reporting after one volume might suggest that he did not find it to be a particularly lucrative exercise, and an obituary of Campbell suggested that Espinasse reported with limited pecuniary success.[278] As for Campbell, it has already been noted that his principal motive for reporting was to bolster his professional practice: in 1813, having noted the substantial sum earned by the authorised King's Bench reporter, Campbell remarked that '[i]f it were double the value I should decline it without hesitation, as it is almost entirely inconsistent with practice at the bar.'[279]

Quite apart from any profit to be made, law reporting was regarded as 'a good channel to professional notoriety',[280] and two aspects of Campbell's reports were likely to have been directed to this end.

The first was Campbell's practice of publishing the names of the attorneys in the cases he reported, which no doubt led to useful introductions.[281] Campbell himself said that he did this so that, in the event of any doubt arising about the accuracy of his reports, it might be known to whom to apply for a reference to the papers in the cause.[282] However, this practice was regarded by many as verging on touting for business, which was much frowned upon by the profession: contemporaries described Campbell as 'the greatest jobber that had ever flourished at the bar.'[283]

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[274] *The Oracle*, 1 May 1795, 7 col.1.

[275] *The Oracle,* 4 Feb. 1796, 1 col.3.

[276] *St James's Chronicle*, 10 Nov. 1796, 2 col.4.

[277] *Morning Chronicle*, 7 Nov. 1811, 2 col.1. As time went on, the price of the authorised reports exceeded those of the nisi prius reports: in 1819, a volume of Barnewell and Alderson's reports cost £1 14s 6d, whereas a volume of Starkie's nisi prius reports cost £1 6s: Joseph Butterworth & Son, *A General Catalogue of Law Books*, 6th ed., London, 1819, 26, 46.

[278] Hugh F. Murray, 'The Late Lord Campbell', 27 *Albany Law Journal* (1883), 364 at 366.

[279] Hardcastle, *Life*, vol.1, 298.

[280] James Stewart, *Suggestions as to Reform in some Branches of the Law*, 2nd ed., London, 1852, 82-83.

[281] Campbell was not the first to do this. There were some earlier isolated examples (such as *Ayliff v Scrimsheire* (1689) 1 Show. K.B. 46, *Skinner v Kilbys* (1689) 1 Show. K.B. 70 and *Wilkes v Wood* (1763) Lofft 1) and the practice of doing so throughout a volume of reports was instituted by Henry Clifford in his reports of Southwark Election Cases published in 1802. Campbell's successors as nisi prius reporters - Starkie, Holt, and Carrington and Payne - maintained this innovation, and the practice was continued almost solely by nisi prius reports and the Law Journal Reports, until it was adopted by the Bankruptcy and Insolvency Reports published in 1855.

[282] Anon., 'Law Reporters and Law Reporting', 100 *Law Times* (1896), 338.

[283] Attributed to Serjeant Storks in Ballantine, *Experiences*, vol.1, 213. This practice was said to have 'long been considered as constituting the only blemish of Lord Campbell's most valuable Reports': "J.P.T.", 'Modern Common Law Reports', 336.

The second aspect of Campbell's reporting that seemed designed to increase his professional standing was the care he took in rejecting for publication any ruling which he considered to be bad law, which was doubtless done partly to put the judge concerned in the best possible light. This was particularly so with regard to the rulings of Lord Ellenborough CJ: Campbell's quip about having a drawerful of 'bad Ellenborough law' has already been referred to,[284] and it is perhaps no coincidence that Sir James Mansfield CJ was reported to have found, to his surprise, that Ellenborough's rulings as reported by Campbell were so often right.[285] This practice may well have contributed to the respect Ellenborough generally showed Campbell when he appeared as an advocate before the usually irascible Chief Justice.

For these reasons, amongst others, law reporting achieved its purpose for Campbell, who later said that his reports had been 'of the most essential service to me.'[286]

Newspaper reporting

Finally, it has been suggested that the practice of regularly reporting nisi prius cases originated with the reporting of such cases in the newspapers, in the manner already adopted in relation to parliamentary proceedings.[287] However, there is no evidence to support that suggestion, and it is doubtful for several reasons. First, by the time nisi prius cases began to be regularly reported in the mid-1790s, newspapers had been doing so for at least ten years.[288] Secondly, newspapers often reported cases because of the notoriety of the parties or the salaciousness of their facts rather than their legal merits. Finally, and connected with the previous point, the reporters covering trials were regarded as lowest grade of their craft – 'penny-a-liners' – as opposed to the relatively well-regarded parliamentary reporters.[289]

Conclusion

Although the reports of Lord Raymond and Sir John Strange show that the reporting of nisi prius cases was not without precedent before the end of the eighteenth century, the conditions for the regular reporting of such cases at that time were particularly favourable: a greater demand for law reports due to their improvement in quality and the growth in civil litigation; the increasing influence of evidence law and mercantile law, both of which featured heavily in the nisi prius courts; and the presence of authorised reporters in the superior courts requiring new sources of reportable cases to be identified.

However, the commencement of regular nisi prius reporting at this time was likely to have been as much due to the particular circumstances of the reporters themselves. Espinasse, already an established nisi prius practitioner and author, saw at first-hand how the profession could benefit from cases dealing with the day-to-day practice of the trial courts; Peake, at the very beginning

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[284] See Chapter 1.

[285] *Fentum v Pocock* (1813) 5 Taunt. 192, 195-196.

[286] Hardcastle, *Life*, vol.1, 294. Ironically, Campbell came to rue the multiplicity of law reports, commenting in 1859 that 'The whole world is now insufficient to contain all the law reports which are published' and that they should be dealt with by 'a decennial *auto da fe*': ibid., vol.2, 383-384.

[287] Anon., 1 *Legal Review* (1813), 326.

[288] See Appendix 1.

[289] Anon, 'The Newspapers Against the Bar', 3 *Law Magazine: Or Quarterly Review of Jurisprudence (n.s.)* (1845), 165 at 176.

of his practice, also had an interest in matters of evidence that led him to publish more widely on the subject in due course; and Campbell, building on the efforts of his predecessors, saw a gap in the market and took it with the opportunism and confidence that marked his outstandingly successful subsequent career.

Whether or not the venture made them money or enhanced their reputations, these early reporters set in train a sequence of nisi prius reporting that continued for more than half a century and ran to forty volumes, despite the fact that the reported rulings were held in low regard as authorities. Why those reports survived for so long is the subject of the next Chapter.

CHAPTER 3

WHY DID THE NISI PRIUS REPORTS SURVIVE?

INTRODUCTION

If the principal function of law reports is to provide the legal profession with authoritative decisions on points of law which can be subsequently cited and followed, the reporting of nisi prius cases, which carried so little weight as authorities, ought to have been a short-lived and unsuccessful enterprise.

Indeed, the reports drew a good deal of criticism from the legal press, the most vitriolic of which came from an 1813 review of Campbell's reports in the short-lived *Legal Review*, which described them as 'wholly unnecessary' and declared that they 'can never be authority'.[290] This added to its earlier criticism of those reports as a 'bulky, and, as we conceive, almost useless, publication.'[291] The *Legal Review* referred back to these criticisms in its review later that same year of James Manning's digest of nisi prius reports: '… we have rejected their authority, and deny their utility; they either, incumber the legal path, already beset with obstacles; or they serve to divert, dazzle, and mislead the legal inquirer, already wandering amidst the wildernesses of authority.'[292] Carrington and Marshman's reports fared no better in this regard, it being said of them that: '[w]e would gladly avoid speaking of [them] if we could do so consistently with our plan, for we find some difficulty in discussing this work with becoming gravity.'[293] In its review of what turned out to be the last volume of nisi prius reports to be published, The *Law Journal* delivered a doleful epitaph, noting that they had met with little favour by the profession.[294]

Accordingly, in contrast to Henry Horwitz's surprise that so few nisi prius cases were included in the nominate reports,[295] it is perhaps more surprising that they ever came to be reported with any regularity at all. However, even as the reports of cases from other courts were published sporadically and ceased relatively quickly,[296] nisi prius reporting continued, more or less continuously, from 1795 to 1853. This suggests that the venture proved financially worthwhile for both reporters and publishers during that period: as Campbell remarked of Espinasse's and Peake's reports: 'though sneered at, [they] were bought and were quoted.'[297]

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[290] Anon., 'Reports of Cases at Nisi Prius, by Campbell', 1 *Legal Review* (1813), 326 at 330, 332.

[291] Anon., 'Paley's Law of Principal and Agent', 1 *Legal Review* (1813), 104 at 111.

[292] Anon., 'Manning's Digest of N.P. Reports', 1 *Legal Review* (1813), 639. For other criticisms of Campbell's Reports in this journal, see ibid., 84 and 644-645.

[293] "J.P.T.", 'Modern Common Law Reports', 335.

[294] Anon., 'Cababe's & Ellis's Reports of Trials', 18 *Law Journal* (1883), 664. Campbell's reports were, however, singled out for praise as 'worth citing for the two reasons that he was a painstaking note-taker and a good lawyer, who never reported what he believed to be bad law': ibid.

[295] Horwitz, 'Nisi Prius Trial Notes', 154.

[296] For example, a single volume of parliamentary and military cases was produced in 1792, twenty-one volumes of Bail Court cases between 1820 and 1854 and sixteen volumes of ecclesiastical cases between 1822 and 1865.

[297] Hardcastle, *Life*, vol.1, 214.

THE PURPOSE OF THE NISI PRIUS REPORTS

A clue as to why nisi prius reports survived, despite criticism from the legal press, comes from how the reporters themselves sought to explain the purpose of their labours. The reports of cases decided by the courts in Westminster Hall needed no such justification: the value of publishing decisions that were integral to the elucidation and development of the common law was self-evident. This was not the case for nisi prius reporters, who felt the need to confront the fact that the common law had survived and flourished for hundreds of years without the regular reporting of the trial phase of civil litigation, and to answer the resulting question: why bother now?

The explanations of these reporters, in the prefaces to the first volumes of their reports, reveal that the purpose for which many of the reports were produced was limited in scope, and different from the reports of courts in banc. The reporters frankly recognised that the cases they were reporting were not as authoritative on matters of substantive law as cases decided in banc; and they instead focused on the practical utility of the cases, in particular on points of evidence and practice which could be of use to lawyers when conducting nisi prius business.

Thus, John Clayton described the purpose of his seventeenth century assize reports as identifying 'how to avoid a dangerous Jury to your Clyent' and 'what evidence best to use for him.'[298] In the advertisement to the first volume of his nisi prius reports, F.A. Carrington met the objection to reporting opinions 'given "in the hurry of Nisi Prius"' by explaining that their purpose is 'not to give the fundamental rules of law … but to convey a practical knowledge of Nisi Prius and Criminal Law, to such Counsel, Attornies and other persons, as have not had an opportunity of constantly attending Courts, for a series of years, to gain the experience for themselves.'[299] The clearest description of the reason for reporting nisi prius cases came from Isaac Espinasse, in the preface to the first volume of his nisi prius reports:

> How important a part of professional information a knowledge of the Law of Evidence forms, every Member of the Profession must feel: With its difficulties those are well acquainted, who at an early stage of professional experience have been called upon as part of their duty, to settle the evidence upon cases which are preparing for trial; difficulties only to be removed by a close and constant attendance on the Courts of Nisi Prius, where those points often occur, and are fully discussed. In this attendance few have been found to persevere, and of many and important points continually occurring there, which have been heard, canvassed, and decided, every report is lost, or preserved only as a solitary memorandum in a note book, devoted only to the private use of the compiler. To rescue these decisions from that oblivion to which they would otherwise be consigned, and to preserve them for the benefit of the Profession, is the object at which I have aimed in the following collection …[300]

The influence of nisi prius reporting on the development of the modern law of evidence is considered in Chapter 8, but it is clear that many of the reporters themselves thought that the

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[298] John Clayton, *Reports and Pleas of Assises at Yorke: Held before Severall Judges in That Circuit*, London, 1651, xx-xxi.

[299] Frederick Augustus Carrington and Joseph Payne, *Reports of Cases Argued and Ruled at Nisi Prius in the Courts of King's Bench and Common Pleas and on The Circuit*, London, 1825, vol.1, iii-iv.

[300] Espinasse, *Reports*, vol.1, iii-iv.

cases they reported would be of most practical use where they dealt with issues of evidence and procedure.

It must be said that the way in which these reporters envisaged that the cases they reported would be used by the profession did not always accord with how they were in fact used. As is discussed in Chapter 6, the criticisms of the nisi prius reports and reporters may have been due more to the misapplication of the reports rather than to their lack of accuracy. However, it is true to say that the nisi prius reporters – even those who professed to report cases solely for their practical value – strayed beyond reporting only cases on evidence and procedure, and included many rulings by trial judges on matters of substantive law.[301] This was no doubt due to the need to fill volumes of near-contemporaneous reports which could not be sustained solely by cases on evidence and procedure,[302] but it led to the reporting of cases which carried little or no weight as authorities for the legal propositions contained in them.

Whilst this practice exposed the concept of nisi prius reporting to criticism, the principal purpose of the reports, to introduce newer members of the profession to the practical requirements for preparing cases for trial, meant that there was a ready market for them which justified their continued production.

WHAT WAS THE MARKET FOR NISI PRIUS REPORTS?

In order to explain the survival of the nisi prius reports, it is useful to consider who bought them, and why.

Law students

The regular reporting of nisi prius cases began at a time when there was no organised system of formal legal education in England, a period which spanned from the decline of the educational functions of the Inns of Court by the early eighteenth century to the establishment of the Council of Legal Education in 1852.[303]

An aspiring barrister during this fallow period was expected to have a university education, join an Inn of Court, and learn his law as a pupil to a special pleader, equity draftsman or conveyancer.[304] Reading law reports had of course always been an important part of the education of practising barristers, but the greater regularity with which cases were being reported at the end of the eighteenth century meant that the reports were being read with a view to learning not only the established state of the law, but also how the law was developing from term to term. This injected a dynamism into the study of the law that hitherto only came from regularly attending the courts at Westminster Hall, which students engaged as pupils would necessarily have had only limited time to do.

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[301] Of the cases reported by Espinasse, 394 involved one or more points of evidence or procedure and 471 involved points of substantive law.

[302] This charge was often levelled at Carrington and Payne's nisi prius reports: see, for example, Anon., 'Digest of Cases', 3 *Law Magazine: Or Quarterly Review of Jurisprudence* (1830), 210; Anon., 'Law Reporting', 2 *Legal Observer* (1831), 34 at 35; Anon., 'Reviewal', 5 *Legal Examiner and Law Chronicle* (1835), 57 at 58.

[303] See, generally, Sir John Baker, *Legal Education in London 1250–1850,* repr. *Collected Papers on English Legal History*, Cambridge, 2013, vol.1, 270. See also Lemmings, *Professors*, 113-131.

[304] Thomas Ruggles, *The Barrister: Or, Strictures on the Education Proper for the Bar*, London, 1792, 160-167.

This applied particularly to nisi prius reports, which were published regularly and relatively contemporaneously. Moreover, the concentration of these reports on points of evidence and practice that arose daily in those courts made them extremely useful to students.[305]

These reports accordingly became a valuable source of education for student barristers. In his 1804 book on the study of the law, Richard Whalley Bridgman advised reading Espinasse's and Peake's reports when learning the law of nisi prius,[306] and in a lecture delivered to students in Lincoln's Inn Hall in December 1814, Joseph Chitty recommended Espinasse's works as 'Reading with a view to Practice'.[307]

As for student attorneys, they were required by legislation to serve a clerkship in an attorney's office and, as with pupil barristers, would largely be educated "on the job".[308] However, as with more senior members of their profession (discussed below), they would not be expected to spend their time reading law reports, but would instead concentrate on learning the more practical aspects of their profession, such as writing and copying legal documents and reading accounts.[309] Thus, in his avowedly aspirational advice to clerks on the books that they should read for the study of the law, the attorney William Wright recommended a formidable number of law books, but not a single contemporary law report;[310] and on the law of evidence he recommended several treatises and case digests,[311] but none of the nisi prius reports themselves.

Barristers

Most barristers at this time would spend a substantial proportion of their working day reading and noting up the latest law reports, particularly those starting out who had yet to acquire busy practices.[312] Notwithstanding the low regard in which nisi prius rulings were held by the courts in banc, reports of those cases would usually be amongst young barristers' reading material. For example, Henry Crabb Robinson, while a member of the Norfolk Circuit from 1813 to 1828, recorded in his diary spending long periods of time reading and making notes from Starkie's nisi prius reports, despite considering them to be 'very moderate' and 'very indifferent.'[313]

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[305] Anon., 'Notices of New Books - Foster and Finlason's Nisi Prius Reports, vols. I and II', 13 *Law Magazine and Law Review (3rd ser.)* (1862), 190 at 191. Of course, the student had to be careful not to assume that all he read in the nisi prius reports was good law, as the judge's ruling may have been subsequently overturned in banc: Thomas Tayler, *The Law Glossary*, 4th ed., New York, 1856, 354.

[306] Bridgman, *Reflections*, 89.

[307] 'Mr Chitty's Directions to Law Students', repr. 3 *United States Law Intelligencer and Review* (1831), 296-297.

[308] Robert Robson, *The Attorney in Eighteenth-Century England*, Cambridge, 1959, 52-53.

[309] Samuel Warren, *The Moral, Social, and Professional Duties of Attornies and Solicitors*, London, 1848, 65-90.

[310] Wright, *Advice*. Similarly, Warren recommended several law books to be read by a senior articled clerk, but he included no law reports: Warren, *Duties*, 137-145.

[311] Wright, *Advice*, 93.

[312] The 'fearful matter' of the high cost of the contemporary reports would, however, have deterred many young practitioners, who may have to make do with digests of reports: Samuel Warren*: A Popular and Practical Introduction to Law Studies*, London, 1835, 494. Popular digests of the time included Samuel Bealey Harrison, *Analytical Digest of All the Reported Cases etc.*, London, 1835 and Edward Chitty, *Index to All the Reported Cases Decided in the Several Courts of Equity etc.*, London, 1831.

[313] Dr Williams's Library (DWL) Henry Crabb Robinson Archive (HCR). See, for example, the entries for 1 Dec. 1817 (HCR/1/6), 23 Feb. 1819 (HCR/1/7) and 18 Sept. 1819 (ibid.).

Despite their shortcomings, nisi prius reports were of value to barristers for two principal reasons.

First, as stated above, they provided an insight into the daily practice of the nisi prius courts on matters of evidence, as well as on the application of established legal principles to particular factual situations, which could not be gleaned from reports of the courts in banc or from other publications. Given that much of young barristers' work - actual and anticipated - was on circuit, the value to their practices of the nisi prius reports made them required reading.

Secondly, however slight the authority of nisi prius rulings were, they were better than nothing: accordingly, Joseph Chitty cannily remarked that the only justification for reporting nisi prius cases was '… the laudable ground that one side or the other usually wants to have *some materials*, however questionable, to support a bad case, and so far Nisi Prius decisions … may be useful in a *desperate* case.'[314] The possibility that they might furnish the advocate with some support, however slight, for a legal proposition that would otherwise be required to bear its own weight, meant that the barrister could not afford to ignore the nisi prius reports.

Attorneys

Whatever their approach was to learning the law as students, it is unlikely that practising attorneys, even those specialising in litigation, would have been prolific purchasers of nisi prius reports, or indeed law reports in general. At the end of the eighteenth century, the vast majority of attorneys were sole practitioners[315] who made a comfortable living rather than large fortunes through their legal work,[316] and the high cost of reports would have put them out of the reach of most.

Moreover, any case which needed to be litigated at nisi prius would as a rule be swiftly referred for consultation with counsel, upon whom the attorney would rely for the analysis of its legal merits. The attorney's litigation duties were focused on more practical and logistical matters such as gathering evidence, proofing witnesses, preparing briefs and ensuring that the witnesses attended court. The attorney accordingly had little need, and even less time, for perusing the law reports.[317]

A realistic approach to the attorney's law library was taken by a manual for articled clerks produced in 1836.[318] Noting that it was impossible for the private practitioner to afford all the reports, he was advised to purchase them 'by degrees' depending on his means, but in the meantime to rely on digests of reported cases and more general legal abridgments. Alternatively, if London attorneys needed to consult the law reports, they could join the Law

[314] Joseph Chitty, *The Practice of the Law in All Its Departments,* London, 1836, vol.3, 7n (emphasis in the original).

[315] More than 75% in London and 90% in the provinces: Cornish *et al*, *Oxford History vol.XI*, 1214.

[316] Michael Birks, *Gentlemen of the Law*, London, 1960, 233.

[317] Warren, *Duties*, 170. Warren did, however, advise young practitioners to purchase *Smith's Leading Cases*: ibid., 213.

[318] Anon., *A Manual for Articled Clerks and other Law Students*, London, 1836, 92-98.

Society, founded in 1825, and visit the Society's library, which by 1832 contained a thousand volumes, housed in the Society's new premises in Chancery Lane.[319]

Whilst apocryphal, the reaction of George and James Stephen's young attorney to a client citing authorities to him may be regarded as not untypical of that branch of the profession's general attitude to raw caselaw: trembling and breathless at being so out of his depth, the attorney resorted to replying by quoting, from an empty commonplace book, a bogus case from a fictitious set of reports.[320]

Merchants

As noted in Chapter 2, the explosion of trade and commerce in the early nineteenth century led to an increase in civil litigation, as well as a much closer connection between law and commerce given the greater prominence in commercial life of such matters as insurance, agency, liens, partnerships, bankruptcy and bills of exchange. It was at this time that commercial law became a freestanding topic of analytical study,[321] and an experienced tradesman would be exposed to more law and needed more legal advice than his predecessors. As George and James Stephen noted, 'there is scarcely any important transaction in which the merchant can engage, that does not more or less require the counsel of his solicitor, till long familiarity with the subject has made him half a lawyer himself.'[322]

It appears that some merchants went further and read the nisi prius reports themselves: John Campbell recalled that, from the outset of their publication, his reports were purchased by merchants as well as by lawyers.[323] Campbell's recollection appears plausible: compared to the reports of Westminster Hall cases, the relatively short and accessible nature of the nisi prius reports would have made them easier for the non-lawyer to understand, and their topicality would have enabled ambitious men of commerce both to keep abreast of the latest developments in the courts and to impress clients or intimidate business rivals with their legal knowledge.

AN APPRECIATION OF NISI PRIUS REPORTS

This Chapter began with a selection of highly critical commentary on the uselessness of nisi prius reports, consistent with the general attitude of the judiciary to the standing of nisi prius rulings as authorities. However, there was another set of responses to the nisi prius reports which recognised their practical use to the profession, irrespective of their value as precedents.

For example, the *Law Magazine* in 1830 pronounced its support for the reporting of nisi prius cases, noting that 'well-weighed decisions are frequently made at nisi prius, on important points that never come before the courts, that many judgments, now regarded as land-marks, would have been lost to us but for Nisi Prius Reports.' It supported the continuation of these reports,

[319] E.B.V. Christian, *A Short History of Solicitors*, London, 1896, 179.

[320] Sir George Stephen and Sir James Stephen, *Adventures of an Attorney in Search of a Practice*, London, 1839, 24-25.

[321] Joseph Chitty, *Prospectus of a Course of Lectures on the Commercial Law, to be Delivered Immediately after the Michaelmas Term, A.D. 1810*, London, 1810.

[322] Stephen and Stephen, *Adventures*, 194.

[323] Hardcastle, *Life*, vol.1, 215-216.

on the basis that, although they did not have the full force of decisions in banc, their worth could be assessed on the same basis as the old nominate reports 'which were respected in exact proportion to the learning and judgment of the collector.'[324]

The same journal, in its review of the first two volumes of Foster and Finlason's reports, recognised the value of nisi prius reports, not as settling disputed points of law, but as 'illustrating the practical application of admitted principles of law … of great professional interest, not elsewhere reported, and which would otherwise be lost to the profession …'. The journal also declared that the decisions would be found to be extremely useful to younger practitioners and students.[325]

This theme was taken up by the *Jurist*, in two reviews of Foster and Finlason's reports. In addition to providing the student with valuable lessons on the preparation of cases, the first review stated that nisi prius reports were of advantage to the practitioner as 'shewing the mode of treatment adopted by our several judges when acting singly, and without any special preparation for the subject.'[326] In the second review, the journal said that the reports were useful both to the nisi prius practitioner and 'to those who are arming for conflict in the great arena', given the variety of the topics and the interesting nature of the cases which did not find their way to the higher court.[327] Similarly, the editor of *The Revised Reports* justified his inclusion of a number of Peake's nisi prius cases on the basis that 'such decisions are often the only recorded judicial authority for rules of practical importance and constant application.'[328]

CONCLUSION

The majority of contemporary opinion viewed nisi prius reports as a waste of effort and money: as regards the main function of law reporting - the publication of authoritative decisions to be subsequently cited and followed - there was little professional support for them, at least in public.

However, the more favourable reviews explained that there were three principal reasons why the reports were nevertheless purchased and read. First, they provided a source of recent rulings on evidence and trial practice that could not be obtained elsewhere. Secondly, they recorded interesting examples of how the trial courts worked and gave students and inexperienced practitioners a feel for the practice of those courts. Thirdly, they reported decisions on points that were not the subject of decisions of the courts in banc, perhaps because they were not considered to merit argument when the cases went back to Westminster Hall.

Irrespective of those reasons, the nisi prius reports could not have survived if the judiciary of the time had not permitted them being referred to by counsel. In Chapter 1, examples are cited of judges regretting their use and wishing that they were never cited, but it is interesting to speculate on why this never developed into a hard and fast exclusionary rule.

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[324] Hayward, 'Reports and Statutes', 18.

[325] Anon., 'Notices of New Books', 13 *Law Magazine and Law Review (3rd ser.)* (1862), 186 at 191.

[326] Anon., 'Review – Foster and Finlason's Nisi Prius Reports, vol.1, part 1', 4 *Jurist (n.s.)* (1858), 301-302.

[327] Anon., 'Review – Foster and Finlason's Nisi Prius Reports, vol.1, part 2', 5 *Jurist (n.s.)* (1859), 227.

[328] Sir Frederick Pollock, ed., *The Revised Reports*, London, 1892, vol.3, vii.

One likely reason is the fact that, as explained in Chapter 7, nisi prius rulings on matters of evidence did have a significant influence even on courts in banc until the mid-nineteenth century. The judges may have decided that the usefulness of those rulings meant that it was worth permitting nisi prius cases on matters of substantive law also to be cited, and that a ban on only the latter would have been difficult to apply in practice, in cases where the line between evidential and substantive legal issues was difficult to draw.

Perhaps more relevantly, as a matter of general practice there was no attempt by nineteenth century judges to limit the citation of authority by counsel, either formally or informally by means of critical statements in judgments as to the conduct of counsel in that regard. Although there are anecdotes about excessive citation of authority receiving a mild rebuke from the Bench,[329] there is no evidence of judges of the time requiring restrictions to be placed on the number of authorities cited to them.

This is not because counsel of the time did not suffer from what Karl Llewellyn diagnosed as "Cititis"[330] – the tendency to ply the court with an abundance of cases, without due consideration of how relevant they were to the proposition for which they were being cited. In the early seventeenth century, Sir Edward Coke was complaining about 'long arguments with such farrago of authorities, it cannot be but there is much refuse, which ever doth weaken or lessen the weight of the argument.'[331] However, sustained judicial criticism of the practice of favouring quantity over quality when it came to the provision of caselaw for the court is largely a modern experience.[332]

The closest a nineteenth century judge came to prohibiting the citation of nisi prius cases was in the Common Pleas, in circumstances where the issue for which such a case was cited had already been fully settled by a body of cases from the court in banc: and even in that situation, Dallas CJ was careful not to give any opinion on the utility of the nisi prius reports in general.[333]

Whatever the reason, nisi prius rulings were not only allowed to be cited but would often be referred to in judgments without criticism. The reasons for their use by the nineteenth century judges are explored in Chapter 7, but the fact that judges of that time were prepared to refer to nisi prius rulings at all meant that they merited being cited by counsel, and that the reports of them were worth purchasing.

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[329] For example, Lord Eldon recounted the story of Serjeant Hill, who began an argument in the King's Bench asking for the court's pardon that he had seventy-eight cases to cite, to which Lord Mansfield CJ replied: 'you can never have our pardon, if you cite seventy-eight cases': A.L.J Lincoln and R.L McEwan, eds., *Lord Eldon's Anecdote Book*, London, 1960, 42.

[330] Karl N. Llewellyn, *The Bramble Bush: On our Law and its Study*, New York, 1951, 8.

[331] Coke, *Reports*, vol.10, xii. This would not necessarily be solely the fault of counsel: frequently they did so in compliance with the wishes of their attorneys: Wright, *Advice*, 1st ed., 1810, 81.

[332] The first prohibition on the citation of specific cases to certain courts was in 1983: *Roberts Petroleum Ltd v Bernard Kenny Ltd* [1983] 2 AC 192; the first general limitation on the citation of authorities in civil proceedings was in 2001: *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001.

[333] *Levy v Roberts, The Times,* 9 Jul. 1819.

SECTION 2: REPUTATION

CHAPTER 4

THE JUDICIAL ASSASSINATION OF ISAAC ESPINASSE

INTRODUCTION

At the beginning of his article on the sources of the reputations of nineteenth-century judges, Patrick Polden warns of the danger of relying on throwaway comments of subsequent biographers in assessing how judges were regarded in their own time.[334] It is accordingly somewhat ironic that, when referring to Isaac Espinasse later in the same article, Polden dismisses him as 'the notoriously inaccurate reporter.'[335]

Whenever the quality of nominate law reporters is discussed, Espinasse is more often than not cited as the worst example of his kind. For example, the book which introduced the law to several generations of law students – Glanville Williams's *Learning the Law* – cited Espinasse's reports as the foremost example of the poor quality of some of the old reports, describing him as 'the one who got most kicks of all.'[336] No-one's reports have been more reviled, and his reputation has been described as 'lost beyond recovery.'[337]

As explained in this Chapter, the destruction of Espinasse's standing as a law reporter was brought about by a series of adverse comments by judges delivered in the mid-nineteenth century. However, the force of these criticisms is weakened by the fact that they are no more than assertions, unsupported by evidence or analysis, and undermined by the context in which they were made. This gives rise to a more general issue, discussed at the end of this Chapter, about how, and by whom, the authority of nominate law reports should be assessed, involving as it does the serious matter of a judicial system which has caselaw at its heart ignoring cases that are potentially relevant to the exercise of its function.

Chapter 5 then seeks to subject the criticisms of Espinasse to closer scrutiny, by considering the reputation of his reports during his lifetime, and by comparing the accuracy of his reports with other sources that reported the same cases. The conclusion to be drawn from that analysis is that those criticisms are not supported by the evidence, and that Espinasse's reports are broadly accurate.

The consequent question of why judges felt the need to disparage the quality of Espinasse's reports is relevant in two different contexts. Why do so if those criticisms are not consistent with the evidence? And why do so if the nisi prius rulings he was reporting were of so little worth as authorities? The former question is considered in Chapter 6; the latter question, which also arises from the citation of such rulings by counsel and the regular references to them in the judgments of courts in banc, is considered in Section 3.

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[334] Patrick Polden, 'Judging Judges: The Reputations of Nineteenth-Century Judges and their Sources', in Musson and Stebbings, *Making Legal History*, 53.

[335] Ibid., 58-59.

[336] Glanville Williams, *Learning the Law*, 11th ed., London, 1982, 35.

[337] Luther, 'Text and Context', 531. For a recent negative reference to Espinasse in a very short summary of the history of law reporting, see Paul Magrath, 'Law Reporting: a History', 174 *New Law Journal* (2024), issue 8066, 6.

JUDICIAL CRITICISM

Although Espinasse is now commonly accepted amongst lawyers to be an incompetent reporter, the source of his poor reputation can be traced back to four isolated comments made by Victorian judges.

The first, and probably the most influential, critical comment was made by Lord Denman CJ in 1849. In *Small v Nairne*,[338] the issue for the Queen's Bench was whether the trial judge was right to allow part of an interrogatory to be read in evidence, having rejected another part as being a response to a leading question. The objector cited a case reported by Espinasse, *Wheeler v Atkins*,[339] as authority for the proposition that interrogatories must be either wholly rejected or wholly received. The court unanimously dismissed that objection without express reference to *Wheeler v Atkins*, but Denman, having already given his judgment, said this after the rest of the court had spoken:[340]

> 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 than 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.[341]

The second comment, made in 1853, has been given equal prominence because of its *soi disant* humorous nature. During argument in *Whyman v Gath*,[342] counsel remarked that Espinasse's reports had often been spoken of as being entitled to little weight, to which Pollock CB responded as follows:

> It used to be said that Mr Espinasse heard *one* half of the cases and reported the *other* half.[343]

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[338] (1849) 13 Q.B. 840, cited by Coleridge J in *Wenman v Mackenzie* (1855) 5 E. & B. 447, 453 (*arguendo*). See also *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, 87 per Maugham LJ.

[339] (1805) 5 Esp. 246.

[340] *Small v Nairne*, 844. Denman was clearly here not objecting to references to nisi prius cases in general, as he said nothing about the citation to the Court of *Hutchinson v Bernard* (1836) 2 Moo. & Rob. 1, a nisi prius decision of Patteson J.

[341] There is an irony in Denman's use of Coke's reports as a comparator: whilst they were undoubtedly highly influential, they too were not noted for their precision: Luther, 'Text and Context', 534; Veeder, 'English Reports', 11.

[342] (1853) 22 L.J. Rep. Ex. 316. This comment was not included in the report of this case by Welsby, Hurlstone and Gordon (8 Ex. 803).

[343] *Whyman v Gath*, supra, 317 (emphasis in the original).

Presumably a reference to Espinasse's alleged deafness, this comment was picked up by a number of subsequent writers and judges,[344] and is often quoted when his quality as a reporter is under consideration, apparently as a reason for his low standing.[345]

The third comment was made in 1867 by Blackburn J – himself a former law reporter who had reported *Small v Nairne* for the Queen's Bench Reports. In *Readhead v The Midland Railway Company*,[346] the judge referred to cases reported by Espinasse and by Carrington and Payne, and concluded as follows:

> These are, it is true, only Nisi Prius decisions, and 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.[347]

The final comment is purely anecdotal. It is said to come from Maule J, a judge of the Common Pleas from 1839 to 1855[348] who had a reputation for being a caustic wit.[349] It can be traced back to the memoirs of two barristers, Arthur Ashton KC and Sir Henry Chartres Biron, published in 1924 and 1936 respectively.[350] The anecdote is recorded by the former in the following terms:

> A counsel once asked Mr Justice Maule how he got over the case in Espinasse, and Mr Justice Maule, in his thin languid voice (he suffered from asthma), said that he cared nothing for Espinasse or any other ass.

From these comments, one could be forgiven for thinking that Espinasse was the type of slovenly, incompetent and briefless barrister satirised by Dickens, Trollope and Thackeray. But to all appearances, Espinasse was well suited to his task. As noted earlier, he had been a scholar

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[344] Edward Manson, *Builders of our Law during the Reign of Queen Victoria*, 2nd ed., London, 1904, 119; Theobald Mathew, 'Law-French', 54 *Law Quarterly Review* (1938), 358 at 368; see also E.S.P. Haynes, *A Lawyer's Notebook*, London, 1932, 43, in which the comment was wrongly stated to have been recorded by Pollock's great-grandson. The quip was repeated by Denning LJ in *Warren v Keen* [1954] 1 QB 15, 21.

[345] The remark was not particularly original, reminiscent as it is of Samuel Johnson's 1773 criticism of English law reporting as being 'in general … very poor; only the half of what has been said is taken down; and of that half, much is mistaken': James Boswell, *Life of Samuel Johnson*, London, 1847, 206.

[346] (1866-1867) L.R. 2 Q.B. 412, 437. On appeal, this comment was cited by Montague Smith J, delivering the judgment of the Exchequer Chamber: (1868-69) L.R. 4 Q.B. 379, 388; however, that court went on to cite without criticism another case reported by Espinasse: *Aston v Heaven* (1797) 2 Esp. 533.

[347] Blackburn also cast doubt on Espinasse's reports in his treatise on the sale of goods: Colin Blackburn, *A Treatise on the Effect of the Contract of Sale etc.*, 1st ed., London, 1845, 255-256.

[348] Luther states that Maule was also a law reporter, but he appears to be confusing the judge William Henry Maule with George Maule, who was responsible for Maule and Selwyn's King's Bench reports: Luther, 'Text and Context', 535. Luther here is in good company, as both Sir William Holdsworth and the editor of the *Law Quarterly Review* made the same mistake: W.S. Holdsworth, 'The Named Reporters', 8 *Anglo-American Legal History Series* (1943), 1 at 9; A.E. Randall, 'Reviews and Notices', 40 *Law Quarterly Review* (1924), 373 at 374. The two Maules may well have been related: Anon., 'Obiter Dicta', 24 *Law Journal* (1889), 605. Incidentally, Maule J's closest friend was the nisi prius reporter Edward Ryan: Emma Leathley, *Memoir of the Early Life of The Right Hon. Sir W.H. Maule*, London, 1872, 169.

[349] Benjamin Coulson Robinson, *Bench and Bar*, London, 1889, Ch.9. In one case, in which there was a difference of opinion amongst the Judges, Maule is reported to have said: 'I agree with the conclusions of my brother A, for the reasons offered by my brothers B and C': Heard, *Curiosities*, 65.

[350] Arthur Ashton KC, *As I Went on My Way*, London, 1924, 27; Sir Henry Chartres Biron, *Without Prejudice: Impressions of Life and Law*, London, 1936, 88.

of Trinity College Dublin; he was a busy nisi prius barrister, regularly acting as junior to the two leading advocates of the day, Thomas Erskine and William Garrow; and he was already the author of a successful digest of nisi prius law.[351] As also stated above, he was no neophyte, beginning to report at the age of thirty-eight, which was many years older than Peake and Campbell when they began reporting. As a nisi prius junior Espinasse would also have been well-placed, physically and intellectually, to report on these cases; and indeed he reported a number of cases in which he appeared as counsel, and so would have had access to the pleadings, documentary evidence and other court papers relating to those cases which would not necessarily have been available to other reporters.[352]

Espinasse was also well-regarded in the profession. As referred to in Chapter 2, at the end of his reporting career he was elected a Bencher and then Treasurer of his Inn, in 1809 and 1811 respectively; and Henry Crabb Robinson in his unpublished diaries recounted an occasion when his leader compromised a case due for trial because an opinion on evidence given by Robinson had been disapproved of by Espinasse, even though it had been mostly agreed to by the respected special pleader Joseph Chitty.[353] Espinasse was recognised for his work outside the law too, receiving an award from the Royal Society of Arts in 1818 for his writings on beekeeping.[354]

These facts, combined with the absence of any substantial explanation given by the judges for their dismissal of Espinasse's work, require a closer look to be taken at the circumstances in which those criticisms were made.

THE CRITICISMS RECONSIDERED

On their face, the judicial comments referred to above constitute strong circumstantial evidence to support Espinasse's incompetence as a law reporter. However, when put into their various proper contexts, the force of those comments is somewhat reduced.

Citation of Espinasse

The first general point is that, in what might be considered to be inconsistent, even hypocritical, conduct on the part of all four of the judicial commentators, none of them appeared to have had any problem either with relying on cases reported by Espinasse when they were at the Bar, or with citing such cases on other occasions without criticism when they were on the Bench.[355] In

[351] Espinasse, *Digest*. This ran to four editions in England and was still being published in the United States in 1820.

[352] There are a number of instances of courts preferring, out of several reports or notes of the same case, that produced by the person who was counsel in the case: for example, *Evelyn v Evelyn* (1753) Amb. 191, 193 per Lord Hardwicke C; *Windham v Chetwynd* (1757) 1 Burr 414, 428 per Lord Mansfield CJ. By contrast, Grant Gilmore speculates that Espinasse may have done a terrible job of reporting *Stilk v Myrick* because he appeared in the case himself, and hence was rather distracted: Grant Gilmore, *The Death of Contract*, Columbus, Ohio, 1974, 23-28.

[353] DWL HCR 8 Mar. 1817 (HCR/1/5).

[354] Isaac Espinasse, 'Management of Bees', 36 *Transactions of the Society for the Encouragement of Arts, Manufactures and Commerce* (1818), 29.

[355] Cases in Espinasse's reports were accordingly referred to by: Denman as counsel (*Baldey v Parker* (1823) 2 B. & C. 37, 40; *Partridge v Coates* (1824) Ry. & M. 153, 155; *Harington v Hoggart* (1830) 1 B. & Ad. 577, 581); Denman as judge: (*Nowell v Davies* (1833) 5 B. & Ad. 368, 371; *Thompson v Percival* (1834) 5 B. & Ad. 925, 933-934; *Doe d Mudd v Suckermore* (1836) 5 A. & E. 703, 742 and 744; *Routledge v Ramsey* (1838) 8 A. &. E

one case,[356] Blackburn J queried counsel's citation from a textbook of a case, on the basis that the reference in the textbook was at odds with the case as reported – by Espinasse. Whilst Blackburn may have been forced to rely on Espinasse's report for want of a better alternative, it is notable that he said nothing about the quality of Espinasse's reporting when so doing.

Denman's comment

Denman's comment on the accuracy of Espinasse's reporting was presumably made to justify the court's decision without having to grapple with *Wheeler v Atkins*, allowing it to be inferred that that decision must have been wrongly reported. But had the judges considered the case, they could have easily distinguished it from the case before them. In *Wheeler v Atkins*, a defendant's witness had been examined on interrogatories which were produced on evidence. In one of those interrogatories a letter was referred to which the plaintiff desired to see. The defendant refused to produce it and said that the interrogatory concerned would be abandoned. Lord Ellenborough CJ was reported by Espinasse as ruling that the defendant must produce the letter, unless he abandoned the interrogatories as a whole. That decision can be justified on the basis that the remainder of the interrogatories would not have been intelligible without the interrogatory which referred to the letter, and that it would be unfair to permit the defendant to rely on the other interrogatories without being required to produce the letter.[357] This explanation is consistent with the decision in *Small v Nairne* itself, where the court upheld the decision of the trial judge to allow the remainder of the interrogatories on the basis that the offending interrogatory was divisible from the rest.[358] This does not sit easily with the implication from the criticism of Espinasse's reports that *Wheeler v Atkins* was either unintelligible or wrong in principle.

Moreover, the case in which Deman made his comment was one of his last. According to his biographer,[359] Denman - who was then aged 71 - suffered a stroke on 14 April 1849 which paralysed his entire right side; his faculties were restored a few weeks afterwards, and Denman ignored his doctors' advice to rest from work by sitting during the whole of the Trinity Term (22 May to 12 June) and giving several judgments - including in *Small v Nairne* on 15 June - during the early part of the long vacation. After that, Denman never sat as a judge again, as on 21 July he suffered a second stroke which prevented him from attending court, leading to his resignation in February 1850. It is therefore possible that, when he made his comment about Espinasse, Denman's advanced age and poor health meant that he was not as balanced and as clearheaded as he might otherwise have been.

221, 223-224; *Skeate v Beale* (1841) 11 A. & E. 983, 991; *Barnett v Brandao* (1843) 6 M. & G. 630, 666; *Bessell v Landsberg* (1845) 7 Q.B. 638, 640; *Garrard v Cottrell* (1847) 10 Q.B. 679, 681; *Simpson v Margitson* (1847) 11 Q.B. 23, 32); Pollock as counsel (*R v Gutch* (1829) Mood. & M. 432, 435); Pollock as judge (*Rodgers v Maw* (1846) 15 M. & W. 444, 449; *Graham v Inglesby* (1848) 2 Ex. 442, 445; *Astley v Johnson* (1860) 5 H. & N. 137, 142; *Swinfen v Bacon* (1860) 6 H. & N. 184, 188); Blackburn as counsel (*Hallifax v Lyle* (1849) 3 Ex. 446, 450); Blackburn as judge (*Henderson v Squire* (1868-1869) L.R. 4 Q.B. 170, 174; *Morison v Thompson* (1873-1874) L.R. 9 Q.B. 480, 483); Maule as counsel (*Ex parte Jones* (1832) 2 Cr. & J. 513, 522; *Bromage v Rice* (1836) 7 C. & P. 548); and Maule as judge (*Hubert v Treherne* (1842) 3 M. & G. 743, 752).

[356] *Durrell v Evans* (1862) 1 H. & C. 174, 180.

[357] Cf. *Temperley v Scott* (1832) 5 C. & P. 341, where the plaintiff was not entitled to rely on the witness's answers to his own interrogatories without putting into evidence the answers to the defendant's cross-interrogatories.

[358] *Small v Nairne*, supra, 843 per Lord Denman CJ and 844 per Wightman J.

[359] Arnould, *Memoir*, vol.2, Ch.34.

Pollock's comment

As to Pollock's comment about Espinasse's deafness affecting his ability to report, apart from being hearsay, it was also probably wide of the mark, as it is unlikely that Espinasse was suffering from such an affliction during the time he was reporting. At the time he finished reporting in 1811 at the age of 53, and for more than a decade thereafter, Espinasse was still being regularly instructed in cases both at nisi prius and in banc:[360] this would have been unlikely if his hearing had been seriously impaired, as that would have been inimical to a successful practice at the Bar, especially for a nisi prius practitioner having to contend with the noise of a crowded courtroom.[361]

Such evidence as there is suggests that Espinasse's deafness occurred many years after he finished reporting. Recalling his time as a student at Gray's Inn in the mid-1820s, the Irish barrister, law reporter and journalist Andrew Valentine Kirwan wrote pseudonymously that:

> There were only two Irishmen of any eminence then at the English Bar. Mr. Nolan, a man of great learning in his profession, of whom it was disparagingly said that he had the shoulders of Hercules and the voice of Bathyllus; the other, Mr. Isaac Espinasse, who had become deaf, and lost a portion of his business. [362]

Writing about a period many years after Espinasse's retirement as a reporter, Kirwan's testimony is more consistent with Espinasse suffering his affliction during that period rather than at the time he was reporting.

Further evidence that Espinasse's decline in practice did not occur until the 1820s comes from his own correspondence. In a letter to an old friend, the attorney Charles Hodgson, dated 26 March 1816,[363] Espinasse informs him that he is busy at the assizes – 'nailed to the Counter like a bad shilling' - and that, although Maidstone assizes was unusually quiet, 'Surry promises to be immense.' In a letter to Hodgson dated 10 March 1821,[364] Espinasse complained of suffering from gout 'which attended me, most unkindly in the middle of one of the busiest Terms I have for some time had.' However, by 1823, Espinasse had given up appearing in court, telling Hodgson in a letter dated 27 December[365] that 'I have thrown off the Gown & Wig' although he meant 'to come to town occasionally every week to answer Cases or draw pleadings or such business as does not require attendance in Court.'[366]

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360 A survey of *The English Reports* shows that Espinasse appeared in seventy cases between 1812 and 1822; by comparison, Michael Nolan, a prominent Irish barrister who took silk in 1818, appeared in ninety-nine cases during the same period.

361 It was for this reason that Serjeant Sellon, a contemporary of Espinasse, retired early after becoming profoundly deaf in one ear: H.W. Woolrych, *Lives of Eminent Serjeants-at-Law of the English Bar*, London, 1869, vol.2, 808-809.

362 "A Man on the Shady Side of Fifty" (A.V. Kirwan), 'Social and Political Life Five-and-Thirty Years Ago', 62 *Fraser's Magazine* (1860), 113 at 123.

363 Kent State University (KSU) The Charles George Hodgson Collection, Folder 5.

364 Ibid., Folder 8.

365 Ibid., Folder 11.

366 A compilation of public figures published in 1825 referred to Espinasse as a barrister, 'but, not having an extensive practice at the bar, he has devoted his leisure hours to the composition of treatises on law subjects.' George Byrom Whittaker, *A New Biographical Dictionary of 3000 Cotemporary Public Characters*, 2nd ed., London, 1825, vol.1, part III, 28.

The only evidence which might suggest an earlier disorder comes from the preface to Espinasse's sixth and final volume of reports, published in 1811, in which he said this:

> In the year 1807, in consequence of a severe nervous illness, I was forced to relinquish the task of reporting; and on my recovery I found myself incapable of taking notes with that correctness which was requisite to give them to the world as accurate Reports of what fell from the learned Judges by whom the points were decided.

It may be that his inability properly to take notes was due to deafness caused by his illness, but that would not have greatly affected his reporting in that final volume, given that in it Espinasse departed from his previous practice of contemporaneous reporting. The substantial majority of the cases included in that volume dated from prior to his illness: of the sixty cases reported there, only twelve were decided between 1808 and 1810, and Espinasse appeared as counsel in five of them.

This evidence is contradicted, moreover, not only by the other evidence discussed above, but also by a comment made in 1813, during the course of a highly critical review of Espinasse's treatise on penal statutes, that 'a work, the production of a gentleman of Mr Espinasse's rank and standing in the profession, demands more respectful notice than mere general censure'.[367] This does not suggest that his reputation or practice as a barrister had begun to decline while has was still reporting.

Blackburn's comment

Blackburn's criticism of Espinasse in *Readhead v The Midland Railway Company* loses a great deal of weight given that it was made in respect of a case reported by Espinasse that was cited for a very different purpose than that for which it had been reported. As noted in Chapter 3, Espinasse's stated aim in reporting nisi prius rulings was to assist practising lawyers in settling the evidence needed to prove their cases; yet Blackburn's criticism of Espinasse was made during an attempt to rely one of his reported cases in support of a substantive legal principle.

The issue in *Readhead* was whether the liability of a carrier of passengers for hire to provide a roadworthy carriage extended to latent defects which could not reasonably have been discovered by the carrier. The Queen's Bench Division held, by a majority, that the carrier was not so liable; Blackburn J dissented, and was of the view that the carrier was responsible for latent defects. The plaintiffs, who argued for the greatest liability, relied on Espinasse's report of *Israel v Clark*, in which Lord Ellenborough CJ expressed his views as to the obligation of the carrier in very wide terms:[368]

> [The carriers] … were bound by law to provide a sufficient carriage for the safe conveyance of the public who had occasion to travel by them. At all events, he would expect a clear landworthiness in the carriage itself to be established.

[367] Anon., 'Espinasse on Penal Law', 1 *Legal Review* (1813), 610 at 614. The professional respect accorded by this journal to Espinasse stands in contrast with its criticisms of the competence of other legal writers: see, for instance, its description of the author of a book on evidence - a Gray's Inn barrister - as a 'legal Quixote': ibid., 62. See also this journal's spirited defence of its independence, at ibid., 553.

[368] (1803) 4 Esp. 259, 260.

The majority of the court distinguished that case, holding that it could not be discerned from the report whether that applied even in the case of a latent defect.[369] As for Blackburn, even though *Israel v Clark* supported his view, he dismissed that case and another case to the same effect,[370] in the critical terms stated above. But *Israel v Clark* was not reported by Espinasse in order to support the proposition that a warranty of roadworthiness was to be implied in a contract of carriage: indeed, the report says nothing about whether the legal basis on which the carriers were bound to provide a roadworthy carriage was a contractual implication or a common law duty. The point on which the case was reported related to the defendant carrier's argument that, because statute provided for a maximum number of passengers to travel on the roof of a carriage, evidence adduced in cross-examination to the effect that there were fewer passengers on the roof than were permitted by statute was sufficient to absolve the carrier of responsibility. This was rejected by Ellenborough, who held that compliance or otherwise with the statute had nothing to do with the issue. The plaintiffs in the *Readhead* case were therefore seeking to rely on a report dealing with a purely evidential point to establish their substantive legal case.

Maule's comment

As to the final comment from Maule J as reported by Ashton and Biron, neither of those writers could have had first-hand knowledge of it, and there is no contemporaneous corroboration from (for example) the obituaries of Maule published in the legal journals of the time.[371] Moreover, there are reasons to doubt the general accuracy of both writers' recollections: Ashton erred in his description of Espinasse's reports in other respects;[372] and Biron frankly admitted that his 'memories cannot pretend to be more than impressionist.'[373]

Personal nature of the comments

The final point to note about the three later judicial commentators is their particularly personal nature: unlike Denman, they did not confine themselves to a criticism of the reports, but instead included critical, or downright insulting, remarks about Espinasse himself, commenting adversely on his intelligence, his state of health, even his name. Perhaps these simply reflected the general view that Espinasse was a ridiculous laughing stock amongst the profession at the time, but they do not provide any compelling analysis to support the inaccuracy of his reports and suggest that they are directed more at Espinasse the man rather than Espinasse the reporter, a matter considered further in Chapter 6.

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[369] *Readhead v The Midland Railway Company*, supra, 419 per Lush J and 428-429 per Mellor J.

[370] *Bremner v Williams* (1824) 1 C. & P. 414. Blackburn's summary dismissal of Carrington and Payne's Nisi Prius reports is at odds with other judges' approval of the quality of Carrington as a reporter: see, for example, *R v Harley* (1830) 4 C. & P. 368, 370 per Park J. An obituary of Carrington described his reports as 'compiled with care and industry, and … regarded with favour by the profession': Anon., 'Obituary – F.A. Carrington, Esq.', 4 *Solicitors' Journal* (1860), 783.

[371] See, for example, Anon., 'Sir William Henry Maule', 5 *Law Magazine and Law Review (3rd ser.)* (1858), 1; Anon, 'Death of the Right Honourable Sir W.M. Henry Maule', 2 *Solicitors' Journal* (1858), 236; Anon., 'Death of Mr. Justice Maule', 30 *Law Times* (1858), 247.

[372] For example, he said that Espinasse was the reporter who followed immediately on Campbell (Ashton, *As I Went*, 27), whereas it was the other way round.

[373] Biron, *Without Prejudice*, 10.

QUIS CUSTODIET IPSOS CUSTODIES? JUDICIAL ATTITUDES TO THE REPORTERS

Due to the closer relationship which today exists between judges and law reporters, the legal profession takes the quality and accuracy of modern law reports for granted: criticisms are accordingly limited to minor typographical quibbles.[374] In the age of the nominate reporters, by contrast, the authority of reports would often depend on the regard the profession had for the reporters, who thereby acquired 'reputations as distinctive as Bordeaux vintages, ranging from the widely admired to the greatly disparaged.'[375]

Given the key role played by caselaw in the English legal system, in the age before quasi-official law reporting one would expect the ascertainment of the quality of the reporter and the accuracy of the report to be given high priority and to be the subject of detailed analysis. In the introduction to his survey of the law reports, John Charles Fox lists the questions which, in his view, needed to be asked when assessing the authority of a set of reports:[376]

> What were the qualifications of the reporter? Under what circumstances were his reports published? Did he himself take notes of the cases or did he borrow, and from whom? Were the reports published during his lifetime or edited by others after his death? Were they prepared by him with a view to publication? What opinion as to the authority of his reports have been delivered by judges and learned writers? What are the special features of the several editions?

What is notable about the judicial criticisms of Espinasse's reports considered above is that none of them involves an analysis by reference to these questions. Indeed, those criticisms involve no analysis at all, but are instead presented as generally-accepted and incontrovertible fact; yet they are little more than the personal view of the particular judge, delivered without reasoning, specific authority, evidence or corroboration. Espinasse is not alone in this respect: the reports are littered with negative comments by judges on the authority of particular reporters which rest solely on bare assertions.[377] In no other aspects of their decisions would judges seek to base their judgments or to make findings of fact or law on such weak grounds,

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[374] For example, *LRT Pension Fund Trustee Co Ltd v Hatt* [1993] Pens LR 227, 265, where Knox J referred to such an error in the Pensions Law Reports as 'one of the more unfortunate proof reading errors with which this series of reports abounds.'

[375] John H. Langbein, 'Chancellor Kent and the History of Legal Literature', 93 *Columbia Law Review* (1993), 547 at 577.

[376] Fox, *Handbook*, 1-2.

[377] Examples of cases in which unsubstantiated assertions are made as to the lack of authority of a reporter or reports include: *R v Starling* (1662) 1 Keb. 675, 676 per Hyde CJ (on Popham); *Mollam v Hern* (1666) 2 Keb. 316 per Keeling J (on 3 Croke); *Pennoyer v Brace* (1702) Comb. 441, 442 per Lord Holt CJ (on Carter); *Mitchell v Reynolds* (1712) 10 Mod. 130, 138 per Parker CJ (on March); *Tomkyns v Ladbroke* (1755) 2 Ves. Sen. 591, 595 per Lord Hardwicke C (on Levinz); *Mostyn v Fabrigas* (1774) 1 Cowp. 161, 178 per Lord Mansfield CJ (preferring the report of a case by Lord Raymond over the report in 6 Modern); *La Vie v Philips* (1775) 1 W. Bl. 570, 571 per curiam (on Atkyns); *R v Lyme Regis* (1779) 1 Dougl. 79, 83 per Buller J, *arguendo* (on 12 Modern); *Jones v Maunsell* (1779) 1 Dougl. K.B. 302, 305 per Lord Mansfield CJ (on Keble); *Borrowdale v Hitchener* (1802) 3 Bos. & P. 244, 245 per Heath J (on Barnes); *Nash v Nash* (1817) 2 Madd. 133, 140 per Plumer V-C (on 2 Equity Cases and on Bunbury); *R v Francis* (1874) 43 L.J. Rep. M.C. 97, 100 per Blackburn J, *arguendo* (on Lewin). A different, but no less egregious example is provided by the solicitor Sir John Hollams, who recalled Martin B, when a decision from Bingham's New Cases was cited to him, saying to counsel: 'I shall pay no attention to cases decided at that time. Sir Nicholas Tindal, who was an amiable man, was induced by Sir Thomas Wilde to decide cases as he wished': Hollams, *Jottings*, 130.

yet such assertions have been deemed sufficient to damn reporters such as Espinasse in the eyes of the legal profession for all time.

Thus, a reviewer of the third edition of J.W. Wallace's book on the reporters[378] said that:

> … there seems to be little doubt that even judges have occasionally been misled to pronounce hasty estimates of the value of particular reporters from a partial view of their works. A case, perhaps erroneously reported, gives rise to an expression of distrust or disparagement, affecting the character of whole volumes, and there is much weight we think in Mr Wallace's observation, that many judges have reflected on the accuracy of reporters merely at second-hand, and often inaccurately.[379]

The reviewer went on to recount the story of a case in the Exchequer Chamber, in which counsel cited a case from Lord Raymond's reports, which elicited the observation from one of the judges that he remembered to have seen Lord Raymond spoken of as an inaccurate reporter: even though the sole example of that was a remark from Lord Mansfield CJ, referred to below, and there were a number of contrary views expressed judicially: the unpreparedness of counsel to respond to that comment meant that the authority of the reporter was traduced, probably unfairly.[380]

This treatment of certain law reporters meant that their reports could not be relied upon to state what the law was, to the detriment of the administration of justice. This point was made by Jeremy Bentham in his only recorded comment on law reporting:

> Some [barristers], to drive a penny, run the risk of being sent to jail, and publish their note-books which they call reports. But this is as it happens, and a judge hears a case out of one of these report-books, or says it is good for nothing, and forbids it to be spoken of, as he pleases.[381]

Whilst the absence of any objectively justifiable grounds for the judges' views does not, of course, necessarily mean that they were wrong, it does make it difficult to ascribe much value to them, particularly where there is disagreement amongst judges as to the quality of a particular reporter.[382] As the reviewer of Wallace's book remarked:

> It is nothing less than a careful comparison with contemporary reports (when there happen to be any), and that continued patiently and carefully through a long series of examples, that qualifies a man (except in gross and patent cases of error) to pronounce that the reports of this or that reporter are untrustworthy.[383]

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[378] Wallace, *The Reporters*.

[379] Anon., 'Reporters and Reporting', 9 *Law Magazine and Law Review (3rd ser.)* (1860), 321 at 329.

[380] Ibid., 329-330.

[381] John Bowring, ed., *The Works of Jeremy Bentham*, Edinburgh, 1843, vol.5, 235.

[382] For differing views on Strange's reports, compare *Green v Weaver* (1827) 1 Sim. 404, 432 per Hart V-C and *Lynall v Longbothom* (1756) 2 Wils. K.B. 36, 38 per Willes CJ; similarly, with respect to Barnardiston's Chancery reports, compare *Zouch v Woolston* (1761) 2 Burr. 1136, 1142n per Lord Mansfield CJ and *Duffield v Elwes* (1827) 1 Bligh N.S. 497, 538 per Lord Eldon C; and with respect to Moseley's reports, compare *Quantook v England* (1770) 5 Burr. 2628, 2629 per Lord Mansfield CJ (*arguendo*) and *Mills v Farmer* (1815) 1 Mer. 54, 92 per Lord Eldon C.

[383] Anon., 'Reporters and Reporting', 331.

A particular reason why judicial criticisms of reporters need to be supported by reasons is the concern that, where those criticisms were made by judges when faced with a decision which did not accord with the way in which they wished to decide a case, they were choosing to discredit the reporter rather than the decision:[384] this allowed the judges to rule in the way they wished, without disturbing the doctrine of precedent or having to doubt a fellow judge.

The worst culprit in this respect was Lord Mansfield, of whom Lord Denman said the following:

> Many of Lord Mansfield's observations, and more particularly those which tend to disparage the former authorities, may be fairly urged as evincing a disposition on his part to depart from them.[385]

A notorious example of this was Mansfield's refusal in *Cooper v Chitty*[386] to rely upon Holt CJ's nisi prius decision in *Cole v Davis*[387] on the basis that the reporter, Lord Raymond, was young when he took the notes of that case.[388] In *Garland v Carlisle,*[389] Denman, sitting in the Exchequer Chamber, rejected that criticism in the following terms:

> But is it really impossible to believe that Lord Raymond was too young to understand what he heard? If not, his youth is immaterial in this argument; and are we then to discard as inaccurate and incorrect all that he reported in the first half of his first volume during the five years preceding? I cannot refrain from saying, that we can rely upon none of our reports, if we admit a doubt that Raymond has accorded Holt's genuine doctrine, and that he understood it fully.

Coincidentally, a different aspect of *Cooper v Chitty* led another Chief Justice to reject the authority of a reporter on grounds which were not only spurious, but which he must have known to be so. In *Rorke v Dayrell*,[390] Lord Kenyon wished to follow another decision of Holt,[391] but was faced with Mansfield's statement in *Cooper v Chitty* that that case had been misreported too.[392] Kenyon's response was to say that it was probable that Mansfield had himself been misreported by Burrow.[393] Unfortunately for him, when Kenyon's own manuscript note of *Cooper v Chitty* was published in 1819,[394] it was found to be in materially identical terms to Burrow's report.[395]

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[384] Wallace, *The Reporters*, 30.

[385] *Garland v Carlisle* (1833) 2 Cr. & M. 31, 117. See also Wallace, *The Reporters*, 504-505.

[386] (1756) 1 Burr. 20, 36.

[387] (1701) 1 Ld. Raym. 724.

[388] In *Ball v Herbert* (1789) 3 Term Rep. 253, 261-262, Lord Kenyon CJ also referred to the youth of Lord Raymond when discounting another nisi prius case reported by him.

[389] Supra, 115-116.

[390] (1791) 4 Term Rep. 402.

[391] *Lechmere v Thorowgood* (1688) Comb. 123.

[392] *Cooper v Chitty*, supra, 36.

[393] *Rorke v Dayrell*, supra, 412.

[394] (1756) Keny. 395.

[395] See *Giles v Grover* (1832) 1 Cl. & F. 72, 144-145 per Vaughan B.

Not all judges were guilty of dismissing the accuracy of reports on such flimsy bases. Where the report in question was of a case from the Court of Chancery, judges would often check the veracity of the report against the corresponding entry in the Register's Books, which constituted the official record of the decrees and orders made by the court and which often referred to the facts and steps in the proceedings as well as the main principle of the decree.[396] The Register's Books were also used by the editors of later editions of old Chancery reports, who would seek to verify their authenticity by examining the Register's Books and, if necessary, correcting the report by reference to those records.[397]

The judgment rolls for common law cases could not fulfil the same function as the Register's Books, however, as they merely recorded the result and did not hint at the reasons for the judgment.[398] It was therefore not possible for judges to check the accuracy of reports of such cases against an authoritative official source, although judges would sometimes correct printed reports of cases from manuscript reports made by counsel and judges involved in the cases.[399]

Despite these limitations, a bold attempt to produce a definitive edition of all the reports down to 1800 was begun in 1832 by the publisher Richard Pheney. The purpose of *The Complete Series of the Law Reports* was explained in an announcement placed in the legal press.[400] Each set of reports was to be printed verbatim from the best editions, with each case corrected and collated with any contemporary reports of the same case in print or in manuscript form in public and private collections. Material differences would be pointed out, with references to the best reports of each case. The Chancery reports would be corrected by the Register's Books and new or revised marginal notes would be included throughout. Translations would be given of those reports that had not hitherto been translated into English and the whole endeavour would be systematically arranged. The whole work was to cost about one-sixth of the current reports.

This sounded too good to be true, and the catch was that subscribers were obliged to pay in advance for the entire undertaking. A review of the first part of the series[401] noted that 'the public have already suffered so much from literary speculations by way of subscription, that no one in his senses now thinks of binding himself to take in a series of works of any kind',

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[396] See, for example, *Boycot v Cotton* (1738) 1 Atk. 552, 556 per Lord Hardwicke C; *Lloyd v Williams* (1816) 1 Madd. 450, 467 per Sir Thomas Plumer V-C; *Massey v Hudson* (1817) 2 Mer. 130, 135 per Sir William Grant MR.

[397] Clyde Croft, 'Lord Hardwicke's Use of Precedent in Equity', in Thomas G. Watkin, ed., *Legal Record and Historical Reality*, London, 1989, 126. Examples include: Brown, *Reports*, 5th ed., by Robert Belt, London, 1820; John Tracy Atkyns, *Reports of Cases Argued and Determined in the High Court of Chancery*, 3rd ed., by Francis Williams Sanders, London, 1794; Martin John West, ed., *Reports of Cases Argued and Determined in the High Court of Chancery from the Original Manuscripts of Lord Chancellor Hardwicke*, London, 1827. The second edition of Vernon's reports, by John Raithby, were considerably improved from the first edition by references to the Register's Books: Wallace, *The Reporters*, 495-496. There are also examples of early printed Chancery reports made up of extracts or notes from the Register's Books: see Michael Macnair, 'The Nature and Function of the Early Chancery Reports', in Chantal Stebbings, ed., *Law Reporting in Britain*, London, 1995, 126.

[398] W.H.D. Winder, 'Precedent in Equity', 57 *Law Quarterly Review* (1941), 245 at 249. Occasionally, the rolls might prove a useful comparator where, for example, they recorded the pleadings in full. It was on the discovery of an error in a case reported in 4 Modern by this means that caused Holt CJ to exclaim: 'see the inconveniences of these scrambling reports, they will make us appear to posterity for a parcel of blockheads': *Slater v May* (1704) 2 Ld. Raym. 1071, 1072.

[399] Anon., 'Law Manuscript Reports and Privy Council Papers' 3 *Jurist or Quarterly Journal of Jurisprudence and Legislation* (1832), 230 at 235-240. See, for example, *Dare v Chase* (1692) 2 Show. K.B. 164 per Dolbein J.

[400] Anon., 'Review', 3 *Legal Examiner* (1832), 334

[401] Anon., 'Review of Lord Raymond's Reports, By Gale', 3 *Legal Examiner* (1832), 36 at 37.

and predicted that a continuation of the subscription model would lead to an abandonment of the design. That prediction proved to be prescient as, despite favourable reviews,[402] only three sets of reports were produced in seven parts in the following five years,[403] before the series ended.[404]

Thirty years later, in his celebrated 1863 speech to the House of Lords on law reform, Lord Westbury C proposed the revision of all the extant law reports, to weed out contradictory decisions and, where there were opposing decisions, to decide on those which ought to remain. His intention was to appoint a body of young barristers under the guidance of more senior practitioners and judges, to whom particular sections of the reports would be assigned, in order to eliminate all cases which did not represent or illustrate the present law; and of the cases that remained, arguments and points no longer necessary or useful would be omitted.[405] However, nothing came of this proposal before Westbury's resignation as Lord Chancellor in 1865.

In the absence of definitive editions of the reports, their reputations largely rest on the assessment of the merits of the reporters by judges or other legal writers. In this respect, surely more is required than merely unsubstantiated and unreasoned assertion: what is needed is an objective analysis of the report and the reporter by a disinterested party, delivered outside the pressure of the courtroom. The questions identified by Fox, as set out above, are a good starting point, although the opinions of 'judges and other learned writers' should be limited to those who have themselves sought to justify their comments – such as, for example, where a judge had caused the official records to be searched to compare against a reported case, as discussed above. Yet, despite calls for such a work,[406] no comprehensive analysis which seeks to grade the value of the reporters has ever been produced.

Whilst two anthologies of nominate reports have been published, the selection criteria employed by their editors do not appear to have included either the accuracy of the report or the reputation of the reporter.

The first of these, *The Revised Reports*, comprised 149 volumes published between 1891 and 1917 under the general editorship of Sir Frederick Pollock. The intention was to republish all the cases in the nominate reports between 1785 and 1865 which were considered modern enough to be still of frequent practical use,[407] and many nisi prius cases, including those

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[402] For example, Anon., 'Review', 4 *Legal Observer* (1832), 309; Anon., 'Review – Shower's Reports, by Butt', 9 *Legal Observer* (1835), 119; Anon, 'Reprints of the Old Reporters', 9 *Legal Observer* (1835), 322.

[403] Lord Raymond, *Reports*, 5th ed., by Charles James Gale, London, 1832; *Reports of Cases in the Court of King's Bench during the reigns of Charles II, James II and William III, by Sir Bartholomew Shower, Knt.*, 3rd ed., by George Butt, London, 1836; Henry Blackstone, *Reports of Cases Argued and Determined in the Courts of Common Pleas and Exchequer Chamber*, 5th ed., by Frederic William Meymott, London, 1837.

[404] One valuable by-product of the undertaking was the publication by Pheney of a digest of the legal manuscripts collected in order to assist in the correction of the printed reports: *A Chronological Statement of the Printed Law Reports, and of the Contemporary Manuscripts by which they may be Authenticated and Improved*, repr. in Wallace, *The Reporters*, appx.

[405] Thomas Arthur Nash, *The Life of Richard Lord Westbury*, London, 1888, vol.2, 60-63.

[406] Particularly from P.H. Winfield: 'Some Bibliographical Difficulties of English Law', 30 *Law Quarterly Review* (1914), 190 at 199-200; *Chief Sources*, 185. See also Anon., 9 *Jurist (n.s.)* (1863), 159 at 160.

[407] Pollock, *Revised Reports*, vol.1, v.: the intention was to extend the venture to include pre-1785 reporters if it was a success but this never occurred, perhaps because of the commencement of *The English Reports* in 1900.

reported by Espinasse, were included. As to him, although the reader was directed to judicial criticisms of his reports, the editors of *The Revised Reports* added the following:

> This caution has been kept in mind in making the selection. There remain, however, a considerable number of cases where a proposition of sound law, sometimes an elementary one, is frequently repeated in text books with a citation of Espinasse as the only or primary authority, so far as appears by reported decisions. A large proportion of the cases here collected belong to this category.[408]

The other compilation of nominate reports is *The English Reports*, published between 1900 and 1932 under the editorship of Sir Alexander Wood Renton. It appears that the original intention was to reprint the whole body of English reports from the Year Books to the *Term Reports* in 150 volumes,[409] but eventually 176 volumes were published which excluded the Year Books and extended to cases decided in 1873. The precise intended scope of the work remains obscure,[410] and some reports found in *The Revised Reports* were not included; but there is no indication that any attempts were made to select the reports to be included in *The English Reports* on the grounds of accuracy or reliability. Almost all the reports dedicated to nisi prius rulings are reprinted in volumes 170 to 176.

Aside from these collections of reports, only two books have attempted anything resembling an assessment of the quality of the reporters. The first is Wallace's *The Reporters Arranged and Characterised with Incidental Remarks*, which was originally published in Philadelphia in 1851 and was revised and enlarged by Franklin Fiske Heard for its fourth edition in 1882. Whilst this is a valuable historical resource, its commentary on the reporters is rather discursive;[411] and its detailed analysis is limited to reports published prior to 1776, as the author considered that the merits of subsequent reports were sufficiently known to the profession.[412] The other work is Fox's *A Handbook of English Law Reports from the Last Quarter of the Eighteenth Century to the Year 1865, with Biographical Notes of Judges and Reporters*, which was intended to pick up where Wallace left off: whilst it was intended to cover all the reports in two volumes, only the first volume, dealing with House of Lords, Privy Council and Chancery reports, was ever published.

Realistically, it is now too late for such a work to have much practical relevance, given that cases from the nominate reports are now rarely cited in court. However, when such a case is cited, the judge ought to consider whether their assessment of it would be assisted by submissions as to the quality of the reporter, and to rely not simply on past judicial assertions but on more objective and reasoned sources of information.[413] However, as will be seen in

[408] Ibid., vol.5, 715. In his review of *The Revised Reports*, the law reporter Alfred Randall said that 'A sworn enemy of nisi prius decisions like myself can only regard the reprint of these cases as mainly unnecessary, but I am prepared to find myself in a minority of one': A.E. Randall, 'The Revised Reports', 28 *Law Quarterly Review* (1912), 276 at 279.

[409] Veeder, 'The English Reports', 1.

[410] Winfield, *Chief Sources*, 197.

[411] Although it occasionally lapses into mere assertion: for example, the complete entry for the King's Bench reports known as 'Sessions Cases' is: 'An indifferent book, or worse': Wallace, *The Reporters*, 417.

[412] Ibid., 524.

[413] For instances of cases where Wallace has been consulted for this purpose, see *Farrall v Hilditch* (1859) 5 C.B.N.S. 840, 855 per Williams J; *Kennedy v Broun* (1863) 13 C.B.N.S. 677, 728 per Erle CJ; *Manton v*

Chapter 9 with regard to nisi prius cases, modern judges are more likely not to consider the standing of the reporter at all, and simply to accept the judgment as being correct: long gone are the days when a judge's first consideration, when a case from a nominate report was cited to them, was as to the reputation of the reporter.

Brocklebank [1923] 2 KB 212, 219 per Lord Sterndale MR; *DPP v Woolmington* [1935] AC 462, 479 per Viscount Sankey LC; *Indian Oil Corpn Ltd v Greenstone Shipping Co SA (Panama)* [1988] QB 345, 360 per Staughton J.

CHAPTER 5

WERE THE CRITICISMS JUSTIFIED?

It is notable that all the criticisms of Espinasse referred to in the previous Chapter were made after Espinasse's death in 1834, and decades after the publication of his reports between 1794 and 1811. Of the four judicial commentators, only Denman had been in practice at that time, although he was very junior, having been called to the Bar in 1806. Moreover, as will be seen, those criticisms stand in stark contrast to statements made about Espinasse's reports during his lifetime.

These facts make it all the more surprising that generations of lawyers have simply treated the brickbats thrown at Espinasse as established fact, despite the meagre evidence in support of them; and there has never been any substantial analysis of whether Espinasse's reports merit that treatment. This Chapter considers whether the criticisms of Espinasse's reports are justified, either by reference to the contemporaneous treatment of his reports or by comparing the cases reported by him with the same cases reported by other sources.

CONTEMPORANEOUS EVIDENCE

Judicial treatment of Espinasse's reports

The law reports of the early nineteenth century disclose none of the wholesale criticisms of the accuracy of Espinasse's reports found in the later judicial comments identified in the previous Chapter. Thus, there are plenty of references by counsel and by judges to cases reported by Espinasse during this period, without any suggestion, as claimed by Lord Denman, that they were quoted with doubt and hesitation or that a special reason had to be given as an apology for citing them.

That is not to say that Espinasse's reports were not occasionally made the subject of criticism by contemporaneous judges. Five examples of adverse comments can be identified in cases between 1795 and 1834: Lord Ellenborough CJ considered one case reported by Espinasse to have been 'imperfectly stated';[414] Alexander CB, Graham and Hullock BBs said that another of his cases had not been accurately reported;[415] Parke J thought that the nature of a report of another case meant that it was probable that there were other relevant facts to explain the decision;[416] and Lord Brougham C felt unable to rely on the report of a further case.[417]

Two qualifications must be made of these contemporary criticisms. First, despite Alexander, Graham and Hullock's doubts as to the accuracy of a case reported by Espinasse, their fellow judge, Garrow B, who appeared as leading counsel in that case, made no adverse comment on the report, despite referring to his recollections of two other unreported nisi prius cases in which he appeared as counsel.[418] Secondly, it is notable that, in each of the cases in which Espinasse's

[414] *Warneford v Kendall* (1808) 10 East 19, 21.

[415] *Smallcombe v Bruges* (1824) 13 Price 136, 153, 157 and 168.

[416] *Robinson v Read* (1829) 9 B. & C. 449, 455-456.

[417] *Casamajor v Strode* (1833) 2 My. & K. 706, 725.

[418] *Smallcombe v Bruges,* supra, 158-160.

reports were criticised, the reported ruling was contrary to the result that those judges wished to reach.

Moreover, five adverse comments in very nearly forty years does not suggest wholesale dissatisfaction with Espinasse's reports on the part of the legal profession, particularly as there were also judicial endorsements of the accuracy of his reports during that period, by Lord Eldon C (referring to a report 'very well put together'),[419] Lord Erskine C (citing a case 'which I know to be correctly reported')[420] and Coleridge J (approving a case bringing the relevant issue 'very fully under review').[421] In this regard, Espinasse was little different from other reporters of this era whose reports were also subject to the odd criticism, even though they were otherwise of good repute.[422]

Finally, whilst a number of cases reported by Espinasse were overruled or not followed by subsequent judges during his lifetime[423] - which is not surprising given that they were nisi prius cases - the disapproval of a reported decision on its merits does not mean that the judge disapproved of the quality of the report: if anything, it is a tacit acceptance of its accuracy; and in any event, many more of Espinasse's cases during this period were followed or otherwise cited without criticism.[424]

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[419] *Eagleton v Kingston* (1803) 8 Ves. Jun. 438, 474.

[420] *Buckmaster v Harrop* (1807) 13 Ves. Jun. 456, 473.

[421] *Doe d Mudd v Suckermore* (1836) 5 A. & E. 703, 706.

[422] See, for example, Park J's comments on the unsatisfactorily brief nature of Campbell's reports in *Laythoarp v Bryant* (1835) 1 Bing. N.C. 421, 429. See also *Lench v Lench* (1805) 10 Ves. Jun. 511, 520 (on Dickens' reports); *Selby v Selby* (1828) 4 Russ. 336, 340 (on Cooper's reports); *Pluck v Digges* (1831) 5 Bligh N.S. 31, 63 (on Wilson's K.B. reports); *Murray v Barlee* (1834) 3 My. & K. 209, 215-216 (on Vesey's reports).

[423] *Wennall v Adney* (1802) 3 Bos. & P. 247; *Eagleton v Kingston*, supra; *Church v Brown* (1808) 15 Ves. Jun. 258; *Urquhart v Barnard* (1809) 1 Taunt. 450; *Laroche v Oswin* (1810) 12 East 131; *Cock v Taylor* (1811) 13 East 399; *Chapman v Black* (1819) 2 B. & Ad. 588; *Parton v Williams* (1820) 3 B. & Ad. 330; *Smith v Wiltshire* (1821) 2 Brod. & Bing. 619; *Gill v Cubitts* (1824) 1 C. & P. 487; *Jones v Cowley* (1825) 4 B. & C. 445; *Cousins v Brown* (1825) Ry. & M. 291; *Snow v Peacock* (1826) 3 Bing. 406 *Maxwell v Jameson* (1818) 2 B. & Ad. 51; *Duncan v Grant* (1834) 1 Cr. M. & R. 383.

[424] *Wilson v Justice* (1796) Peake Add. Cas. 96; *Pariente v Plumbtree* (1799) 2 Bos. & P. 35; *Allingham v Flower* (1800) 2 Bos. & P. 246; *Elwes v Maw* (1802) 3 East 38; *Lothian v Henderson* (1803) 3 Bos. & P. 499; *Fairlie v Hastings* (1804) 10 Ves. Jun. 123; *Taylor v Okey* (1806) 13 Ves. Jun. 180; *Soulsby v Neving* (1808) 9 East 310; *Amey v Long* (1808) 9 East 473; *Robertson v Liddell* (1808) 9 East 487; *Thomas v Evans* (1808) 10 East 101; *Bishop of Durham v Beaumont* (1808) 1 Camp. 206; *Israel v Israel* (1808) 1 Camp. 499; *Baillie v Sibbald* (1808) 15 Ves. Jun. 185; *Cole v Parkin* (1810) 12 East 471; *Burgess v Merrill* (1812) 4 Taunt. 468; *Bathe v Taylor* (1812) 15 East 412; *Ex p Heath* (1813) 2 Ves. & B. 240; *Jones v Ryde* (1814) 5 Taunt. 488; *Sanderson v Busher* (1814) 4 Camp. 54n; *Hutton v Bragg* (1816) 7 Taunt. 14; *Edwards v Kelly* (1817) 6 M. & S. 204; *Brown v Croome* (1817) 2 Stark. 297; *Idle v Royal Exchange Assurance Co* (1819) 8 Taunt. 755; *Saph v Atkinson* (1822) 1 Add. 162; *Drayton v Dale* (1823) 2 B. & C. 293; *Duncan v Thwaites* (1824) 3 B. & C. 556; *Morgan v Palmer* (1824) 2 B. & C. 729; *Smallcombe v Bruges*, supra; *R v Humphery* (1825) M'Cle. & Y. 173; *Binns v Tetley* (1825) M'Cle & Y 397; *Took v Tuck* (1827) 4 Bing. 224; *Doe d Tilt v Stratton* (1828) 4 Bing. 446; *Rundle v Beaumont* (1828) 4 Bing. 537; *Doe d Savage v Stapleton* (1828) 3 C. & P. 275; *Strother v Barr* (1828) 5 Bing. 136; *Britten v Hughes* (1829) 5 Bing. 460; *Higgins v M'Adam* (1829) 3 Y. & J. 1; *R v Williams* (1829) 9 B. & C. 549; *R v Watts* (1830) 1 B. & Ad. 166; *Harington v Hoggart* (1830) 1 B. & Ad. 577; *Symonds v Page* (1830) 1 Cr. & J. 29; *Mount v Larkins* (1831) 8 Bing. 108; *Meirelles v Banning* (1831) 2 B. & E. 909; *Street v Blay* (1831) 2 B. & Ad. 456; *Davis v Blackwell* (1832) 9 Bing. 5; *Greenough v Gaskell* (1833) 1 My. & K. 98; *Munk v Clarke* (1833) 10 Bing. 102; *Nowell v Davies* (1833) 5 B. & Ad. 368; *Walter v Cubley* (1833) 2 Cr. & M. 151; *Thompson v Percival* (1834) 5 B. & Ad. 925.

Treatment of Espinasse's reports by the legal press

The *ex post facto* judicial comments discussed in the previous Chapter are to be contrasted with the generally positive reception afforded by legal journals to the quality of Espinasse's reports at the time of their publication – a reception which was not given to all such reports.[425]

The earliest review came in *The Monthly Review,* in respect of the first part of Espinasse's reports produced in 1794. The reviewer said that Espinasse's intention to report nisi prius cases 'deserves encouragement, because it may be accompanied with many advantages; and the execution of this volume is entitled to approbation.'[426] A review of the publication in 1796 of the first full volume of these reports drew the following from the same periodical: 'Of the first [part] we gave an [earlier] account …; and we see no reason, on the completion of the volume, to retract the praise which we there bestowed on the undertaking.'[427]

The reviewer of the same book in *The Critical Review*, whilst criticising the reporting of cases that appeared to him to be of little merit, went on to say of Espinasse that: 'He is, however, not deficient in accuracy and precision, two very essential qualities in a reporter';[428] and a review of the second volume of his reports published in 1799 confined its criticism to proofing errors.[429] Further praise for his efforts came from a review of law books published in 1802, which referred to the periodical law reports of (amongst others) Espinasse as being 'highly useful to the profession.'[430] Similarly, a review in an American journal described the first four volumes of Espinasse's reports, published in Connecticut in 1808 in a two-volume set edited by Thomas Day, as 'certainly … useful in this country'.[431]

Espinasse's reports were also referred to in contemporary legal bibliographies: thus Richard Whalley Bridgman's work, which contained negative observations on the authority of certain reporters, mentioned the first five volumes of Espinasse's reports without criticism.[432] Further evidence of the regard in which Espinasse's reports were held at this time comes from a review of the first volume of Campbell's reports, published in 1809, which described them as 'certainly not inferior in execution and interest' to Espinasse's reports.[433]

The absence of controversy as to the authority of Espinasse's reports shortly after their publication is further illustrated by the digest of nisi prius reports first published by James Manning in 1813,[434] with a further edition published in 1820 containing summaries of all the

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[425] As discussed in Chapter 3.

[426] Anon., 'Monthly Catalogue – Art.22', 15 *The Monthly Review (ser.2)* (1794), 200.

[427] Anon., 'Monthly Catalogue – Art.29', 21 *The Monthly Review (ser.2)* (1796), 463.

[428] Anon., 'Monthly Catalogue – Law', 18 *The Critical Review (ser.2)* (1796), 351-352.

[429] Anon., 'Monthly Catalogue – Art.19', 31 *The Monthly Review (ser.2)*, (1800), 84.

[430] Anon., 'Law', 2 *The Annual Review* (1804), 807.

[431] Anon., 'Review – Espinasse's Nisi Prius Reports', 2 *American Law Journal* (1809), 173.

[432] Richard Whalley Bridgman, *A Short View of Legal Bibliography*, London, 1807, 110-111.

[433] Anon., 'Monthly Catalogue – Art.23', 59 *The Monthly Review (ser.2)* (1809), 213. Similarly, an early and important legal bibliography, written by the librarian of Harvard Law School, described Campbell, in what was clearly intended to be a compliment to him, as 'equal to Espinasse as a reporter': J.G. Marvin, *Legal Bibliography*, Philadelphia, 1847, 72.

[434] James Manning, *A Digested Index to the Nisi Prius Reports, with Notes and References*, London, 1813.

existing nisi prius reports.[435] Manning, for many years the leader of the Western Circuit and a reporter of King's Bench cases, could have been expected to refer in his digest to any doubts which existed about the accuracy of Espinasse's reports: instead, those reports were accorded the same authority as the other reports; and where there was any discrepancy between them, it was recorded without comment on whose reports were to be preferred.[436]

East's use of Espinasse's notes

Perhaps the most telling contemporary evidence of Espinasse's standing as a law reporter came from the reports of Edward Hyde East.

Along with Charles Durnford, East produced the *Term Reports*, and he continued as the sole authorised reporter in the King's Bench, producing sixteen volumes of reports covering the period 1801 to 1812, before his appointment as Chief Justice of the Supreme Court of Bengal. East was one of the pre-eminent law reporters of his day, and his reports were held in high esteem.[437]

In the final volume of East's reports, he includes the case of *Smith v Lewis*,[438] which concerned an application for a stay of proceedings on the recognizance against bail following the surrender of the defendant. East states that the note of the case was communicated to him by Espinasse, who was the victorious counsel in the case (against Campbell). Thus, East was sufficiently confident of the accuracy and veracity of Espinasse's record of the decision to include it in his own reports.

East did not make a habit of sub-contracting his work: *Smith v Lewis* is the only case in that volume of his reports not to be personally reported by him, and in all his reports only six other cases were reported from notes supplied by others.[439] East's use of Espinasse's notes in his own reports indicates that Espinasse could be trusted to produce notes of a case suitable for publication in the authorised reports of the King's Bench.

No defence from Espinasse

One final piece of evidence indicating a lack of hostility to Espinasse's reports during his lifetime comes from his own writings. As is more fully explored in Chapter 6, late in life Espinasse wrote a series of articles in *Fraser's Magazine* in which he reminisced about his career at the Bar, by way of a series of candid - and in many cases offensive - accounts of his contemporaries. These articles provided Espinasse with the ideal opportunity to mount a defence against any charge of inaccuracy or incompetence made against his reports, but the articles are entirely silent on the matter.

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[435] James Manning, *A Digest of the Nisi Prius Reports, with Notes and References*, 2nd ed., London, 1820.

[436] See, for example, Manning's reference (ibid., 223) to the differing reports of *Godfrey v Turnbull* in 1 Esp. 371 and Peake 209n. See further, Appendix 3.

[437] Bridgman, *Legal Bibliography*, 107.

[438] (1812) 16 East 168.

[439] *Bishop of London v Ffytche* (1801) 1 East 487; *R v Morgan* (1809) 11 East 457; *R v Samson* (1809) 11 East 231; *Smith v Becket* (1810) 13 East 187; *R v Wakefield* (1810) 13 East 190; *Thornton v Williamson* (1810) 13 East 191.

Whilst this reticence may be put down to a sense of discretion or even embarrassment on his part, that would not be in keeping with the general tone of his writings, and the more plausible conclusion to be drawn is that there were no contemporary criticisms of Espinasse's reports that he felt needed to be refuted.

A COMPARATIVE EVALUATION OF ESPINASSE'S REPORTS

The most obvious explanation as to why Espinasse was later considered to be such a poor reporter is that he was, indeed, a poor reporter. To test this, Appendix 3 contains a detailed evaluation of the accuracy of his reports, the results of which are summarised below.

Sources

Assessing the reliability of the reports of rulings in the nisi prius courts of this period is not straightforward, because of the dearth of contemporaneous testimony or official documents with which those reports can be compared. The fact that trials were generally conducted in great haste, together with the practice of judges delivering immediate ex tempore rulings on the points that were then reported, means that there are few judicial records of cases which can be compared to the reports of them.

Fortunately, there are a number of alternative contemporary reports or records of cases also reported by Espinasse which enable a meaningful evaluation of the latter to be made by comparing them with the former.

The principal alternative sources are cases reported by the other contemporaneous nisi prius reporters, Peake and Campbell. While these reporters are generally held in higher esteem by the legal profession than Espinasse[440] – indeed, no reporter could be less well-regarded – there is an intrinsic value in comparing his report of a case with any other report of the same case as, according to Lord Mansfield CJ: 'if both the reporters were the worst that ever reported, if substantially they report a case in the same way, it is demonstration of the truth of what they report.'[441]

Another useful source of comparison occurs where the cases reported by Espinasse went on to be considered by the court in banc: some reports of the latter hearings contain sufficiently detailed summaries of the facts and rulings at trial to enable a meaningful comparison to be made with those matters as reported by Espinasse.

For cases reported later in the nineteenth century, there is usually ample scope for comparison with reports of the same cases that appeared in the legal journals of the day. Unfortunately, at the time of Espinasse's reports, there were only a small number of such journals: prior to the 1830s, there were only a handful of legal publications in existence, and fewer still were

[440] As to Peake, on being referred to a case reported by him, Abbott CJ said in 1820 that: 'My brother Peake's Reports are remarkably correct. I went the same circuit and was in the habit of taking notes. On many occasions I have compared the cases, and I know his to be particularly accurate.': Manning, *Digest*, 2nd ed., advertisement. As to Campbell, his reports were described as being 'of high authority' by Darling J in *Sharman v Mason* [1899] 2 QB 679, 689; see also *Williams v Bayley* (1866) L.R. 1 H.L. 200, 213 per Lord Cranworth C.

[441] *R v Genge* (1774) 1 Cowp. 13, 16.

providing reports of cases.[442] During the period of Espinasse's reporting, there were only three legal journals intermittently in print: *The Counsellor's Magazine* (1795-1800); *The Law Journal* (1803-1804) and *The Legal Register* (1807-1808); and of these journals, only the first contains reports of cases also reported by Espinasse – a total of six such cases.

A more fertile source of comparison is the case reports of *The Times*, and the analysis summarised in this Chapter includes reference to a number of those cases. Whilst the value of these reports is limited because the newspapers were usually more interested in reporting the (often salacious) facts of the case rather than the legal issues, the often extensive factual reporting is of assistance in assessing the accuracy of Espinasse's recording of the relevant facts.

Another main source of comparative material is to be found in the surviving manuscript notebooks of the judges who presided at the trials reported by Espinasse. Judges sitting at nisi prius would take handwritten notes of the evidence and sometimes of the arguments, which they would use primarily for summing up and instructing the jury at the end of the trial. The judge would retain his notes to aid his recollection if he was required to recount what occurred at trial when the case returned to the court in banc.

Although many sets of notebooks survive in libraries and archives, only some have proved to be of any use, as the judge could capture only a few essentials of what was happening before him, and their handwriting, due to the haste in which they wrote, is often illegible.[443]

In Appendix 3, cases reported by Espinasse are compared with three sets of judicial notes: six reported cases tried by Lord Kenyon CJ are the subject of notes made during the trial by the judge in bound notebooks which are in the collection of Kenyon family papers held in the Lancashire Archives;[444] ten reported cases tried by Lawrence J are referred to in that judge's notebooks, which have been the subject of academic analysis by James Oldham;[445] and 120 reported cases tried by Lord Ellenborough CJ are noted in the collection of that judge's notebooks held in the Harvard Law School library.[446]

The most valuable alternative manuscript source for cases reported by Espinasse is the notebook kept by Sir Vicary Gibbs containing nisi prius cases decided between 1782 and 1811, which is held in the Middle Temple library.[447] The careful way in which the cases are summarised, the neatness of the handwriting and the occasional reference in them to Espinasse's reports show that these notes were not made at the time of the trials but were likely to have been made later from notes taken by Gibbs contemporaneously.

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[442] Stefan Vogenauer, 'Law Journals in Nineteenth-Century England', 12 *Edinburgh Law Review* (2008), 26 at 35-36.

[443] John H. Langbein, 'Historical Foundations of the Law of Evidence: a View from the Ryder Sources', 96 *Columbia Law Review* (1996), 1168 at 1177.

[444] Lancashire Archives (LA) MS Kenyon, DDKE 5/4/1, Boxes 115 (1801), 117 (1801), 118 (1788-89) and 120 (1789-90).

[445] Oldham, *Case Notes*.

[446] Harvard Law School (HLS) MS 1267.

[447] MTL Sir Vicary Gibbs manuscript collection MS 17.

Analysis

Appendix 3 accordingly provides an analysis of cases reported by Espinasse, by way of comparison between his report and the report of the same case in the following sources: (1) other printed reports of the same trial; (2) the manuscript notebooks of the trial judges referred to above; (3) the notebook of Sir Vicary Gibbs; (4) the law reports published in *The Times*; (5) reports of the case when heard by the court in banc; (6) the law reports published in *The Counsellor's Magazine*; and (7) other miscellaneous sources. A total of 282 cases have been compared in this way, representing a third of the 836 cases reported by Espinasse.

No report, taken from notes of ex tempore oral rulings in the hurly-burly of the nisi prius courts, will be entirely free from error, and minor mistakes relating to the spelling of names and places or the amounts of the sums at stake are not indicative of any more fundamental inaccuracies.[448] Differences as to the recording of the verdict – provided the reports are in agreement as to the successful party – are also not to be regarded as material. For example, in *Holmer v Viner*,[449] Espinasse reported the jury as finding a verdict for the defendant, whereas Lawrence J's notebook[450] recorded the plaintiff being nonsuited. As to this, Oldham says that, in a crowded courtroom, it would have been hard to tell the difference; and Kenyon often instructed the jury to return a verdict for the defendant as there was no basis for the plaintiff to recover, at which point the plaintiff's counsel would often request a nonsuit so that the plaintiff could bring the same claim again if better evidence could be collected.[451]

Whilst a number of the cases referred to in Appendix 3 which are reported by Espinasse can be said to differ in material respects from other reports of them, that does not of itself indicate any error on the part of Espinasse. In many of those cases, the difference is that the report of the alternative source is more extensive than that of Espinasse, either in respect of the issues also reported by him, or because the report deals with additional issues; but this does not by itself cast doubt on the accuracy of what Espinasse actually reported. Succinctness in a reporter is not a fault, unless it is thereby not possible properly to understand the basis of the decision; it must also be kept in mind that, in many cases, Espinasse deliberately restricted himself to reporting limited – usually evidential – issues; and in any event, there are also a number of cases where it is Espinasse's report that is the more extensive.

The following examples illustrate how differences in the reports do not necessarily work to Espinasse's disadvantage.

In *Smith v Jamesons*,[452] one of the defendants was a joint assignee of a bankrupt's estate with the plaintiffs, but subsequently his interest was reassigned to the plaintiffs on his removal. Prior to his removal, the defendant had received money which he applied to the use of himself and the other defendant, his business partner, with the approval of that other defendant. Both defendants having become bankrupt, the question for the court was whether the estates of both

[448] Sir James Burrow noted that 'no sort of inaccuracy is more frequent amongst note-takers, than an inattention to the precise names of the cases, and the transposing the names of the plaintiffs and defendants': see his notes to *Tinkler v Poole* (1770) 5 Burr. 2657, 2659-2660.

[449] (1794) 1 Esp. 132.

[450] Oldham, *Case Notes*, 56 (sub nom. *Holman v Viner*).

[451] Ibid., lix.

[452] (1794) 1 Esp. 114; Peake 279 (sub nom. *Smith v Jameson*).

defendants were liable to the plaintiffs. That question was reserved to the court in banc,[453] but both Peake and Espinasse provided brief reports of other issues which were raised at the trial.

Espinasse's report concerned the validity of the discharge by the non-assignee defendant of the assignee's debts due to the partnership, including the money in question, on the dissolution of the partnership, which Kenyon ruled was a valid discharge. Peake's report concerned whether the assignee could be a defendant, as he was entitled to receive the money, could not have maintained an action against himself, and had only assigned such interest as he himself had. Peake reported Kenyon as ruling that, when an assignee assigns his interest, he divests himself of all rights, and becomes a debtor to those who remain assignees.

This was one of the cases which Peake, in the preface to his reports, said that he was including because it contained points not reported by Espinasse. Luther describes this as a veiled criticism of Espinasse;[454] but it is notable that Peake did not include in his report the point dealt with by Espinasse, so that the same criticism could equally be made of Peake.

The other example is *Ward v Haydon*.[455] That case involved an action for the recovery of the plaintiff's coach which had been wrongfully distrained from a coach-maker's yard by the first defendant, Haydon. The second defendant, Ventom, was Haydon's broker. Haydon having let judgment go by default, the action proceeded solely against Ventom.

Espinasse reported two aspects of the case, one of which concerned whether Haydon could give evidence in support of Ventom's defence that he did no more than make an inventory and never had possession of the carriage. As to this, Espinasse reported that the plaintiff objected to Haydon being called as a witness on the ground that he was personally interested in the verdict, because either of the defendants could be called upon to pay the whole sum to be recovered and the costs of the issue, so that Haydon would be liable for the costs of a verdict against Ventom. Espinasse reported Kenyon as ruling that Haydon was not an interested witness: in a case where one defendant actively defended the case and others suffered judgment in default, Kenyon, although he had some doubts, did not think that the other defendants would be liable to pay costs if the active defendant lost; and in any event if the active defendant won, the plaintiff would not be liable for the costs of the other defendants. Espinasse recorded that Kenyon cited a case from Barnes's reports to that effect, although the name of that case was not reported.

Peake also dealt with this issue, similarly reporting Kenyon as ruling that the objection was not well-founded, as by the judgment in default Hayden's interests were settled and he would not be liable for the costs of the trial.

The editor of Peake's Additional Cases said in a note that: 'This case, as far as relates to … the admissibility of the witness, has been before reported by Mr Espinasse without comment or observation; but still it seems to admit of some doubt how far the witness was admissible.'[456] This is not a criticism of Espinasse's reporting of the case, but of his failure to query whether Kenyon's ruling was correct. The editor's note goes on to contrast that ruling with what he

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[453] See *Smith v Jameson* (1794) 5 Term Rep. 601.

[454] Luther, 'Text and Context', 531-532.

[455] (1797) 2 Esp. 552; Peake Add. Cas. 126.

[456] Ibid., 126-127n.

considered to be the practice, which was to tax the costs of the proceedings against active and defaulting defendants jointly, with no allowance made for the defaulting defendant. But Espinasse would have been justified in not doubting the ruling because of Kenyon's reliance on the decision in Barnes' reports. As to this, the editor of Peake's Additional Cases claimed that 'No case is to be found there which can be supposed to have the most remote bearing on the subject', save for one case which only decided that a defendant who succeeded in an action and who was indemnified by the other defendant who failed, should not have his costs.[457] But the case relied on by Kenyon was surely *Goodright v Tregurtha*:[458] in an action for ejectment in respect of certain tenements, one of the two defendants admitted partial liability; the other defendant actively defended the action and lost: the plaintiff sought costs against the active defendant, and was granted them after the active defendant failed to show why he should not be so liable. The editor's implied criticism of Espinasse in this note – referred to by Luther as a 'gentle dig'[459] – therefore seems misplaced.

Accordingly, the only differences which can be said to cast substantial doubt on the accuracy of Espinasse's reporting are those in which there is a material inconsistency between his report and that of the alternative source. Of course, in that situation, it is rarely, if ever, possible to determine with certainty which of the reports is right and which is wrong, but even if it is assumed that Espinasse was at fault in respect of all such cases, only fourteen of the cases analysed in Appendix 3 contain such an inconsistency.

Of those cases, the reports of eight of them disclose material differences between Espinasse's report and the report of another reporter of the same case.[460] The differences in the reports of the other six cases are between Espinasse's report and the summary of the trial by the reporter of the case when it was heard by the court in banc: of those, four relate to the judge's ruling,[461] one relates to the basis of the defendant's objection to the claim and how that related to the ruling,[462] and one relates to the description of the subsequent motion before the court in banc.[463]

Ultimately, the safest conclusion that can be drawn from the analysis of the cases in Appendix 3 is that, given there are material differences in only fourteen of the 282 cases referred to above, less than 5% of the cases reported by Espinasse are not materially consistent with an alternative source.[464] The analysis therefore provides no real support for the commonly-held view that

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[457] Ibid., citing *Thrustout dem. Jenkinson v Woodyear* (1742) Barnes 131 (not 2 Barnes, as the editor says).

[458] (1734) Barnes 121.

[459] Luther, 'Text and Context', 532.

[460] *Allesbrook v Roach* (1795) 1 Esp. 351; *Bristow v Eastman* (1794) 1 Esp. 172; *Godfrey v Turnbull* (1795) 1 Esp. 371; *R v Cole* (1794) 1 Esp. 169; *Leigh v Mather* (1795) 1 Esp. 412; *Penton v Robart* (1801) 4 Esp. 33; *Klinitz v Surry* (1805) 5 Esp. 267 and, most famously, *Stilk v Meyrick* (1809) 6 Esp. 129.

[461] *Weedon v Timbrel* (1793) 1 Esp. 16; *Anderson v Pitcher* (1800) 3 Esp. 124; *Allen v Keeves* (1801) 3 Esp. 281; *Warrington v Furber* (1806) 6 Esp. 89.

[462] *Bowman v Nicoll* (1794) 1 Esp. 81.

[463] *Arding v Flower* (1800) 3 Esp. 117.

[464] Of the 110 of Espinasse's cases reported *The Revised Reports*, vols.5 to 9, errors were noted in only five cases: *Jendwine v Slade* (1797) 2 Esp. 572; 5 R.R. 754 (criticism of the reporting of what the editor took to be an extra-judicial comment of Kenyon's as to the date of the painting which was the subject matter of the action); *Woolf v Clagget* (1800) 3 Esp. 257; 6 R.R. 830: (typographical error); *Thomas v Day* (1803) 4 Esp. 262; 6 R.R. 857 (typographical error); *Strutt v Bovingdon* (1803) 5 Esp.56; 8 R.R. 834 (omission of a relevant fact in the headnote); *Doe ex dem Macartney v Crick* (1805) 5 Esp.196; 8 R.R. 848 (incorrect headnote).

Espinasse was an unreliable reporter; if anything, it substantiates the contrary view that Espinasse's reports can be regarded as broadly accurate.

CONCLUSION

According to the Canadian legal author Charles Morse:

> … we cannot condone [the] hypercriticism of one of the old law reporters: "Espinasse! Oh yes, he was that deaf old reporter, was he not, who heard one half of a case and reported the other half!" True, Espinasse hasn't the best reputation in the world for reportorial accuracy, but before he could merit the extreme terms of this condemnation he must needs descend into the nethermost abyss of fatuous uselessness.[465]

The analysis of Espinasse's reports set out in Appendix 3, together with the other matters discussed in this Chapter, not only acquits Espinasse of dwelling in such a place, but also shows that his reputation as an unduly inaccurate reporter is largely without merit.

This leads to the question that is considered in the following Chapter: if Espinasse's reports were not as inaccurate as the criticism of them indicate, why was he subject to such censure?

[465] Charles Morse, *Apices Juris and Other Legal Essays in Prose and Verse*, Toronto, 1906, 17.

CHAPTER 6

WHY WAS ESPINASSE SO CRITICISED?

If the criticisms levelled at Espinasse's inaccuracy as a reporter are unsubstantiated, other reasons must be considered as to why his standing was particularly poor, quite apart from the low regard in which nisi prius reports were generally held. This Chapter considers a number of possible reasons.

The views of Espinasse's rivals

Although, as previously noted, the hostile expressions from judges about the quality of Espinasse's reports did not begin to occur until the mid-nineteenth century, surviving contemporaneous criticism of Espinasse as a reporter[466] is limited to the correspondence of one of his principal rivals, John Campbell, which was published by his daughter many years after his death.[467]

During the first year of his practice, Campbell secured an agreement with the publisher Joseph Butterworth to report nisi prius cases, and he wrote in the following terms to his brother in November 1807:

> I have had this plan in contemplation for some months, but had not brought matters to a settlement till about ten days ago. The most embarrassing circumstance was the field being in some measure preoccupied. A barrister yclept Espinasse has reported the cases hitherto, but, particularly of late, in a very negligent and slovenly style. I was in hopes that he would have given up to me; however, he says he shall go on. I shall certainly beat him, for not only do I think I can do the thing better, but Butterworth, formerly his publisher, refuses to have anything more to say to him and has a complete command of the market, so as to be able to force my Reports into circulation.[468]

Campbell's plan paid off, as he wrote to his brother at the beginning of 1808: 'My scheme has hitherto succeeded beyond my expectations. Espinasse did not take a note during the sittings, and I see little danger of a new rival.'[469]

Campbell's criticisms of Espinasse may well have stemmed from the younger man's vaulting ambition: it was said of him that 'It was a principle with him never to make enemies, except of those who came in the way of his advancement.'[470] Moreover, Campbell's comments about Espinasse's relationship with his publisher appear to be wide of the mark: at that time, Espinasse had published the fifth volume of his reports, after which he was forced to pause reporting because of ill-health,[471] and four years later his sixth and final volume was, as before,

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[466] Criticism of more personal nature came from the diary of John Egerton, a Fellow of New College Oxford, who in 1823 dined twice with Espinasse at his house in Kent. After recording the dreary time he had there, he resolved 'not to go there again, if possible.' Anon., 'Espinasse at Home', 79 *Law Journal* (1935), 257.

[467] Hardcastle, *Life*.

[468] Ibid., vol.1, 213.

[469] Ibid., vol.1, 217.

[470] Robinson, *Bench and Bar*, 201.

[471] Espinasse, *Reports*, vol.6, v.

published by Joseph Butterworth. Further, these comments did not stop Campbell in later life citing without criticism or qualification cases reported by Espinasse, both in court[472] and in his extrajudicial writings.[473]

On the other hand, although Campbell's status as a direct competitor might suggest that he was overstating Espinasse's defects, the fact that he was writing privately to his brother indicates that his views were honestly held. In any event, assuming that Campbell disseminated his opinion more widely amongst his legal friends,[474] this raises the question of whether the great influence Campbell had on the profession in the mid-nineteenth century, first as a prominent reforming lawyer-politician and then as Chief Justice of the Queen's Bench from 1850 to 1859 and Lord Chancellor from 1859 to his death in 1861, meant that his views are likely to have taken hold more generally, leading to the judicial criticisms of Espinasse's reports described in Chapter 4. Luther has speculated that Campbell's status may have caused judges to overestimate the qualities of his nisi prius reports:[475] might Campbell's status also have caused judges to belittle the reports of his principal rival?

Relevant to this question is that fact that Campbell had connections of varying degrees with all four of the judges who were responsible for the negative comments about Espinasse described in Chapter 4.[476] Campbell and Denman were near contemporaries at the Bar, attending the same legal debating club in 1804;[477]and as practitioners and Whig MPs they continued to be on good terms until Denman went on the Bench in 1832.[478] Although a Tory MP, Pollock was also friendly with Campbell,[479] and as Attorney-General between 1834 and 1835 Pollock was both preceded and succeeded in that post by Campbell. Blackburn was, to the surprise of many in the profession, appointed a judge of the Queen's Bench by Campbell in 1859. As for Maule, in 1815, when Campbell was a rising junior on the Oxford Circuit, he spent several pleasant days in Cheltenham with Maule, who had just been called to the Bar;[480] and they also remained on good terms during practice,[481] although their friendship must have been sorely tested by Maule's apparent responsibility for the fire that burned down Campbell's chambers in 1838.[482]

[472] *Batard v Hawes* (1853) 2 E. & B. 287, 297. In *Papendick v Bridgwater* (1855) 5 E. & B. 166, 178, Campbell disapproved another case reported by Espinasse on the ground that the report was taken from loose notes made by someone else.

[473] Campbell, *Chief Justices*, vol.4, 70.

[474] During his first year in practice, Campbell describes gossiping with his fellow young juniors: 'Here we assemble and talk over the news and scandal of the day. When these topics fail us we criticise the leaders, quiz the judges and abuse the profession': Hardcastle, *Life*, vol.1, 195.

[475] Luther, 'Text and Context', 535.

[476] Five, if Coleridge J (who, as stated in Chapter 4, repeated Lord Denman's negative comments) is included: until his resignation in 1858, Coleridge served as one of Campbell's puisne judges, and he helped smooth Campbell's path to the Chief Justiceship, assuring the Lord Chancellor that, contrary to Denman's assertion, he and his fellow puisnes were happy to serve under Campbell (Hardcastle, *Life*, vol.2, 271, 273); Campbell described Coleridge's company on circuit as 'very amiable and agreeable' (ibid., vol.2, 294).

[477] Ibid., vol.1, 140.

[478] Ibid., vol.1, 394, 401, 406, 516.

[479] Ibid., vol.2, 44.

[480] Ibid, vol.1, 317; Leathley, *Maule*, 279-282.

[481] Hardcastle, *Life*, vol.1, 435.

[482] Ibid., vol.2, 107.

However, Campbell's influence in this respect should not be overstated. As illustrious lawyers in their own right, these judges were unlikely to have their views of Espinasse fixed by Campbell; and as established judges, they may well not have felt the need to pander to Campbell's ego in this way, particularly in such an elliptical manner. Moreover, at the time Denman made his critical remarks about Espinasse, his relationship with Campbell was very poor: Campbell's inability to accept Denman's judgment in the great case of *Stockdale v Hansard*[483] had so annoyed Denman that he sought at his retirement to block Campbell from succeeding him as Chief Justice.[484] Moreover, a friend described Maule, after being appointed as a judge, as having 'entertained and constantly expressed for [Campbell] the greatest contempt.'[485]

One other piece of contemporaneous evidence, said to be critical of Espinasse, comes from the preface of the nisi prius reports of his other rival, Thomas Peake, in which he explained that he had included reports of three cases which had also been reported by Espinasse, two of which were included because they 'contain points not noted in that Gentleman's reports of those cases.'[486] Luther accordingly suggests that this was a veiled criticism of Espinasse's reports.[487] However, that does not tally with the fact that Peake had made notes of a number of other cases which had also been reported by Espinasse, but which Peake did not feel the need to report: they were not published until many years later by Peake's son.[488] It is also unlikely that Peake, who had not even been called to the Bar at the time, would have presumed to criticise a more senior and established member of the profession in such a public way: indeed, Peake's deference to Espinasse is illustrated by his declaration that he would no longer report nisi prius cases, given Espinasse's intention to continue with his reports.[489]

'My Contemporaries'

A much more plausible reason for Espinasse's posthumous unpopularity was the publication, in the last couple of years of his life, of a series of sketches of leading barristers and judges of his time, which contained outspokenly negative comments on many of them. Given the close-knit and clubbable world of the early nineteenth-century legal profession, in which courtesy amongst barristers and deference to judges featured prominently,[490] it is very possible that these remarkable portraits tarnished Espinasse's reputation as a gentlemen and, by extension, as a lawyer and reporter. Certainly, the personal nature of the criticisms by Espinasse of the judges of his time echo the personal nature of the criticisms of Espinasse by later judges.

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[483] (1839) 9 A. & E. 1: Campbell, then Attorney-General, appeared for the unsuccessful defendant.

[484] Arnould, *Memoir*, vol.2, 288-292 Hardcastle, *Life*, vol.2, 268-269. They were afterwards reconciled: ibid., vol.2, 295.

[485] Ballantine, *Experiences*, vol.1, 211. See also Maule's reference to the 'short and unsatisfactory' report of a case by Campbell in *Overton v Freeman*, supra.

[486] Thomas Peake, *Cases Determined at Nisi Prius in the Court of King's Bench*, London, 1795, vi.

[487] Luther, 'Text and Context', 531-532.

[488] Thomas Peake Jnr., ed., *Cases Determined at Nisi Prius, in the Court of King's Bench ... Being a Continuation of Cases at Nisi Prius,* London, 1829.

[489] Peake, *Cases*, vi.

[490] Raymond Cocks, *Foundations of the Modern Bar*, London, 1983, 1-4 and 15-29.

Espinasse's sketches appeared in a series of six articles published in *Fraser's Magazine* between September 1832 and May 1833, entitled *My Contemporaries: from the Note-Book of a Retired Barrister*. Although they were unsigned, Espinasse did nothing to hide his identity as their author, as he referred to himself as 'Mr E',[491] and mentioned both his reporting of the nisi prius decisions of Lord Ellenborough[492] and his Irish heritage.[493]

The selection of *Fraser's Magazine* for the publication of these articles is interesting. First published in February 1830, it quickly acquired and maintained a reputation for the wit and pungency of its articles and for its willingness to attack and ridicule everyone and everything:[494] Espinasse's articles certainly conformed to that pattern. The magazine also, like Espinasse, had close connections with Ireland and the Bar: its editor, William Maginn, was born and raised in Cork, and the capital for the venture was provided by Maginn's wealthy barrister friend, Hugh Fraser, for whom the magazine was named.[495]

Espinasse's articles featured candid, unflattering and at times offensive accounts of many of the leading figures of the late eighteenth and early nineteenth-century Bench and Bar. Hardly any of the great and the good escaped censure in one form or other, and the following are some examples of Espinasse's criticisms of the judges of his time.

Of Lord Kenyon, Espinasse said that 'he had so undisputed a title to every thing ungracious … He felt his superiority, and displayed it with a want of feeling bordering on contempt.' He noted that 'The parsimony of Lord Kenyon was notorious, and the absence of all hospitality the theme of general animadversion … He had no vices, but many faults, which threw a shade over his virtues … his ruling passion was a love of money, and … avarice was the predominant feature in his character.' Espinasse also said that 'To the junior part of the Bar he was unencouraging and ungracious; to those more advanced in the profession, assuming and offensive … he practised an offensive parsimony, without disguise, apology, or necessity.'[496]

Espinasse was no kinder to Willes J: 'There was a flippancy of manner and a levity of deportment about him … These were the ornaments of a fat, unwieldy figure, endowed with a face of smirking fatuity.'[497] As for Ashhurst J, 'His manner was confused and embarrassed, and he seemed to shrink from the eye of every one who approached him.'[498] Espinasse's view

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[491] Espinasse, 'My Contemporaries', 6 *Fraser's Magazine* (1832), 315; 7 *Fraser's Magazine* (1833), 52.

[492] Ibid., 48.

[493] Ibid., 52

[494] James Grant, *The Great Metropolis*, London, 1837, vol.1, 317-322.

[495] Patrick Leary, '"Fraser's Magazine" and the Literary Life, 1830-1847', 27 *Victorian Periodicals Review* (1994), 105 at 107. A regular contributor to the magazine, writing under the pseudonym 'Morgan Rattler', was another Trinity College Dublin-educated barrister, Percival Weldon Banks: Davis Coakley, 'Sir John Thomas Banks', *Oxford Dictionary*, vol.3, 690.

[496] Espinasse, 'My Contemporaries', 6 *Fraser's Magazine* (1832), 222, 227, 230, 417, 419, 424. He also criticised Kenyon's bad temper, his bad Latin, his unjust conduct towards attorneys and his lack of hospitality: ibid., 420-423. Espinasse did, however, praise Kenyon's legal knowledge, crediting him with the introduction of principles of equity into the King's Bench: ibid., 419-420, 424. For a more sympathetic portrait of Kenyon and his attitude to the junior Bar, see Thomas Frognall Dibdin, *Reminiscences of a Literary Life*, London, 1836, vol.1, 124; Polson, *Law and Lawyers*, vol.2, 359.

[497] Espinasse, 'My Contemporaries', 6 *Fraser's Magazine* (1832), 223.

[498] Ibid., 223.

of the appointment of Nash Grose to the King's Bench was that 'He … fell short of what the King's Bench bar were led to expect from him, and, as a lawyer, he lost in credit what he gained in rank.'[499] Le Blanc J fared no better: 'He was tamely correct, tedious, and unconvincing… With the bar, he was not popular … [H]e chilled with distant civility … [H]is countenance … bore evident marks of self-satisfaction.'[500]

Although Espinasse never practised in the Exchequer, the Barons of that court were similarly despatched: he said of Macdonald CB that 'He was not distinguished for legal knowledge of any extent … He was an unceasing talker, an indefatigable story-teller, and a living register of stale jokes, worn-out witticisms, and thread-bare jests';[501] and as for Hotham B: 'his knowledge as a lawyer was extremely circumscribed. He was aware of his want of information, and betrayed evident marks of embarrassment when called upon to decide any point of law.'[502]

Espinasse reserved his fiercest criticism for one of his erstwhile leaders, Sir Vicary Gibbs:

> … society did not hold a more disagreeable man. Sneer and ill-nature appeared to have taken settled possession of his countenance … Endless peevishness of observation, and petulance which knew no fatigue, formed the ordinary accompaniments of his administration of justice … As a leader at Nisi prius his powers were contemptible … one of the most unpopular who ever presided in a Court of Justice … Sir Vicary Gibbs … dropped like an acid into the Court, and every thing was sour.[503]

The only judges featured in these sketches about whom Espinasse did not have a bad word to say were Lord Mansfield CJ, Buller J – whom he stoutly defended against the 'malicious hostility' which was 'pointedly and incessantly' directed against him at the Bar and on the Bench[504] - and Lawrence J.

The vitriolic nature of these observations is somewhat difficult to reconcile with Espinasse's denial of any malicious intent: 'I have no private end to answer, no selfish object to attain, no spleen to gratify … The spirit of detraction dwells not in me.' [505] Indeed, his expressed intention to abstain from referring in his sketches to anyone who was still alive[506] may have been largely due to the inability of the dead to sue for libel.

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[499] Ibid., 314.

[500] Ibid., 319-320.

[501] Espinasse, 'My Contemporaries', 7 *Fraser's Magazine* (1833), 50-51.

[502] Ibid., 190.

[503] Ibid., 555. Although the caustic temperament of "Sir Vinegar Gibbs" made him widely unpopular among the profession, he was not universally despised: the barrister, law reporter and historian J.L. Adolphus was a great friend, and decried the 'small wits in the profession' who railed against him: Emily Henderson, *Recollections of the Public Career and Private Life of the Late John Adolphus, the Eminent Barrister and Historian*, London, 1871, 256.

[504] Espinasse, 'My Contemporaries', 6 *Fraser's Magazine* (1832), 225.

[505] Ibid., 221, 417.

[506] Espinasse, 'My Contemporaries', 7 *Fraser's Magazine* (1833), 180.

Although there is no direct evidence that Espinasse's reminiscences lowered his standing in the eyes of the legal profession,[507] it is instructive to consider the fate of others who dared at around this time to publish criticisms of barristers and judges.

Possibly the earliest collection of critical sketches was *Strictures on the Lives and Characters of the Most Eminent Lawyers of the Present Day,*[508] published in 1790. The author chose to conceal his identity,[509] no doubt wishing to escape censure for the book's highly critical comments on many of the judges of the day.[510] As the author explained at the end of the book, he had originally intended to include sketches of other prominent barristers, but had decided to include them in a second volume dealing exclusively with the Bar, which he described as 'ready for the press, awaiting the Public judgment upon the present.'[511] However, it does not appear that that second volume was ever published, which suggests either that the first volume was not a commercial success or that the author or publisher was for some reason unwilling or unable to continue with the venture.

A more salutary example is provided by the publication between August 1818 and January 1819, in the Radical newspaper the *Examiner*, of a series of twenty sketches entitled *Criticisms upon the Bar*, which were written under the pseudonym "Amicus Curiae" but were quickly revealed to be by a law student named John Payne Collier.[512] Revised versions of these sketches, together with two further sketches, were published as a book in 1819.[513] Virtually all of these sketches contained ad hominem attacks on their subjects, often in offensive terms: for example, Samuel Marryat was said to be 'one of the most clumsy, negligent speakers that ever opened his lips … Of wit or humour [he] has not a particle'; and of Michael Nolan, Collier said that 'I really am quite at a loss to conjecture for what reason [he] has been nominated one of his Majesty's Counsel learned in the law.'[514]

These sketches were poorly received by many in the legal profession.[515] The barrister Henry Crabb Robinson recorded in his diary entry for 17 October 1818 that, having read the sketches in the *Examiner*:

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[507] The only contemporary review of the articles in the legal press referred to them as written 'with good taste' although no quotations from the remarks on Willes J were reproduced 'for the whole of them are personal and severe': Anon., 'The Note-book of a Retired Barrister', 4 *Legal Observer* (1832), 294.

[508] Anon., *Strictures on the Lives and Characters of the Most Eminent Lawyers of the Present Day*, London, 1790.

[509] The book has subsequently been attributed to one of two non-practising barristers: Edward Wynne and Leman Thomas Rede. The former is identified as the author in Samuel Halkett and John Laing, *A Dictionary of the Anonymous and Pseudonymous Literature of Great Britain*, Edinburgh, 1885, vol.3, 2506. The latter is identified as the ostensible author by "A Hermit at Hampstead" in *Notes and Queries (ser. 2)*, London, 1856, vol.2, 513.

[510] The judges who came in for particular criticism were Lord Thurlow, Heath and Wilson JJ, and the puisne Barons of the Exchequer: Hotham, Perryn and Thompson BB.

[511] Anon., *Strictures*, 223.

[512] Collier maintained that his identity was revealed for malign motives: John Payne Collier, *An Old Man's Diary, Forty Years Ago*, London, 1872, vol.4, 95.

[513] Anon. (John Payne Collier), *Criticisms on the Bar; including Strictures on the Principal Counsel Practising in the Courts of King's Bench, Common Pleas, Chancery and Exchequer*, London, 1819.

[514] Anon., *Criticisms,* 37, 43, 276. The author's judgement often proved to be unsound, such as when describing as 'a young man of overrated abilities, and who will never do better than he has done, nor attain a higher rank than that of a debater', a young Tory MP called Robert Peel: ibid., 172.

[515] Collier, *An Old Man's Diary*, vol.4, 95.

> These did not by any means please me – not that the criticisms were on the whole ill done, but that the thing itself ought not to have been done at all. It seems an impertinent intrusion of public censure where there is no right whatever to play the part of a critic. Actors, public performers of every kind & authors invite criticism … but the Barrister, tho' he acts before the public, does not act for the public, and it is scandalous to bring forward the infirmities of body & mind to amuse an idle & malignant public.[516]

These or similar views came to the attention of Collier, who at the beginning of his book said that: 'I have heard no objection seriously stated and argued to the fitness of subjecting Barristers to critical enquiry, but from Barristers themselves'[517] and who sought to answer his critics at the end of the book with a quotation from Juvenal, to the effect that those who criticise are guilty of doing the same themselves.[518] But even Collier realised that he had on occasion gone too far, deleting from the book a reference in his *Examiner* sketch to the mental decline of one of his subjects, James Topping.[519] However, in the book Collier could not resist a further dig at the legal profession:

> Young men who start on their career, who have just mounted their wig and gown, of late years have obtained practice … generally, by the publication of some treatise upon a particular branch of the law, or by a volume of reports of decided cases, accompanied by a fulsome dedication to an individual, who has the means of advancing them on their progress by smiling upon their labours.[520]

Collier became convinced that these sketches had irrevocably blighted his legal career. He had been a student barrister of the Middle Temple since 1811 but was not called until 1829, and he gave up any ambition to practice shortly thereafter. He called the sketches 'foolish, flippant, and fatal to my prospects, if I ever had any'[521] and in a copy of the book presented to a friend, he wrote that it had proved 'to have always been a "Bar" to my progress in the profession.'[522] He also remarked of the book that 'after I have been called to the Bar of the Middle Temple it was often thrown in my teeth',[523] and he elsewhere alluded to the hostile feeling excited by the sketches as one of the causes that delayed his call to the Bar.[524] Denied a legal career, Collier

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[516] Arthur Freeman and Janet Ing Freeman, *John Payne Collier: Scholarship and Forgery in the Nineteenth Century*, Yale, 2004, vol.1, 82. Crabb Robinson also found the sketch of Sir John Gurney to be 'particularly offensive, and also unjust': ibid., vol.1, 82. Robinson may have been particularly disappointed to find out that Collier was the author of the sketches, as he was a great friend of Collier's father, had lodged with the family in London from 1806 to 1813, and in 1811 had vouched for Collier's good character at the Middle Temple: ibid., vol.1, 8-10, 77.

[517] Anon., *Criticisms,* ii.

[518] Ibid., 308.

[519] Freeman and Freeman, *Collier*, vol.1, 82.

[520] Anon., *Criticisms,* 8

[521] Freeman and Freeman, *Collier*, vol.1, 81.

[522] Ibid., vol.1, 81.

[523] Collier's unpublished memoirs, cited in ibid., vol.1, 83.

[524] George Frederic Warner, 'John Payne Collier', in Sir Leslie Stephen ed., *Dictionary of National Biography*, 1st ed., London, 1887, vol.11., 348 at 349. Collier's biographers query how damaging these sketches were to his career, noting that his friend Barron Field, who while a student of the Inner Temple in 1811 and 1812 had several critical sketches of leading barristers published in the *Reflector* magazine, managed thereafter to pursue a successful legal career: Freeman and Freeman, *Collier*, vol.1, 86. However, Field also wrote his sketches anonymously, signing them with the cryptonym of three daggers (Kenneth E. Kendall, *Leigh Hunt's Reflector*,

went on to become a prominent literary critic and scholar, later achieving notoriety as the forger of a number of documents relating to the life and business of William Shakespeare.[525]

More generally, other barristers with pretensions to success in practice at this time took precautions to avoid their literary careers damaging their prospects at the Bar. Sir Frederick Pollock recalled a courtroom conversation in 1839 with the barrister Samuel Warren, at the time when the first chapters of Warren's novel *Ten Thousand a Year* were being published anonymously in *Blackwood's Magazine*. Warren had been generally denying authorship and said that he hoped Pollock would not suppose him to be the author 'as he was serious in wanting to get on at the Bar, and knew that it was damaging to a man's prospects if he were known to be occupied in literary pursuits.'[526]

It is eminently possible that, just as Collier's sketches at the beginning of his career may have hampered his progress in the legal profession, Espinasse's sketches at the end of his life may have affected his reputation by offending some of his brethren, including those who as judges would go on in the subsequent decades to criticise the quality of his reporting.[527]

Espinasse the Irishman

Another possible reason why Espinasse's reports were held in low esteem was as a result of personal antipathy due to his Irish roots.

As a generalisation, care must be taken when describing the English attitude to the Irish at the end of the eighteenth century, before the subsequent onset of the unambiguously hostile views caused by the large influx of Irish into England following famine and mass demobilization after the end of the Napoleonic Wars.[528] Whilst there was anti-Irish sentiment in eighteenth century England, illustrated by riots in London in 1736 and the Gordon riots in 1780, this was largely fuelled by resentment towards the working-class Catholic Irish.

The tumultuous political events of the 1790s, however, led to a more general decline in Anglo-Irish relations. After a long period of relative social peace in Ireland between the mid-1690s and the 1780s, the discrimination and political repression of Catholics, and the influence of the French Revolution both on an English government fearful of reform and on Irish Catholics radicalised by events in France, led to the Irish Rebellion of 1798. Although ill-organised and short-lived, the ruling Irish Protestant elite was discredited and constitutional union followed

The Hague, 1971, 143), and there is no evidence that his identity was revealed at or near the time of publication. Other anonymous sketches of the legal profession from around this time include: Anon., *The Bar, with Sketches of Eminent Judges, Barristers*, London, 1825; and Anon., 'Letters from a Heidelburg Student', 1 *Legal Observer* (1831), 386-387, 2 *Legal Observer* (1831), 65-67, 257-259, 305-307.

[525] See generally, Freeman and Freeman, *Collier.*

[526] Pollock, *Personal Remembrances*, vol.1, 21-22.

[527] As the nineteenth century wore on, criticisms of lawyers were more freely canvassed and prejudice against such criticisms abated: Anon., 'Eminent Members of the Bar', 15 *Law Magazine: Quarterly Review of Jurisprudence (n.s.)* (1851), 193; cf. Stephen and Stephen, *Adventures*, 221: '… it is not fair in an anonymous work to quote the names of private individuals to their prejudice.'

[528] Peter King, 'Ethnicity, Prejudice, and Justice: The Treatment of the Irish at the Old Bailey, 1750–1825', 52 *Journal of British Studies* (2013), 390 at 409-414.

in 1801.[529] The events of 1798 led to widespread prejudice amongst the English against the Irish.[530]

As regards the law, Irish students were in Espinasse's time a common sight in legal London, as all aspiring Irish barristers were required by statute to enrol in one of the English Inns of Court before they could be called to the Bar in Dublin.[531] These students were not held in particularly high repute, and were caricatured as wild and dangerous adventurers.[532] Moreover, there were scarcely any Irish barristers practising successfully in England at the time: one commentator recalled that, in the mid-1820s: 'The most inveterate prejudices were then entertained against Irishmen, not merely against Irish hodmen and servants, but against educated Irishmen' and that there were only two Irishman of any eminence then at the English Bar.[533]

However, such evidence as there is suggests that Espinasse, even though he was not an Anglican and his wife was a Catholic, was not professionally hindered by either nationality or religion. As referred to earlier, he become a Bencher and Treasurer of his Inn; he was one of the two eminent Irish barristers at the English Bar referred to by the aforementioned commentator;[534] and in *My Contemporaries*, Espinasse himself said that he had no enemies at the Bar.[535] The only, relatively mild, published prejudicial comment about Espinasse's nationality came from the barrister and biographer William Townsend in his book *Lives of Twelve Eminent Judges of the Last and of the Present Century*.[536] Referring to Espinasse's criticism of Lord Kenyon in *My Contemporaries*, Townsend dismisses Espinasse as 'a rattling [i.e. fast talking] Irishman, more studious of repartee than reporting.' However, Townsend was unlikely to have had much personal contact with Espinasse: Townsend was called to the Bar in 1828 after Espinasse's retirement, and his book was published in 1846, at around the time the posthumous judicial criticisms of Espinasse first emerged.

Espinasse's abbreviated reporting style

In the preface to the first volume of his King's Bench reports published in 1783, Sylvester Douglas explained that, when considering the best method of reporting, he found that different reporters had adopted very different approaches. He compared those reporters who stated the facts at great length and set out counsel's arguments almost as diffusely as they were delivered, with those who gave a very abridged state of the case, together with only the point decided, omitting all the arguments and most of the court's reasoning. Having compared the advantages and disadvantages of each, Douglas explained that he sought to steer a middle course, and set out his general method in thirteen propositions. As regards the style of the reports themselves,

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[529] T. W. Moody and W. E. Vaughan, *A New History of Ireland IV. Eighteenth-Century Ireland 1691-1800*, Oxford, 1986, 355-361.

[530] Mary Dorothy George, *London Life in the Eighteenth Century*, London, 1925, 123-131.

[531] 33 Hen. 8, c.3, s.3 (Ir.). This requirement was not removed until 1885: V.T.H. Delany, 'The History of Legal Education in Ireland', 12 *Journal of Legal Education* (1960), 396 at 397.

[532] Anon., *Advice to a Certain Lord High Chancellor etc.*, Dublin, 1792, 23-31.

[533] Anon. (Kirwan), 'Social and Political Life', 122-123.

[534] The other was Espinasse's great friend, Michael Nolan.

[535] Espinasse, 'My Contemporaries', 6 *Fraser's Magazine*, 221.

[536] Townsend, *Twelve Eminent Judges*, vol.1, 51.

Douglas stated that his approach was to report the material aspects of the pleadings or evidence, a digest of counsel's arguments including all applicable cited cases and the judgments of the court; and to include an abstract of the principal decided points by way of a sidenote.

This method, which Burrow had been the first to adopt, quickly became standard practice, and by the mid-1790s all the authorised reporters of the Westminster Hall courts were adopting the same approach. Thus, in the preface to the first volume of his Exchequer reports published in 1795, Alexander Anstruther said that he had 'endeavoured, in the execution of my design, to adhere as much as possible to the plan of those Reporters in the Courts of Law, whose method is most eminently sanctioned by the public approbation', and then summarised his method in materially the same terms as applied by Douglas.[537] Henry Blackstone's Common Pleas reports, published in two volumes in 1793 and 1796, also followed the same form, and were praised for being 'confined … to points of real importance … with as great a degree of conciseness as is consistent with perspicuity.'[538] The other authorised reporters of the time – Durnford and East in the King's Bench and Francis Vesey junior in Chancery – also applied the same method of reporting as Douglas.

Espinasse, by contrast, did not copy Douglas's method and instead adopted a much more abridged style. A typical report would begin with a reference to the form of action and a short recitation of the facts, usually only those that were necessary to set the issues he was reporting in context.[539] The issue would then be shortly described, in terms of how it was raised and responded to by counsel. Caselaw was only very rarely cited, reflecting the unplanned nature of most challenges, the general lack of authorities on many points of evidence, and the fact that cases were not usually cited at nisi prius. The report would conclude with the judge's ruling on that issue and - usually, but not always[540] - the decision in the case. If the case was decided on an issue which was not the subject of the reported point, there may have been the briefest of references to that issue; often there would be no reference to it at all.

Espinasse adopted this method of reporting for three reasons.

First, his reporting style matched the course of most nisi prius cases: they were generally short affairs, decided by juries who were not to be persuaded by subtle or lengthy legal arguments, and presided over by judges more interested in getting through the cause list than hearing detailed arguments on reportable points and delivering involved and learned rulings on them. Thus, when such points did arise, they would be swiftly raised, barely argued and briefly ruled upon.

Secondly, as Espinasse wrote in the preface to the first volume of his reports (referred to in Chapter 3 above), his object was to rescue from oblivion decisions on points of evidence which frequently arose and were discussed in the nisi prius courts. Espinasse was thus principally interested in reporting cases which raised interesting points of evidence or procedure, and he would concentrate on the judges' rulings on such points, often to the exclusion of any

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[537] Alexander Anstruther, *Reports of Cases argued and determined in the Court of Exchequer*, London, 1796, v-vi.

[538] Marvin, *Legal Bibliography,* 128.

[539] An analysis of Ellenborough's notes on the cases reported by Espinasse, referred to in Appendix 3, shows that the recitation of the facts in the report would often involve the omission of oral testimony from a number of witnesses, covering several pages of Ellenborough's notebooks.

[540] For an example of a case in which the decision was not reported, see *Flower v Pedley* (1796) 2 Esp. 491.

subsequent rulings on the substantive legal issues at stake. His focus on the evidential issues raised at trial was demonstrated by his decision to report rulings on those issues in a number of trials whose verdicts had already been overturned in banc by the time those trials came to be reported.[541]

Thirdly, in the same preface, Espinasse justified his reporting of nisi prius cases by referring to the earlier reporting of such cases by Lord Raymond and Sir John Strange. As discussed in Chapter 2, their reports of nisi prius cases were very short indeed, often limited to a brief description of the ruling, reported in a single paragraph or even a single sentence. Although Espinasse said that he had departed from their method by setting out the factual context of the ruling, his abbreviated approach was clearly influenced by those earlier reports.

Accordingly, as the following table shows, the cases reported by Espinasse were, on average, considerably shorter than those reported by his Westminster Hall contemporaries.

Reporter	**Years covered**	**Total pages**[542]	**Total cases**	**Pages per case**
1-6 Espinasse[543]	1793-1807	582	832	0.69
5-8 Durnford & East	1795-1800	1596	922	1.73
1-6 East	1801-1805	1433	577	2.48
1-2 H Blackstone	1788-1796	742	311	2.39
1-5 Bosanquet & Puller	1796-1807	1453	746	1.95
3-11 Vesey Junior	1795-1805	1665	1228	1.36
1-3 Anstruther	1792-1797	312	323	0.96
Forrest	1801	56	41	1.36

Espinasse's contemporary nisi prius reporters followed the same structure, and their reports were similarly brief: Peake's reports averaged 0.63 pages per case, and Campbell's reports (which contained a greater number of notes than the others) averaged 0.80 pages per case. But it was Espinasse who bore the brunt of the criticism for the way he reported cases: hence the jibe that he only heard one half the case and reported the other half; and some judges relied upon the brevity of the report as a reason for declining to follow cases reported by Espinasse.[544]

An important example of such a case is *Nichol v Martyn*.[545] The defendant travelling salesman was employed by the plaintiffs to obtain orders for their business. The plaintiffs brought an action on the case for seducing customers, alleging that the defendant, during the time he was employed by them, had enticed several customers to transfer their business to him, as he was

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[541] See Chapter 8.

[542] *The English Reports* are used rather than the reports themselves to ensure uniformity of layout across the different reports.

[543] This excludes four Westminster Hall cases reported by Espinasse.

[544] For example: *Robinson v Read* (1829) 9 B. & C. 449, 455-456 per Parke J; *Hill v White* (1839) 6 Bing. N.C. 26, 33 per Maule J; *Morris v Bethell (No.2)* (1869-70) L.R. 5 C.P. 47, 50 per Bovill CJ; *Berger v Raymond Sun Ltd* [1984] 1 WLR 625, 629 per Warner J; *Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust* [2018] 1 WLR 2073 at [49] per Lady Black JSC. The brevity of Campbell's and Peake's reports also attracted some judicial criticism: see, for example, *Tidmarsh v Grover* (1813) 1 M. & S. 735, 736 per Lord Ellenborough CJ; *Laythoarp v Bryant*, supra.

[545] (1799) 2 Esp. 732.

intending to set up on his own account in the same business as the plaintiffs. The customers testified that the defendant, during his last visit to them when representing the plaintiffs, had told them he was going into the same business and would be obliged to them for an order on his account, but on cross-examination it was established that the defendant did not obtain any custom during that time, and that he only sought business for the period after the termination of his engagement by the plaintiffs. Lord Kenyon CJ nonsuited the plaintiffs,[546] on the basis of the following ruling, as reported by Espinasse:[547]

> The conduct of the defendant in this case, may perhaps be accounted not handsome; but I cannot say that it is contrary to law. The relation in which he stood to the plaintiffs, as their servant, imposed on him a duty which is called of imperfect obligation, but not such as can enable the plaintiffs to maintain an action. A servant, while engaged in the service of his master, has no right to do any act which may injure his trade, or undermine his business; but every one has a right, if he can, to better his situation in the world; and if he does it by means not contrary to law, though the master may be eventually injured, it is *damnum abs. injuria*. There is nothing morally bad, or very improper in a servant, who has it in contemplation at a future period to set up for himself, to endeavour to conciliate the regard of his master's customers, and to recommend himself to them so as to procure some business from them as well as others. In the present case, the defendant did not solicit the present orders of the customers; on the contrary, he took for the plaintiffs all those he could obtain: his request of business for himself was prospective, and for a time when the relation of master and servant between him and the plaintiffs would be at an end.

More than 130 years later, in *Wessex Dairies Ltd v Smith*,[548] the Court of Appeal disapproved *Nichol v Martyn* when holding that an employee was liable in damages to his employer for doing what the defendant had done in the earlier case: on his last day of service with his employers, the employee asked a number of their customers to transfer their custom to him as from the following day, when he was to begin business on his own account. As an appellate tribunal, it was open to the court to overrule *Nichol v Martyn* as a matter of principle, without attacking the status of the report. Yet Greer and Maugham LJJ, who gave the substantial judgments, chose to go further, attacking both the report and the reporter.

Greer said this:[549]

> [Counsel] on behalf of the defendant … cited in support of his contention *Nichol v Martyn*, which is to be found in that collection of imperfect and misleading reports bearing the name of Espinasse … The report of *Nichol v Martyn* is very short, but if the words of Lord Kenyon are correctly reported they lay it down that a servant may, while in the master's service, canvass or solicit business from the master's customers for himself to take effect after he has left the service. In that case the defendant was a traveller in the service of the plaintiffs, but it does not appear whether he was entirely in their employment, and it may be that if we knew the precise facts the actual decision might be justified without accepting the general principle stated by Lord Kenyon as applicable to all master and servant contracts.

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[546] Despite them being represented by the formidable quartet of Erskine, Garrow, Gibbs and Best.

[547] Ibid., at 733-734.

[548] [1935] 2 KB 80.

[549] Ibid., 84.

Maugham said this, after setting out Kenyon's reported ruling:[550]

> … having regard to the fact that the skill and accuracy of Espinasse as a reporter have been often adversely criticized (indeed at one time counsel were recommended by judges not to cite him, inasmuch as he afforded no sure guidance), I cannot think that the report in this particular can be accurate. I doubt whether Lord Kenyon used the words I have cited, beginning "There is nothing morally bad." They do not sound like a judgment of his. If what the servant was doing was morally bad it was improper, and if improper it was morally bad. I doubt also whether we can accept the view attributed to the Chief Justice that a person while still in the employment of wholesale ironmongers is entitled to solicit customers for himself as from the time when he ceases to be employed by them.

Greer's comment on the brevity of the report led him to assert that there may have been other relevant facts which justified the decision without accepting the principle as stated by Kenyon; but that appears to be more of a criticism of Kenyon for setting out a principle which was wider than required to decide the case, unless it is suggested that Espinasse failed to report the aspect of Kenyon's judgment that limited the principle to those facts. If that is the suggestion, it is difficult to reconcile such an omission with the scope of the principle as reported, which is clearly intended to cover all servants who sought to entice the custom of their master's customers after the termination of their service. Greer suggested that the result could have been justified if the defendant had been in the service of persons other than the plaintiffs, but it is hard to see why that would validate enticing away the plaintiffs' customers when the defendant was meeting them, as plainly he would be doing so while in the service of the plaintiffs. In short, there is nothing in the facts or the ruling as reported by Espinasse that warrants a conclusion that case was defectively reported.

For his part, Maugham did not suggest that the report was too short: his criticism was based on the assumption that Kenyon cannot have intended to rule as he was reported to have done. Yet the only justification for that conclusion was Maugham's view that the ruling did not sound like one that Kenyon would have given because of the attributed words: 'There is nothing morally bad, or very improper in a servant …', given that, in Maugham's view, 'If what the servant was doing was morally bad it was improper, and if improper it was morally bad.' Without any further explanation, the reason why this caused Maugham to doubt the accuracy of Kenyon's reported ruling is obscure.[551] Maugham seems to be suggesting that Kenyon is reported to be making a distinction between immorality and impropriety, by criticising it on the basis that the two should be regarded as the same. But Kenyon was not doing that. He was saying that the servant's conduct was neither morally bad nor improper but 'not handsome', which is consistent with the principle that morality and impropriety were the same. In fact, the reported ruling does sound like one that Kenyon would have given, because of his earlier statement that the servant's relationship 'imposed upon him a duty which I called of imperfect obligation, but not such as can enable the plaintiffs to maintain an action': references to the notion that not all moral duties are legally enforceable featured in a number of Kenyon's rulings

[550] Ibid., 87.

[551] Maugham could not have been disavowing the report on the basis that no judge could have made such a ruling, as he said at the start of his judgment (ibid., 86) that: 'The point of law involved is one upon which judges have not always expressed the same opinion'. For a statement of the position consistent with Kenyon's reported ruling, see *Robb v Green* [1895] 2 QB 1, 12-15 per Hawkins J. Moreover, there is no objection to an employee soliciting their employer's suppliers, with a view to using them when they later set up business themselves: *Laughton v Bapp Industrial Supplies Ltd* [1986] ICR 634.

and judgments, where he recognised that not all morally deficient conduct gave rise to a cause of action.[552]

Another indication that the ruling in *Nichol v Martyn* was accurately reported concerned a suggestion during the course of the case that the defendant had enticed some of the plaintiffs' servants to leave their service and to enter into his when he went into business. Espinasse reported Kenyon as saying that, while enticing a servant to leave during the course of their service was actionable, to induce a servant to leave at the expiration of their service, even though the servant had no intention at the time of leaving, was not actionable. This proposition has always been treated as accurately reported and good law.[553]

There is nothing in Greer's or Maugham's judgments that supports the conclusion that either relevant facts had not been recorded or Kenyon's ruling had been otherwise inaccurately reported. The simplest explanation for Kenyon's ruling as reported in *Nichol v Martyn* is that it accurately reflected his view as to the state of the law at that time, when the scope of a servant's duties to their master was largely undeveloped,[554] and the general duty of fidelity owed to the master for the duration of the servant's service was unknown.[555] In this respect, it is notable that the plaintiffs in *Nichol v Martyn* appeared to accept the correctness of the ruling and the subsequent nonsuit: there is no suggestion that Kenyon was asked to reserve the point for the court in banc and no evidence that the plaintiffs moved for a new trial. Given that context, all that the Court of Appeal in the *Wessex Dairies* case needed to do was to declare that Kenyon's view, delivered in the haste of nisi prius, did not fit with the way in which the law had since developed, perhaps adopting Hawkins J's comment in *Robb v Green*:[556]

> I cannot help asking myself whether at the present day Lord Kenyon, after considering the matter, would have considered it no breach of the duty of a servant deliberately to utilize his hours of service by being false to his master's interests and endeavouring to induce his master's customers to transfer their custom to him on a near approaching day.

As already stated, Espinasse's concise style of reporting was deliberate, rather than negligent, reflecting the nature of the cases and the reasons why they were being reported,[557] but there is no doubt that this feature caused some judges to question his competency. However, as the *Wessex Dairies* case shows, whilst it is relatively easy to dismiss a short report on the basis that

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552 See, for example, *Pasley v Freeman* (1789) 3 Term Rep. 51, 63; *Mellish v Motteux* (1792) Peake 156, 157; *R v White* (1792) 4 Term Rep. 771, 775; *Hodges v Hodges* (1796) Peake Add Cas 79, 80; *Haycraft v Creasy* (1801) 2 East 92, 104.

553 John Macdonnell, *The Law of Master and Servant*, London, 1883, 229n.

554 A late nineteenth-century treatise referred to the principle that a servant was bound to consult the interests of his master, but even this was described as 'a vague description of a class of cases … no very precise account of their nature can be given': ibid., 210.

555 A common law duty of fidelity was not established until the Court of Appeal's decision in *Robb v Green* [1895] 2 QB 315.

556 Supra, 14.

557 Espinasse's ability to report cases as fully as their nature and standing required is illustrated by his reports of three cases decided in banc: *Proprietors of the Trent Navigation v Ward* (1785) 3 Esp. 127, *Cooper v Booth* (1785) 3 Esp. 135 and *Wright v Smith* (1805) 5 Esp. 203, which respectively occupied five, thirteen and fourteen-and-a-half pages of his reports. For an analysis of the accuracy of the reports of the first two cases, which were also reported elsewhere, see Appendix 3. His report of a fourth decision from a court in banc – *Newby v Wiltshire* (1784) 2 Esp. 739 - was prepared from a note of the case supplied to him.

it must have omitted material factors or relevant parts of the ruling, it is more difficult to justify that dismissal.

The final words on this subject must go, first, to the law reporter Richard Bligh:[558]

> The purchaser [of the reports] in the abstract, having no view to present use, naturally complains of prolixity, which adds to expense without an equivalent. The student sees, with dread, continued addition to the labour of a mind already overcharged; and the minister of law, whose notions are settled, is prone to repose on his acquired stores of knowledge. – But it has been observed, that the ground of objection occasionally changes with the circumstances and condition of the objector. As a mere purchaser the practitioner would be satisfied with the briefest abstract of the decisions of the Courts; but when a case occurs in his practice, where he wants authority to remove his doubts, to confirm his opinion, or to support the cause of his client, then the complaint most familiar to the ears of those who are accustomed to courts of justice is, that the case resorted to as an authority is much too briefly reported, - that material statements of fact, pleading, argument and decision are omitted; and the same report which before was deemed burthensome, because it contained too much of matter, is now reviled as negligent and worthless, because it contains too little. In the midst of these conflicting objections the task of Reporters is neither easy nor enviable.

In a similar vein was this comment from *The Law Magazine*:[559]

> A law report may be likened to a map or chart of a coast. A person using such an instrument for ordinary purposes, is satisfied with it if it contains a general outline of the coast he studies, but the navigator who relies upon it for the safety of his vessel, requires that every small rock and shoal shall be accurately marked upon it. A report is consequently viewed in different lights by the student and practitioner.

The misuse of Espinasse's reports

These shrewd comments shed light on what is likely to be another reason why Espinasse's reports have such a poor reputation: because they were intended to serve a particular limited purpose and were simply not fit for the different purposes for which those cases often came to be cited.

As stated above, Espinasse primarily reported with a view to preserving rulings on points of evidence for the benefit of the profession. Given that the principal forum for such points to arise was at trial, it is likely that Espinasse's object was to provide practitioners with some authority to cite at nisi prius, where the ability to find and cite any ruling on the matter in hand would usually be sufficient to win the day. However, counsel did not confine their citation of nisi prius rulings to that type of proceedings and would seek to rely on them in cases before the court in banc, where their limitations would be revealed when greater attention was paid to their underlying reasoning (or the lack thereof). This is of a piece with the excessive citation of authority which seems to have been prevalent, if largely unremarked upon by the courts, at this time.[560]

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[558] Richard Bligh, *Reports of Cases Heard in the House of Lords on Appeals and Writs of Error*, London, 1823, vol.1, vi-vii.

[559] Anon, 'Law Reporting', 22 *Law Magazine: Or Quarterly Review of Jurisprudence (n.s)* (1855), 292 at 299.

[560] See Chapter 3.

Repeated challenges to nisi prius rulings, together with a reluctance to criticise the judge who made them, are likely to have caused judges to focus their criticisms on the report and the reporter: just such an occurrence, in *Readhead v The Midland Railway Company*,[561] has already been discussed in Chapter 4.

In this respect, as stated above, Espinasse did not help himself by often straying beyond his expressed object, and additionally reporting points of substantive law that were required to be ruled upon at nisi prius. Whilst short evidential points may have suited Espinasse's abbreviated reporting style, the same could not necessarily be said for substantive points, especially when decided in haste. The citation of cases for such points exposed the weaknesses in Espinasse's method of reporting and most probably contributed to his poor reputation.

This feature may explain the treatment in *Warneford v Kendall*[562] of a case reported by Espinasse. A statute provided that a person unqualified to kill game was subject to a penalty for exposing a hare to sale if the hare was found in their possession. A claim for breach of the statute was brought against a servant employed to detect poachers, who had taken possession of a hare after it had been killed by strangers, in order to carry it to his master. At trial the plaintiff relied upon Espinasse's report of *Molton v Cheeseley*,[563] in which a pheasant had been killed by accident by the dog of the defendant, who then carried the pheasant away. The defendant was charged with two penalties under the statute: having a pheasant in his possession; and keeping a dog for killing and destroying the game. Espinasse first reported Buller J's ruling that the plaintiff could only seek one penalty under the statute for a single act, and then Buller's ruling that the defendant was liable, on the basis that:[564]

> … if it appeared that the bird was killed by accident, that that was no offence, but that in such case it should be left where it was killed; for if it was taken away, it subjects the party to the penalty, for having game in his possession.

The King's Bench in *Warneford v Kendall* set aside the verdict for the plaintiff. Lord Ellenborough CJ said that possession of the hare itself was not sufficient, where the defendant neither claimed it as his property, nor acquired the possession of it for himself.[565] He said that *Molton v Cheeseley* 'must have been imperfectly stated.'[566] However, this may be put down to Espinasse being principally concerned with the first ruling in that case about the number of offences created by the statute, with the substantive ruling being of only secondary importance.[567]

It is not clear why Espinasse so often went beyond his stated objective by reporting points of substantive law, but it is likely to have been an example of what was known as "book-making", a pejorative term used to describe the inclusion in volumes of reports of many cases of little or

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[561] (1866-1867) L.R. 2 Q.B. 412.

[562] (1808) 10 East 19.

[563] (1788) 1 Esp. 123.

[564] Ibid., 124.

[565] Supra, 20.

[566] Ibid., 21.

[567] In any event, it can be inferred from the context of Buller's reported ruling, and in particular his use of the words 'taken away', that the key point was the intention of the defendant to take permanent possession of the bird for his own use, an intention which was clearly not present in *Warneford v Kendall*.

no value.[568] Whilst this practice was principally due to the practice of payment "by the sheet" – described as 'the most objectionable that could be devised'[569] – another reason, at least as far as Espinasse was concerned, would have been that there were simply not enough rulings purely on points of evidence to fill an issue of reports so as to enable roughly contemporaneous publication for the benefit of practitioners. Whatever the reasons, nisi prius reports in particular gained a reputation for book-making.[570]

If nisi prius rulings on points of evidence were of some use at trial, such rulings on points of substantive law were likely to be of little or no value when cited before the full court. Yet that did not stop counsel from citing such rulings there, which led to them being scrutinised in a forum where they were not intended to be used, and on issues which went beyond the purpose of the reports in which they appeared: it should accordingly be of no surprise when they were found wanting, although that would not by itself have justified the doubts expressed as to the accuracy of Espinasse's reporting.

CONCLUSION

The abbreviated style of Espinasse's reports, together with the lack of judicial regard for nisi prius rulings on matters of substantive law, may account for the criticisms of Espinasse as a law reporter, but four factors suggest that they cannot have been the complete explanation. First, the brevity of Espinasse's reports was matched by the brevity of his fellow early nisi prius reporters Peake and Campbell, neither of whom received the same level of censure for their accuracy and quality. Secondly, those who criticised Espinasse's reports on the ground that the judge could not have said what he was reported to have said, did not take account of the fact that nisi prius rulings were generally treated as being of no authority precisely because the judges were not to be held to views expressed by them in haste, and from which they could later resile on mature consideration. In other words, there was simply no need for the judges to criticise Espinasse's reports if they were doing so in order to justify not following the reported ruling. Thirdly, the ad hominem nature of the criticisms of Espinasse went further than was necessary to undermine his reputation as a reporter. Finally, the absence of any evidence justifying those criticisms is consistent with there being no such evidence.

This gives rise to two conclusions. First, the concentration on Espinasse's defects, and the spiteful nature of the criticisms, indicate that the judges' reasons for doing so were more personal than professional. Secondly, despite the apparent lack of authority of nisi prius rulings, judges felt the need to grapple with the merits of Espinasse's reports of them, which suggests that they were given a greater prominence than the general approach to their value would otherwise have merited: this is explored in the following Section.

[568] Anon., 'Review - Moody and Malkin's Nisi Prius Reports', 1 *Legal Observer* (1831), 247 at 248; Anon., 'Law Reporting', 16 *Legal Observer* (1838), 474; Anon., 'A New Digest of the Law', 25 *Legal Observer* (1843), 163 at 164; See also Daniel, *History and Origin*, 11, 18.

[569] Anon., 'Law Reports and Law Reporting', 18 *Law Magazine and Law Review (3rd ser.)* (1865), 270 at 288.

[570] See the sources cited in n.302 above.

SECTION 3: EFFECT

CHAPTER 7

THE TREATMENT OF SUBSTANTIVE LAW RULINGS AT NISI PRIUS IN THE NINETEENTH CENTURY

INTRODUCTION

Judges in the nineteenth century felt it necessary to censure Espinasse's nisi prius reports for their lack of accuracy, notwithstanding the absence of substantial weight accorded to nisi prius cases in general, because the reported rulings of trial judges, far from being routinely ignored by the courts, were being regularly cited, even on issues of substantive law.

How is this to be reconciled with the plethora of statements from judges warning of the dangers inherent in applying nisi prius rulings, as discussed in Chapter 1? After all, not even the nisi prius reporters themselves necessarily regarded the rulings in their reports as containing substantive legal principles to be followed by subsequent judges. For example: Carrington said that '… the use of Nisi Prius Reports is not to give the fundamental rules of law, to supersede Bracton, Coke's Institutes, and Lord Hale';[571] Holt explained his practice of supplementing the reported cases with notes putting them in their proper legal context on the basis that 'It is not usual, and scarcely possible, for the Judges at Nisi Prius, in the vast multitude of Cases brought before them, to do more than touch upon the principles of the Cases in point; and, still less, to unfold the system of law, of which such Cases are but individuals';[572] and in a similar vein, Foster and Finlason said that 'the object of these reports is not merely, nor mainly, citation for authority, but practical utility.'[573]

The citation of nisi prius cases by counsel is easily understood: the respect accorded by the common law to the authority of previous decisions will cause an advocate to use any case law that they can find to support the principle which they wish to advance;[574] and Lord Denman CJ's warning to the profession about the inaccuracy of Espinasse's reports was delivered because, as he said: '[n]ow they are often cited as if counsel thought them of equal authority with Lord Coke's Reports.'[575] But why would the judges choose to follow nisi prius rulings on issues of substantive law, while at the same time warning of their lack of authority?

WHY DID JUDGES FOLLOW SUBSTANTIVE LAW RULINGS AT NISI PRIUS?

In order to answer that question, it is necessary to analyse the case law citing nisi prius rulings to see if there are any patterns which may help to explain their use.

The following analysis is based on a survey of nisi prius rulings on substantive legal principles reported by Thomas Peake and Isaac Espinasse which have been positively cited by subsequent

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[571] Carrington and Payne, *Reports*, vol.1, iii.-iv.

[572] Holt, *Reports*, iii.

[573] Note to *Smith v Clench* (1865) 4 F. & F. 578, 585-586.

[574] M.H. Hoeflich, 'The Lawyer as Pragmatic Reader: The History of Legal Common-Placing', 55 *Arkansas Law Review* (2002), 87; and see Lord Parker of Waddington CJ, 'Address to the Twelfth Dominion Legal Conference', [1963] *New Zealand Law Journal*, 155 at 160-164.

[575] *Small v Nairne*, supra.

nineteenth-century judges sitting in the superior courts, drawn largely from cases reported in either *The English Reports* or *The Law Reports*.

A note of caution must be sounded about this analysis, as it relies on the accuracy of the words reported to have been used by the judges with regard to their application of the nisi prius rulings. In circumstances where one would expect the reporter to be concentrating on ensuring that the legal principle was accurately reported, it cannot be said with certainty that the report of how the judge was said to have linked the case to the principle was always accurate.

Subject to that caveat, the survey discloses well in excess of a hundred cases in which nineteenth-century judges followed or approved nisi prius rulings on substantive legal principles, or else treated them as illustrating such principles even if the rulings were not followed in the particular case. However, it is clear from the survey that the judges were generally treating nisi prius rulings on issues with which they agreed differently from the way they treated decisions of courts in banc, no doubt because of the different weight accorded to them as authorities.

Of those cases, a very substantial number can be disregarded as they treat the nisi prius rulings in question as makeweights, i.e. those rulings are cited by judges together with at least one other decision of a court in banc in support of the substantive legal principle being relied upon.[576] The judges are able to cite the nisi prius case in support of a point without the need to

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[576] *Allingham v Flower* (1800) 2 Bos. & P. 246, 247 per Lord Eldon CJ; *Lothian v Henderson* (1803) 3 Bos. & P. 499, 520 per Lawrence J; *Kitchen v Bartsch* (1805) 7 East 53, 62 per Lord Ellenborough CJ; *Buckmaster v Harrop* (1807) 13 Ves. Jun. 456, 473 per Lord Erskine C; *Foster v Hodgson* (1809) 2 Ves. Jun. Supp. 559; *Ex parte Greening* (1809) 2 Ves. Jun. Supp. 332; *Peters v Anderson* (1814) 5 Taunt. 596, 602; *Ex parte Binmer* (1816) 1 Madd. 250, 251 per Plumer VC; *Edwards v Kelly* (1817) 6 M. & S. 204, 209 per Abbott J; *Deane v Clayton* (1817) 7 Taunt. 489, 513 per Park J and 532 per Gibbs CJ; *Copeland v Stephens* (1818) 1 B. & Ad. 593, 605 per Lord Ellenborough CJ; *Idle v Royal Exchange Assurance Co* (1819) 8 Taunt. 755, 773 per Dallas CJ; *Davis v The Governor and Company of the Bank of England* (1824) 2 Bing. 393, 404 per Best CJ; *Duncan v Thwaites* (1824) 3 B. & C. 556, 583 per Abbott CJ; *Doe dem. Tilt v Stratton* (1828) 4 Bing. 446, 447 per Best CJ; *Stephenson v Hart* (1828) 4 Bing. 476, 483 per Park J; *Hamlet v Richardson* (1833) 9 Bing. 644, 647 per Tindal CJ; *Hart v Minors* (1834) 2 Cr. & M. 700, 709 per Vaughan B; *Bywater v Richardson* (1834) 1 A. & E. 508, 513 per Lord Denman CJ; *Burn v Carvalho* (1834) 1 A. & E. 883, 894 per Lord Lyndhurst CB; *Thompson v Percival* (1834) 5 B. & Ad. 925, 933-934 per Denman CJ; *Doe d Gray v Stanion* (1836) 1 M. & W. 695, 702 per Parke B; *Beverley v The Lincoln Gas Light and Coke Co* (1837) 6 A. & E. 829, 836 per Patteson J; *Garland v Carlisle* (1837) 11 Bli. N.S. 421, 520 per Bosanquet J; *Irving v Veitch* (1837) 3 M. & W. 90, 111-113 per Parke B; *Byrom v Thompson* (1839) 11 A. & E. 31, 33-34 per Patteson J; *Skeate v Beale* (1841) 11 A. & E. 983, 991 per Lord Denman CJ; *Quarrier v Colston* (1842) 1 Ph. 147, 151 per Lord Lyndhurst C; *Herbert v Sayer* (1844) 5 Q.B. 965, 979 per Tindal CJ; *Courtenay v Williams* (1844) 3 Hare 539, 552 per Wigram V-C; *Hunt v Hooper* (1844) 12 M. & W. 664, 672-673 per Parke B; *Valpy v Manley* (1845) 1 C.B. 594, 603 per Tindal CJ; *Earle v Oliver* (1848) 2 Ex. 71, 88 per Parke B; *Moss v Sweet* (1851) 16 Q.B. 493, 494 per Patteson J; *Elliot v Clayton* (1851) 16 Q.B. 581, 585 per Coleridge J; *Sievewright v Archibald* (1851) 17 Q.B. 103, 113 per Erle J; *Lumley v Gye* (1853) 2 E. & B. 216, 233 per Erle J; *Ex parte Griffiths* (1853) 3 De G. M. & G. 174, 176 per Knight Bruce LJ; *Crouch v The Great Northern Railway Co* (1856) 11 Ex. 742, 756 per Martin B; *Ex parte Taylor* (1856) 8 De G. M. & G. 254, 258 per Turner LJ; *Astley v Johnson* (1860) 5 H. & N. 137, 142 per Pollock CB; *Swinfen v Lord Chelmsford* (1860) 5 H. & N. 890, 918-919 per Pollock CB; *Brady v Todd* (1861) 9 C.B.N.S. 592, 604 per Erle CJ; *Kennedy v Broun* (1863) 13 C.B.N.S. 677, 728-729 and 741 per Erle CJ; *Re Laycock v Pickles* (1863) 4 B. & S. 497, 507 per Blackburn J; *Re London, Birmingham and South Staffordshire Banking Co. Ltd* (1865) 34 Beav. 332, 336 per Romilly MR; *Kitchin v Hawkins* (1866-67) L.R. 2 C.P. 22, 30 per Byles J; *Evans v Walton* (1866-67) L.R. 2 C.P. 615, 623 per Montague Smith J; *Mayor and Aldermen of the City of London v Cox* (1867) L.R. 2 H.L. 239, 273 per Willes J; *Davis v Hedges* (1870-71) L.R. 6 Q.B. 687, 692-693 per Lush J; *Whitmore v Humphries* (1871-72) L.R. 7 C.P. 1, 6 per Willes J; *Henwood v Harrison* (1871-72) L.R. 7 C.P. 606, 621 per Willes J; *Benjamin v Storr* (1873-74) L.R. 9 C.P. 400, 406-407 per Brett J; *Morison v Thompson* (1873-74) L.R. 9 Q.B. 480, 483-484 per Cockburn CJ; *Seaman v Netherclift* (1876) 1 C.P.D. 540, 545 per Lord Coleridge CJ; *Sottomayer v De Barros* (1879) 5 P.D. 94, 100 per Hannen P; *Pandorf & Co v Hamilton, Fraser & Co* (1885) 16 Q.B.D. 629, 634 per

refer to its lack of status as an authority, because of the existence of another, authoritative, decision on the same point.

In the next most substantial number of cases, the nisi prius rulings are not being used as authorities at all. They are not cited because of their inherent worth as previous decisions, but are used as examples of principles which the judges have articulated independently of those rulings.[577] In following the nisi prius ruling, the judge is not according to it any status as a precedent, but is doing so because the force of reasoning (together, perhaps, with other factors, such as the reputation of the trial judge) has led the judge to choose – perhaps even to feel compelled – to follow it. In this respect, the nisi prius case may be compared with a judicial dictum: of no inherent worth as an authority, but capable of being applied if the judge is persuaded that it is legally correct. This is to be contrasted with the treatment of cases decided in banc, which would generally be followed without prolonged consideration of whether the decision was correct.

A good example of this approach to nisi prius rulings is *Laugher v Pointer*.[578] The issue in that case was whether the defendant owner of a carriage was liable to be sued for an injury suffered by reason of the negligence of the driver provided by the defendant. In holding that the defendant was not liable, Abbott CJ referred to three nisi prius rulings in the defendant's favour, stating that they were decisions of a very learned judge, that they had been capable of revision but had not afterwards been questioned, and that the last of the three bore directly on the case before him.[579] However, instead of resting his decision on the authority of those rulings, the judge went on to analyse in detail how he regarded the case 'as it might stand independent of prior decisions',[580] concluding that both principle and common sense led him to the same conclusion.[581]

Other examples come from the way in which a series of judges in the first half of the nineteenth century treated the authority of *R v Lord Abingdon*,[582] in which Lord Kenyon CJ ruled at nisi

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Lopes LJ; *Salt v Marquess of Northampton* [1892] AC 1, 16 per Lord Selbourne; *South Hetton Coal Co Ltd v North-Eastern News Association Ltd* [1894] 1 QB 133, 146 per Kay LJ; *Sidebotham v Holland* [1895] 1 QB 378, 382 per Lindley LJ; *Allen v Flood* [1898] AC 1, 79 per Lord Halsbury C, 105 per Lord Watson, 113 per Lord Ashbourne, and 136-137 per Lord Herschell.

[577] *Taylor v Okey* (1806) 13 Ves. Jun. 180, 181 per Lord Erskine C; *Thomas v Evans* (1808) 10 East 101, 103 per Bayley J; *Burgess v Merrill* (1812) 4 Taunt. 468, 470 per Mansfield CJ; *R v Creevey* (1813) 1 M. & S. 273, 279-280 per Grose J; *Lewis v Walter* (1821) 4 B. & Ad. 605, 613 per Bayley J; *Drayton v Dale* (1823) 2 B. & C. 293, 299 per Bayley J; *R v Humphery* (1825) M'Cle. & Y. 173, 190-191 per Graham B; *Flint v Pike* (1825) 4 B. & C. 473, 481 per Holroyd J; *Laugher v Pointer* (1826) 5 B. & C. 547, 573 per Abbott CJ; *Roberts v Brown* (1834) 10 Bing. 519, 525 per Park J; *Rand v Vaughan* (1835) 1 Bing. N.C. 767, 770 per Tindal CJ; *Irving v Veitch* (1837) 3 M. & W. 90, 112-113 per Parke B; *Morley v Inglis* (1837) 4 Bing. N.C. 58, 72 per Tindal CJ and 74 per Coltman J; *Christy v Tancred* (1840) 7 M. & W. 127, 130 per Parke B; *Maillard v Duke of Argyle* (1843) 6 M. & G. 40, 45-46 per Tindal CJ; *Brown v Mallett* (1848) 5 C.B. 559, 619 per Maule J; *Lewis v Campbell* (1849) 8 C.B. 541, 547 per Wilde CJ; *Davison v Duncan* (1857) 7 E. & B. 229, 233 per Lord Campbell CJ; *Spiers v Brown* (1858) 6 W.R. 352-353 per Page Wood V-C; *Reade v Lacy* (1861) 1 J. & H. 524, 527 per Page Wood V-C; *Scott v Stanford* (1866-67) L.R. 3 Eq. 718, 722 per Page Wood V-C; *Henderson v Squire* (1868-69) L.R. 4 Q.B. 170, 173 per Cockburn CJ and 174 per Blackburn J.

[578] (1826) 5 B. & C. 547.

[579] Ibid., 573-577.

[580] Ibid., 577.

[581] Ibid., 577-580.

[582] (1794) 1 Esp. 226.

prius that a publication by a member of the House of Lords of a speech given by him in Parliament was not privileged and so could form the grounds of an action for libel. In a number of subsequent cases, this ruling was applied by judges sitting in banc, but each judge was careful to state that they approved of the doctrine as a matter of principle, rather than simply blindly following the ruling as a matter of precedent. Thus, in *R v Creevey*,[583] Grose J said that the arguments addressed before the court had been fully considered in the *Lord Abingdon* case; in *Lewis v Walter*,[584] Bayley J said that the relevant principle had been recognised in that case; in *Flint v Pike*,[585] Holroyd J said that the *Lord Abingdon* case was in point to show the relevant principle; similarly in *Roberts v Brown*,[586] Park J said that the principle had been shown by that case; and in *Davison v Duncan*,[587] Lord Campbell CJ said that he perfectly concurred in the doctrine set out in that case. Whilst the careful consideration given to the principle by these judges may also reflect the importance of the issue at stake, this approach is typical of the way in which judges of the nineteenth century sought to justify their reliance on nisi prius rulings.

The third principal reason for judges citing nisi prius cases is to illustrate legal principles which were regarded as so obvious that there was no need to raise them with the court in banc.[588] The citation of such cases would typically be justified on the basis that they had never been questioned.[589] Accordingly, in 1911, the law reporter Alfred Randall considered that there were around a hundred nisi prius cases that should be included in a general digest of case law, because 'there existed no other authority upon the point ruled, and the direction of the Judge was likely to be endorsed.'[590] The small number of superior court judges, combined with the close relationship between Bar and Bench through the circuit and Bar mess systems, made it easier to facilitate a common understanding amongst the profession that certain legal principles were sufficiently clear as not to require any further debate beyond the trial stage; this would also benefit litigants by saving them the costs of reopening the issue before the court in banc.

The remainder of the cases in this analysis show nisi prius rulings being relied upon in various limited ways, such as where the principle in the ruling was at best only part of the background

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[583] (1813) 1 M. & S. 273, 279-280.

[584] (1821) 4 B. & Ad. 605, 613.

[585] (1825) 4 B. & C. 473, 481.

[586] (1834) 10 Bing. 519, 525.

[587] (1857) 7 E. & B. 229, 233.

[588] *Bromley v Holland* (1802) 7 Ves. Jun. 3, 23 per Lord Eldon C; *Devereux v Barclay* (1819) 2 B. & Ad. 702, 704 per Bayley J; *Hall v Smith* (1823) 1 B. & C. 407, 409 per Bayley J; *Scales v Jacob* (1826) 3 Bing. 638, 649 per Park J; *Polglass v Oliver* (1831) 2 Cr. & J. 15, 17 per Bayley B; *Mount v Larkins* (1831) 8 Bing. 108, 120 per Tindal CJ; *Burroughes v Clarke* (1831) 1 Dowl. 48, 50 per Taunton J; *Walter v Cubley* (1833) 2 Cr. & M. 151, 153 per Bayley B; *Wyld v Pickford* (1841) 8 M. & W. 443, 461 per Parke B; *Carter v Flower* (1847) 16 M. & W. 743, 751 per Parke B; *Frazer v Hatton* (1857) 2 C.B.N.S. 512, 525 per Williams J; *Hall v Wright* (1859) E. B. & E. 765, 778 per Bramwell B; *Lapraik v Burrows* (1859) 13 Moo. P.C. 132, 156 per Dr Lushington.

[589] For example, *Osborn v Gillett* (1872-73) L.R. 8 Ex. 88, 92 per Pigott B.

[590] A.E. Randall, 'Digest of English Case Law', 27 *Law Quarterly Review* (1911), 187 at 189.

to the issue for determination in the case,[591] or where a dictum either summarised the principle behind a number of other cases or featured a turn of phrase which the court wished to adopt.[592]

Yet even in these cases, judges on occasion felt constrained to justify their reliance on nisi prius rulings by reference to some other feature, which would not have been necessary had the case been decided by a court in banc. For example, judges fortified their decision to follow such rulings because of the high repute of the trial judge,[593] the careful consideration given to the issue by the trial judge,[594] the antiquity of a decision which, since made, had been acted upon,[595] the approval given to the decision by an authoritative textbook,[596] or the likelihood that the trial judge would have discussed the issue with his brethren.[597]

Another feature of the judicial consideration of nisi prius cases at this time was the emphasis placed on the quality of the report. Prior to the mid-eighteenth century, the patchy quality of law reporting meant that an integral part of determining the authority of a reported case was the reputation of the reporter: precedent and the status of the report were thus entwined.[598] As already discussed, the emergence of high quality and consistent law reporting from the mid-eighteenth century meant that judges could less easily justify disregarding an authority on the basis that it had been misreported, or had been reported by an unreliable reporter. Yet the quality of the nisi prius reporter was an issue even before the regular reporting of nisi prius cases: in Chapter 4, reference was made to Lord Mansfield CJ's refusal in *Cooper v Chitty*[599] to follow a nisi prius ruling reported by Lord Raymond on the basis of his youth. Moving into the nineteenth century, the lack of weight to be accorded to nisi prius cases and the consequent closer scrutiny of what the trial judge said, was accompanied by the need also to consider how the trial judge's words had been reported - or, rather, who had reported them. As noted earlier, this led the editor of the *Law Magazine*, Abraham Hayward, to suggest that reported nisi prius cases could have value, not as binding authorities but by putting them 'on the same footing as more ancient collections, which were respected in exact proportion to the learning and

[591] *Ex parte Heath* (1813) 2 Ves. & B. 240, 241 per Lord Eldon C; *Munk v Clarke* (1833) 10 Bing. 102, 107 per Tindal CJ; *Rodgers v Maw* (1846) 15 M. & W. 444, 449 per Pollock CB; *Carter v Flower* (1847) 16 M. & W. 743, 751 per Parke B; *Beckham v Drake* (1849) 2 H.L. Cas. 579, 604 per Erle J; *Woods v Finnis* (1852) 7 Ex. 363, 371 per Parke B; *Batard v Hawes* (1853) 2 E. & B. 287, 297 per Lord Campbell CJ; *Gregory v Cotterell* (1855) 5 E. & B. 571, 585 per Jervis CJ; *Blaikie v Stembridge* (1859) 6 C.B.N.S. 894, 907 per Willes J; *Rouquette v Overmann* (1874-75) L.R. 10 Q.B. 525, 542 per Cockburn CJ; *Hart v The Standard Marine Insurance Co Ltd* (1889) 22 Q.B.D. 499, 501 per Lord Esher MR and 503 per Bowen LJ.

[592] *Turner v Richardson* (1806) 7 East 335, 342 per Lord Ellenborough CJ; *Simmons v Heseltine* (1858) 5 C.B.N.S. 554, 571 per Cockburn CJ; *R v Tolson* (1889) 23 Q.B.D. 168, 178 per Wills J.

[593] For example, *Folkingham v Croft* (1795) 3 Anstr. 700, 701 per Macdonald CB; *Rotch v Edie* (1795) 6 Term Rep. 413, 423 per Lord Kenyon CJ; *Strother v Barr* (1828) 5 Bing. 136, 156 per Best CJ: *Garland v Carlisle* (1833) 2 Cr. & M. 31, 86 per Parke J; *Devaux v Salvador* (1836) 5 L.J. Rep. K.B. 134, 136 per Denman CJ; *Cowie v Remfry* (1846) 5 Moo. P.C. 232, 249 per Dr Lushington; *Doe d Bather v Brayne* (1848) 5 C.B. 655, 670 per Coltman J; *Ashling v Boon* [1891] 1 Ch 568, 572 per Kekewich J.

[594] *R v Collins* (1876) 1 Q.B.D. 336, 342 per Mellor J.

[595] *Garland v Jekyll* (1824) 2 Bing. 273, 301 per Best CJ.

[596] *Monkton v A-G* (1831) 2 Russ. & M. 147, 165 per Lord Brougham C; *Hall v Wright* (1859) E. B. & E. 765, 781 per Bramwell B.

[597] *R v The Inhabitants of Cliviger* (1788) 2 Term Rep. 263, 268 per Ashhurst J.

[598] Allen, *Law in the Making*, 222.

[599] (1756) 1 Burr. 20, 36.

judgment of the collector.'[600] This is the context in which Victorian judges felt able to comment on the accuracy of Espinasse as a reporter, notwithstanding the low standing of nisi prius cases as authorities.

The analysed cases are also notable for what they do not show: there are no examples of judges feeling compelled to follow a nisi prius ruling of which they disapproved, on the grounds of precedent or of comity; and, with one apparent exception, there are no examples of courts following a nisi prius ruling on a point of substantive law in the face of a contrary decision of a court in banc.

The one apparent exception is *Garrard v Cottrell*.[601] In that case, the plaintiff, having accepted a bill of exchange in payment of the services provided to the defendant, unsuccessfully defended an action brought by the indorsee of the bill, for which he was required to pay both the amount of the bill and the costs of the action. The plaintiff brought an action of assumpsit for the money paid. At trial, the jury was directed that, if the defendant had requested the plaintiff to undertake the defence, the costs were recoverable as money paid to the plaintiff's use. After the jury found for the plaintiff, the defendant moved before the King's Bench for a nonsuit, on the basis that the claim for costs could only be recovered if it was an original liability of the defendant which he had requested the plaintiff to pay, and no such request had been pleaded or proved.

During argument, two cases were cited by Patteson J. The first, *Howes v Martin*,[602] was a case tried by Lord Kenyon CJ at nisi prius, in which the holder of the bill successfully claimed from the defendant both the amount of the bill and the costs of defending a claim on the bill by a third party. The second, *Dawson v Morgan*,[603] was a decision of the King's Bench, in which the indorser of a bill, having had an action brought against him by the indorsee, was held not to be entitled to recover from the acceptor the costs incurred in that action. The defendant's counsel accordingly submitted that that case was an authority against *Howes v Martin* and that, in any event, the distinction between the amount of the bill and the costs had not been referred to in that case.

Although the Court unanimously affirmed the verdict, there was a difference of opinion between the judges as to the reasons for so doing. Coleridge J (with whom Erle J concurred) considered that the real issue was whether there was sufficient evidence of a request for the matter to be left to the jury, and he was satisfied in that respect. However, Lord Denman CJ (with whom Patteson J concurred) considered the cited cases in the following very short judgment:[604]

> I see no reason to question the authority of Howes v. Martin … It is not in opposition to any case: and there was full opportunity there to take the distinction suggested, if there had been any reason for it.

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[600] Hayward, 'Reports and Statutes', 18.

[601] (1847) 10 Q.B. 679.

[602] (1794) 1 Esp. 162.

[603] (1829) 9 B. & C. 618.

[604] Supra, 681.

On its face, this looks as though Denman was preferring a nisi prius decision over a decision of the court in banc: not only a nisi prius decision, but one reported by Espinasse, about whose unreliability Denman was to warn the legal profession less than two years later.[605] However, it is highly doubtful whether this is the correct analysis of Denman's approach. His statement that *Howes v Martin* was not in opposition to any case strongly suggests that he did not consider *Dawson v Morgan* to be in point; and there were good grounds to distinguish the latter case, as there was no evidence that the defendant had asked the plaintiff to defend the claim, whereas in *Howes v Martin*, there was such evidence. It is likely, therefore, that Denman was not preferring *Howes v Martin* over *Dawson v Morgan* but was proceeding on the basis that the facts of the case before him were closer to the former case than to the latter. Accordingly, subsequent cases have regarded both *Garrard v Cottrell* and *Howes v Martin* as turning on the fact that the principal had requested the agent to incur the expenses in issue.[606]

Two other cases should be mentioned in this context, both of which concern points of evidence, in respect of which (as is discussed in the next Chapter) early nineteenth-century judges were more inclined to follow nisi prius rulings and general circuit practice.

The first case is *Smallcombe v Bruges*[607] which concerned the admissibility of an admission by the bankrupt to a third person of a debt due to the petitioning creditor, made between the act of bankruptcy and the issuing of the commission. The Exchequer was faced with cases going either way, including a decision of the King's Bench to the contrary, *Brett v Levett*.[608] Despite this, the Exchequer was of the clear view that, as a matter of principle, the evidence ought not to be admissible.[609] This led Hullock B, in one report of the case,[610] to contend that *Brett* had been subsequently overruled by Lord Ellenborough CJ, even though the case in question[611] was at nisi prius, and Ellenborough did not even mention *Brett* in his ruling, merely failing to refer to it after it had been cited to him. None of the other judges in *Smallcombe* sought to support this contention, and Hullock himself recognised the difficulty of his contention by saying that *Brett* was overruled 'so far as a case at nisi prius can overrule a case decided on argument.'

The other case provides a very rare example of a judge at nisi prius refusing to follow a decision of a court in banc. In *Johnson v Lewellin*,[612] a plaintiff suing for lost wages wished to prove that he had been hired as a sailor for a particular voyage, and gave notice to the defendant master to produce the ship's articles executed by the captain and crew. Although they were produced, the defendant objected to them being adduced in evidence unless the subscribing witnesses were called to prove their execution. The plaintiff contended that that was not necessary where the articles were produced by the defendant, as the plaintiff could not know who the subscribing witnesses were. For that proposition the plaintiff relied on the decision of

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[605] In *Small v Nairne,* supra.

[606] *Crampton v Walker* (1860) 3 E. & E. 321, 324 per Hill J (*arguendo*); *Williams, Torrey and Field Ltd v Knight* (1894) 71 L.T. 92, 94 per Bruce J.

[607] (1824) 13 Price 136; M'Cle. 45.

[608] (1811) 13 East 213.

[609] 13 Price 136, 155 per Alexander CB, 156 per Graham B, 158 per Garrow B, 161 per Hullock B.

[610] M'Cle. 45, 60: This comment did not appear in Price's report of the case.

[611] *Taylor v Kinloch* (1816) 1 Stark. 175.

[612] (1807) 6 Esp. 101.

the King's Bench in *R v Middlezoy*[613] as expressly deciding the point. Lord Ellenborough CJ rejected the plaintiff's contention, holding that he was not bound by the cited case, even though it supported the plaintiff's case, because it appeared to have been decided without due consideration.[614]

In conclusion, the survey of nineteenth century cases supports the numerous statements by judges as to the dangers of treating nisi prius rulings as having any authoritative weight. Where such rulings were cited in support of a principle of substantive law, the judges were generally careful to endorse the legal principle at issue in the ruling, rather than simply relying upon the ruling itself. Accordingly, even where a nisi prius decision can be regarded as the initial source of a legal principle, the status of that decision required subsequent courts to satisfy themselves as to the correctness of the principle, in a way that would not have been necessary had it been a decision of a court in banc. This treatment of nisi prius cases is consistent with the comment of Grose J, referred to in Chapter 1, that: 'as Judges of Nisi Prius we do not affect to alter or make new law.'[615]

WERE NINETEENTH-CENTURY JUDGES "LAW-MAKING" AT NISI PRIUS?

Notwithstanding Grose J's comment, James Oldham has claimed that there is substantial evidence of "law-making" at nisi prius at the beginning of the nineteenth century, by way of declarations of legal principles by trial judges.[616] Oldham points out that nisi prius actions have not been considered by legal historians to be a particularly fruitful source for tracking the development of the common law, because they involved fact-centred disputes with few occasions to declare or establish principles of law; he challenges that view by reference to a number of what he calls representative commercial nisi prius cases, in particular eight reported rulings by Lord Ellenborough CJ made between 1807 and 1816.[617]

Before considering those cases, it is important to clarify what Oldham means by "law-making", in the context of his challenge to the perceived view that nisi prius cases are not a fruitful source for tracking the development of the common law. Oldham argues that much more was happening at nisi prius than had been hitherto supposed and he justifies his argument by illustrating with selected cases '… the extensive business of law-making at nisi prius, by which I mean the business of declaring, affirming, applying and clarifying legal principles.'[618]

In his analysis of why legal historians have not paid particular attention to nisi prius cases as being relevant to the development of the common law, Oldham omits any reference to the fact that the judges thought little of those cases as authorities. Similarly, his description of what he means by "law-making" does not include any suggestion that the law made in the context of a particular factual situation would be regarded as regulating future cases in which similar factual situations arose. This is a particularly notable omission in an article, the purpose of which is to

[613] (1787) 2 Term Rep. 41. This principle was confirmed by the same court in *Bowles v Langworthy* (1793) 5 Term Rep. 366.

[614] Subsequently, Lawrence J, sitting in the King's Bench (with Ellenborough) in *Gordon v Secretan* (1807) 8 East 548, 559-560, said that *Middlezoy* had been overruled by Lord Kenyon CJ in an unnamed will case.

[615] *R v The Inhabitants of Eriswell* (1790) 3 Term Rep. 707, 711.

[616] Oldham, 'Law-Making', 221.

[617] Ibid., 235-237.

[618] Ibid., 222.

demonstrate that nisi prius cases should be regarded as having had a role to play in the development of the common law.

If, by his reference to the process of declaring, affirming, applying and clarifying legal principles, Oldham is not looking beyond the case in which that process takes place, he is obviously right: in order to frame the issue on which the jury was to give its verdict, the judge was required to analyse and explain to the jury any substantive principles of law relevant to the case, which may well go beyond merely declaring the law in a situation which had not previously arisen, or because the judge was not aware of the existing law because the exigencies of the trial had not enabled full legal research to be undertaken. But that is hardly a revelatory observation: it simply recognises the function of the judge in the nisi prius process.

To justify why legal principles decided at nisi prius should be regarded as significant in the development of the law, it is necessary to do more than simply demonstrate that judges at nisi prius were explaining the law to juries; it must be shown that the law as explained (and as reported) was taken up and followed by subsequent judges. A definition of "law-making" which ignores the doctrine of precedent does not accord with how a common lawyer would generally understand that term, in the context of "judge-made" law.

Indeed, in a later article Oldham himself ascribes a central role to precedent in his description of "law-making":

> The classic common law method of lawmaking was to set a precedent by articulating, extending or limiting a principle with the expectation that the decision would control like cases subsequently.[619]

Unless the ruling in question was regarded by later judges as of authoritative value, it cannot be said to have assisted in the development of the common law, at least in any sense that is capable of assessment. The most that can be said of a ruling which accorded with how the law subsequently developed, but which was not relied upon by any subsequent court, is that it happened to coincide with how the law came to be understood: whether that ruling had any influence on the development of the law (and, if so, how much) cannot be properly judged.

Consideration of the eight reported cases referred to by Oldham[620] is instructive in this regard as, with one (somewhat qualified) exception, the rulings in those cases have been disregarded

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[619] James Oldham, 'Informal Lawmaking in England by the Twelve Judges in the Late Eighteenth and Early Nineteenth Centuries', 29 *Law and History Review* (2011), 181 at 191.

[620] In addition, Oldham ('Law-Making', 233-235) refers to a number of unreported manuscript cases. But of the three which have been cited in subsequent reported cases, one (*Brown v Shelley* (1776) Inner Temple Library (ITL) Misc MS 96 fol.76v, cited by Buller J in *R v The Inhabitants of Eriswell*, supra, 719, concerned a rule of evidence not of substantive law; and the other two (*Lewis v Price* (1761) ibid., fol.37v and *Dougal v Wilson* (1769) ibid., fol.55v, both referred to in a long note to *Yard v Ford* (1669) 2 Wms. Saund. 172) were cited in an opinion to the House of Lords by Pollock B, in ignorance of whether or not they were nisi prius cases: *Dalton v Henry Angus & Co* (1881) 6 App. Cas. 740, 758. Oldham ('Law-Making', 238) also refers to two other cases involving Lord Ellenborough: *Wright v Shiffner* (1809) 2 Camp. 247 and *Gantt v McKenzie* (1811) 3 Camp. 51. These are not suggested to have disclosed any particular legal principles, but are said to be examples of the judge liaising with special jurymen: although such juries were of undoubted value in shaping the views of the judges, such collaborations do not necessarily mean that the resulting nisi prius rulings were examples of "law-making" in the sense adopted by Oldham. For more details about this practice, see James Oldham, *The Varied Life of the Self-Informing Jury*, London, 2006. In any event, there is no evidence that later judges such as Ellenborough followed the practice of Lord Mansfield CJ in closely liaising with special juries to translate custom into law: Patrick Devlin,

by subsequent courts and have not been relied upon as influential declarations of legal principle; indeed, a number of those rulings were on principles of law which had already been decided by courts in banc.

The first case is *Hopkins v Appleby*,[621] in which the plaintiff vendor had warranted the quality of the goods purchased by the defendant; the purchaser used the goods immediately but subsequently claimed that they were of inferior quality, in a defence to an action for the price of the goods. Ellenborough said that the purchaser ought to have returned the goods to the vendor at the earliest opportunity and that his actions in precluding the vendor from testing the goods was fatal to the defence. In the second case, *Fisher v Samuda*,[622] Ellenborough again said that the purchaser, on discovering that the goods were not fit for purpose, was under a duty to return them to the vendor or to give him notice to take them back.

If it is being suggested that Ellenborough was laying down a rule of law that the vendor was under an obligation in those circumstances to return the goods, or else he must be taken to have accepted them, such a suggestion is, with respect, wrong. There never was such a rule of law, although the fact that the purchaser had kept the goods and did not notify the vendor of the defect may raise a strong evidential presumption that the goods were as warranted at the time of sale. That principle had been laid down in the Common Pleas in 1788, where Lord Loughborough CJ said that:

> No length of time elapsed after the sale, will alter the nature of a contract originally false. Neither is notice necessary to be given. Though the not giving notice will be a strong presumption against the buyer, that the horse at the time of the sale had not the defect complained of, and will make the proof on his part much more difficult.[623]

It is therefore likely that Ellenborough was not determining any legal principle at nisi prius, but was directing the jury as to what principles it should apply when determining whether it could be presumed that the goods were fit for purpose at the time of sale. This appears to be the view of Bayley B in *Allen v Cameron*,[624] when he responded to counsel's citation of *Hopkins v Appleby* by suggesting that Ellenborough was there not laying down a rule of law, but seeking to guide the conduct of the jury; and in *Randall v Newson*,[625] Brett JA said that *Fisher v Samada* cannot be said to have decided anything.

Indeed, the fact that in both *Hopkins v Appleby* and *Fisher v Samuda* the issue was left to the jury to give a verdict, suggests that Ellenborough was treating the issue of fitness for purpose of the goods as an evidential matter: if he had been laying down a substantive legal principle that the goods were to be treated as fit for purpose because of the purchaser's delay in returning them, he would have simply nonsuited the purchaser, as there would have been no factual question to be determined by the jury.

'Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment', 80 *Columbia Law Review* (1980), 43 at 83.

[621] (1816) 1 Stark. 477.

[622] (1808) 1 Camp. 190.

[623] *Fielder v Starkin* (1788) 1 H. Bl. 17, 19.

[624] (1833) 1 Cr. & M. 832, 837.

[625] (1877) 2 Q.B.D. 102, 106.

In any event, neither of these cases can be said to have contributed to the development of the English common law. *Hopkins v Appleby* has never been relied upon, or even referred to, by any reported decision of an English court. As for *Fisher v Samuda*, it has only been referred to in three reported English cases and on each occasion it was found to be of no assistance to the determination of the relevant issues.[626]

The next two cases cited by Oldham - *Green v Haythorne*[627] and *Hibbert v Shee*[628] - similarly cannot be said to have influenced the common law, as they too have not been cited by any subsequent reported decision of an English court.

Oldham's next case, however, has a stronger claim to be "law-making" in both senses identified above, as Ellenborough's ruling in *Gardiner v Gray*[629] is now generally regarded as the first occasion on which a term as to merchantability was implied in a contract for the sale of goods, and has been cited as such by the English courts on a number of relatively recent occasions.[630]

However, two qualifications need to be made to the description of this decision as "law-making".

First, whilst Ellenborough's ruling was first in time, having been given on 6 March 1815, barely a month later, on 15 April 1815, the Common Pleas in *Laing v Fidgeon*[631] came to the same decision. Whilst later cases initially recognised the primacy of that case,[632] it later become overshadowed by *Gardiner v Gray*, partly because of Ellenborough's picturesque description of the principle in that case:[633]

> … the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill.[634]

The influence of *Gardiner v Gray* on later cases may therefore be as much to do with the fact that Ellenborough had described the principle in a more pithy, memorable and quotable way than it had been described in *Laing v Fidgeon*.

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[626] *Jones v Bright* (1829) 5 Bing. 533, 547 per Park J and 548 per Gaselee J; *Davis v Hedges* (1870-71) L.R. 6 Q.B. 687, 691 per Hannen J; *Randall v Newson*, supra.

[627] (1816) 1 Stark. 447.

[628] (1807) 1 Camp. 113.

[629] (1815) 4 Camp. 144.

[630] *Cammell Laird & Co Ltd v Manganese Bronze & Brass Co Ltd* [1934] AC 402, 430 per Lord Wright; *Young & Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, 472 per Lord Upjohn; *Cehave NV v Bremer Handels GmbH* [1976] QB 44, 62 per Lord Denning MR; *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1, 6 per Lloyd LJ.

[631] (1815) 6 Taunt. 108.

[632] For example, *Jones v Bright* (1829) 5 Bing. 533, 544 per Best CJ and 547 per Park J. The only difference between the two cases was that the vendor of the goods in *Laing v Fidgeon* was the manufacturer, whereas the vendor in *Gardiner v Gray* was the importer, but that was not regarded in the subsequent cases as a material distinction.

[633] See *Sumner Permain & Co v Webb & Co* [1922] 1 KB 55, 63-64 per Scrutton LJ.

[634] Supra, 145.

Secondly, some later nineteenth century judges referred to *Gardiner v Gray* in terms which showed that they did not regard Ellenborough as having laid down the law in that case. In *Jones v Just*,[635] he is described as 'expressing his opinion'; and in *Mody v Gregson*,[636] the principle is described as 'the general rule of law acted upon by Lord Ellenborough in *Gardiner v Gray*.' This further illustrates the principle that, at this time, nisi prius cases were not in themselves regarded as being of much authority.

The next case, *Raitt v Mitchell*,[637] is cited by Oldham as an example of parties contracting on the basis of a particular usage of trade, so as to reverse the usual principle that a shipwright could claim a lien over a ship for unpaid repairs. However, the application of trade usage was well-established by the time of that case;[638] and Ellenborough was simply applying that principle to the particular facts before him. This cannot be said to be "law-making" in the sense of declaring a legal principle; and *Raitt v Mitchell* has accordingly not been expressly followed in any subsequent reported English case.[639]

These six cases, which relate to sales transactions, are said by Oldham to have 'anticipated, indeed contributed to' Article 2 of the US Uniform Commercial Code, which governs sales of goods.[640] Whether those cases did or did not contribute to that Code,[641] it is not because they were recognised as leading cases in the English common law: indeed, their lack of influence is illustrated by the absence of any reference to them in a leading nineteenth-century treatise on English sales of goods law;[642] and whilst this area of law has been described by a member of the English Supreme Court as a striking example of the development of a systemic corpus of law through a series of cases before being subject to codification by the Sales of Goods Act 1893,[643] none of the cases relied upon was decided at nisi prius.[644]

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[635] (1867-68) L.R. 3 Q.B. 197, 204 per Mellor J.

[636] (1868-69) L.R. 4 Ex. 49, 52 per Willes J.

[637] (1815) 4 Camp. 146.

[638] Two particularly apt examples from the eighteenth century are *Green v Farmer* (1768) 4 Burr. 2214, 2221, in which Lord Mansfield CJ said that a court would hold in favour of a lien over goods where (inter alia) 'it is implied from the usage of trade', and *Bennett v Johnson* (1784) 3 Doug. K.B. 387, where a dyer was held in the King's Bench not to have a lien over goods in respect of prior debts, in the absence of a usage of trade to that effect. See, generally, Ram, *Science*, Ch.VIII.

[639] The only English case citing *Raitt v Mitchell* does so for the unexceptional proposition that an artisan has a right to a lien on goods on which he has expended labour: *In re Westlake* (1881) 16 Ch.D 604, 611 per Bacon CJ.

[640] Oldham, 'Law-Making', 235.

[641] These cases may have influenced the draftsmen of the Code because they had all been relied on as authorities by US state or federal courts in the nineteenth century: see, for example, *Hargous v Stone* 5 N.Y. 73 (1851); *Reed v Randall* 29 N.Y. 358 (1864); *Barnett v Stanton & Pollard* 2 Ala. 181 (1841); *Barrett v Goddard* 3 Mason 107 (1822): *Waring v Mason* 18 Wend. 425 (1837); *Peyroux v Howard* 32 U.S. 324 (1833).

[642] Blackburn, *Treatise*.

[643] Lord Hodge, 'The Scope of Judicial Law-making in the Common Law Tradition', a speech delivered to the Max Planck Institute of Comparative and International Private Law, Hamburg, Germany on 28 October 2019, <https://www.supremecourt.uk/docs/speech-191028.pdf> para. 12 of the transcript.

[644] *Nichol v Godts* (1854) 10 Ex. 191; *Jones v Just*, supra; *Mody v Gregson*, supra; *Drummond & Sons v Van Ingen & Co* (1887) 12 App. Cas. 284.

That is not to say that there are no examples of decisions at nisi prius by Ellenborough - who was regarded as a distinguished mercantile lawyer when in practice[645] - which have had a significant influence on this field of law. One such example is *Baglehole v Walters*,[646] which involved the sale of a ship on the express stipulation that it was to be taken "with all faults". The seller was held not liable in respect of latent defects of which he knew without disclosing them to the purchaser at the time of sale. There was a previous nisi prius ruling of Lord Kenyon CJ in favour of the purchaser,[647] but Ellenborough refused to follow that ruling, holding that, where an article was sold with all faults, the seller's knowledge of them was irrelevant unless he had used some artifice to disguise them and to prevent their discovery by the purchaser. Ellenborough's ruling was affirmed by the Common Pleas two years later;[648] and since then, his ruling has been approved and applied,[649] and has even been referred to as 'the principle of *Baglehole v Walters*.'[650]

However, this decision, if anything, refutes Oldham's thesis that nisi prius judges were making law in such a way as to contribute to the development of the common law, as Ellenborough himself recognised in that case that he was not engaged in any such "law-making". After explaining the reasoning for his decision, he said that: 'I make no doubt that this will be held as law when the question shall come to be deliberately discussed in any court of justice.'[651]

This approach tallies with the true worth of any declaration of legal principle made at nisi prius in the nineteenth century: it is determinative of the issue at trial only, and is not to be regarded as law unless and until it is considered afresh by a court in banc.[652]

In addition to the rulings already discussed, Oldham refers to two rulings made in other commercial contexts. The first, *Farnsworth v Garrard*,[653] was an early case of abatement, in which Ellenborough (after consulting his fellow judges) permitted the defendant to claim for quantum meruit to set up a defence of set-off for the cost of making good the defects caused by the negligent work of the plaintiff, without the defendant having to bring a cross-action. Again, this is not an example of "law-making", as the principle had been established the previous year by the King's Bench (which included Ellenborough) in *Basten v Butter*.[654] It is

[645] Townsend, *Twelve Eminent Judges*, vol.1, 318.

[646] (1811) 3 Camp. 154.

[647] *Mellish v Motteux* (1792) Peake 156.

[648] *Pickering v Dowson* (1813) 4 Taunt. 779, 784 per Heath J: counsel for the purchaser in that case said (at 784) that, if Lord Kenyon's decision in *Mellish v Motteux* was to be set aside, 'it ought to undergo the solemn consideration of at least one Court.'

[649] Most notably by Lord O'Hagan in *Ward v Hobbs* (1878) 4 App. Cas. 13, 27, who described it as a 'familiar case'.

[650] By Lord Denman CJ in *Bywater v Richardson* (1834) 1 A. & E. 508, 513.

[651] *Baglehole v Walters*, supra, 157.

[652] See, to the same effect, *Wells v Horton* (1826) 2 C. & P. 383, 386 per Best CJ (*arguendo*) at nisi prius: '[t]here was a moral obligation to pay, and I hope that the judges in Westminster Hall will always hold, that a moral obligation to pay is a sufficient consideration for a promise to pay.' His hopes in that respect were unfulfilled.

[653] (1807) 1 Camp. 38.

[654] (1806) 7 East 479. Although this case was not specifically referred to by Ellenborough, it is highly likely that he was reminded of it when he consulted his fellow judges on the matter.

now generally accepted that the common law principle of abatement began with that case, rather than with *Farnsworth v Garrard*.[655]

The second case, *King v Milsom*,[656] is said by Oldham to contain a lengthy explanation by Ellenborough about the special status of negotiable instruments and the need to extend the protection to bona fide note holders for valuable consideration, and to include an observation that noteholders should not be compelled by any prior holder to disclose the manner in which they were received, in the absence of strong evidence of fraud.[657] In fact, Ellenborough's reasons as to why he nonsuited the plaintiff for failure to establish that the defendant's receipt of the note was sufficiently suspicious were shortly stated, amounting to eight sentences; and as for the observation about the strength of the presumption of the noteholder's bona fides, Ellenborough was doing little more than stating the law as laid down by a series of cases decided in banc in the previous century.[658]

In conclusion, the cases cited by Oldham provide scant support for the proposition that nisi prius rulings of the early 1800s assisted in the development of the common law, in the sense of constituting authoritative decisions relied upon by later judges. If anything, they reinforce the lack of authority accorded to such rulings by the judges of the time. Legal historians are therefore right to regard nisi prius cases as having little relevance to the development of the common law during this period.[659] However, as is discussed in Chapter 9, nisi prius cases came to be more influential in the evolution of the common law after the end of the nineteenth century; but it may be concluded that this was not because such cases were regarded as being of greater authority than before, but because lawyers had by then forgotten about their previous lack of standing.

CONCLUSION

Despite Oldham's endeavours, the generally low regard in which nineteenth-century judges held nisi prius rulings on substantive legal principles is substantiated by an analysis of the way in which those rulings were cited by those judges, which was fundamentally different from their treatment of decisions of courts in banc. Those rulings play no more than a supporting role, in terms of being cited together with more authoritative cases, or as illustrations of conclusions at which the judges had independently arrived, or as examples of obvious principles. Whilst this is sufficient to make it worth the judge's while to satisfy themselves that the ruling is accurately reported, this should not be thought to indicate any particular weight being put on those rulings as a matter of precedent.

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[655] *Sagar v H Ridehalgh & Son Ltd* [1931] 1 Ch 310, 324 per Lord Hanworth MR; *Aries Tanker Corpn v Total Transport Ltd* [1977] 1 WLR 185, 192 per Lord Simon of Glaisdale. Earlier cases attributing the establishment of the principle to *Farnsworth v Garrard*, such as *H. Dakin & Co Ltd v Lee* [1916] 1 KB 566, are wrong in that respect.

[656] (1809) 2 Camp. 5.

[657] Oldham, 'Law-Making', 237.

[658] *Miller v Race* (1758) 1 Burr. 452; *Clarke v Shee* (1774) 1 Cowp. 197; *Peacock v Rhodes* (1781) 2 Doug. K.B. 633; *Solomons v Bank of England* (1791) 13 East 135n; *Collins v Martin* (1797) 1 Bos. & P. 648.

[659] In his history of contract law, Warren Swain asserts that nisi prius hearings played a significant role in shaping the direction of contract doctrine: Swain, *Law of Contract*, 129. But he neither elaborates on, nor provides any evidence in support of, this assertion.

The nisi prius rulings considered in this Chapter have been largely limited to those concerning matters of substantive legal principle. The next Chapter considers whether another reason why nineteenth-century judges were interested in the accuracy of the nisi prius reports was that they accorded greater influence to rulings at trial on matters of evidence and practice.

CHAPTER 8

NISI PRIUS REPORTING AND THE MODERN LAW OF EVIDENCE

INTRODUCTION

As discussed previously, in general nisi prius rulings were treated by nineteenth-century judges as having little or no authoritative value. It is often asserted that this attitude did not apply to rulings on evidential issues. The first regular nisi prius reporters differed from their superior court counterparts in reporting decisions on points of evidence: indeed, whereas those reporters deliberately refrained from including cases which turned only on the evidence adduced at trial,[660] the express object of a number of nisi prius reporters was to record rulings on evidence. For example, as noted in Chapter 3, Isaac Espinasse said that the purpose of his reports was to rescue from oblivion decisions on points of evidence which frequently arose and were discussed in the nisi prius courts. This focus of interest led him in many cases only to report rulings on evidence to the exclusion of subsequent rulings on the substantive legal issues at stake, and even to report rulings on evidence in trials where the verdicts had already been overturned in banc.[661] Later writers recognised the practical utility of nisi prius reports on issues of procedure and evidence which did not often come up for determination at Westminster Hall,[662] and in time other law reporters came to appreciate the value to the conduct of litigation of reporting decisions on evidence.[663]

In considering the connection between reported nisi prius rulings and the modern law of evidence, this Chapter has two aims, one specific and one general. The specific aim is to assess whether such rulings on matters of evidence were regarded by the nineteenth-century judiciary as exceptions to the general low status of nisi prius rulings as authoritative sources of law: did such rulings "make the law", in the sense discussed in the previous Chapter, in a way that nisi prius rulings on matters of substantive law did not? As the answer to that question is a qualified "yes", the Chapter goes on to consider the extent to which reported nisi prius rulings more generally influenced the development of modern evidence law.

It is tempting to conclude that the degree of respect, even authority, accorded to nisi prius reports on matters of evidence in the early nineteenth century led to nisi prius cases making a substantial contribution to the modern law of evidence. Thus, the entry for Espinasse in the *Oxford Dictionary of National Biography*[664] states that his reports 'helped contribute to a development of the law of evidence in the early nineteenth century'; and one writer has gone so far as to claim that the reports of Peake, Espinasse and Campbell 'heralded the golden age

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[660] Burrow declared that his practice was to omit all cases where the question turned upon facts and evidence only: Burrow, *Reports*, vol.1, ix.

[661] For example, *Young v Bairner* (1794) 1 Esp. 103; *Richardson v Tomlin* (1794) 1 Esp. 255; *Ximenes v Jaques* (1795) 1 Esp. 311; *Walwyn v St Quintin* (1796) 2 Esp. 515; *Exall v Partridge* (1799) 3 Esp. 8; *Price v Messenger* (1800) 3 Esp. 96; *Allen v Keeves* (1801) 3 Esp. 281.

[662] Anon., 'Notices of New Books', 191; and see E.W. Cox, *The Advocate*, London, 1852, 371.

[663] Roland Burrows, 'Law Reporting', 58 *Law Quarterly Review* (1942), 96 at 98-99. In 1821, a prominent Scottish advocate noted with dismay the failure to report Court of Session cases in Scotland because they determined points of evidence 'which of all others are most requisite to be known, since Evidence holds a universal influence, being as it were a lamp of the Law': Hannay, *Address*, 2.

[664] Lobban, 'Isaac Espinasse', 604.

of the law of evidence.'[665] The contribution of nisi prius reports to the development of the modern law of evidence was also noted by W.S. Holdsworth, who claimed that the beginning of regular nisi prius reporting rendered possible the great developments in the law of evidence in the nineteenth century, opening the way for new treatises summing up the modern developments of this branch of the law, and for an analysis and discussion of its contents by Bentham and others that paved the way for the statutory reforms in the later part of the century.[666]

There is no doubt that the nisi prius reports added greatly to the body of accessible decisions on points of evidence law: John H. Wigmore said that these reports probably contained more rulings on evidence than in all the prior reports of two centuries;[667] but care needs to be taken not to elide the weight given to nisi prius rulings on evidence as precedent, and the influence of those rulings on the development of the law. As this Chapter seeks to demonstrate, the latter does not follow from the former.

THE PRECEDENT VALUE OF NISI PRIUS RULINGS ON EVIDENCE

Influence and authority

In this context, a distinction needs to be made between the influence a decided case may have on a subsequent court, and the formal authoritative value of such a case. This distinction has been described by Stephen Lewis as follows: in the civil law tradition, precedents are often used to tip the balance in favour of particular outcomes but are also used as a means to illustrate how a legal point has been dealt with before. By contrast, in the common law, precedents typically play a more decisive role, and in many cases, are authoritative sources of law, in the sense that if the facts in a later case are legally the same as those of a precedent, the later court is often required to deliver the same decision.[668]

Influence

As was discussed in Chapter 7, despite the lack of authority accorded to nisi prius rulings on matters of substantive law, nineteenth-century judges would often cite such rulings, both to support principles established by decisions in banc and as illustrations of principles which the judges adopted independently of those rulings. In this very limited sense, nisi prius rulings could be said to have had an influence on the development of those principles.

There is no doubt that nisi prius rulings on matters of evidence exercised a greater influence on eighteenth and early nineteenth-century judges, who would often be faced with points of evidence that had only been previously considered at nisi prius, as such points always arose at that stage but would much less often be the subject of consideration by the full court. In such a situation, the judge's desire to ensure consistency in decision-making, and out of respect for

[665] Lirieka Meintjes Van der Walt, 'A Historical Overview of the Expert in the Criminal Justice Process in South Africa, the Netherlands and England and Wales', 8 *Tilberg Foreign Law Review* (1999-2000), 217 at 243.

[666] Holdsworth, *History*, vol.9, 222.

[667] John H. Wigmore, *A Treatise on the System of Evidence in Trials at Common Law*, 1st ed., Boston, 1904, vol.1, 26. Even before the regular reporting of nisi prius cases, rulings from such cases began to appear in books and collections of precedents on evidence from the mid-eighteenth century: Horwitz, 'Nisi Prius Trial Notes', 154-155.

[668] Sebastian Lewis, 'Precedent and the Rule of Law', 41 *Oxford Journal of Legal Studies* (2021), 873-874.

his fellow judges, meant that he could be expected to take account of those rulings and be minded to follow them, without enquiring too deeply into the principle behind them. Indeed, the general desire to follow established nisi prius practice on matters of evidence led trial judges to disregard earlier rulings that they considered to be out of kilter with such practice.

For example, in *Doe d Pile v Wilson*,[669] when a point of practice arose during a nisi prius case, Lord Denman CJ refused to follow an earlier report of a ruling made during a trial at Bar, in the face of statements from Sir John Scarlett and the Solicitor General, acting as *amici curiae*, that that ruling did not accord with established nisi prius practice. Denman said that he believed that such points of practice were for the discretion of the trial judge and that 'I am anxious to act on the general understanding at Nisi Prius.'[670]

Similarly, in *R v Wettenhall*,[671] Rolfe B, when trying an indictment for perjury at the York assizes, refused the defendant's application for bail without having first pleaded to the offence. The defendant's counsel relied on a ruling made several years previously by Parke B, who refused a similar application but said that a different rule would apply in the circumstances now relied on by the defendant. Rolfe B refused to apply Parke B's distinction, saying that he did not understand it, and that it was contrary to what he had found, on enquiry, to be the usual practice of the Northern Circuit on the matter.

However, the influence of nisi prius rulings on evidence did not equate to authority if the trial judge could decline to follow the earlier ruling where he considered there to be a good reason to do so; and not all trial judges were prepared to permit circuit practice to override their views on the principle of the issue in question. For example, in *Harris v Oke*,[672] which was an action tried by Lord Mansfield CJ at the Winchester Summer assizes in 1759, the plaintiff pleaded a special agreement and a general indebitatus assumpsit, and the question was whether the plaintiff should be allowed to prove the general count having failed to prove the special agreement. Mansfield allowed the plaintiff to proceed, and in court next day he said that he had asked Wilmot J, who was also on circuit, who said that his ruling was contrary to circuit practice. Mansfield said that he did not approve of that practice and confirmed (with the concurrence of Wilmot) that the plaintiff could in that situation recover on the general count.[673]

In addition to trial judges, there are a number of examples of courts in banc following general trial practice on points of evidence law, a few of which follow.

In *Harwood v Sims*,[674] hearsay evidence from a deceased parishioner as to the amount payable by way of a tithe was admitted by the Exchequer notwithstanding the parishioner's interest as a tithe payer, Wood B stating that he had 'heard this evidence given at Nisi Prius a hundred times, without any objection being taken to it'.

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[669] (1834) 6 C. & P. 301.

[670] Ibid., 306.

[671] (1840) 2 Moo. & Rob. 291.

[672] Cited in Buller, *Introduction*, 137. Cf. *Robinson v Bland* (1760) 2 Burr. 1077, 1081 per Lord Mansfield CJ.

[673] Many years later Mansfield upheld this ruling in banc, saying that, after making the original ruling, he had mentioned it to the other judges, who also concurred: *Payne v Bacomb* (1781) 2 Doug. K.B. 651.

[674] (1810) Wightw. 112.

In *Gomersall v Serle*,[675] the Exchequer held that the execution of an assignment of a bankrupt's debts was required to be proved in order to establish the assignee's title to bring proceedings, notwithstanding that statute provided that the registration of bankruptcy proceedings was sufficient for them to become proceedings of record. Alexander CB, giving the judgment of the court, relied on the fact that that decision accorded with the prevailing practice on the Northern Circuit.

Finally, in *The Berkeley Peerage Case*,[676] a majority of the judges advised the Committee of Privileges of the House of Lords that hearsay evidence of the declaration of a deceased person in a matter of pedigree should not be admitted. Lawrence J said that, where the authorities were balanced, 'we must resort to principle and the uniform practice which has obtained';[677] and Heath J relied on the fact that 'In the course of my long experience, in all the circuits I have gone, I never heard till now of such evidence being receivable.'[678] Accepting that advice, Lord Redesdale affirmed his agreement to the inadmissibility of the evidence on the basis of his experience on the Western Circuit where 'we apprehended that we were more correct on subjects of evidence than any other.'[679]

<u>Authority</u>

Despite Mansfield's approach in *Harris v Oke*, there are plenty of examples of eighteenth and early nineteenth-century judges according greater weight to general circuit practice and nisi prius rulings on matters of evidence, in terms of judges sitting in banc willing to regard the fact of such practice and rulings in support of a particular principle as being sufficient to justify that principle, without needing to enquire further into its correctness. There are even examples of the full court following such practice and decisions even where the court did not necessarily agree with the result. However, this approach appears to have ceased by the middle of the nineteenth century.

Circuit practice

Several examples follow of eighteenth-century judges treating circuit practice on evidential issues as practically binding on them.[680]

In *Duke of Somerset v France*,[681] a trial at Bar was held in the King's Bench to determine whether certain financial obligations owed to the lady of a manor situated in Cumberland by

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[675] (1827) 2 Y. & J. 5.

[676] (1811) 4 Camp. 401.

[677] Ibid., 410.

[678] Ibid., 412.

[679] Ibid., 421. Graham B, who dissented, remarked that, if such an exclusionary rule existed, it was 'confined to the breasts of a few peculiarly conversant with the business of Nisi Prius': ibid., 407.

[680] This policy did not extend to the full court following the practice of Justices of the Peace in Quarter Sessions, where the full court did not agree: the King's Bench in *R v the Inhabitants of Eriswell* (1790) 3 Term Rep. 707 refused to permit certain evidence to be admitted despite the general practice of the justices to the contrary, Lord Kenyon CJ stating that 'there is something of novelty in that argument which refers those whom the constitution of the jurisprudence of this country hath invested with the power of correcting the errors of justices of the peace to the practice of those very persons to learn the rules of evidence by which they are to proceed': ibid., 724-725.

[681] (1725) 1 Stra. 654.

her tenants became due to her widower following her death. The plaintiff sought to admit evidence of several instances of such obligations being owed in similar cases in other manors within the county, contending that it was the constant practice on the Northern Circuit, where similar questions frequently arose, to allow such evidence. The defendant objected, citing a contrary ruling made at the last assizes at Carlisle. The Court, much against its own inclination, allowed the evidence to be admitted. Lord Raymond CJ, having stated his view that such evidence should not be admitted, went against his own opinion 'upon the credit of the gentlemen who go the Northern Circuit, and affirm that it has been the constant practice to allow this kind of evidence there.'[682] Similarly, Reynolds J allowed the evidence to be admitted '… upon what has been affirmed by the gentlemen at the Bar … though it is contrary to the notion I have always had of the rules of evidence.'[683]

In *Duchess of Marlborough v Grey*,[684] the trial judge allowed the defendant to admit, on the general issue, evidence in an action for trespass that the place in question was a common highway. On a motion for a new trial, it was argued, in reliance on an earlier case in the King's Bench,[685] that the evidence should not have been admitted without the point being specifically pleaded. The Exchequer agreed with the trial judge, saying that 'the constant practice in the circuits has been to admit this evidence on the general issue.'

In *Lumley v Palmer*,[686] Lord Hardwicke CJ ruled at nisi prius that parol evidence of the acceptance of a bill of exchange was sufficient to establish the acceptor's liability, notwithstanding the statutory requirement for writing in order to bring a claim against the drawer. After a contrary ruling on the same point by Sir Robert Eyre CJ, a motion for a new trial was heard by the King's Bench, which agreed with Hardwicke as his ruling was 'agreeable to constant practice.'

A final example is *Gough v Cecil*,[687] in which a new trial was sought after the plaintiff's claim for debt on a bond was nonsuited at trial for failure to prove the handwriting of the obligor. Gould J supported the nonsuit, on the basis that the requirement to provide such proof was the practice of the Western Circuit, but Nares J said that the contrary was the practice of the Oxford Circuit. Lord Loughborough CJ thought that the deciding factor ought to be the general circuit practice and, after taking time to inquire, a new trial was granted.

Compliance with general circuit practice by the full court continued into the early nineteenth century, as illustrated by Lord Denman CJ's statement in *Doe d Pile v Wilson*[688] that judges in banc would be very slow to interfere with a nisi prius ruling on a point of practice, 'unless it was a surprise.'

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[682] Ibid., 661-662.

[683] Ibid., 662. The Court was also influenced by the admission of such evidence in an earlier trial at Bar: *Champian v Atkinson* (1671) 3 Keb. 90.

[684] (1728) 1 Salk. 287n (note to the 5th ed.): the case is also shortly reported at Bunb. 259.

[685] *Watson v Sparks* (1706) 1 Salk. 287.

[686] (1734) 2 Stra. 1000.

[687] Decided by the Common Pleas in 1783, noted in William Selwyn, *An Abridgment of the Law of Nisi Prius*, 7th ed., London, 1827, vol.1, 535n.

[688] Supra., 306. For a nisi prius case to the like effect, see *Cotton v James* (1829) Moo. & Mal. 273, discussed below.

These cases show that, on matters of evidence, judges of this period were prepared to give particular weight to the general practice of the circuit on which the case before them had been tried.

As *Gough v Cecil* demonstrated, difficulties might arise where different practices applied on different circuits. A striking example of this is provided by *Morewood v Wood.*[689] On a motion for a new trial heard by the King's Bench, the issue was whether general evidence of reputation as to a prescriptive right of digging stones on a particular estate was correctly excluded. The Court was evenly divided on the matter: Lord Kenyon CJ and Ashhurst J would not permit such evidence to be adduced; whereas Buller and Grose JJ were of the view that it was admissible, provided that it was corroborative of other evidence of the right. The latter two judges, however, were of the view that the contrary evidence was so strong that a new trial ought not to be ordered. This division of judicial opinion reflected the different circuits on which the judges had previously practised: Kenyon and Ashhurst were of the Oxford Circuit, where the general practice was not to allow such evidence; Buller and Grose were of the Western Circuit, where such evidence was allowed.

Three of the judges adverted to the practice on their circuits in their judgments. Kenyon said that: 'With respect to the other question raised respecting the rejection of general evidence of reputation; it is involved in great dispute; and one is apt to imbibe prejudices from the opinion one has always heard inculcated. Upon the Oxford Circuit which I went, such evidence was never received; and I cannot help thinking that that practice is best supported by principle.' Buller J said that 'I have already mentioned what has been the general practice on the Oxford and on the Western Circuit; and as there are two judges from each of those circuits in Court, it is hardly likely for us to agree upon the general point.' Grose J said that: 'I confess … that habit has so enured my mind to think it admissible in these cases, that I cannot change my opinion without much further consideration: though I certainly should if, upon future thoughts, I should be convinced that the practice of the Western, and I believe also of the Northern Circuit, is wrong.'

The unsatisfactory state in which the general principle was left following this decision makes it a notable illustration of the desire for judges sitting in banc to adhere to circuit practice as the basis for their decision, or at least to use such practice as a freestanding ground of support for their view as to the correct answer.

The clearest explanation for the court in banc's reliance on circuit practice came from Lord Ellenborough CJ in *Weeks v Sparke*,[690] where the issue was whether reputation evidence could be adduced to support the establishment of private rights over land. During a judgment described by Sir James Stephen as 'remarkable for the light it throws on the history of the Law of Evidence',[691] Ellenborough noted that it was the habit and practice of different circuits to admit such evidence, explaining the basis for applying that practice as follows:

> That certainly cannot make the law, but it shews at least from the established practice of a large branch of the profession, and of the Judges who have presided at various times on those circuits,

[689] (1792) 14 East 327n.

[690] (1813) 1 M. & S. 679.

[691] Sir James Fitzjames Stephen QC, *A Digest of the Law of Evidence*, 1st ed., London, 1876, 148.

> what the prevailing opinion has been upon this subject, amongst so large a class of persons interested in the due administration of the law.[692]

Ellenborough concluded that the trial judge was not wrong in admitting the evidence and that it was probable that he would have admitted it himself. The other judges agreed, with Dampier J adding that he knew that such evidence had been generally received on the Western Circuit.[693]

Ellenborough's judgment in *Weeks v Sparke* affirmed the status of general circuit practice on disputed evidential issues as influential, rather than authoritative as a matter of formal precedent; but even this status had ended by 1850,[694] when *Weeks v Sparke* was disapproved by the Exchequer Chamber in *Earl of Dunraven v Llewellyn*.[695] Parke B, giving the judgment of the Court, said as follows:

> But it is said that there are cases which have decided that, where there are numerous private prescriptive rights, reputation is admissible; and the case of Weeks v. Sparke is relied upon as establishing that proposition. The reasons given by the different Judges in that case would certainly not be satisfactory at this day; some putting it on the ground of the custom of the Circuits, some upon the ground that where there was proof of the enjoyment of the right reputation was admissible. Both these reasons are now held to be insufficient.[696]

It is not clear whether, in rejecting the proposition that circuit practice on a point of evidence would be followed where the court in banc did not agree with it, Parke B was laying down a new principle or simply reflecting a prior rejection of that proposition. In any event, there appear to have been no further reported examples of courts according any particular influence to such practice.[697]

Nisi prius rulings

Turning from general circuit practice to specific cases, the following are examples of eighteenth and early nineteenth-century judges sitting in banc adhering to nisi prius rulings on matters of evidence and practice.

In *Foreland v Hornigold*,[698] the King's Bench held that a party seeking to rely on a bond for the performance of an award must plead and prove the entirety of the award save to the extent that it is void, as had previously been ruled at nisi prius at Guildhall and on the Home Circuit.

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[692] Supra, 687.

[693] Ibid., 691.

[694] See also the treatment of which party had the right to begin at trial, discussed below.

[695] (1850) 15 Q.B. 791.

[696] Ibid., 811-812.

[697] Circuit practice would still occasionally be regarded as relevant where there was no authority to support the judge's view on the evidential issue: see, for example, *Andrew v Motley* (1862) 12 C.B.N.S. 514, 532 per Williams J.

[698] (1701) 1 Ld. Raym. 715.

In *Clayton v Andrews*,[699] the King's Bench held that executory contracts could be proved without the need for written evidence under the Statute of Frauds, relying for authority on a nisi prius ruling of Pratt CJ.

In *Wood v Chessal*,[700] the King's Bench allowed excise officers executing a warrant of forfeiture to give evidence of the plaintiff's conviction for excise offences, which was the ground for the issue of the warrant, as a defence to the plaintiff's claim for trespass, on the general issue without the conviction being specifically pleaded. In so doing, Blackstone J relied on a series of nisi prius cases in which such evidence had been permitted.[701]

In *Talbot v Hodson*[702] the Common Pleas upheld the refusal to admit other evidence of the execution of a deed, where an attesting witness had denied seeing the deed executed. In so doing, Park J relied on three nisi prius rulings as well as a case tried at the Old Bailey, as related to him by three judges on the judicial rota.[703]

Finally, in *Pringle v Isaac*,[704] the Exchequer upheld the practice of the sheriff levying under a writ of fieri facias, in priority to an earlier writ which the creditor had requested not to be executed until a later time. Richards CB and Wood B followed a nisi prius ruling of Lord Kenyon CJ to the same effect, holding that there was no basis to distinguish that ruling as a matter of principle.[705]

Reliance on nisi prius rulings in those cases was made easier by the fact that they accorded with the views of the judges who relied upon them. However, judges would also follow such rulings where they were less sure that they were correct, as shown by an 1825 case which represents the high watermark of reliance on nisi prius rulings on evidential matters by courts in banc.

In *Binns v Tetley*,[706] the question for the Exchequer was whether a bankrupt could give evidence of any fact which supported or undermined the validity of their bankruptcy. The court was faced with a number of nisi prius cases in which such evidence had been declared inadmissible, on the basis of the bankrupt's interest in the matter. On what Graham B described as a point 'perhaps of very considerable importance',[707] all the members of the court followed the nisi prius cases, albeit reluctantly: they would have held differently had the matter been free from authority but, in the words of Hullock B:[708]

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[699] (1767) 4 Burr. 2101.

[700] (1779) 2 W. Bl. 1254.

[701] Ibid., 1256-1257.

[702] (1816) 7 Taunt. 251.

[703] Ibid., 254.

[704] (1822) 11 Price 445.

[705] Ibid., 451 and 452 respectively.

[706] (1825) M'Cle. & Y. 397.

[707] Ibid., 402.

[708] Ibid., 404.

> They are only nisi prius cases on which the Court now founds itself, but every judge in Westminster Hall, I believe, will be found to have adopted them in practice, not because they are good decisions, but because they are decisions.

This case is accordingly a strong example of the court in banc following nisi prius rulings on a point of evidence, despite its misgivings as to their correctness.[709]

The approach in *Binns v Tetley* was not confined to the Exchequer. In the 1830 case of *Sayer v Garnett*,[710] the defendant moved in the Common Pleas for a new trial, on the ground that a bankrupt was wrongly prevented from giving evidence for him, to explain an act which the plaintiff relied on as an act of bankruptcy. The defendant sought to rely on the judicial misgivings expressed in *Binns v Tetley*, but the court unanimously refused the motion. Tindal CJ said that: 'We ought not lightly to set aside the general understanding of the profession, and the rule laid down in text-books' and rested his decision 'on the universal practice in cases of this kind'; Park J cited Hullock B's statement from *Binns v Tetley* referred to above; and Bosanquet J said that to accede to the motion 'would only have the effect of calling into question a practice long established.'

The turning of the tide against reliance on nisi prius rulings is illustrated by the 1834 case of *Summers v Moseley*.[711] The issue before the Exchequer was whether a person compelled by the plaintiff to produce a document under a subpoena duces tecum had to be sworn as a witness, and was therefore liable to be cross-examined by the defendant. The plaintiff sought to rely on a number of nisi prius rulings and submitted that all the rulings on this issue were in the plaintiff's favour; the defendant responded that they were all merely nisi prius decisions on an issue which had never come before the court in banc. Bayley B, delivering the judgment of the court, declined to follow the nisi prius rulings as a matter of course, and instead consulted the other judges on the issue, stating as follows:[712]

> Several cases were cited upon the argument as having been decided in conformity with the rule as contended for on behalf of the plaintiff, but they were all cases at Nisi Prius, and as the question is one of great importance and frequent occurrence, and it is highly desirable that the rule of evidence should be fixed, we were desirous of having an opportunity of communicating on the subject with the Judges of the other courts before we delivered our judgment. We have accordingly had a communication with the other Judges, and the result is, that we are of opinion that the cases ruled at Nisi Prius, and relied upon on behalf of the plaintiff, were rightly ruled ….

Thereafter, there appear to be no examples in the reports of judges sitting in banc simply following nisi prius rulings on matters of evidence irrespective of their own views on the

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[709] Its force in this respect is not diminished by the fact that, in a case not cited to the court, the Common Pleas had reached the same conclusion some thirty years earlier: *Chapman v Gardner* (1794) 2 H. Bl. 279. For a nisi prius case to the like effect, see *Bedell v Russell* (1825) Ry. & M. 293, discussed below.

[710] (1830) 7 Bing. 103. See also *Morgan v Pryor* (1823) 2 B. & C. 14.

[711] (1834) 2 Cr. & M. 477. See also the overruling by the common law judges in around 1832 of the established practice on the right to begin at trial, discussed below.

[712] Ibid., 488. The issue was regarded as so completely settled by this case, that the King's Bench soon after refused to grant a rule nisi for the point to be argued before it: see the notes to *Rush v Smith* (1834) 1 Cr. M. & R. 94.

matter;[713] it is likely that any such approach would have been subject to the same disapproval as to the use of general circuit practice expressed in *Earl of Dunraven v Llewellyn*.

Conclusion

There was no rule that nisi prius rulings on points of evidence, whether on their own terms or as part of general circuit practice, were regarded as formally binding on either other trial judges or the full court. However, their influence in persuading judges of the eighteenth and early-nineteenth centuries as to the correct approach to such points was undoubtedly substantial, much more so than on points of substantive law. This no doubt reflected a desire both to ensure consistent treatment of the types of evidential issues that frequently arose in trials on circuit, and to respect the practice of the circuit built up over time.

However, by the mid-nineteenth century, the influence of these rulings had waned, and the courts were more concerned with the correctness of the underlying principle. This was due to an increase in the willingness of trial judges to reserve points of evidence for the full court,[714] and (as discussed below) the relaxation of the restrictions on the granting of new trials where the judge had wrongfully allowed or disallowed evidence to be adduced, both of which encouraged the full court to consider evidential issues as a matter of principle. By this time, most issues of evidence were being decided by courts in banc, which is likely to have contributed to the general decline in the reporting of nisi prius cases.[715]

IMPACT OF NISI PRIUS REPORTING ON THE DEVELOPMENT OF THE MODERN LAW OF EVIDENCE

Introduction

There is a considerable chronological overlap between the period during which modern evidence law was exclusively regulated by the judges, and the regular reporting of nisi prius cases. As is explained below, the beginning of modern evidence law can be traced to the late eighteenth century, and it was not until the middle of the nineteenth century that judicial control over its development began to be supplemented by a series of statutory reforms. This period coincides with both the regular reporting of nisi prius cases, which began in the mid-1790s and continued until the mid-1850s, and the greater weight accorded to nisi prius rulings on matters of evidence, as discussed above.

The question for consideration in this part of the Chapter is how, if at all, did the nisi prius reports contribute to the development of modern evidence law during this period.

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[713] Although the *Law Times* in 1844 justified the reporting of nisi prius cases by including only 'cases in which the decision of a single judge is an authority, such as those on *practice and evidence*': Anon., 'The Reports', 4 *Law Times* (1844), 127 (emphasis in original).

[714] This practice began in the middle of the eighteenth century (David Ibbetson, *A Historical Introduction to the Law of Obligations*, 1999, Oxford, 161-162) and increased from the mid-nineteenth century, when the desire to get though court business caused trial judges to reserve all but the plainest propositions of law for the court in banc: Finlason, *Our Judicial System*, vii; see also the note to *Smith v Clench* (1865) 4 F. & F. 578, 585-586.

[715] See Anon., 'Foster and Finlason's Nisi Prius Reports, vol.1', 32 *Law Times* (1858), 94. In that volume of reports, only 15% of the reported civil cases contained substantive rulings on evidential issues, of which nearly 20% were reserved for the full court.

Two factors render it difficult to undertake such an assessment. First, the contemporaneous records are limited and unsatisfactory. Whilst it is perfectly possible that reported rulings on evidence at nisi prius influenced judicial thinking, the only surviving physical manifestation of that process is the caselaw, which is of only slight assistance in determining the impact of such rulings. Secondly, there is doubt as to whether during this period there was any significant development of evidence law, in the form of establishing a set of coherent principles. In the absence of a systemised appellate system, the judges at Westminster Hall focused on ascertaining the legal principles necessary to decide the particular cases before them, rather than coming up with a clear set of rules that could be applied to cases more generally; and as discussed below, that latter role was not taken up by the treatise-writers of the period.

However, these difficulties did not stop bold claims from being made by legal writers about the influence reported nisi prius rulings had on the development of modern evidence law during this time.

What is modern evidence law?

The first attempt to separate the history of evidence law into distinct periods was the threefold division identified by Sir John Salmond in 1891.[716]

During the first period, the jury system was not the only method of proving disputed facts,[717] and where juries were used, they acted as witnesses using their own knowledge, or knowledge gleaned from their community, to determine factual issues. The original nature of trials as methods of conclusive proof meant that there was little room for a law of evidence, as there was no real opportunity for passing a rational judgment on the facts.[718]

The second period reflected the change in the role of juries from witnesses to judges of evidence adduced by others, a process which began in the fourteenth century and was substantially completed by the end of the sixteenth century.[719] The fact that the jury's verdict came to rely on the evidence produced to it in court, rather than its own knowledge, meant that legal principles relating to that evidence became necessary.[720] But during this period, the law of evidence was characterised by the prevalence of rules relating (predominantly in civil cases) to written evidence and to the exclusion of witnesses, such as the parties themselves, their relations and those disqualified on the grounds of incompetency.[721]

It was not until the third period that the modern law of evidence began to be developed and regularly applied, in the form of rules for the exclusion of evidence, based not on the character of the witness, but on the nature of their testimony.[722]

[716] John W. Salmond, *Essays in Jurisprudence and Legal History*, London, 1891, 15.

[717] Other methods included battle, ordeal and compurgation.

[718] Holdsworth, *History*, vol.9, 130: see also ibid., vol.1, 299.

[719] Ibid., vol. 1, 312-337.

[720] Ibid., vol.9, 126.

[721] Salmond, *Essays*, 30-42. Thus, Gilbert's influential treatise on evidence law, discussed below, focused almost exclusively on written evidence.

[722] Ibid., 42-64.

Salmond's analysis was supplanted by Wigmore's 1904 essay, *General Survey of the Historical Development of the Rules of Evidence,* originally published in the first volume of his hugely influential treatise on the law of evidence.[723] Wigmore identified seven periods of the history of evidence law, the third of which, spanning from 1500 to 1700, he identified as giving rise to the possibility of a modern system. For Wigmore, it was 'the constant employment of witnesses, as the jury's chief source of information' which brought about a radical change of emphasis directed at the admissibility of the words and documents used by witnesses, as well as their competency.[724] In this respect, that period is similar to the second period identified by Salmond.

Wigmore identified 1700 to 1790 as the next relevant period, during which two developments enabled the law to move forward in practical and philosophical terms.[725] According to Wigmore, the practical development was the establishment at the beginning of the period of the right of cross-examination by counsel; the philosophical development was the appearance of the first treatises on evidence law, notably those by Gilbert, Bathurst and Buller. Wigmore noted that the theoretical foundation of these treatises was rooted in the previous century's work, and was independent of the expansion of the practice caused by regular cross-examination of witnesses. The treatises of the time therefore advanced a simplistic and narrow view as to the scope of the law.

For present purposes, it is the fifth period identified by Wigmore, from 1790 to 1830, that is the most important, as it sets out the case in favour of nisi prius reporting having a key role to play in the development of modern evidence law. Its importance merits separate treatment, and it is dealt with below.

Wigmore's final two periods mark the continuing evolution of modern evidence law, featuring the production of further treatises, Bentham's critical reaction to the state of the law, the efforts of Lord Brougham and Lord Denman to reform the law, and the legislative reforms of the mid-nineteenth century, culminating in the Judicature Act 1875 and the Rules of Court of 1883 following which (according to Wigmore) 'the law of evidence in England attained rest.'[726]

The effect of nisi prius practice

When considering the extent to which nisi prius reports contributed to the development of the modern law of evidence, a distinction must be drawn between practice in the trial courts and the reporting of that practice.

The trial system was of course central to the law of evidence given the key role played in that system by the jury: the principles of evidence law were originally intended to control the activities of autonomous juries whose members, if left to their own devices, might otherwise be tempted to pay undue regard to irrelevant or prejudicial material. This is illustrated by Sir James Mansfield CJ's explanation of the reason for the rule against hearsay. He contrasted the position in jurisdictions where the facts were determined by the judges - where there was no

[723] Wigmore, *Treatise*, vol.1, 23-30.

[724] Ibid., 24-25.

[725] Ibid., 25-26.

[726] Ibid., 27-29.

danger of them taking undue account of hearsay evidence, because when they came to consider their judgment on the merits of the case, they could be trusted either to disregard it, or to give it whatever little weight it deserved – with the position in England, where hearsay evidence was properly excluded because it was impossible to determine what effect it might have on the minds of the jury.[727]

As J.B. Thayer remarked: '… the English law of evidence … is the child of the jury';[728] and a post-war English criminal barrister put the matter more colourfully, describing evidence law as 'founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries.'[729] The centrality of evidence law to the English jury trial led another experienced practitioner, writing in 1864, to remark that the most useful area of law that the nisi prius advocate could master was the law of evidence.[730]

Before the nineteenth century, very little evidence law was the product of the courts in banc.[731] Until then, objections to the production of evidence or to the testimony of witnesses would be made to the trial judge, whose rulings would generally be the final word on the matter. It was not until the beginning of the eighteenth century that the King's Bench would grant a new trial if the nisi prius judge wrongly allowed or disallowed evidence;[732] and even after that, there were relatively few decisions of the courts in banc on evidential issues prior to the end of eighteenth century: for example, of the 108 cases reported in *The English Reports* as decided by the King's Bench and Common Pleas in 1755, less than 7% considered the presentation of evidence in court or its effect on the jury.[733] A probable important factor in this inactivity was the refusal of the courts in banc to grant a new trial on an evidential issue unless it was likely that the correct answer would have led to a different result,[734] a condition that was only removed for all courts in 1837.[735]

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[727] *The Berkeley Peerage Case* (1811) 4 Camp. 401, 415. See also *Wright v Doe d Tatham* (1838) 7 A. & E. 313,375 per Bosanquet J.

[728] James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Boston, 1898, 47. There is some scholarly dissent from this view, most notably Edmund Morgan, who argues that the exclusionary rules of evidence were caused by the limitations of the adversarial system, in particular the close involvement of the parties in the production of proof: Edmund Morgan, *Some Problems of Proof under the Anglo-American System of Litigation*, New York, 1956, 109.

[729] C.P. Harvey QC, *The Advocate's Devil*, London, 1958, 79.

[730] Bliss, *Nisi Prius*, 18.

[731] Nelson, *Evidence*, preface.

[732] *Thomkins v Hill* (1702) 7 Mod. 64. It had long been the practice to grant a new trial in the case of misconduct by juries, such as where a member of the jury had previously been a juror in the same cause: *Argent v Darrell* (1699) 2 Salk. 648. Since the thirteenth century, a party who objected to the trial judge's ruling on a point of evidence could include this in a bill of exceptions, but this process suffered from limitations, in particular its non-application to cases to which the Crown was a party: Holdsworth, *History*, vol.1, 224.

[733] Thomas P. Gallanis, 'The Rise of Modern Evidence Law', 84 *Iowa Law Review* (1999), 499 at 510-511.

[734] See, for example, *Horford v Wilson* (1807) 1 Taunt. 12, 14 per Mansfield CJ; *Tyrwhitt v Wynne* (1819) 2 B. & Ad. 554, 558-559 per Abbott CJ.

[735] *Wright v Doe d Tatham* (1837) 7 A. & E. 313, 330 per Lord Denman CJ in the Exchequer Chamber, adopting the practices of the King's Bench and the Exchequer laid down in 1835: *De Rutzen v Farr* (1835) 4 A. & E. 53; *Crease v Barrett* (1835) 1 Cr. M. & R. 919. Even then, a new trial would only be granted where the objection to the evidence had been taken at the original trial.

Moreover, little weight could be placed on old cases, decided prior to the evolution of the law of evidence to its modern form. Despite the nostalgic view of some as to the influence of ancient authorities on the law of evidence,[736] the attitude of judges of the eighteenth and nineteenth centuries was illustrated by Lord Mansfield CJ's remark: 'We don't now sit here to take our rules of evidence from Siderfin and Keble.'[737]

The fact that contentious issues of evidence were not being routinely considered by the courts in banc did not mean that those issues were not being determined outside of the trial courts in which they were first raised. From at least the sixteenth century, questions of procedure and evidence raised at nisi prius were referred informally for deliberation by the twelve common law judges, who would then transmit their conclusion to the trial judge, in whom the ultimate decision rested.[738] The twelve judges would rarely give reasons for their conclusions and nor were they reported, at least not before the 1820s.[739] However, as a matter of practice they would be adopted and followed by those judges in the nisi prius courts, even by those who had not agreed with the view of the majority.[740]

Sometimes, trial judges would adopt even less formal means of obtaining assistance on points of evidence. As will be seen below, a judge might consult his fellow judges on circuit or those judges who happened to be in London if he was trying causes at Guildhall or Westminster. Alternatively, the judge might seek assistance from the chief of his court: amongst Lord Kenyon's papers in the Lancashire Archives[741] is a letter dated 24 March 1800 from Chambre J, who was on the Midland Circuit, requesting an opinion as to whether he was correct to allow evidence of similar offences to be adduced in the trial of two forgers at the Northampton assizes, on the basis that a number of similar offences remained to be tried. Chambre said that, if Kenyon's view was that there was a doubt, he would respite the forgers' sentences pending an opinion being sought from all the judges. Another example of informal decision-making is *Lewis v Pottle*,[742] in which the question arose in the King's Bench as to whether the defendant could be held to special bail, which only applied to debts over £10, where that threshold was only reached with the addition of the costs of the action. As there was a conflict in practice between the King's Bench and Common Pleas, a conference was held between the judges of both courts, and it was agreed that the practice of the latter court would prevail, so that special bail would apply in such circumstances.

Subject to the above, prior to the commencement of nisi prius reporting there was no doubt that much of this branch of the law was in the hands of the trial judge, delivering instantaneous rulings after little or no argument or deliberation, in the rush and tumult of the nisi prius court. Whilst variations in practice on such matters may have been mitigated by the fact that the judges and counsel on circuit were members of a small and close-knit community who

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[736] See, for example, *R v The Inhabitants of Eriswell*, supra, 721 per Lord Kenyon CJ; *R v Ryle* (1841) 9 M. & W. 227, 239 per Lord Abinger CB.

[737] *Lowe v Jolliffe* (1762) 1 W. Bl. 365, 366.

[738] Baker, *Introduction*, 149, 564.

[739] Between 1757 and 1828, notes of the judges' deliberations were made in notebooks kept by the Chief Justice of the King's Bench: these were discontinued in 1828 because it had become the practice to give the details to the law reporters: D.R. Bentley QC, ed., *Select Cases from the Twelve Judges' Notebooks*, London, 1997, 1.

[740] Oldham, 'Informal Lawmaking', 194-199, 212-213.

[741] LA MS Kenyon DDKE 1/1/157/20.

[742] (1792) 4 Term Rep. 570.

associated with each other socially as well as professionally, the absence of both a uniformity of practice and the mature consideration of the principles by the full court were factors that tended to hinder the development of modern evidence law.

The effect of nisi prius reporting as the catalyst for the modern law of evidence

As stated above, in his description of the fifth period of the historical development of evidence law, Wigmore argued, in typically bold and emphatic language,[743] that the reporting of nisi prius rulings on evidence was the principal catalyst for the rapid development of the modern law of evidence in the first part of the nineteenth century. The importance of this influential passage makes it worth citing in full:

> A.D. 1790-1830. The full spring-tide of the system had now arrived, In the ensuing generation the established principles began to be developed into rules and precedents of minutiae relatively innumerable to what had gone before. In the Nisi Prius reports of Peake, Espinasse, and Campbell, centering around the quarter-century from 1790 to 1815, there are probably more rulings upon evidence than in all the prior reports of two centuries. In this development the dominant influence is plain; it was the increase of printed reports of Nisi Prius rulings. This was at first the cause, and afterwards the self-multiplying effect, of the detailed development of the rules. Hitherto, upon countless details, the practice had varied greatly on the different circuits; moreover, it had rested largely in the memory of the experienced leaders of the trial bar and in the momentary discretion of the judges. In both respects it therefore lacked fixity, and was not amenable to tangible authority. These qualities it now rapidly gained. As soon as Nisi Prius reports multiplied and became available to all, the circuits must be reconciled, the rulings once made and recorded must be followed, and these precedents must be open to the entire profession to be invoked. There was, so to speak, a sudden precipitation of all that had hitherto been suspended in solution. This effect began immediately to be assisted and emphasized by the appearance of new treatises, summing up the recent acquisitions of precedent and practice. In nearly the same year, Peake, for England (1801), and MacNally, for Ireland (1802), printed small volumes whose contents, as compared with those of Gilbert and Buller, seem to represent almost a different system, so novel were their topics. In 1806 Evans' Notes to Pothier on Obligations was made the vehicle of the first reasoned analysis of the rules. In this respect it was epoch-making; and its author in a later time once quietly complained that its pages were "more often quoted than acknowledged." The room for new treatises was rapidly enlarging. Peake and MacNally, as handbooks of practice, were out of date within a few years, and no new editions could cure them. In 1814, and then in 1824, came Phillipps and Starkie,-in method combining Evans' philosophy with Peake's strict reflection of the details of practice. There was now indeed a system of evidence, consciously and fully realized.[744]

Accordingly, Wigmore was of the view that the principles of evidence law were in a relatively advanced state of development in the later part of the eighteenth century. Further, his opinion, which was largely adopted by Holdsworth as noted at the beginning of this Chapter, was that the introduction of regular nisi prius reports at the end of the century was the primary cause of those principles to be more widely and regularly applied in the following generation.

However, Wigmore's view was not shared by the one contemporaneous English treatise on evidence law that included a chapter on the history of the law. In his 1849 *Treatise on the*

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[743] William Twining describes Wigmore as 'supremely self-confident and untroubled by doubt': William Twining, 'The Rationalist Tradition of Evidence Scholarship", in Enid Campbell and Louis Waller, eds., *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston*, Sydney, 1982, 240.

[744] Wigmore, *Treatise*, vol.1, 26-27.

Principles of Evidence,[745] William Maudsley Best said that the law of evidence was the creation of comparatively modern times, although the leading principles on which it was founded had been long established.[746] He identified the mid-seventeenth century as when the establishment of a system of principles of evidence law began to form, being the point at which those principles become rules of law rather than matters to be disregarded or relaxed at the discretion of the judges.[747] However, he emphasised that the process was a gradual one, using as an example the rule against hearsay.[748] Although treatises at the end of the eighteenth century spoke of that rule as being generally established, as late as 1779, in a case of the rape of a child, Buller J allowed the testimony of the child's parents that the child had informed them of the commission of the offence, to be adduced in evidence against the defendant: that ruling was reserved to the twelve judges and was duly overturned.[749]

Best identified three causes for the development of the modern law of evidence in England:[750] the independence of the judges from the Crown, which prevented the relaxation of the principles of evidence applying in state prosecutions; allowing those accused of serious crimes the right of being defended by counsel, which led to more objections being taken to the admissibility of evidence and generally more focus being given by judges to evidential issues; and, principally, the change in the functions of the jury from witnesses of fact to finders of fact. Although Best said that other causes may have contributed, and that those he identified were only offered by way of speculation,[751] it is notable that his list did not include the establishment of regular nisi prius reports.

More recently, Wigmore's claims that the principles of evidence law were in a relatively advanced state of development in the eighteenth century, and that the nisi prius reports were the primary reason for the regular application of those principles, have been called into question, in particular by the work of John H. Langbein and Thomas P. Gallanis, in articles published in 1996 and 1999 respectively.[752]

As to Wigmore's first claim, Langbein's thesis is that, even into the middle of the eighteenth century, the modern law of evidence was not yet in operation;[753] and the exclusionary rules which make up the modern law of evidence were not introduced until the last decades of that century. Using the notebooks of civil trials produced by Sir Dudley Ryder, Chief Justice of the King's Bench from 1754 to 1756, Langbein identifies the prevalence of rules relating to written

[745] W.M. Best, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law*, 1st ed., London, 1849.

[746] Ibid., 118.

[747] Ibid., 129.

[748] Ibid., 129-131.

[749] *R v Brasier* (1779) 1 Leach 199.

[750] Best, *Treatise*, 132-135.

[751] Another probable factor, not identified by Best, was the relaxation of the strict rules of pleading, discussed in Chapter 2 above, which necessitated a different method of ensuring that the jury was prevented from having undue regard to irrelevant or prejudicial material.

[752] Langbein, 'Historical Foundations'; Gallanis, 'Modern Evidence Law'.

[753] Langbein, 'Historical Foundations', 1170.

evidence and the competency of witnesses, and the almost complete absence of objections to oral testimony, such as hearsay, which make up the bulk of the modern law of evidence.[754]

Langbein illustrates the lack of rigid adherence to rules of evidence at this time by reference to the practice of judges determining issues of admissibility in the presence of the jury, which undermined the exclusionary approach to inadmissible evidence.[755] In support, Langbein cites Sylvester Douglas's note to his report of the trial of a 1775 petition disputing a parliamentary election in Cardigan:

> It has often occurred to me, that, in trials at nisi prius, when evidence is objected to, there is an impropriety in allowing the counsel who offers it, to state what he means to prove in the hearing of the jury, and this for the reason already mentioned; especially as jurymen are too apt to infer, that evidence so offered must be both true, and fatal to the party who objects to it, merely because it is objected to. Perhaps it would be an improvement, when questions of admissibility are raised, that the jury, as well as the witnesses, should withdraw, till the point was argued and decided.[756]

More evidence of the eighteenth century representing the pre-modern period of evidence law comes from the treatises of that period, written by Gilbert,[757] Bathurst[758] and Buller.[759] Langbein notes that virtually the entirety of Gilbert's treatise was taken up with written evidence, and that all these treatises attempted to subsume the rules of evidence under a single principle, the "best evidence rule", which related principally to documentary authenticity.[760] As to their treatment of oral evidence, Gilbert focused on the competency of witnesses, and none had anything substantial to say about modern exclusionary rules relating to such matters as hearsay and opinion evidence.[761]

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[754] Ibid., 1181-1190.

[755] Ibid., 1188-1189.

[756] Note (B) to *The Case of the Borough of Cardigan and its Contributory Boroughs in the County of Cardigan*, reported in Sylvester Douglas, *The History of the Case of Controverted Elections which were Tried and Determined During the First and Second Sessions of the Fourteenth Parliament of Great Britain, 15 & 16 GEO III*, 2nd ed., London, 1802, vol.3, 232. Although this report was not included in the first edition of this work, published in 1775, it appears from online catalogues that the report was originally published in 1777 (for example, https://www.abebooks.co.uk/first-edition/1777-Cardigan-Case-Borough-Contributory Boroughs/30794642218/bd), although it is not possible to tell whether that report included Douglas's notes.

[757] Gilbert, *Evidence*. The first edition was published in Dublin in 1754 and in London in 1756: it was published posthumously, as Gilbert died in 1726. It has been suggested that it was written in the early 1700s: Mike Macnair, 'Sir Jeffrey Gilbert and His Treatises', 15 *Journal of Legal History* (1994), 252 at 259.

[758] Bathurst, *Theory of Evidence*.

[759] Buller, *Introduction*. This book was largely based on Bathurst's work.

[760] Langbein, 'Historical Foundations', 1173-1174. See, further, below.

[761] Ibid., 1174-1176. See also Gallanis, 'Modern Evidence Law', 509. The general paucity of evidence law at this time enabled Edmund Burke, during a speech to Parliament in 1794 on the impeachment of Warren Hastings, to remark that: 'as to the rules of law and evidence, he did not know what they meant … it was true, something had been written on the Law of Evidence, but very general, very abstract, and comprised in so small a compass, that a parrot that he had known might get them by rote in one half-hour, and repeat them in five minutes': Anon., *The History of the Trial of Warren Hastings*, London, 1796, 84.

Accordingly, it is now generally accepted that the modern law of evidence was, as late as the mid-eighteenth century, relatively undeveloped and inconsistently applied.[762]

As to Wigmore's claim relating to the reliance on the early nisi prius reports, Langbein rejects this as the cause of the expansion of the law of evidence, in favour of the rapid development of adversary criminal procedure in the last quarter of the eighteenth century, which rendered the judge a more passive presence in the courtroom, unable to influence the jury as before, and which required new rules governing the functions of judge and jury, which in turn influenced the conduct of civil trials.[763] In this respect, Langbein was echoing a cause identified by Best, as stated above. However, Langbein's reference to this factor was not a product of his own research, and was only tentatively suggested as a reasonably likely cause: he concluded his article by inviting further research into the development of the law of evidence in the late eighteenth century to be undertaken. That invitation was subsequently taken up by Gallanis.[764]

Gallanis argues that, even as late as the 1750s, the exclusionary rules which are the hallmark of modern evidence law were embryonic and frequently disregarded, because of the broad discretion exercised by trial judges;[765] however, by the early nineteenth century, judicial discretion had been largely replaced by considerably less flexible exclusionary rules, applied in a more recognisably modern way.[766] Gallanis examines the treatment of the prohibition against hearsay in treatises and caselaw between 1750 and 1820, concluding that the 1780s was a period of considerable activity in this field and that, by 1800, much of the modern approach to hearsay was already in place.[767]

Gallanis reiterates Langbein's view that the relatively undeveloped state of evidence law in the mid to late-eighteenth century was reflected in its treatment by the legal writers of the time. After referring to Gilbert's attempt to bring the whole law within the best evidence rule, Gallanis notes that Blackstone's four-volume work on the Laws of England, published between 1765 and 1769, devoted fewer than nine pages to evidence law;[768] and Buller's treatise, first published under his name in 1772, summarised the rules of evidence under just nine general principles.[769]

Gallanis identifies the cause of the growth of exclusionary rules of evidence as the increased participation of lawyers in late eighteenth-century criminal trials, rejecting Wigmore's notion that those rules must have been prompted by changes in the reporting of nisi prius cases.[770]

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[762] Gallanis, 'Modern Evidence Law', 502.

[763] Langbein, 'Historical Foundations', 1197-1202. See also John H. Langbein, *The Origins of Adversary Criminal Trial*, Oxford, 2003, Ch.4.

[764] Gallanis, 'Modern Evidence Law'. This otherwise immensely impressive work of scholarship is blighted by the all-too-familiar summary dismissal of Espinasse's reports as 'of notoriously poor quality': ibid., 532n.

[765] Ibid., 504-515.

[766] Ibid., 515-530.

[767] Ibid., 530-537.

[768] Blackstone, *Commentaries*, vol.3, 367-375.

[769] Buller, *Introduction*, 289-294.

[770] Gallanis, 'Modern Evidence Law', 537-550.

Using data gleaned from over a thousand pamphlet accounts of civil and criminal trials,[771] Gallanis concludes that the increased appearance by counsel in routine criminal cases from the 1780s led them to take a more active role in shielding the jury from untrustworthy testimony by means of objections, and that this more aggressive approach to oral evidence quickly migrated into the civil context, because of the participation by the same counsel in both criminal and civil trials. Gallanis's analysis is supported by Stephen Landsman, whose study of the records of eighteenth-century criminal trials known as the Old Bailey Session Papers lead him to conclude that the participation of counsel in those trials increased significantly in the 1780s, accompanied by a growth in the strict adherence to the rules of evidence.[772]

The work of Langbein and Gallanis on when the modern law of evidence started to be developed in earnest and on the reasons for that development, argues against the commencement of nisi prius reporting as a significant contributory factor. It is difficult to regard the beginning of nisi prius reporting at the very end of the century as of great relevance if the key period for that change was the previous twenty-five years; and if the catalyst for that change was the practice in the criminal courts, the reporting of evidential rulings in the civil courts was unlikely to have been the dominant influence on the development of the modern law of evidence claimed by Wigmore. Accordingly, the conclusions of Langbein and Gallanis suggest that the nisi prius reports reflected, rather than caused, the significant strides taken in the development of modern evidence law at the end of the eighteenth century.

The effect of nisi prius reports on the continued development of modern evidence law

If, as Langbein and Gallanis suggest, the commencement of nisi prius reporting was not the catalyst for the beginning of the modern law of evidence towards the end of the eighteenth century, might Wigmore's view still be justified on the basis that such reporting influenced the continued development of the law during the first half of the nineteenth century?

In the passage from his general survey set out above, Wigmore said that the reported nisi prius rulings had to be followed and that they compelled the previously varied practice as to evidence on different circuits to be reconciled. However, an analysis of the cases does not support either this claim or the view that reported nisi prius cases were of substantial assistance in creating a set of coherent underlying principles by the courts. On the contrary, in a number of areas the development of a clear logical rule of evidence was hindered by a series of unreasoned and inconsistent nisi prius rulings, and it was not until the intervention of the courts in banc that the rule in question came to be put on a sound legal basis.

Four principal reasons can be advanced for this state of affairs.

The first is a lack of consistency on issues of particular difficulty. Whilst, as discussed above, judges of the eighteenth and early nineteenth centuries often followed the uniform practice of the circuits on evidential matters, in many such matters the practice was not uniform, whether

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[771] Published in 1990 in microfiche form by Chadwyck-Healey as *British Trials 1660-1900*.

[772] Stephen Landsman, 'The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England', 75 *Cornell Law Review* (1990), 496 at 524, 533, 543-545, 548-564 and 569-572. The move from a non-adversarial to an adversarial approach to evidence in the late eighteenth and early nineteenth centuries was also reflected in the treatises of the time, particularly in the greater importance ascribed by later writers to rules concerning oral evidence: Stephen Landsman, 'From Gilbert to Bentham: The Reconceptualization of Evidence Theory, 36 *Wayne Law Review* (1990), 1149.

because of insufficient deliberation, a preoccupation with practical common sense over strict principle, or genuine differences of principle. For example, when discussing the competency of witnesses, Lord Hardwicke CJ said that:

> There have been variety of opinions as to what shall go to the competency, and what to the credit of a witness, and I think it is impossible to reconcile all the cases; most of them have happened at Nisi Prius, where points have not so much consideration, as in Court, and in some of the boundaries set between what goes to competency, and what to credit, are extremely nice; and I believe there have been many, where when a Judge has seen a witness inclined to be partial, he has carried the incompetency further than he could be warranted.[773]

The second reason is that, in many of the reported nisi prius rulings, the judge was recorded as simply stating his opinion on the admissibility of the evidence, without giving any reasons for that opinion. For example, in Peake's reports, the majority of the rulings on points of evidence were unreasoned;[774] and even in those rulings where reasons were given, they tended to be perfunctory, without discussion of the competing arguments. Whether this was because the reporter failed to record the reasons or (more likely) because the judge did not give any, the mere fact that the judge had ruled one way or the other on a point of evidence would be of no assistance in ascertaining the principal legal basis for that ruling.

The third reason is that the narrow scope of the reports meant that they could never hope to provide a comprehensive survey of evidential rulings being made at nisi prius, either in London or Middlesex, or on the circuits. Only a very small number of nisi prius cases were reported, and only a small number of those reported cases were tried at the assizes, being selected from the circuit which the reporter happened to frequent. Thus, the eleven volumes of nisi prius reports of Espinasse, Peake and Campbell contained a handful of cases from the Home or Oxford Circuits; and the dates of the first cases reported from the other circuits were as follows: 1816 for the Northern Circuit; 1824 for the Western Circuit; 1826 for the Norfolk Circuit; and 1832 for the Midland Circuit.[775] As the judges were assigned to different circuits, knowledge of how points of evidence were treated on a particular circuit would be principally spread by the counsel who practised on that circuit informing the trial judges of the usual practice.

The final reason was, as Thayer put it,[776] 'the habit of assuming, whenever evidential matter was rejected or received, that the result was attributable to some principle of the law of evidence.' Often, when a trial judge was reported as accepting or rejecting a piece of evidence, the reason had nothing to do with the law of evidence, and instead related to the rules of pleading, procedure or substantive law by which the case was governed. This caused the law of evidence to be overloaded with cases, many of which belonged to other branches of law. For example, the second and third volumes of Thomas Starkie's treatise on evidence law are devoted to explaining the elements of the substantive law (categorized alphabetically with

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[773] *R v Bray* (1736) Cas. Temp. Hard. 358, 359. A similar sentiment was expressed by Lord Kenyon CJ on the same principle in *Smith, QT v Prager* (1796) 7 Term Rep. 60, 62: 'The case of *Bent v Baker* laid down a clear and certain rule by which I have ever since endeavoured to regulate my opinions in causes coming before me at Nisi Prius though probably I may not have decided properly in every instance, when called upon to form an opinion on the sudden.'

[774] There were twenty-seven instances of reasoned rulings and thirty-seven instances of unreasoned rulings.

[775] Respectively reported at 1 Stark. 393, 1 Ry. & M. 77, 2 C. & P. 458 and 5 C. & P. 322.

[776] Thayer, *Preliminary Treatise,* 4.

topics such as abatement, conspiracy and malice) and to cases dealing with the forms of proof that do or do not satisfy the legal elements.[777]

Some examples follow of the detrimental effect of nisi prius rulings on the development of the law of evidence in this period.

Statements against interests as primary evidence

An aspect of evidence law which was subject to conflicting rulings at nisi prius was whether a statement made by a party against their interests was admissible as primary evidence, even if the statement related to the contents of a document which was either inadmissible or not produced in court.

In *Bloxam v Elsie*,[778] Abbott CJ sitting at Guildhall refused to allow a question to be put to a witness as to whether the plaintiff's assignor had said that a document existed which was adverse to the plaintiff's case, without the production of the document or an explanation as to why it was not produced. Abbott emphasised his ruling to enable the defendant to review it before the court in banc, but he declined to do so. However, a few years later in *Earle v Picken*,[779] Parke J at the Stafford assizes allowed such a question, ruling that what a party said was evidence against himself, as an admission, whether it related to the content of a document or to anything else.[780] When the matter finally came before a court in banc, the Exchequer in *Slatterie v Pooley*[781] ruled in favour of the admissibility of the statement. Parke B (as he had by then become) gave the leading judgment, and sought to justify overruling *Bloxham* by claiming that the contrary was the constant practice at nisi prius.[782] However, Parke appears to have been underestimating the uncertainty over this issue, as there had been several earlier reported nisi prius rulings to the same effect as *Bloxam*,[783] and Best's treatise said of the issue that 'there is probably not one to be found in the whole law of England, which has caused greater difference of opinion.'[784]

[777] Thomas Starkie, *A Practical Treatise on the Law of Evidence*, 3rd ed., London, 1842, vols.2 and 3. The first book of this kind was Isaac Espinasse, *A Practical Treatise on the Settling of Evidence for Trials at Nisi Prius*, London, 1819.

[778] (1825) Ry. & M. 187, 188.

[779] (1833) 5 C. & P. 542.

[780] The reporter noted (ibid., 542n) that Parke J had several times during the course of the circuit observed that not too great a weight should be attached to such evidence.

[781] (1840) 6 M. & W. 664.

[782] Ibid., 668.

[783] *Breton v Cope* (1791) Peake 43; *Scott v Clare* (1812) 3 Camp. 236; *Harrison v Moore* (Nottingham Spring assizes, 1837, noted in Samuel March Phillipps, *Treatise on the Law of Evidence*, 8th ed., rev. by Andrew Amos, London, 1838, 365n). See also *R v Hube* (1792) Peake 180 and *Thomas v Ansley* (1806) 6 Esp. 80, where it was held that a matter of record could not be proved by oral evidence not consisting of an admission against interest. Nisi prius rulings consistent with *Earle v Picken* include *Doe d Digby v Steel* (1811) 3 Camp. 115; *Doe d Waithman v Miles* (1816) 1 Stark. 181; *Doe d Lowden v Watson* (1817) 2 Stark. 230; *Sewell v Stubbs* (1824) 1 C. & P. 73; *Newman v Stretch* (1829) Moo. & Mal. 338 and *Ashmore v Hardy* (1836) 7 C. & P. 501.

[784] Best, *Treatise*, 396. See also Phillipps, *Treatise*, 363-364.

Certificates or registers of baptisms as evidence of date of birth

Another example of inconsistent nisi prius rulings causing confusion in the law of evidence concerned whether certificates or registers of baptism were admissible as evidence of a person's date of birth. In two cases tried in 1821 and 1829, it was ruled that they were not admissible to prove such a fact;[785] but in *Cope v Cope*,[786] tried in 1833, Alderson J rejected an objection to the admissibility of a register as evidence of a child's illegitimacy,[787] on the ground that a similar entry had been received in evidence without opposition in *Morris v Davies*,[788] a legitimacy case tried in 1828 where the property in dispute was of great amount and where every available point had been taken. Notwithstanding this, during a case tried the following year Alderson B (as he had by then become) refused to admit the register as evidence of the defendant's date of birth in a case for assumpsit which was defended on the ground of infancy.[789]

The matter did not come before a superior court until 1885 when Chitty J, sitting in the Chancery Division,[790] held that the register of baptisms was admissible as evidence of a person's date of birth when determining their legitimacy, in reliance on *Cope v Cope* and *Morris v Davies*. The judge confined himself to speculating as to the principle behind these rulings, saying - surprisingly, given that they were nisi prius cases - that they were binding on him.[791] This unsatisfactory state of affairs was finally resolved by the Court of Appeal in 1887, which held that a certificate of a person's baptism was not evidence of their age, even in a case where the person's legitimacy was in question.[792]

The right to begin

An issue which commonly arose at nisi prius was the question of which party had the right to begin at trial. This issue was the subject of a large number of nisi prius rulings, which led Best to conclude that: 'There are few points of practice more unsettled than this, and on which a larger number of irreconcilable decisions have taken place.'[793] Best went on to state that much of the confusion and inconsistent ruling on this subject could be traced to the idea that the order of beginning was exclusively to be determined by the judge at nisi prius, and that the court in banc would not interfere in any case, however egregious.[794]

This issue often arose in cases where the burden of disproving liability was on the defendant but the burden of proving quantum of damage was on the plaintiff. In two nisi prius cases, tried

[785] *Wihen v Law* (1821) 3 Stark. 63; *R v Clapham* (1829) 4 C. & P. 29.

[786] (1833) 1 Moo. & Rob. 269.

[787] Supported by reference to *Wihen v Law,* supra.

[788] (1828) 3 C. & P. 427, on a reference from the Court of Chancery: the evidence in question was not referred to in that report but was referred to in the summary of the evidence before the court when the case went back before the Lord Chancellor: (1837) 5 Cl. & Fin. 163, 192: see the notes to *Cope v Cope* (1833) 1 Moo. & Rob. 269, 271n.

[789] *Burghart v Angerstein* (1834) 6 C. & P. 690.

[790] *Re Turner, Glenister v Harding* (1885) 29 Ch D 985.

[791] Ibid., 991.

[792] *Robinson v Duke of Buccleuch and Queensbury* (1887) 3 T.L.R. 472.

[793] Best, *Treatise*, 474.

[794] Ibid., 477.

in 1813 and 1819, it was ruled that the defendant in those circumstances had the right to open the case.[795] However, in two nisi prius cases tried later in 1819 and in 1822, the plaintiff was permitted to begin.[796] In 1825, Best CJ at nisi prius followed the earlier two cases in *Bedell v Russell*,[797] despite his misgivings as to their correctness, because 'it is of the utmost consequence that the practice should be uniform': the later two cases were not cited to the judge.

Lord Tenterden CJ was faced with the issue in three cases when sitting at nisi prius in December 1828 and January 1829. In *Fowler v Coster*,[798] which was tried at Guildhall on 5 December, the defendant to an action on several bills of exchange claimed in abatement that the promises, if any, were made jointly with another. The judge ruled that, where the only real issue was for the defendant to prove, and there was no real dispute as to the damages, the defendant should begin. However, in *Cooper v Wakley*,[799] which was tried in Westminster Hall on 12 December, the damages issue was live: a surgeon brought an action for libel against a defendant alleging that an operation was negligently conducted; the defendant (who appeared in person) pleaded justification as a defence and the question arose as to who had the right to open the case. Faced with the earlier authorities in favour of the defendant opening, culminating in *Bedell v Russell*, Tenterden left the court to confer with the other King's Bench judges who were sitting in the Bail Court, and returned to rule that the defendant had the right to begin. Finally, in *Cotton v James*,[800] which was tried in Westminster Hall on January 17, Tenterden ruled that the established practice in those circumstances was that the defendant was entitled to begin where the burden of proving the issue lay on him, and that he therefore ought to follow that practice, even though it was inconvenient and he doubted whether it was well-founded in principle.

Despite their statements as to the importance of following established nisi prius practice, the misgivings of Best and Tenterden about the correctness of the principle led to the practice being overruled at a meeting of the judges. The story is told by Lord Denman CJ in the following terms:[801]

> Soon after I was raised to the Bench,[802] this ruling[803] became the subject of discussion among the Judges. Many of them attended at my house to consider of it; and the following short resolution was drawn up and signed by those present, and afterwards adopted by Lord Lyndhurst CB, Bayley B, Taunton J and myself. "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant". I possess

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[795] *Hodges v Holder* (1813) 3 Camp. 366; *Jackson v Hesketh* (1819) 2 Stark. 518.

[796] *Robey v Howard* (1819) 2 Stark. 555; *Lacon v Higgins* (1822) 3 Stark. 178.

[797] (1825) Ry. & M. 293, 294.

[798] (1828) Moo. & Mal. 240.

[799] (1828) 3 C. & P. 474.

[800] (1829) Moo. & Mal. 273, 275. This issue was not raised when the case went back to the King's Bench: (1830) 1 B. & Ad. 128.

[801] *Mercer v Whall* (1845), supra, 462.

[802] In November 1832. Denman was an advocate of the plaintiff's right to begin, so ruling shortly after his appointment in *Morris v Lotan* (1832) 1 Moo. & Rob. 233. In *Mercer v Whall* (1845) 5 Q.B. 447, 461 Denman said: 'But I can speak of my own impression arising from attendance at Nisi Prius as a barrister near thirty years, and corresponding, as far as I have observed, with the general opinion of the Bar. I never doubted that the plaintiff was privileged and required to begin, whenever any thing was to be proved by him.'

[803] In *Cooper v Wakely*, supra.

> this document signed with the initials of the present Chief Justice of the Common Pleas,[804] of Sir J B Bosanquet and of the late Mr Justice Park, Littledale and Gaselee Js, Bolland and Gurney Bs.

Thus, instead of waiting for a suitable case to come before the court in banc,[805] the judges – or at least a majority of them – effectively put an end to the former nisi prius practice by means of an informal memorandum, which then became the new nisi prius practice.[806] However, this change in practice did not appear to have been published or otherwise immediately made known to all the profession. In an action for libel tried in July 1833,[807] the defendant pleaded justification and claimed the right to begin, which would have been permitted under the old practice. Counsel for the plaintiff referred to the judge's resolution, to which the defendant's counsel replied that he had never heard of any such resolution. Tindal CJ confirmed the resolution altering the practice, and ruled that the plaintiff had the right to begin, notwithstanding that the case before him had been deliberately pleaded so as to take advantage of the old practice.

Another example of the inroads made by judges into the nisi prius practice of who was to begin was the shift away from a view, espoused particularly by Denman,[808] that the question was a matter for the discretion of the trial judge and should not be the subject for a new trial even if the court in banc did not agree. Thus, in *Huckman v Fernie*,[809] the Exchequer held that it would interfere if the decision of the judge was clearly and manifestly wrong, as the issue was sometimes very important, and a departure from the usual rule might have serious consequences.[810] This principle was confirmed by Pollock CB in *Geach v Ingall*,[811] stating that the court would order a new trial where it was clear that wrong had been done by the nisi prius ruling.

Declarations in the course of business

In his book on evidence law in Victorian England, Christopher Allen contrasts the significant development of civil evidence during the nineteenth century, and the slower progress of criminal evidence for want of an effective appellate structure.[812] One of the case studies, which

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[804] Tindal CJ, who had been appointed Chief Justice in June 1829.

[805] Presumably because it was doubted whether a ruling on the right to begin could ever be the subject of a review by the full court.

[806] Perhaps concerned by the unusual nature of this procedure, Denman was at pains to assert in *Mercer v Whall*, supra, 463, that 'If ever a decision was overruled on great deliberation and by an undeviating practice afterwards, it is that in *Cooper v Wakley*.'

[807] *Carter v Jones* (1833) 6 C. & P. 64; 1 Moo. & Rob. 281. The judge's verbal statement of the resolution was reported differently in each set of reports, a source of confusion at nisi prius which was not remedied until Denman quoted the written resolution in *Mercer v Whall*: Best, *Treatise*, 475-476.

[808] See *Doe d Pile v Wilson* (1834) 6 C. & P. 301, discussed above. See also *Burrell v Nicholson* (1833) 1 Moo. & Rob. 304 and *Bird v Higginson* (1834) 2 A. & E. 160.

[809] (1838) 3 M. & W. 505. See also *Mills* v *Barber* (1836) 1 M. & W. 425.

[810] Supra, 517 per Abinger CB.

[811] (1845) 14 M. & W. 95, 98-99. See also *Ashby v Bates* (1846) 15 M. & W. 589, although Rolfe B (at 596) concurred with the majority on this point 'with extreme reluctance'.

[812] Christopher Allen, *The Law of Evidence in Victorian England*, Cambridge, 1997, 29. His analysis makes no attempt to distinguish between nisi prius and in banc cases, which undermines his suggestion (ibid., 25-26) that Wigmore's reliance on the increase of nisi prius reports as the reason for the detailed development of evidence

Allen cites in support of that contrast, also demonstrates that the lack of coherent principle underlying the evidential rule in question was due to its inconsistent and unreasoned application by a series of trial judges, a defect only rectified when the rule came to be considered in banc.

The case study in question involves declarations in the course of business as an exception to the rule against hearsay. Allen identifies an emerging principle in the period before the 1840s, at which time there were differences of judicial opinion as to whether such evidence came within the scope of the rule against hearsay at all, and, if it did, as to whether and on what basis an exception should be allowed to develop in favour of admissibility. He also notes a tendency, during and after the 1830s, for judges to adopt a more restrictive approach to the operation of hearsay exceptions generally, as is shown in the case of declarations in the course of business by the emphasis on duty and contemporaneity as essential conditions of admissibility.[813]

An analysis of the cases cited by Allen shows that the differences of judicial opinion arose from a series of nisi prius rulings, whereas a more principled approach to the issue was taken by judges sitting in the superior common law and equity courts.

The case that was said to be the foundation of the principle was a nisi prius ruling of Holt CJ in 1703, which admitted entries of a deceased drayman, in a book kept by a brewhouse clerk for the purpose of recording deliveries of beer, as evidence of a particular delivery.[814] However, the reports of the case do not record the reasons for this decision. This case was later distinguished by Lord Kenyon CJ at nisi prius, when refusing to admit a deceased servant's book entry on the ground that it was not contrary to his interest.[815] But Lord Ellenborough CJ routinely admitted entries as evidence at nisi prius, even where they were consistent with the interests of the makers, relying on policy rather than principle: 'The rules of evidence must expand according to the exigencies of society.'[816]

A principled explanation for this rule first emerged from the judgment of Parke J in the King's Bench in 1832,[817] holding that a book entry which was not against the interests of the maker was admissible because it formed part of the chain of events from which the relevant fact could be inferred: in other words, the entry did not fall foul of the rule against hearsay if its probative force did not come solely from the words used, but also from the statement itself as a piece of original evidence.[818] Later decisions of superior courts further refined and standardised the principle, establishing that it was necessary to prove that the maker was under a duty to make

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law in the period after 1830 was due in part to the strengthening of the doctrine of precedent during that period: that is because, as discussed above, that doctrine was not applied to nisi prius rulings, at least from the mid-nineteenth century.

[813] Ibid., 42.

[814] *Price v The Earl of Torrington* (1703) 2 Ld. Raym. 873.

[815] *Calvert v Archbishop of Canterbury* (1798) 2 Esp. 646. See also *Sikes v Marshal* (1799) 2 Esp. 705; *Cooke v Banks* (1826) 2 C. & P. 478.

[816] *Pritt v Fairclough* (1812) 3 Camp. 305, 307: see also *Hagedorn v Reid* (1813) 3 Camp. 377 and *Chamneys v Peck* (1816) 1 Stark. 404. Similarly, Thayer said that: '[t]he law of evidence is the creature of experience rather than logic': Thayer, *Preliminary Treatise*, 267.

[817] *Doe d Patteshall v Turford* (1832) 3 B. & Ad. 890, 896.

[818] Allen, *Law of Evidence*, 33.

the declaration and that it was made pursuant to that duty,[819] and that the declaration was made contemporaneously with the transaction it was intended to record.[820]

Conclusion

The widespread publication of numerous nisi prius rulings on principles of evidence from the end of the eighteenth century ought, in theory, to have led to a greater consistency in the application of those principles in civil trials of the early nineteenth century, particularly given the readiness of courts to accord significant weight to general circuit practice and nisi prius rulings on evidential issues, compared to the meagre regard paid to equivalent rulings on matters of substantive law.

However, Wigmore's claim that reported nisi prius rulings made a key contribution to establishing, clarifying and settling judicial practice during the first half of the nineteenth century, and thereby contributed to the development of the modern law of evidence in that period, must be qualified by the examples, referred to above, of such rulings which operated to obscure, rather than settle, the law.

It should not be thought from those examples that there were no areas of modern evidence law at this time that had been effectively settled by a series of nisi prius cases without the need of the full court to intervene. One such example given by Best[821] was the rule as to the proof of a person's handwriting by sight, which he said was 'clear and settled' on the authority of a number of nisi prius decisions: any person who had ever seen the supposed writer of a document write, so as to have acquired a standard in their own mind of the general character of the handwriting of that party, was a competent witness to say whether they believed the handwriting of the disputed document to be genuine or not.

In practice, however, whilst nisi prius reports allowed advocates to be armed with authority which may have been sufficient to win the day at trial,[822] it is doubtful whether they played a substantial role in advancing the principled development of evidence law. Perhaps a more accurate summary of the true legacy of nisi prius rulings on the law of evidence, reported or otherwise, comes from Thayer - described as 'our leading historian on evidence'[823] - in the introduction to his *Preliminary Treatise*:[824]

> From the diversity and multitude of the casual rulings by the judges, —rulings often hastily made, ill-considered, and wrong, —from the endeavor to follow these as precedents and to generalize and theorize upon them, from the forgetting by some courts, in making this attempt,

[819] *Chambers v Bernasconi* (1834) 1 Cr. M. & R. 347; *Poore v Ambler* (1843) 1 L.T. (o.s.) 253; *Bright v Legerton (No.1)* (1860) 29 Beav. 60; *Smith v Blakey* (1866-67) L.R. 2 Q.B. 326; *Massey v Allen* (1879) 13 Ch.D. 558.

[820] *Doe d Kinglake v Beviss* (1849) 7 C.B. 456; *The Henry Coxon* (1878) 3 P.D. 156.

[821] Best, *Treatise*, 257-258.

[822] Thus, advocates were encouraged to study 'the practice of nisi prius' as 'Many a victory has been won solely by the superior diligence of an Advocate in thus possessing himself of the most recent decisions on cases of this class': Cox, *The Advocate*, 371.

[823] Twining, 'Rationalist Tradition', 242.

[824] Thayer, *Preliminary Treatise*, 4. As to the influence of the early nisi prius reports, Thayer went no further than to suggest that they promoted the careful consideration of questions of evidence by the courts in banc: James B. Thayer, 'Bedingfield's Case – Declarations as a Part of the Res Gesta (Part II)', 15 *American Law Review* (1881), 1 at 9-10.

of the accidental and empirical nature of much in these determinations, and the remembering of this fact by others, there has resulted plenty of confusion. The pressure under which a ruling must be made is often unfavorable to clear thinking, and the law of evidence, largely shaped at nisi prius, took on a general aspect which was vague, confused, and unintelligible.

This was the context for Bentham's attack on judge-made rules of evidence, in *Rationale of Judicial Evidence*, a five-volume work written between 1802 and 1812 but not published until 1827.[825] Bentham attributed the mass of artificial rules and devices to the self-serving interests of the legal profession and the judiciary, who he called "Judge and Co", motivated principally by the generation of fees rather than the pursuit of justice.[826] Whilst Bentham's attack on the judges was largely political,[827] with no distinction drawn between the types of court in which those rules were made,[828] it is perhaps no coincidence that the lack of deep and consistent thinking about the law of evidence which fuelled Bentham's criticisms occurred in a legal system where the vast majority of the reported decisions on evidence were being made "on the hoof" at trial, rather than on mature consideration at Westminster Hall.

Effect of reported nisi prius rulings on evidence law treatises

In the part of his survey set out above, Wigmore adverts to the role of early nineteenth-century legal treatises in the development of modern evidence law. He cites no evidence for this, but there is suggestion from the caselaw that these treatises did influence the development of evidence law at that time. Whilst, in general, treatises and analytical jurists did not have a significant role to pay in the systemisation of the law until after 1850,[829] treatise writers on evidence law were referred to by judges during the earlier half of the century,[830] and their regular citation to the court by counsel provides further evidence that these treatises can be regarded as having influenced the development of evidence law during this period.[831]

Although Wigmore does not discuss the influence that nisi prius reports had on those treatises, there is undoubtedly more than merely a chronological connection between them: it is surely no coincidence that three of the authors of evidence law treatises at this time were also nisi prius reporters.[832] It is therefore worthwhile considering what influence the nisi prius reports had on the treatise writers of the period, which in turn requires an understanding of the relatively limited aspirations of those writers.

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[825] Bentham, *Rationale*.

[826] For example, ibid., vol.4, Ch.III.

[827] Twining describes it as Marxist: William Twining, *Theories of Evidence: Bentham and Wigmore*, London, 1985, 75.

[828] Other than to decry the costs involved in cases passing (or "bandying") between Westminster Hall and the nisi prius courts: Bentham, *Rationale*, vol.4, Ch.VIII.

[829] Michael Lobban, *The Common Law and English Jurisprudence 1760-1850*, Oxford, 1991, 258.

[830] For example, *Nelson v Whittall* (1817) 1 B. & Ad. 19, 21 per Bayley J (Phillipps); *Batthews v Galindo* (1828) 4 Bing. N.C. 610, 614 per Best CJ (Phillipps); *Chapple v Durston* (1830) 1 Cr. & J. 1, 10 per Vaughan B (Starkie); *Bright v Walker* (1834) 1 Cr. M. & R. 211, 217 per Parke B (Starkie); *Doe d Mudd v Suckermore* (1836) 5 A. & E. 703, 722 per Williams J (Starkie and Phillipps); *Howard v Newton* (1843) 2 Moo. & Rob. 509, 510 per Cresswell J (Starkie).

[831] Allen, *Law of Evidence,* 15.

[832] Peake, *Compendium*; Espinasse, *Settling of Evidence*; Starkie, *Practical Treatise*.

Before 1800, the most important work was Geoffrey Gilbert's *The Law of Evidence*, which sought to establish a single unifying theory of evidence law based on Lockean rules of probability, which led him to propound what became known as the "best evidence rule":

> The first therefore, and most signal Rule, in Relation to Evidence, is this, That a Man must have the utmost Evidence, the nature of the Fact is capable of; For the Design of the Law is to come to rigid Demonstration in Matters of Right, and there can be no Demonstration of a Fact without the best Evidence that the Nature of the Thing is capable of …[833]

Gilbert proceeded to create a formal hierarchy of types of evidence based on the probability of it demonstrating the truth, identifying public records as the very best evidence.

The clarity and coherence of Gilbert's best evidence rule, together with the rigidity of his hierarchy of evidence, proved to be highly influential during the nineteenth century; but the rule bore little similarity to the state of evidence law as applied in the courts at the beginning of the century, which was described by Twining as hardly deserving to be called a "system", being 'the confused and confusing product of largely ad hoc and often arbitrary growth, developed very largely by lawyers and judges with little regard for principle or consistency.'[834] Thayer accordingly concluded that Gilbert did more harm than good, in his 'premature, ambitious, and inadequate' attempt to adapt Lockean philosophy to establish a body of rules of evidence, in the face of 'the rude beginnings and tentative, unconscious efforts of the courts' in that direction.[835]

As well as inhibiting the common law development of evidence law, Thayer was of the view that Gilbert's thesis hindered any re-evaluation of the guiding principles by his successor treatise-writers during the first half of the nineteenth century. Thayer considered that most of them, including Peake, Phillipps, Starkie and Best, treated the "best evidence rule" as a fundamental principle, whose inflexibility was enhanced by being transformed from a positive requirement to adduce the most reliable kind of evidence, to a rigid rule of exclusion that often required complicated distinctions and exceptions to be found so as not to lose valuable evidence.[836] Accordingly, a feature of the evidence law treatises of this time was a lack of any attempt to create a unified system based on principle that was different from Gilbert's: the writers of these treatises were largely content to adopt his thesis and had little or no interest in influencing the development of the law.[837]

Instead, the aim of most of the writers of this period was to create reference works for practitioners. All the authors were practising lawyers rather than academics,[838] and their motives for writing were more practical than scholarly, there being no formal system of legal

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[833] Gilbert, *Evidence*, 4. Gilbert cited, as authority for this principle, 'Per Holt 6 Mod 248'. This is presumably a reference to *Stillingfleet v Parker* (1704) 6 Mod. 248, where, during a trial at Bar, the King's Bench refused to allow a lease to be proved from an entry in an 'antient book', ruling that a copy of the formal document recording the creation of the lease had to be produced as that 'is better evidence of a lease in fact than the book'.

[834] Twining, *Theories of Evidence*, 21. It is partly for this reason that Bentham launched a venomous attack on Gilbert's work in the early part of the nineteenth century: Twining, 'Rationalist Tradition', 216-217.

[835] Thayer, *Preliminary Treatise,* 506.

[836] Ibid., 488-489, 494-497.

[837] Twining, 'Rationalist Tradition', 222.

[838] Save for Thomas Starkie who, in addition to being a successful special pleader on the Northern Circuit, was appointed Downing Professor of the Laws of England at Cambridge University in 1823.

education to create a student market.[839] Thus, in the preface to his 1801 treatise, Thomas Peake referred to his intention to exclude 'every thing that which not practically useful';[840] Thomas Starkie named his 1824 work *A Practical Treatise on the Law of Evidence*; John Saunders said in the advertisement to his 1828 treatise that he had 'spared no labour to render the work of extensive practical utility'; [841] and John Pitt Taylor referred in the preface to his 1848 treatise to his wish to produce a work of 'practical utility to the English and Irish lawyer.'[842]

Even those writers who sought to undertake a more systematic analysis of the law, such as Samuel March Phillipps and William Maudsley Best, produced treatises that were principally aimed at being useful to the practitioner,[843] and which accordingly became the leading reference works for the profession, running to many editions. Both books also succumbed to the wish of the profession to have all the cases on points of evidence referred to in their works, and they grew considerably in size as a result. Phillipps' treatise ran to nine editions between 1814 and 1843, each adding new cases but deleting few old cases: the second edition (1815) was 520 pages long and cited around 1500 cases, while the ninth edition ran to 1176 pages and cited around 3500 cases. Similarly, the first edition of Best's treatise (1849) was 540 pages long and cited under 600 cases, whereas the sixth edition (1875) ran to 908 pages and cited around 1400 cases.

Reflecting the fact that most reported cases on points of evidence at the time came from the nisi prius courts, all of the treatises on evidence law published during the first half of the nineteenth century cited a substantial number of reported nisi prius rulings. By way of example, in the second edition of his treatise, Phillipps cited, in the chapter dealing with the incompetency of witnesses based on interest,[844] ninety-four reported nisi prius cases, compared with 126 reported Westminster Hall cases. Of the former, seventy came from the reports of Espinasse, Peake and Campbell, with the rest coming from earlier reporters, including Strange and Lord Raymond.

In conclusion, the nature of evidence law treatises of this period, discussed above, are informed by the use made by them of the reported nisi prius rulings on evidence. Rather than seeking to create a unified system of evidence law based on principle,[845] these treatises were largely collections of rulings on points of evidence designed for use by practitioners. The nisi prius reports furnished the authors with more rulings on evidence and therefore more material to add to those collections. The relatively modest contribution of these reports to the development of modern evidence law was therefore not to influence what the law should be, but to allow a fuller explanation of what the law was. However, the nature of many of the nisi prius rulings,

[839] Allen, *Law of Evidence*, 14.

[840] Peake, *Compendium*, iii.

[841] John Saunders, *Law of Pleading and Evidence in Civil Actions*, London, 1828, vol.1, vi.

[842] John Pitt Taylor, *A Treatise on the Law of Evidence as Administered in England and Ireland*, London, 1848, vol.1, viii.

[843] Twining, 'Rationalist Tradition', 227, 230.

[844] Phillipps, *Treatise*, 2nd ed., London, 1815, Ch.V.

[845] In any event regarded by modern scholars as a forlorn hope: Twining, 'Rationalist Tradition', 243.

made in haste and often without hearing full argument, meant that reference to those rulings in the treatises were notable more for increasing their bulk than adding to their coherence.[846]

CONCLUSION

In considering the effect of nisi prius reporting on the modern law of evidence, it is necessary to distinguish between the impact of reported nisi prius cases on the quotidian application of principles of evidence law, and the influence of the reports themselves on the longer-term development of the law.

When dealing with matters of evidence and practice, the Westminster Hall courts of the early nineteenth century undoubtedly took greater notice of nisi prius rulings on this subject than such rulings on substantive law, due to the desire of the courts to adhere to any settled practice on points of evidence, as they were dealt with when they arose for determination at trial. As more rulings on evidence came to be reported, so the superior courts were prepared to follow those rulings irrespective of whether they agreed with the underlying principle - if such a principle was even disclosed in the report. Similarly, the courts in banc were eager to follow general circuit practice on matters of evidence regardless of the merits of that practice. In this way, nisi prius rulings on evidence, even if not strictly binding on the superior courts as a matter of precedent, were highly influential as to how the law was applied in that field, thereby providing a further reason why judges of this time were interested in the accuracy of the nisi prius reports.

A likely principal reason for the judicial attitude to rulings on evidence was a recognition that it was the nisi prius courts, not the courts in banc, that were responsible in practice for setting and controlling the rules of evidence, reflecting the relatively few occasions on which the superior courts were called upon to consider such matters. However, as more and more points of evidence were reserved by trial judges to the full court during the nineteenth century, judges at Westminster Hall stopped taking nisi prius rulings and circuit practice on such points at face value, instead approaching them as they would matters of substantive law. By the middle of the century, reported nisi prius rulings on evidence were being treated no differently from any other rulings.

More generally, claims that the nisi prius reports were the dominant influence on the advancement of evidence law during the heyday of those reports appear to be wide of the mark. Even during the period that reported nisi prius cases on evidence were being accorded great respect by the courts in banc, the most likely answer to the question of whether those reports influenced the development of evidence law is: not much, if at all. The increase in the use of lawyers in criminal trials in the final two decades of the eighteenth century, leading to the greater use of objections to protect the jury from hearing unreliable evidence, is likely to have been the main driver in the development of more rules to regulate when and how such evidence could be adduced.

Whilst the reporting of nisi prius cases added to the quantity of rulings on evidence law available to the courts and the treatise-writers, the quality of those short and often unreasoned rulings, together with the relatively small number of cases being reported and the differences

[846] Cornish *et al*, *Oxford History vol.XI*, 606. This was a common criticism of legal treatises in general at this time: see, for example, Anon., ‘The Principles of the Law’, 1 *Law Students’ Magazine (o.s.)* (1845), 182, which described them as ‘destitute of principles, being for the most part made up of a collection of marginal notes.’

in judicial opinion on evidential points often identified by those reports, would not have assisted in creating a coherent set of principles in that field. Indeed, in a number of areas, inconsistencies in the reported nisi prius cases on points of evidence served to obscure rather than to elucidate the law, until the matter was considered by the court in banc. Likewise, whilst the increased number of reported decisions helped fill the treatises on evidence law, they did nothing to explain the underlying principles, and rendered such treatises little more than a digest of cases rather than a set of coherent and systematic propositions.

The matters discussed in this Chapter and in Chapter 2 strongly suggest that, far from the nisi prius reports shaping the modern law of evidence, it was the developments in that area of the law that caused the rise and fall of those reports: the increased significance of points of evidence in civil trials towards the end of the eighteenth century created a market for reports of rulings on those points; the consequently greater number of rulings on evidence formed the content for such reports; and the assumption of responsibility by the Westminster Hall courts in the mid-nineteenth century for determining points of evidence marked the end of any usefulness those rulings still had to practitioners, thereby hastening the demise of the reports. These are the real products of the relationship between the nisi prius reports and the modern law of evidence.

CHAPTER 9

THE MODERN APPROACH TO NISI PRIUS CASES

A CHANGE IN THE TREATMENT OF NISI PRIUS CASES

As explained in Chapter 7, nineteenth-century judges were citing nisi prius rulings on substantive legal issues for a number of reasons which, when combined with the numerous warnings delivered by judges of that time about the dangers of relying on such rulings as noted in Chapter 1, support the conclusion that little or no weight was being placed upon them as authorities in their own right. Has that attitude continued to prevail in the treatment of nisi prius cases by courts in the last hundred years?

A survey of the caselaw of the past century shows that, in many instances, nisi prius rulings were being cited for the same reasons as discussed in Chapter 7: a number of those cases cited one or more nisi prius rulings in addition to decisions of courts in banc or post-Judicature Acts superior courts;[847] other cases used such rulings as examples of principles which the judges had articulated independently of those cases;[848] and other cases referred to such rulings to illustrate principles which were so obvious as not to require any further consideration by the full court.[849] In addition, modern courts have cited nisi prius rulings as part of the history of how the common law has developed in respect of a particular issue.[850]

Notwithstanding these similarities, other cases show that modern judges have tended to accord more weight to nisi prius decisions as authorities than their nineteenth-century counterparts.

Most notably, modern judges have generally paid no attention to the practical constraints which caused earlier judges to regard nisi prius cases as having little worth as authorities in their own right. There are very few cases during the last hundred years which have even recognised the different status of nisi prius rulings; and in almost all of those cases, no reference is made to

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[847] *Robinson v Marsh* [1921] 2 KB 640; *Dean v Dean* [1923] P 172; *Harper v GN Haden & Sons Ltd* [1933] Ch 298; *Tims v John Lewis & Co* [1951] 2 KB 459; *Reardon Smith Line Ltd v Ministry of Agriculture, Fisheries and Food* [1963] AC 691; *Sen v Headley* [1991] Ch 425; *McLeod v Butterwick* [1998] 1 WLR 1603; *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2000] 2 WLR 15; *Buchanan v Jennings* [2005] 1 AC 115; *Marlwood Commercial Inc v Kozeny* [2006] EWHC 872 (Comm); *TW Logistics Ltd v Essex County Council* [2019] Ch 243.

[848] *Butterworth v Butterworth* [1920] P 126; *British and Foreign Marine Insurance Co v Gaunt* [1921] 2 AC 41; *Marsden v Edward Heyes Ltd* [1927] 2 KB 1; *Addis v Burrows* [1948] 1 KB 444; *Philips v Ward* [1956] 1 WLR 471; *A-G v PYA Quarries Ltd* [1957] 2 QB 169; *Regis Property Co Ltd v Dudley* [1959] AC 370; *Bank of Boston Connecticut v European Grain & Shipping Ltd* [1989] AC 1056; *Bloom (Kosher) & Sons Ltd v London Borough of Tower Hamlets* (1978) 35 P. & C.R. 423; *Oxfordshire County Council v Oxford City Council* [2006] 2 AC 674; *Britvic plc v Britvic Pensions Ltd* [2021] ICR 1648.

[849] *Pennington v Reliance Motor Works Ltd* [1923] 1 KB 127; *Phillips v Britannia Hygienic Laundry Co Ltd* [1923] 1 KB 539; *R (Bozkurt) v Thames Magistrates' Court* [2002] RTR 15; *Strive Shipping Corp v Hellenic Mutual War Risks Association (Bermuda) Ltd* [2003] 1 CLC 401; *R (o.a.o. Laing Homes Ltd) v Buckinghamshire CC* [2004] 1 P. & C.R. 36; *Murphy v Murphy* [2004] 1 FCR 1; *Angove's Pty Ltd v Bailey* [2016] 1 WLR 3179.

[850] *R v Wicks* (1936) 25 Cr. App. R. 168; *IRC v Hambrook* [1956] 2 QB 641; *Berry v British Transport Commission* [1962] 1 QB 306; *Probatina Shipping Co Ltd v Sun Insurance Office Ltd* [1974] QB 635; *Regina (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42; *R v Hamilton* [2008] QB 224; *Kimathi v Foreign and Commonwealth Office (No 2)* [2017] 1 WLR 1081; *Gwinnutt v George* [2019] Ch 52; *TW Logistics Ltd v Essex County Council* [2021] AC 1050.

the previously-articulated reasons as to why those rulings should be treated with caution. Further, of the handful of cases in which judges have expressly qualified the authority of nisi prius rulings, reliance on those rulings is nevertheless justified on the basis of the reputation of the judge or the careful consideration given to the ruling.[851]

There are only two examples of modern cases in which specific reference is made to the practical reasons for according less weight to a nisi prius ruling; and even in those cases, the references are somewhat elliptical. Thus, in *R v Brown*,[852] Lord Mustill said as follows:

> [the nisi prius ruling] accords with my own instinct, but I must recognise that a direction at nisi prius, even by a great judge, cannot be given the same weight as a judgment on appeal, consequent upon full argument and reflection.

And in *Greenhill v Federal Insurance Co Ltd*,[853] Lord Hanworth MR, when discussing the history of a nisi prius case, said that:

> It is important to observe that the report of the case is of the trial at nisi prius, at a time when Lord Ellenborough tried four cases which appear in the same book, all reported as having been tried on the same day.

The tendency to ignore the reasons inherent in the nisi prius process for treating those cases with suspicion as authorities is also borne out by the reasons given by modern judges when refusing to apply nisi prius cases reported by Isaac Espinasse: all the judges do so on the basis of his perceived poor quality as a reporter, with no reference to the lack of status of the cases he was reporting.[854]

Further, nisi prius cases have in the modern era achieved a greater influence as a matter of authority than had been previously permitted. Even where judges have noted that they are not formally bound by nisi prius decisions, they have been careful to state that they should nevertheless be accorded significant weight, in terms which were unlikely to have been used in the nineteenth century.[855] A particularly egregious example of this is in *Hongkong and Shanghai Banking Corp. v Kloeckner & Co. AG*,[856] where Hirst J equated a nisi prius ruling with a decision of Lord Erskine C which applied that ruling, stating that, although neither case was strictly binding on the court, they were both ‘of course highly persuasive’; no less striking are the references of the Court of Appeal and the Supreme Court in *Fearn v Board of Trustees*

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[851] For example, *Admiralty Commissioners v Owners of the SS Amerika* [1917] AC 38, 51 per Lord Sumner; *Everett v Griffiths (No.1)* [1920] 3 KB 163, 214 per Atkin LJ; *Brown v Dagenham UDC* [1929] 1 KB 737, 745 per McCardie J.

[852] [1994] 1 AC 212, 266.

[853] [1927] 1 KB 65, 70.

[854] *Wessex Dairies Ltd v Smith* [1935] 2 KB 80, 87 per Maugham LJ; *Warren v Keen* [1954] 1 QB 15, 21 per Denning LJ; *Hersom v Bernett* [1955] 1 QB 98, 100-101 per Roxburgh J; *Berger v Raymond Sun Ltd* [1984] 1 WLR 625, 629-630 per Warner J. See also *Rumping v DPP* [1964] AC 814, 844 for Viscount Ratcliffe’s criticism of the quality of nisi prius reporting in general.

[855] *Everett v Griffiths,* supra, 214 per Atkin LJ; *H.S. Wright and Webb v Annandale* (1930) 46 Times L.R. 239, 241 per Humphreys J; *Green v Berliner* [1936] 2 KB 477, 493-494 per Du Parcq J (applying Bray J in *Forster v Baker* [1910] 2 KB 636, 638); *Longthorn v British Transport Commission* [1959] 1 WLR 530, 532 per Diplock J.

[856] [1990] 2 QB 514, 521.

of the Tate Gallery[857] to an observation of Le Blanc J at nisi prius as being 'of the highest authority'.

Moreover, it appears that at least some judges of this period were of the view that the common law was developed primarily through trials at nisi prius, rather than by cases argued and decided in banc, as is illustrated by the following statement of du Parcq LJ in 1939:

> The common law of this country has been built up, not by the writings of logicians or learned jurists, but by the summings-up of judges of experience to juries consisting of plain men, not usually students of logic, not accustomed to subtle reasoning, but endowed, so far as my experience goes, as a general rule, with great common sense, and if an argument has to be put in terms which only a school-man could understand, then I am always very doubtful whether it can possibly be expressing the common law.[858]

It is of course the case that the requirement for juries to decide issues of fact has had an important effect on the common law: this is clear from, for example, the development of the standard of liability in negligence away from the simple "reasonable man" test, which was easy to explain to a jury, to the inclusion of a more complex set of factors[859] which followed the judges becoming responsible for deciding all aspects of the tort.[860] Another example was the use of pleadings to simplify the facts of a dispute and the issues at stake in order to prevent complex issues unduly burdening a jury.[861] But to assert that the bulk of the common law emanates from directions to juries is to overestimate the effect of such directions, and to underestimate the role of the courts in banc, on the development of the law.

THE REASONS FOR THE MODERN TREATMENT OF NISI PRIUS CASES

The change in the way nisi prius cases have been treated by modern courts was neither the result of any deliberate change of policy, nor was it accompanied by any contemporaneous or *ex post facto* judicial or academic rationalisation: like much of the common law,[862] it just happened over time. Can any specific reasons for this different treatment of nisi prius cases nevertheless be identified?

The antiquity of the decisions

One possible reason that nisi prius cases have been cited by modern courts as authorities, despite the status of nisi prius courts, is because the cases were decided a long time ago, and have therefore gained weight by reason of their age. There is some circumstantial evidence for this theory in the caselaw: thus, as discussed below, Russell LJ in *Williams v Roffey Bros &*

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[857] [2020] Ch 621 at [54] and [61] per curiam; [2024] AC 1 at [98] per Lord Leggatt JSC (with whom Lord Reed PSC and Lord Lloyd-Jones JSC agreed).

[858] *Smith v Harris* [1939] 3 All ER 960, 967.

[859] Such as the economic or social implications of setting the standard of care at a particular level: see, for example, *Hatton v Sutherland* [2002] ICR 613 at [14] per Hale LJ.

[860] Simon Whittaker, 'Precedent in English Law: A View from the Citadel', 14 *European Review of Private Law* (2006), 705 at 716-717.

[861] '… the use of pleading is to reduce the matters in litigation to a single point …': *Douglas v Patrick* (1790) 3 Term Rep. 683, 684 per Lord Kenyon CJ. See also Blackstone, *Commentaries*, vol.3, 311.

[862] 'More like a muddle than a system': A.W.B Simpson, *Legal Theory and Legal History: Essays on the Common Law*, London, 1987, 24.

Nicholls (Contractors) Ltd [863]refused an invitation not to follow two nisi prius cases because of the reverence accorded to them; similarly, a number of more recent decisions on village greens have relied on what Lord Walker of Gestingthorpe JSC called the 'venerable authority' of an old nisi prius decision, as establishing the need for coexistence between concurrent rights.[864]

The principal problem with this justification of the modern use of nisi prius decisions is the absence of any suggestion in the cases that the courts have been prepared to regard the antiquity of the decisions as outweighing the factors which led earlier courts to accord little weight to the authority of such decisions: indeed, as explained above, the courts have largely disregarded those factors. So whilst age might be a reason for following the case, this has been done despite the fact that it was decided at nisi prius, which considerably weakens the argument for age being the reason why modern courts have not followed the nineteenth-century approach to such cases.

Moreover, the mere age of a case has never been a reason to follow it as a matter of precedent, particularly if it has never been acted upon: indeed, age can weaken as well as strengthen the authority of a case,[865] such as where the social or other conditions in which it was decided have rendered the case anachronistic.[866] Thus, modern cases in which the age of a nisi prius decision has been referred to in support of its citation are most likely to be relying on that decision, either because of other reasons which earlier judges would have recognised (such as where the case has been regarded as good law for a long period of time), or because of the perceived status of the decision as an authority in its own right. Age alone therefore fails to explain why nisi prius cases have come to be accorded such respect.

Widening the scope of legal sources

Another possible justification for the modern treatment of nisi prius cases is that it is consistent with the more relaxed attitude to *stare decisis* which prevails today,[867] and a consequent willingness to recognise a wider range of legal sources beyond those which were traditionally regarded as having the status of authorities. In support of this argument may be cited: the modern application of decisions of the Privy Council in preference to decisions of the Court of Appeal or even the House of Lords; the abrogation of the principle that textbooks could only be cited as authorities if the author was dead; and the persuasive status of decisions *sub silentio*, where the court's decision is predicated upon having taken a position on a legal issue on which there was no argument.

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[863] [1991] 1 QB 1, 20.

[864] *R (Lewis) v Redcar and Cleveland Borough Council (No.2)* [2010] 2 AC 70 at [28] and [29], citing *Fitch v Fitch* (1797) 2 Esp. 543: see also *R (o.a.o. Laing Homes Ltd) v Buckinghamshire County Council* [2004] 1 P. & C.R. 36; *Oxfordshire County Council v Oxford City Council* [2006] 1 AC 674.

[865] For examples in the context of nisi prius cases, see *Garland v Jekyll* (1824) 2 Bing. 273, 302 per Best CJ; *Hersom v Bernett* [1955] 1 QB 98, 100 per Roxburgh J.

[866] 'When the nature of things changes, the rules of law must change too': *Davies v Powell* (1738) Willes 46, 51 per Willes CJ.

[867] Allen, *Law in the Making*, 356-358; P.S. Atiyah and Robert S. Summers, *Form and Substance in Anglo-American Law: A Comparative Study in Legal Reasoning, Legal Theory, and Legal Institutions*, Oxford, 1987, 119.

There are, however, a number of reasons as to why this argument is not likely to be the reason why nisi prius rulings have been so highly regarded by modern judges.

First, the consistent treatment of nisi prius cases as being of low standing in the nineteenth century, combined with the practical reasons for this, means that any subsequent deliberate departure should have been accompanied by a careful explanation by an authoritative legal source of the reasons for so doing. Yet there is no evidence that modern courts have deliberately and as a matter of principle chosen to treat nisi prius rulings as having greater weight than they had in earlier times.

Secondly, the examples of the widening of legal sources referred to above began much more recently than the period of time during which nisi prius cases have been regarded as of authority.[868] Thus, whilst Privy Council decisions have always had persuasive effect, it was not until the 1960s that an English court felt able to prefer a Privy Council decision over a Court of Appeal decision, and then only because it was considered a foregone conclusion that the view taken by the Privy Council would prevail in the House of Lords.[869] Moreover, more recent attempts to extend that principle[870] were quashed in 2016, when the Supreme Court clarified that English courts are not bound as a matter of precedent to follow a Privy Council decision and could not follow such a decision which was inconsistent with the decision of a court which had binding effect, unless the Privy Council had expressly stated in the decision that that was its effect.[871] As to the citation of textbooks by living authors as authority, this did not come to be generally permitted until the 1980s.[872] As to decisions *sub silentio*, the ancient principle that they were of no authority[873] was still being followed in the 1930s,[874] and the modern view that they have persuasive but not binding effect was not adopted until the 1950s at the earliest.[875]

Finally, in other contexts, modern courts are still prepared to take little or no notice of cases precisely because of the conditions in which they were decided. In *Clark v University of Lincolnshire and Humberside*,[876] Lord Woolf MR held that decisions in applications for permission to appeal should not be regarded as binding precedents, in terms which could apply equally to trials at nisi prius:

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[868] Cross and Harris, *Precedent*, 5.

[869] *Doughty v Turner Manufacturing Co Ltd* [1964] 1 QB 518.

[870] See, for example, *R v James* [2006] QB 588; *R v Moses* [2006] EWCA Crim 1721.

[871] *Willers v Joyce (No.2)* [2018] AC 843.

[872] Alexandra Braun, 'Burying the Living? The Citation of Legal Writings in English Courts', 58 *American Journal of Comparative Law* (2010), 27 at 49-51.

[873] *R v Warner* (1660) 1 Keb. 66, 67.

[874] *Orpen v Haymarket Capitol Ltd* [1931] All ER 360, 363 per Rowlatt J.

[875] In *Bryers v Canadian Pacific Steamships Ltd* [1957] 1 QB 134, 147 Singleton LJ said that 'It is no part of the duty of the court to look for a reason for not following a decision if the decision, on the face of it, covers the particular case', although Lord Radcliffe in *Society of Medical Officers of Health v Hope* [1960] AC 551, 566 said that 'to suppose that decisions can be persuasive on propositions that were never considered, for good reasons or bad, would be an altogether unconvincing way of arriving at a judgment.' The persuasive effect of *sub silentio* decisions was, however, firmly established by the late 1960s: *Esso Petroleum Company Ltd. v Harper's Garage (Stourport) Ltd* [1968] AC 269, 315 per Lord Hodson, 322 per Lord Pearce.

[876] [2000] 1 WLR 1988 at [40]-[43].

> If there is an oral hearing on an application for permission, the hearing is normally intended to last no more than 20 minutes. A judge may deal with seven or eight applications in the one day. In each he will give judgments of differing lengths.
>
> Until recently it would be unusual for any judgment on an application for permission to be reported. However, as a result of the development of specialist reports, even in relation to applications for permission, judgments are now commonly reported. However, the fact that they are reported does not alter the consideration which the judge can give to the terms in which his judgment is couched. Furthermore the judge is not usually referred to reports of other cases, or if he is referred to reports, he will have them drawn to his attention in a much more summary manner than would be the case on the hearing of an appeal.

In a Practice Direction issued in 2001,[877] the heads of the divisions of the High Court and Court of Appeal directed that certain categories of judgment could not be cited in any civil court unless it clearly indicated that it purported to establish a new principle or to extend the present law: those categories included applications attended by one party only, applications for permission to appeal and decisions on applications that only decide that the application is arguable. Those decisions are treated as not having any probative value, because the low threshold necessary for success and the summary process mean that they may well not have been as fully reasoned as other cases.

Thus, given that the law now explicitly recognises that the authoritative status of particular types of cases is diminished by reason of the practical circumstances in which they were heard and decided, it is not credible to put the modern treatment of nisi prius rulings - which share similar features to those cases - down to a deliberate relaxation of judicial attitudes to the authority of such rulings.

Out of sight, out of mind

The absence of any systemic or principled reason for the change in the treatment of nisi prius cases, and the problems with the other arguments identified above, means that another reason must found for the modern approach to such cases.

With the institution of a centralised system of law reporting in 1865, the publication of reports dedicated to nisi prius cases went the way of the nominate reports generally. After the fourth volume of Foster and Finlason's Nisi Prius reports was produced in 1867, the publication of nisi prius reports ceased, save for a one-off volume published by Cababe and Ellis in 1885.[878] Also in the mid-nineteenth century, the nisi prius system itself began its steady descent into desuetude.[879] The seeds of its demise were apparently sown by the trial judges themselves: contrary to the previous practice of ruling on all but the most difficult legal issues at nisi prius, the desire to get though court business caused trial judges from the mid-nineteenth century to reserve all but the plainest propositions of law for the court in banc, thereby reducing jury trials to a mere formality.[880] Other causes of the decline of nisi prius business included Lord

[877] *Practice Direction (Citation of Authorities)* [2001] 1 WLR 1001.

[878] Michael Cababe and Charles Gregson Ellis, *Reports of Actions Tried in the Queen's Bench Division of the High Court of Justice*, London, 1885.

[879] The use of the nisi prius clause in writs of jury summons ended with the abolition of those writs by s.104 of the Common Law Procedure Act 1852.

[880] See the final two sources cited in n.714 above.

Denman's Act of 1841 restricting the award of costs in cases of small value, and the introduction in 1846 of the nationwide system of county courts, which took smaller cases out of the scope of the superior courts.

An important development in the decline of the nisi prius system was the replacement of the superior courts with a single High Court by the Judicature Acts 1873 and 1875: by s.30 of the 1875 Act, a judge sitting at nisi prius was deemed to constitute a court of the High Court. Although that did not immediately end the practice of the divisions of the High Court sitting in banc,[881] it did quickly lead to the end of the requirement for nisi prius verdicts to be validated as judgments by the full court.[882] The connection between the nisi prius court and the court in banc was thereby severed, and the term "nisi prius" began to fall out of common legal usage. A legal commentator accordingly stated in 1883 that the term was now or should be obsolete;[883] and in the preface to their 1885 reports, Cababe and Ellis said that '"Nisi Prius", properly so called, no longer exists.'[884] When the process of collecting and recording statistics on civil justice was reorganised in 1894, the annual Home Office returns began to describe civil cases tried on circuit as circuit trials, and references to nisi prius cases all but disappeared from the returns, save for the odd vestigial reference in one or two returns at the end of the nineteenth century.[885]

Despite the dismantling of the legal basis underpinning the nisi prius system, judges occasionally referred to civil jury trials in this way into the 1950s;[886] and even in this century, a High Court judge has referred to a fellow judge trying a first instance civil case without a jury as sitting in nisi prius.[887] These anachronisms do not change the fact that, by the beginning of the twentieth century, the nisi prius system, as understood by judges of the previous century, was gone, together with the practical constraints which caused nisi prius judges to spend little time on legal issues at trial.[888]

The most plausible reason for the modern judicial attitude to nisi prius cases is that it is a by-product of the decline of the nisi prius system, which led to the onset of collective amnesia amongst the legal profession regarding the former low standing of nisi prius rulings: as the

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[881] Cornish *et al*, *Oxford History vol.XI*, 768.

[882] By s.17 of the Appellate Jurisdiction Act 1876, the trial judge was required finally to dispose of the case, subject to any appeal.

[883] Anon., 'Reports of Cases in the Queen's Bench Division', 2 *Gibson's Law Notes* (1883), 381: The last volume of the *Law Times Reports* which referred to nisi prius in the list of courts from which it reported was vol.65, covering September 1891 to February 1892.

[884] Cababe and Ellis, *Reports*, iii.

[885] The term remained in more general use: the entry for "nisi prius" in 19 *The Encyclopedia Britannica* (1911), vol.19, 710, described it as: 'a term used to denote generally all actions tried before judges of the king's bench division … As a rule actions only are tried at nisi prius, and a judge is said to sit at nisi prius when he sits, usually in the king's bench division, for the trial of actions.'

[886] For example, *Dolbey v Goodwin* [1955] 1 WLR 553, 555 per Lord Goddard CJ.

[887] Haddon-Cave J, in *R (o.a.o. Thompson) v Oxford City Council* [2013] 3 EGLR 75 at [56] and in *Shakil-ur-Rahman v Ary Network Ltd* [2015] EWHC 2917 (QB) at [19].

[888] For another attempt to equate modern civil jury trials with trials under the nisi prius system, see Philip Morgan, 'Doublethink and District Judges: High Court Precedent in the County Court', 32 *Legal Studies* (2012), 421 at 437-439. There is, with respect, no foundation for the author's suggestion (ibid., 439) that the nineteenth-century treatment of nisi prius cases should still apply to modern jury trials because the same limitations on legal argument and judicial consideration of such argument continue to exist.

distinction between those rulings and the decisions of courts in banc was forgotten, greater weight became attached to such rulings. This practice may well have been exacerbated by the fact that first instance decisions following the Judicature Acts, which were followed by courts of co-ordinate jurisdiction as a matter of comity, were still being referred to as "nisi prius" decisions: judges and lawyers therefore got used to following recent "nisi prius" decisions, and came to forget the distinction between such cases and rulings under the old nisi prius process.

This danger was identified as early as 1902, when the editor of *The Revised Reports*, Sir Frederick Pollock, wrote as follows:

> We rather think there has been some recrudescence in late years, in text-books at any rate, of the habit of citing Nisi Prius cases. Some such decisions have acquired authority by being approved in more considered judgments. Others may be used to illustrate familiar and elementary rules for which there is not much reported authority. The rest should be trusted only with great caution. But probably a large proportion of our modern students do not know the difference between a Judge at Nisi Prius and the Court in banc.[889]

The best explanation for the modern treatment of nisi prius cases is that Pollock's suspicions were borne out in practice: the law students' ignorance of the differences between the courts in Pollock's time persisted through subsequent generations of lawyers, causing nisi prius cases to be given a status as authorities which would have surprised the legal profession of the previous century.

Influence of treatise and textbook writers

By the end of the eighteenth century, legal books were becoming an important means by which the law was disseminated amongst the legal profession, and their importance increased with the proliferation of such works - in particular, legal treatises - through the nineteenth century.[890] Legal literature therefore played a significant role as a means by which practising lawyers learned about legal principles and as an aid to advising clients and making submissions to courts on the law.

However, the extent to which these works had a substantial influence on judicial thinking is not clear.[891] Unlike in civilian legal systems, writings about the law have always been subordinate to judicial decisions as a source of common law,[892] and whilst the golden age of the treatise may have added to development of legal doctrine in some areas,[893] the relative lack of references in judgments to academic writing for most of the twentieth century suggests that it had little relevance to the progression of the common law during that period.[894] On the other

[889] Pollock, *The Revised Reports*, vol.67, v.

[890] Treatises became the typical form of legal writing in mid nineteenth-century Britain: A.W.B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature', 48 *University of Chicago Law Review* (1981), 632 at 651-662.

[891] Swain, *Law of Contract,* 278.

[892] Cornish *et al*, *Oxford History vol.XI*, 59-61. For an analysis of the authority of legal literature in the 1830s, see Ram, *Science*, Ch.XII.

[893] David Ibbetson, 'Legal Printing and Legal Doctrine', 35 *Irish Jurist* (2000), 345 at 347-354.

[894] Braun, 'Burying the Living', 48. An analysis of cases reported between 1875 and 1940 disclosed a significant reduction in citations from textbooks during that period: Steve Hedley, 'Words, Words, Words: Making Sense of Legal Judgments, 1875-1940', in Stebbings, ed., *Law Reporting in Britain*, 169-170.

hand, the subliminal effect of academic writing on the judicial approach to the law cannot be wholly discounted, particularly in recent times as more of the profession learned their law at university; and modern courts have become more flexible in the citation of treatises and textbooks.[895] Accordingly, John Bell has felt able to assert that doctrinal legal writing has become a major influence on legal development.[896] The extent and nature of the treatment of nisi prius cases in legal treatises is therefore of at least some importance in understanding how the legal profession approaches those cases.

Treatises in general made numerous references to nisi prius cases: an edition of the *Law Times* issued during its first year of publication in September 1843 sought to justify its reporting of cases decided on circuit on the following ground:

> Perhaps it may be thought by some that reports of decisions at Nisi Prius and in Criminal Courts are of no practical value, for that they would not be received as authorities. But a glance at any text-book will convince the reader that this opinion is erroneous. He will find the Nisi Prius Reports and Crown Cases continually cited.[897]

Treatises of the late nineteenth century were no different in their use of nisi prius cases, often regarding them as little different from cases decided in banc. The review in Appendix 4 of five long-standing and well-regarded treatises published at the end of the nineteenth century, in legal areas that arose regularly at nisi prius, shows the citation of a large number of nisi prius decisions – between 125 and 380 cases – with relatively few references to those decisions having been made at nisi prius and virtually no qualifications made as to their authority. No reader of these works could have gained the impression from them that nisi prius cases were generally regarded as having little value as precedents: indeed, only readers well-versed in the nominate reporters would have been aware that a cited case had been tried at nisi prius.

Three reasons may be advanced for this trend.

The first concerns the underlying aim of legal treatises of the time. It is in the nature of a treatise – as opposed to a mere digest of cases – to seek to define the law in a series of logical and systematic stages, resulting in a set of principles into which the cases are to be fitted.[898] This approach accorded with the view of academics from the new law schools of the nineteenth century that legal topics should be subject to a theoretical framework which enabled them to claim the law as a scientific discipline, worthy of serious study.[899] The problem with such an approach is that it did not always accord with how the law developed through the cases, where legal principles arose haphazardly depending on the nature of the cause and the arguments of the parties, and where decisions would often be influenced by considerations other than the desire to create a logical and coherent legal framework. Striving to justify their scientific approach, and to distance themselves from the mere abridgments and digests of the eighteenth century, treatise and textbook writers were not necessarily going to let the law as laid down in

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[895] Simpson, 'Rise and Fall', 667.

[896] John Bell, 'Sources of Law', in Andrew Burrows, ed., *English Private Law*, 3rd ed., Oxford, 2013, para. 1.103.

[897] Anon., 'Circuit Reports', 1 *Law Times* (1843), 563.

[898] T.F.T. Plucknett, *Early English Legal Literature*, Cambridge, 1958, 19; see also Simpson, 'Rise and Fall', 666.

[899] Cornish *et al*, *Oxford History vol.XI*, 61. It has been said that writers on the law of this time were almost obsessed with scientific analysis: Raymond Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence*, Cambridge, 1988, 14; see also Morton J. Horwitz, 'Treatise Literature', 69 *Law Library Journal* (1976), 460.

the cases get in the way of what they thought the law should be, according to reason and principle. For example, writers of contract law treatises sought to formulate principles in areas such as mistake in the face of, rather than in accordance with, the existing case law, leading Warren Swain to conclude that 'veracity was sacrificed on the altar of doctrinal coherence'.[900] If legal writers were prepared to mould the cases to fit the principles, it would be no surprise if those writers were also prepared to use nisi prius cases to illustrate those principles, without qualification by reference to their lack of authority.

The second, more mundane, reason is the desire of the treatise-writer to ensure that no case connected to a legal principle is uncited, leaving it to the reader to assess the weight and relevance of each case for their particular purposes. Whilst a nisi prius case may have been of little value when seeking to bolster an argument to the High Court or to an appellate court, such a case may have been of more use when presenting a case in a county court or when advising a client in an area on which there is no other authority. However, whilst this reason would explain why nisi prius cases were cited, it does not excuse the failure of the writer to identify the cases as such.

This leads to the third reason, which serves to explain that failure: the legal profession during the nineteenth century would still have been well aware of the nisi prius system, and of the weakness of such decisions as authorities, and so there was less need for treatises to point out what would have been obvious to lawyers of the time.

However, not all treatises of the time relied so heavily on nisi prius cases. Unsurprisingly, given his comments on the use of such decisions in textbooks as cited above, Sir Frederick Pollock's treatises on contract and on tort[901] referred to very few of them – ten and thirteen respectively – and he was careful to warn his readers about the dangers of relying on nisi prius cases;[902] and virtually every nisi prius case cited in the text of Lord Blackburn's treatise on sales of goods[903] was clearly acknowledged as such.

Whilst the identification and qualification of nisi prius decisions in late nineteenth-century law books may have been less important, the end of the nisi prius system and the consequent ignorance of the difference between nisi prius cases and decisions of the court in banc as identified by Pollock made it more important for twentieth-century books to elucidate that difference. However, as is clear from the review of the editions of same set of treatises written in the middle of that century, set out in Appendix 4, they singularly failed to do that: despite the reference in them to a substantial number of nisi prius cases, precious few of those cases were identified as such, and those treatises made no attempt to qualify the authority of any of them.

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[900] Swain, *Law of Contract*, 207. Treatises on equity in this period similarly favoured rationalisation over accuracy: Fiona R. Burns, 'The Court of Chancery in the 19th Century: A Paradox of Decline and Expansion', 21 *University of Queensland Law Journal* (2001), 198 at 202-203.

[901] For example, Frederick Pollock, *Principles of Contract: A Treatise on the General Principles concerning the Validity of Agreements in the Law of England*, 7th ed., London, 1902; Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations arising from Civil Wrongs in the Common Law*, 6th ed., London, 1901.

[902] Thus, the following statements were made about such cases in Pollock's treatise on tort: 'a nisi prius case, but often cited with approval' (ibid., 84); '… it is evidently a rough and ready summing-up given without reference to the books' (ibid., 133); '… a Nisi Prius case with nothing particular to recommend it' (ibid., 142).

[903] Blackburn, *Treatise*.

Accordingly, it is likely that the tendency of modern judges to give undue weight to nisi prius decisions has been exacerbated, or at least supported, by the failure of, in particular, twentieth-century writers of treatises and textbooks to identify and qualify their reliance on such decisions used to justify or illustrate legal principles.

EFFECT ON THE DEVELOPMENT OF THE COMMON LAW

The practising lawyer's response to the modern treatment of nisi prius cases is likely to be: so what? Unless the recent approach has influenced the development of the common law, it can be regarded as merely a series of arcane solecisms, of interest only to historians of law reporting. The significance of the change in how nisi prius cases are treated as authorities therefore lies in whether that has influenced how the common law has developed. As will now be shown, there are a number of pertinent examples.

Attribution of legal principles to nisi prius cases

One, perhaps superficial, way in which the greater influence of nisi prius cases has affected the common law has been the willingness of modern judges to identify legal principles with such rulings, despite the fact that those principles were not settled until subsequently considered by courts of higher authority. In this way, judges have arrogated to such cases a law-making status which would have been largely unrecognised by nineteenth-century judges.[904]

"The rule in *Baker v Bolton*"

A good example of this is *Baker v Bolton*,[905] in which a plaintiff claimed damages for (amongst other things) the suffering caused to him by the injuries sustained by, and subsequent death of, his wife following a stagecoach accident. Lord Ellenborough CJ directed that the jury could only take into consideration the plaintiff's suffering on account of his wife's injuries up until the time of her death, as: 'In a civil Court, the death of a human being could not be complained of as an injury; and in this case the damages, as to the plaintiff's wife, must stop with the period of her existence.'

This ruling was controversial: it has been described as one of the most criticised decisions in legal history;[906] and even the reporter, John Campbell, queried its correctness by commenting at the foot of the report: 'Q. If the wife be killed on the spot, is this to be considered *damnum absque injuria*?'[907] The report of the case, too, is unsatisfactory: it is very short, does not record

[904] But not entirely unrecognised: see the references to 'the principle in *Baglehole v Walters*' in Chapter 7; and see the consistent citation of *Armory v Delamirie* (1721) 1 Stra. 505 as authority for the proposition that bare possession of moveable property without ownership is sufficient to enable the possessor to keep it against all but the rightful owner: that case was described as 'well known' by Pollock CB (*arguendo*) in *White v Mullett* (1861) 6 Ex. 713, 714.

[905] (1808) 1 Camp. 493.

[906] Stuart M. Speiser and Stuart A. Malawer, 'An American Tragedy: Damages for Mental Anguish of Bereaved Relatives in Wrongful Death Actions', 51 *Tulane Law Review* (1976), 1 at 5. As Allen observed: 'Never was an important principle of liability founded on such slender authority': Allen, *Law in the Making*, 328. See, to the same effect, T.A. Smedley, 'Wrongful Death – Bases of the Common Law Rules', 13 *Vanderbilt Law Review* (1960), 605 at 614-615.

[907] Nearly forty years later, in 1846, an Act was passed which enabled families of persons killed in accidents to claim compensation; and Campbell, by then a member of the House of Lords, was instrumental in the passage through Parliament of the Bill which resulted in what came to be known as Lord Campbell's Act.

the form of action, contains no explanation for the judge's ruling and refers to no other cases.[908] The authority of *Baker v Bolton* was accordingly doubted by Bramwell B in his dissenting judgment in *Osborn v Gillett*.[909]

However, following lengthy discussions as to the soundness of the principle in issue, Ellenborough's ruling was successively confirmed by the majority of the Exchequer in *Osborn v Gillett*,[910] by the Court of Appeal in *Clark v London General Omnibus Co*,[911] and by the House of Lords in *Admiralty Commissioners v Owners of the SS Amerika*.[912] By reason of their status, each of those cases have a far stronger claim to be regarded as establishing the common law rule that no damages claim lies for wrongful death;[913] yet modern cases eschew reference to those cases and instead refer to 'the rule in *Baker v Bolton*.'[914] By harking back to the nisi prius case as the source of the rule, in C.K. Allen's words: '… the law could thank nothing but a vicious antiquity for a rule which constituted a serious anomaly in our law of civil wrongs.'[915]

Before leaving this case, it should be noted that the current tendency of courts to treat nisi prius cases as on a par with courts of greater authority is shared by some modern academics. Thus, in his article on *Baker v Bolton*, Peter Handford seeks to defend the authority of that case by commenting as follows:

> Looking at *Baker v Bolton* with modern eyes, we can say that it resembles the sort of case that would today be decided by a judge of the Queen's Bench Division sitting at first instance, and in the absence of higher authority it is unquestioned that such cases can be important precedents.[916]

On the contrary, whilst a comparison between nisi prius cases and modern first instance cases can be made on a very simplistic level, the differences between them, as regards the conditions in which the cases were heard and the role played by legal analysis in their determination, invalidates any attempt to equate the two in terms of their weight as precedents.

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[908] For other criticisms of the report, see *Osborn v Gillett* (1872-73) L.R. 8 Ex. 88, 96 per Bramwell B.

[909] Ibid., 96. See also *Clark v London General Omnibus Co Ltd* [1906] 2 KB 648, 660-661 per Lord Alverstone CJ; *Jackson v Watson & Sons* [1909] 2 KB 193, 206 per Kennedy LJ.

[910] Supra, 92-93 per Pigott B, 100 per Kelly CB.

[911] Supra.

[912] Supra.

[913] Thus, in *The Moliere* [1925] P 27, 34, Roche J refers to the rule being established 'by a line of decisions from *Baker v Bolton* to *The Amerika*.'

[914] *F v Wirral Metropolitan Borough Council* [1991] Fam 69, 104 per Ralph Gibson LJ; see also *Cox v Ergo Versicherung AG* [2014] AC 1379 at [6] per Lord Sumption JSC; *Paul v Royal Wolverhampton NHS Trust* [2024] UKSC 1 at [2] per Lord Leggatt and Lady Rose.

[915] Allen, *Law in the Making*, 328-329.

[916] Peter Handford, 'Lord Campbell and the Fatal Accidents Act', 129 *Law Quarterly Review* (2013), 420 at 426. For examples of modern judges equating nisi prius cases with first instance decisions, see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* supra, 11 per Glidewell LJ; *Abbhi v Slade* [2019] Costs LR 2039 at [52] per Flaux LJ.

“The well-known principle of *Wilkinson v Coverdale*”

Wilkinson v Coverdale[917] was an action on the case, in which it was alleged that the defendant negligently failed properly to perform his promise to renew an insurance policy for the plaintiff’s premises, so that, when the premises burned down, the plaintiff had no remedy on the policy. The plaintiff admitted that the defendant’s promise was gratuitous, which led Lord Kenyon CJ to express a doubt as to whether the action would be maintained. The plaintiff’s counsel cited a manuscript note of a nisi prius case decided before Buller J[918] in which a similar action had been allowed to proceed, apparently on the principle that:

> … though there was no consideration for one party's undertaking to procure an insurance for another, yet where a party voluntarily undertook to do it, and proceeded to carry his undertaking into effect by getting a policy underwritten, but did it so negligently or unskilfully, that the party could derive no benefit from it, that in that case he should be liable to an action.[919]

As a result of this, Kenyon ‘suffered the cause to proceed.’

This case is accordingly of extremely limited weight as an authority: Kenyon did no more than allow the plaintiff’s case to be argued on the strength of an earlier unreported case; and because the plaintiff was subsequently nonsuited for failing to prove that the defendant made the alleged promise, there is nothing in the report to indicate that Kenyon agreed with either Buller’s ruling or the principle on which that ruling was said to have rested.

Indeed, this case added nothing to the principle laid down in the Common Pleas four years earlier by Lord Loughborough CJ, that:

> ... if a man gratuitously undertakes to do a thing to the best of his skill, where his situation or profession is such as to imply skill, an omission of that skill is imputable to him as gross negligence.[920]

For the next 150 years, *Wilkinson v Coverdale* was not mentioned by name, still less followed or applied, in any reported English case.[921] However, the case was regularly referred to in a number of treatises, and in the influential *Smith’s Leading Cases*.[922] In the preface to vol.53 of *The Revised Reports*,[923] which consisted of cases which had been originally omitted from the reports but were later considered worthy of being included, Frederick Pollock justified the

[917] (1793) 1 Esp. 75.

[918] *Wallace* v *Tellfair* (1768).

[919] Supra., 76. It is not entirely clear whether Buller’s ruling rested on such a general basis: two years after *Wilkinson v Coverdale*, the same judge (sitting in banc) recalled the ruling, but did not repeat it as recorded in the manuscript note: he instead limited the scope of an actionable duty to procure insurance to prescribed sets of facts: *Smith v Lascelles* (1788) 2 Term Rep. 187, 188-190.

[920] *Shiells v Blackburne* (1789) 1 H. Bl. 158, 162.

[921] Coleridge J refers to the case in passing, without naming it, in *Blackmore v The Bristol and Exeter Railway Co* (1858) 27 L.J Rep. (n.s.) Q.B. 167, 172.

[922] In the first edition of J.W. Smith, *A Selection of Leading Cases on Various Branches of the Law*, London, 1837, vol.1, 96n, it is mentioned in a footnote as one of a number of cases affirming the proposition in *Coggs v Bernard* (1703) 2 Ld. Raym. 909 that a bailee can be liable for negligence despite the absence of consideration. That reference continued up to the final edition: 13th ed., London, 1929, vol.1. 191.

[923] Pollock, *The Revised Reports*, vol.53, v-vi.

inclusion of *Wilkinson v Coverdale* - although he continued to think the case unimportant - on the basis that 'it has acquired a factitious importance in textbooks.'

Wilkinson v Coverdale was judicially resurrected in two judgments of Du Parcq LJ delivered in 1939. In *Davis v Foots*,[924] Du Parcq LJ described the case as having 'long been regarded as quite accurately stating the law'; and in *Kent v East Suffolk Rivers Catchment Board*,[925] the judge, in a dissenting judgment, referred to 'the well-known principle of *Wilkinson v Coverdale*.' In neither instance did the judge seek to justify those statements or consider the status of the case.

Since then, *Wilkinson v Coverdale* has been treated at the very highest level as one of the founding authorities for the principle that purely economic loss can be recovered for negligent acts or omissions. The ruling was cited by several members of House of Lords in the seminal case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[926] and was described as a 'great case' by Lord Upjohn in *Rondel v Worsley*.[927] Thus, a case formerly regarded as of no authority, described in 1902 as 'a Nisi Prius case, meagrely reported by a notoriously inaccurate reporter',[928] is now regarded as a landmark in the development of the common law of negligence.

Applying nisi prius cases as authorities in their own right

The next two examples are of modern judges treating nisi prius cases as having settled a legal principle without the need either to seek endorsement from courts of higher authority, or to consider further the soundness of that principle.

The scope of the power to arrest for wilful obstruction

Wershof v Metropolitan Police Commissioner[929] involved a claim for assault and false imprisonment following the arrest of the plaintiff by a police officer for wilfully obstructing him in the course of his duty, in circumstances which did not involve either an actual or likely breach of the peace or the prevention of the lawful detention of another person.

May J was required to consider the scope of the common law power to arrest for wilful obstruction, on which there were conflicting views in the leading books on police law: in one,[930] there was an unqualified statement that at common law a police constable may arrest without warrant a person who obstructs him in the discharge of his duty; in the other,[931] the constable's

[924] [1940] 1 KB 116, 123-124.

[925] [1940] 1 KB 319, 340.

[926] [1964] AC 465, 495 per Lord Morris of Borth-y-Gest, 510 per Lord Hodson, 526-527 and 530 per Lord Devlin, 538 per Lord Pearce. See also in *N v Poole Borough Council* [2020] AC 780 at [67] per Lord Reed DPSC.

[927] [1969] 1 AC 191, 279. Glanville Williams also called it an 'important case': Williams, *Learning The Law*, 36.

[928] Pollock, *The Revised Reports*, vol.53, vi. See also Robert Stevens, '*Hedley Byrne v Heller*: Judicial Creativity and Doctrinal Possibility', 27 *Modern Law Review* (1964), 121 at 136n; Tony Weir, 'Contracts in Rome and England', 66 *Tulane Law Review* (1992), 1615 at 1629.

[929] (1979) 68 Cr. App. R. 82.

[930] W.J. Williams, *Moriarty's Police Law*, 23rd ed., London, 1976, 18.

[931] John Richman and A.T. Draycott, eds., *Stone's Justices Manual*, 110th ed., London, 1978, vol.2, 3165.

power to arrest without a warrant a person obstructing him in the execution of his duty was limited to those cases where '… the obstruction is such as to cause or to be likely to cause a breach of the peace, or is an obstruction calculated to prevent the lawful arrest or detention of another person.'

Although the judge considered that the wide statement of the law might be thought to be reasonable,[932] he was more influenced by the authorities cited in the latter book for the limited proposition: of those authorities, the two in which the issue was determined by the court were both nisi prius decisions.[933] The judge was therefore prepared to accept that the restricted view was correct on the authority of nisi prius rulings without considering the issue as a matter of principle, notwithstanding his initial opinion.

Payments for additions to building contracts

In *Pepper v Burland*,[934] Lord Kenyon CJ directed the jury that, where a builder agreed to erect a building for a particular sum of money and additions were made, the builder was bound by the contract insofar as it can still be identified from the building and can claim on a quantum meruit basis for the excess only. This case caused Cohen LJ in *Sir Lindsay Parkinson & Co Ltd v Commissioners of His Majesty's Works and Public Buildings*[935] to resile from his initial view that the builder could in such a case claim on a quantum merit basis for the entirety of the building. However, in so doing, the judge disregarded a statement in a House of Lords case which appeared to support that initial view.[936]

Nisi prius cases causing the common law to take a wrong turn

Most significantly, there are examples of modern judges treating as settled law controversial principles supported only by nisi prius rulings, to the detriment of the development of the common law.

The tort of harbouring

In *Winchester v Fleming*,[937] the plaintiff, who had only recently married the ninety year-old Marquess of Winchester, brought proceedings alleging that the defendant, a wealthy widow (and the mother of the author Ian Fleming), had enticed away the plaintiff's husband. Those proceedings were settled on terms which included an undertaking by the parties not to

[932] Supra, 91-92.

[933] *White v Edmunds* (1791) Peake 123; *Levy v Edwards* (1823) 1 C. & P. 40. In the third case mentioned by the Judge, *Gelberg v Miller* [1961] 1 WLR 153, the Divisional Court was not required to rule on the issue, although the Attorney-General, appearing as an *amicus curiae*, did not feel able to support the wide statement of the law.

[934] (1791) Peake 139.

[935] [1949] 2 KB 632, 660.

[936] *Thorn v The Mayor and Commonalty of London* (1876) 1 App. Cas. 120, 127-128 per Lord Cairns. It is not clear whether that case was cited to the Court of Appeal in the *Sir Lindsay Parkinson* case. It is suggested in a leading textbook on building contracts that Lord Cairns's statement must have been limited to the additional work only: Robert Clay, Nicholas Dennys QC, eds., *Hudson's Building and Engineering Contracts*, 14th ed., London, 2020, para. 5-031. However, there is no such qualification in his opinion, and the issue was left open by Coulson J in *Severfield (UK) Ltd v Duro Felguera UK Ltd* (2017) 175 Con. L.R. 266 at [52].

[937] [1958] 1 QB 259. Devlin J's judgment was reversed on appeal on a different point, without reference to the tort issue: [1958] 3 All ER 51n.

'interfere' with each other thereafter. Despite this, the plaintiff's husband continued to live at a cottage on the defendant's estate in Nassau and to take meals at her house. The plaintiff brought fresh proceedings, claiming breach of the undertaking on the basis that the defendant had "interfered" with her by harbouring her husband against her will. In order to decide whether there had been interference within the terms of the compromise, Devlin J had to determine whether, apart from the compromise, it would have been an actionable tort for the defendant to harbour the plaintiff's husband without any enticement.

In holding that the common law did recognise such a tort, Devlin relied solely upon *Philp v Squire*,[938] in which Lord Kenyon CJ ruled at nisi prius that no action lay for harbouring the plaintiff's wife where she said that she had been ill-treated by the plaintiff and the defendant had taken her in on compassionate grounds. Devlin said that the tort of harbouring had therefore been clearly recognised by Kenyon.[939] The judge went on to consider a much more recent decision of Denning LJ, sitting as an additional judge of the Queen's Bench Division, in which it was held that there was no claim by a husband against his mother-in-law for enticing and harbouring his wife.[940] In the course of his decision, Denning appeared to suggest that an action for enticement and harbouring could be brought only against persons in the position of a lover or a mistress, which, according to Devlin, meant that the tort of harbouring simpliciter, which involved no element of seduction, could not exist at all, which was at odds with *Philp v Squire*: Devlin did not, however, treat that case - which had not been cited to Denning - as having been disapproved.

Instead of holding that an action for harbouring did not lie, having only been recognised by an obiter dictum at nisi prius which had never been endorsed by a court in banc, Devlin was left to deal with a tort that was wholly out of kilter with modern thinking and methods of effecting matrimonial reconciliation. Despite this, Devlin said that '[i]t would not … be proper for me to lay down new law and reject the old unless the facts of this case ineluctably required me to do so'[941] and he was able to distinguish the case before him on the basis that the action lay only at the suit of the husband and not the wife. The Judge rationalised the entrenchment of an already iniquitous tort on the basis that 'where the choice lies between leaving a decaying form of action in the shape in which it was originally constructed and adding on up-to-date extensions, the court may refuse to embark on the task of modernization.'[942] Had Devlin taken a more robust view of the status of nisi prius rulings, he could have applied the *coup de grâce* to the tort, leaving the common law in a better shape than he had found it.[943] Instead the tort of

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[938] (1791) Peake 114. Devlin also referred to there being other authority cited in T. Ellis Lewis, ed., *Winfield on Tort*, 6th ed., London, 1954, 272, without naming the relevant cases. The cases cited in *Winfield* were, in addition to *Philip v Squire*, *Berthon v Cartwight* (1796) 2 Esp. 480 and *Winsmore v Greenback* (1745) Willes 577. But neither case provides any further authority for the existence of the tort: in *Berthon*, Kenyon (at nisi prius) simply repeated his ruling in *Philip v Squire*; and *Winsmore* was a case of enticement. Based on these cases, the editor of *Winfield on Tort* could say no more than 'there is ground for thinking' that the mere harbouring of a wife is tortious.

[939] Supra, 264.

[940] *Gottlieb v Gleiser (Note)* [1958] 1 QB 267.

[941] Supra, 265.

[942] Ibid., 265-266.

[943] In *Pritchard v Pritchard* [1967] P 195, 209 Diplock LJ (obiter) referred to the continued existence of the tort of harbouring because of 'well-established precedent'. It is to be hoped that, had this issue been relevant to the case before him, he would have had cause to reconsider that comment.

harbouring, actionable only by a husband, continued to exist until its statutory abolition in 1970.[944]

The legality of lobbying contracts

Norman v Cole[945] is a good example of the kind of peremptory and precipitate ruling made by an impatient judge during the hurly-burly of nisi prius business, which was based on instinct rather than authority and which may well not have survived in its original form had it been subject to a more careful and considered analysis by a court in banc. Having been doubted as an authority in the nineteenth century, its unquestioning resurrection by twentieth-century courts has resulted in a number of exceptions having to be grafted onto the principle in that case to make it accord with modern commercial practice, thereby complicating the law in a way which would not have been necessary had the lack of authority of the founding case been properly appreciated.

The case concerned the payment of £30 by the plaintiff to the defendant to use his influence with 'persons of interest' to procure a pardon for a condemned prisoner. It is not clear from the report whether the defendant was unsuccessful, or else did not contribute enough to the securing of the pardon, but the plaintiff sought to recover the sum by way of an action of assumpsit. At the opening of the case, the trial judge (Lord Eldon CJ) expressed a doubt as to whether the action was maintainable and said that he would hold the plaintiff to very strict proof of the means used to procure the pardon. After counsel sought to justify the claim, the judge nonsuited the plaintiff, stating as follows:

> I cannot suffer this cause to proceed. I am of opinion, this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable.[946]

This ruling is, on its face, startlingly wide: it suggests that no-one retained to assist in seeking an exercise of the royal prerogative of mercy could be remunerated for their efforts; and by pronouncing against an agreement for consideration to influence the policy of a public body, the ruling even casts doubt on the legality of the wider lobbying industry.

Moreover, the case is contrary to earlier authority, not cited to or mentioned by Eldon. In *Lampleigh v Braithwait*,[947] the plaintiff, having obtained a pardon for the defendant and thereafter been promised £100 by the defendant for his efforts, bought an action of assumpsit in the King's Bench for recovery of the sum. The plaintiff succeeded on the basis that, although the promise was subsequent to the act, there was sufficient consideration where the act was done at the request of the defendant. Further, in *Walker v Chapman*,[948] the plaintiff agreed to pay money to the defendant to procure a Crown sinecure, and successfully recovered the sum

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[944] Law Reform (Miscellaneous) Provisions Act 1970, s.5(c): this provision only excludes claims for the harbouring of a wife or child and does not expressly extend to claims for the harbouring of a husband.

[945] (1800) 3 Esp. 253.

[946] Ibid., 253-254.

[947] (1615) Hob. 105.

[948] Cited by Buller J in *Lowry v Bourdieu* (1780) 2 Doug. K.B. 468, 471.

in an action in the King's Bench when the position was not secured. In neither case was the enforceability of the contract affected by its purpose.

Norman v Cole was accordingly stated by a prominent American law reporter in 1840 to be a nisi prius decision of no authority[949] and was treated as doubtful by Willes J in 1870.[950]

Thereafter, the case languished, uncited, for nearly fifty years, until it was resurrected by Shearman J in *Montefiore v Menday Motor Components Co Ltd*.[951] A claim for commission following the procurement by the plaintiff of a loan from the Treasury to the defendant company was held to be illegal, on the precedent of *Norman v Cole*, which the judge cited for the proposition that 'it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government.'[952] The judge was not referred to the earlier caselaw which undermined the authority of that decision, and there was no qualification to its value by reason of its status as a nisi prius ruling.

Montifiore was doubtless influenced by the wartime conditions in which the contract in question was agreed; and in more recent times, judges have had to dilute the rigour of the principle in *Norman v Cole* as applied in *Montifiore*, leaving the common law in a somewhat unsatisfactory state. Thus, in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*,[953] Phillips J derived from *Norman v Cole* and *Montifiore* the principle that it was undesirable for intermediaries to charge for using influence to obtain benefits from public bodies, which enabled the judge to hold that there were certain circumstances in which the employment of intermediaries to lobby for benefits was a recognised and respectable practice.[954] The basis of the illegality in the *Lemenda* case has since been explained as the fact that the public body in question was unaware that the person using their influence was charging for doing so.[955]

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[949] Theron Metcalf, 'Law of Contracts', 22 *American Jurist and Law Magazine* (1840), 249 at 258. Metcalf was at the time the appointed Reporter of the Massachusetts Supreme Court, and later became an Associate Justice of that court: James Grant Wilson and John Fiske, eds., *Appletons' Cyclopedia of American Biography*, New York, 1888, vol.4, 311.

[950] *Elliott v Richardson* (1870) 39 L.J. Rep. (n.s.) C.P. 340, 343 (*arguendo*). This doubt was not referred to in the report of the case at L.R. 5 C.P. 744. See also the gently-expressed doubts in Starkie, *Practical Treatise*, vol.2, 94n, and Joseph Chitty, *A Practical Treatise on the Law of Contracts, Not under Seal*, 2nd ed., London, 1834, 525. In delivering his opinion to the House of Lords in *Egerton v Brownlow* (1853) 4 H.L. Cas. 1, Pollock CB (at 148-149) referred with approval to the dictum of Eldon in *Norman v Cole* that 'where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously and not for money', and said that that case was indistinguishable from the instant case, where it was argued that a disposition in a will trust which was dependent on a peerage being obtained was illegal. None of the members of the House of Lords referred to *Norman v Cole* in their opinions, and it was said by two of them that the issue had to be decided according to the circumstances of each case, and not by reference to other decisions: ibid., 161 and 163 per Lord Lyndhurst and 200-201 per Lord Truro.

[951] [1918] 2 KB 241.

[952] Ibid., 245.

[953] [1988] QB 448.

[954] Ibid., 458.

[955] *Marlwood Commercial Inc v Kozeny* [2006] EWHC 872 (Comm) at [182] per Jonathan Hirst QC (sitting as a Deputy High Court Judge).

The unsatisfactory state of the law is illustrated by *Tekron Resources v Guinea Investment Co*,[956] in which Jack J held that an agreement pursuant to which the claimant acted as an intermediary in negotiations with a foreign government was lawful. The judge distinguished both *Norman v Cole* and *Montifiore* on the basis that they involved the simple sale of influence, to be used improperly to obtain a pardon or a loan, rather than the provision of any 'proper services', such as the introduction and negotiating services provided by the claimant.[957] Not only does this involve reading into *Norman v Cole* an improper motive on the part of the plaintiff (other than the pecuniary reward) which is not apparent on the face of the report, but it also raises fine distinctions which may be difficult to apply in practice.

If, instead, the modern courts had not applied *Norman v Cole* as an authority but had recognised the basic legality of lobbying agreements as permitted by earlier cases, there would have been no need to create artificial qualifications in order to justify accepted commercial practices in the face of the extreme position taken by Lord Eldon. In this way, *Norman v Cole* has had a significant and unhelpful influence on the development of the common law.

Performance of existing duties

Any analysis of the modern treatment of nisi prius cases must include perhaps the best-known of all, *Stilk v Myrick*,[958] a case whose influence is out of all proportion to the cursory - and inconsistently reported - ruling, delivered immediately following what was likely to have been a very short trial, during which the sum total of cited authorities amounted to a single nisi prius case. Despite these unpromising beginnings, the case is now regarded as playing a key role in the development of the law, such that it has recently been judicially described as 'much loved'.[959]

The case involved the desertion of two of a ship's crew during the voyage for which they had contracted to serve, and a promise by the defendant master to divide their wages amongst the remainder if (as turned out to be the case) replacements for the deserters could not be found. The defendant reneged on his promise, and one of the crew brought an action for his promised share. The defendant's counsel argued that the agreement was contrary to public policy, in reliance on *Harris v Watson*,[960] a decision of Lord Kenyon CJ at nisi prius, in which a claim by a sailor for extra wages promised by a captain in consideration of the sailor doing more than the ordinary share of duty in navigating the ship was dismissed on policy grounds, as otherwise sailors may in times of danger demand extravagant sums for doing their already-agreed work. The plaintiff's counsel sought to distinguish that case, on the basis that the demand had been made at sea, whereas the demand in this case had been made on shore, where there was no pressing emergency.

[956] [2004] 2 Lloyd's Rep. 26.

[957] Ibid., at [95] and [101].

[958] (1809) 2 Camp. 317; 6 Esp. 129, sub nom. *Stilk v Meyrick*.

[959] *Bank of Beirut (UK) Ltd v Nabil* [2021] EWHC 3777 (Comm) at [22] per Sean O'Sullivan QC (sitting as a Deputy High Court Judge).

[960] (1791) Peake 102.

Lord Ellenborough CJ dismissed the plaintiff's claim, but the reporters of the case differed as to the grounds for the decision.[961] According to Espinasse's report, the judge based his decision on the public policy ground recognised in *Harris v Watson*; however, according to Campbell's report, the judge said that public policy was not the true principle on which that decision was based, and that the agreement was void because the crew members had provided no consideration by doing what they were already bound by their contracts to do.

For the best part of half a century, there was little reference to *Stilk v Myrick*.[962] However, in *Harris v Carter*,[963] a case involving very similar facts, the Queen's Bench in 1854 endorsed the principle that there was no consideration for the captain's promise of the additional wages to the sailor, as the promise related to the same voyage for which the sailor had originally signed up.[964] Accordingly, the Court of Appeal in 1914 applied *Harris v Carter* when holding that a sailor was not entitled to be paid promised overtime for work additional to that set out in his original contract.[965] However, modern judges have cited *Stilk v Myrick* rather than *Harris v Carter* as the leading case on the principle that a promise to fulfil an existing contractual duty is not good consideration,[966] preferring that explanation of *Stilk v Myrick* to the public policy basis identified in Espinasse's report of the case.[967]

The principle identified in Campbell's report of *Stilk v Myrick* has been the subject of much academic criticism.[968] Whilst it can be justified on the basis that the promisee suffered no legal detriment in performing what was already required from him and the promisor obtained no legal benefit in receiving the performance already due to him, the principle ignores the practical detriment which the promisee may suffer, such as where the wages which the sailor might earn elsewhere could exceed the sum due to him under the original contract plus the damages he might be required to pay for breaching the contract. Conversely, the promisor may in fact benefit from the performance which he receives in consequence of the new promise: getting his ship home may have been worth more to the master of the ship than any damages that he could have recovered from the crew.[969] Accordingly, the restricted view taken of consideration in *Stilk v Myrick* looks difficult to support as a matter of principle, particularly as the result in

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[961] For a comprehensive textual and contextual analysis of the case, see Luther, 'Text and Context'; see also Swain, *Law of Contract*, 141-144.

[962] It was distinguished by Coltman J in *Clutterbuck v Coffin* (1842) 3 M. & G. 842, 847 and by Coleridge J (*arguendo*) in *England v Davidson* (1840) 11 A. & E. 856, 858. It was also referred to as authority for a principle which was not in issue, by Williams J in *Frazer v Hatton* (1857) 2 C.B.N.S. 512, 525.

[963] (1854) 3 E. & B. 559.

[964] Although Campbell, by then Chief Justice of the King's Bench, commented (ibid., 562) that he did not altogether agree with Ellenborough discarding the ground of public policy on which Kenyon relied in *Harris v Watson*.

[965] *Harrison v Dodd* (1914) 111 L.T. 47.

[966] In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, 713 Mocatta J described it as 'the rule in *Stilk v Myrick*'; in *Compagnie Noga D'Importation Et D'Exportation SA v Abacha (No.4)* [2003] 2 All E.R. (Comm) 915 at [44], Tuckey LJ described *Stilk v Myrick* as 'the leading case … which established the principle that a promise to perform an existing contractual obligation does not constitute good consideration for a new agreement.'

[967] See *Pao On v Lau Yiu Long* [1980] AC 614, 632-635 per Lord Scarman.

[968] For example, R.S.T. Chorley *et al*, 'The Law Revision Committee's Sixth Interim Report', 1 *Modern Law Review* (1937), 97 at 104; F.M.B. Reynolds and G.H. Treitel, 'Consideration for the Modification of Contracts', 7 *Malaya Law Review* (1965), 1 at 4-6; Gilmore, *Death of Contract*, 22-30.

[969] Hugh G. Beale, ed., *Chitty on Contracts*, 35th ed., London, 2023, vol.1, para.6-070.

that case may now be justified on the basis of the modern tort of economic duress, if it is not to be explained on the basis of the public policy ground identified by Espinasse.

The issue came to a head in *Williams v Roffey Bros & Nicholls (Contractors) Ltd*.[970] The defendants were contracted to carry out the refurbishment of a block of flats. They sub-contracted the carpentry work to the plaintiff. He was to be paid £20,000 in stages related to the amount of work done. While carrying out his contractual obligation, the plaintiff suffered financial difficulties caused by his failure to supervise his workmen adequately and the fact that the original price of £20,000 was too low. The defendants, who were themselves subject to a time penalty clause in the main contract, therefore agreed to pay the plaintiff an additional sum in instalments of £575 at the time of completion of each remaining flat. The plaintiff sued for the additional sums, which in the Court of Appeal was met by the argument that the defendant's promise to pay those sums was not supported by consideration, in reliance on *Stilk v Myrick*.

The simplest way around that case would have been for the Court of Appeal to disregard that case, on the basis that it was decided at nisi prius, and to consider the question of consideration afresh.[971] However, the plaintiff's invitation to the court to hold that that case was no longer good law was roundly rejected by Russell LJ in the following terms:

> '[the plaintiff's counsel] was bold enough to submit that *Harris v Watson*, albeit a decision of Lord Kenyon, was a case tried at the Guildhall at nisi prius in the Court of King's Bench and that *Stilk v Myrick* was a decision also at nisi prius albeit a judgment of no less a judge than Lord Ellenborough CJ and that, therefore, this court was bound by neither authority. I feel I must say at once that, for my part, I would not be prepared to overrule two cases of such veneration involving judgments of judges of such distinction except on the strongest possible grounds since they form a pillar stone of the law of contract which has been observed over the years and is still recognised in principle in recent [first instance] authority …'[972]

Having decided that they were bound to apply *Stilk v Myrick*, the Court of Appeal proceeded to struggle with the implications of that decision for the case before it: although Purchas LJ said that 'Prima facie this would appear to be a classic *Stilk v Myrick* case',[973] all three judges agreed that the promise in their case was supported by additional consideration, and had to rely on practical and commercial, rather than legal, examples of detriment and benefit; and they differed on what the relevant examples were in the case before them.[974] None of the judges explained why such commercial matters had not been sufficient for the sailor to succeed in *Stilk v Myrick*, and instead reconciled their decision with that case on the basis that they had

[970] Supra.

[971] The possibility of circumventing the case at common law had been suggested in Reynolds and Treitel, 'Consideration', 9.

[972] Supra, 20.

[973] Ibid., 23.

[974] Glidewell LJ (ibid., 10-11 and 16) relied on the assurance that the plaintiff would continue working and not stop work in breach of contract, the avoidance of the penalty clause operating and the avoidance of the expense of engaging different carpenters to complete the work; Russell LJ (ibid., 19) referred to the advantages of replacing what had hitherto been a haphazard method of payment by a more formalised scheme; and Purchas LJ (ibid., 20) relied on the reorganisation of working practices which resulted from the promise to pay additional sums, whereby each flat was completed by the plaintiff in turn, thus allowing the defendant's other tradesmen access to do their work.

'refined' and 'limited' the principle established in that case[975] and that it might be decided differently if it was tried today.[976] Thus, the Court of Appeal has, if anything, added to confusion as to the status of the *Stilk v Myrick* principle.[977]

'Fair wear and tear'

Undue reliance on a nisi prius case by the Court of Appeal in 1957 resulted in the meaning of the 'fair wear and tear' exception found in many leasehold repairing covenants being subject, for a short time, to two inconsistent decisions of the appeal court.

In *Gutteridge v Munyard*,[978] a repairing covenant in a lease in respect of a very old house excluded "reasonable use and wear"; the landlord brought an action of ejectment on the ground of breaches of covenant and the tenant filed a bill in Chancery for an injunction. The Lord Chancellor directed several issues to be tried at nisi prius, including whether the repairing covenant had been complied with. Tindal CJ's direction to the jury on that issue was reported in very different terms by separate reporters. As the report of the trial appears in Carrington and Payne's reports, Tindal CJ's direction to the jury on the issue occupied two sentences,[979] whereas in Moody and Robinson's reports, the direction took up five sentences, none of which bore a particularly close resemblance to the corresponding passage in the other report.[980]

In addition to this inconsistent reporting, Tindal CJ's direction was typical of such rulings at nisi prius, being short, with little in the way of analysis or discussion and without citation of authority; moreover, neither report suggested that the judge was focusing on the "reasonable use and wear" exclusion to the repairing covenant, rather than on the effect of the covenant as a whole.[981] Indeed, the same judge's earlier nisi prius ruling in *Harris v Jones*,[982] which concerned a lease with no such exclusion, is very similar to his ruling in *Gutteridge*. As a result, for many years *Gutteridge* was cited in relation to the construction of repairing covenants in general,[983] whereas a number of cases relating to the "fair wear and tear" exclusion did not

[975] Ibid., 16 per Glidewell LJ and 18 per Russell LJ.

[976] Ibid., 21 per Purchas LJ.

[977] In *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3481 (QB) at [41], David Donaldson QC, sitting as a Deputy High Court Judge, said that 'Though all three judges claimed to accept the rule in *Stilk v Myrick*, it is wholly unclear how the decision in *Williams v Roffey* can be reconciled with it.' See also Richard Hooley, 'Consideration and the Existing Duty', [1991] *Journal of Business Law*, 19; Whittaker, 'Precedent in English Law', 732-734. In *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119, the Supreme Court questioned whether *Williams v Roffey* was good law, but declined to decide the point, as that was not necessary to determine the case before it: the court did not refer to *Stilk v Myrick*, although the case was cited to it.

[978] (1834) 7 C. & P. 129; 1 Moo. & Rob. 334. After the trial, a motion was made to the Lord Chancellor to set aside the verdict on the evidence, but no objection was made to the judge's direction to the jury.

[979] 7 C. & P. 129, 133.

[980] 1 Moo. & Rob. 334, 336-337. This report of the case only dealt with this particular issue, whereas the report by Carrington and Payne dealt with this and another issue which had been directed to be tried.

[981] Sitting in the Common Pleas four years later, Tindal CJ rather delphically said of a repairing covenant with "reasonable wear and tear" exception that: 'Every one knows what such a covenant means': *Mantz v Goring* (1838) 4 Bing. N.C. 451, 453.

[982] (1832) 1 Moo. & Rob. 173, 175.

[983] For example, *Lister v Lane & Nesham* [1893] 2 QB 212, 216 per Lord Esher MR; *Torrens v Walker* [1906] 2 Ch 166, 173 per Warrington J; *Lurcott v Wakeley* [1911] 1 KB 905, 912 per Cozens Hardy MR.

even cite that case,[984] and when Salter J came to review the caselaw on this point in *Haskell v Marlow*,[985] he said that the covenant in *Gutteridge* case would have been construed in very much the same way as it would have been had that exclusion not been present.

However *Gutteridge* was given far greater prominence as a case on the "fair wear and tear" exclusion by the Court of Appeal in *Brown v Davies*.[986] In *Haskell*, the Divisional Court had held that such an exclusion did not exonerate the tenant from all obligations to protect the demised property from the natural process of decay, although the judges differed as to when those obligations were triggered.[987] In *Taylor v Webb*,[988] the Court of Appeal overruled *Haskell* and held that a "fair wear and tear" exclusion contained in a landlord's repairing covenant imposed no obligation on the landlord to deal with natural defects. Despite the fact that two of the members of the Court of Appeal produced long and careful written judgments covering some fourteen pages, less than twenty years later, the unreserved judgments of the Court of Appeal in *Brown v Davies* distinguished *Taylor v Webb* to hold that the 'reasonable wear and tear' exclusion in the tenant's repairing covenant did not mean that the tenant need do nothing active in pursuance of their obligation to repair.

In so holding, the Court of Appeal relied heavily on *Gutteridge*. Lord Evershed MR said that the principle in *Taylor* referred to above 'would have operated to set at nought what had been laid down as long ago as 1834 by Tindal CJ in *Gutteridge v Munyard* … I cannot conclude that this court in *Taylor v Webb* intended to lay down a broad proposition inconsistent with the long-established statement of Tindal CJ.'[989] Romer LJ said that 'It seems to me that the law as laid down by Tindal CJ in *Gutteridge v Munyard* is still the general law and was not intended to be overruled by this court in *Taylor v Webb*.'[990] Both judges also relied on the fact that *Gutteridge* was not cited to the Court of Appeal in *Taylor v Webb*.

The grounds of distinction advanced by the Court of Appeal in *Brown* are, to say the least, flimsy, and the contention that *Gutteridge* would not have been in the minds of the judges in *Taylor v Webb* is unsupportable, for the reasons set out in a typically careful analysis by Robert Megarry QC in a case note on *Brown v Davies* published shortly after it had been reported.[991] In that note, Megarry concluded that the court in *Brown v Davies* did not give full weight to the strength and width of *Taylor v Webb* and so might arguably have been decided *per incuriam*. It is difficult not to conclude that the court in *Brown v Davies* was more swayed by *Gutteridge* than the status and circumstances of that case merited, leaving the common law position on the

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[984] *Manchester Bonded Warehouse Co v Carr* (1880) 5 C.P.D. 507; *Davies v Davies* (1888) 38 Ch.D 499; *Terrell v Murray* (1901) 17 Times L.R. 570; cf. *Miller v Burt* (1918) 63 Sol. Jo. 117.

[985] [1928] 2 KB 45, 53.

[986] [1958] 1 QB 117.

[987] Salter J ([1928] 2 KB 45, 57) considered that the amount of dilapidations may make inactivity on the part of the tenant unreasonable, whereas Talbot J (ibid., 59) considered that, whilst not directly obliged to repair naturally-occurring defects, the tenant is nevertheless liable if they allow those defects to cause consequential damage to the property.

[988] [1937] 2 KB 283.

[989] [1958] 1 QB 117, 126.

[990] Ibid., 130.

[991] Robert Megarry QC, 'Fair Wear and Tear and the Doctrine of Precedent', 74 *Law Quarterly Review* (1958), 33. See also A.L. Diamond, 'Fair Wear and Tear', 21 *Modern Law Review* (1958), 292.

meaning of ‘fair wear and tear’ provisions, at least for a short while, in an unsatisfactory state.[992]

CONCLUSION

The nisi prius reports follow an unusual path for old reports, whose influence with judges tends to wane the further away one gets from the time in which they appeared.[993] By contrast, from the time when the odd enterprising barrister began to publish nisi prius reports they were unloved and unheralded by the profession, except as a practical tool for the education of young barristers in the ways of nisi prius and as a last refuge for those desperately in need of something to cite in court. Outside of the law of evidence, they were regarded as of no authority, little better than illustrative of principles which stood or fell on their own merit, and by the mid-nineteenth century, even rulings on evidence were barely regarded by the full court.

However, the decline of the nisi prius system by the beginning of the twentieth century caused the legal profession - including judges and treatise-writers - to forget the former low standing of nisi prius cases, which in turn led to greater weight being attached to them, as memories of the distinction between them and Westminster Hall decisions became lost in time. Consequently, more attention is now paid to nisi prius cases by the courts than at any other time in the history of the common law, not necessarily to the benefit of the law’s development.

[992] Just over a year after *Brown v Davies* was decided, the House of Lords in *Regis Property Co Ltd v Dudley* [1959] AC 370 effectively overruled *Taylor v Webb* and reinstated the authority of *Haskell*: there was but a single passing reference to *Gutteridge*, in the speech of Viscount Simonds: ibid., 394.

[993] Allen, *Law in the Making*, 230.

GENERAL CONCLUSION

The nisi prius reports are a curious footnote to the history of law reporting. They arrive late on the scene, are the product of opportunism and have very limited ambitions. They seek to record rulings and directions to juries made extemporaneously by single judges without the assistance of either the detailed argument by counsel or the deliberation with their fellow judges that would have occurred when sitting in banc. The physical and logistical circumstances in which those rulings were made were almost designed to prevent them from having any force beyond the little to be accorded to fledgling impressions. The rulings were therefore regarded by the judges of the time as having no weight as authorities, at least on matters of substantive law; and even where more weight was accorded to rulings on evidence and practice, in many cases they operated as much to obscure as to clarify the law. Accordingly, the legal press on the whole considered the reports to be a waste of time and money.

Yet a succession of reporters continued to publish volumes of nisi prius reports from the end of the eighteenth century to the middle of the nineteenth century, and they only died out because of a combination of the assumption by the courts in banc of responsibility for determining issues of evidence, and the decline and eventual end of the nisi prius system itself.

Even after their demise, the nisi prius reports, far from being consigned to the dustbin of legal history, were given new life by a modern legal profession that had quickly forgotten why their nineteenth-century brethren gave them such short shrift. The distinction between decisions of nisi prius courts and the courts in banc seems now to be completely disregarded, such that the Supreme Court equates an observation from a nisi prius ruling of a puisne judge of the King's Bench with a dictum from the House of Lords, and describes them together as 'clear statements of the highest authority'.[994]

Broadly speaking, the use of the nisi prius reports at the time they were produced, and the persistence of their publication into the mid-nineteenth century, can be put down to two factors.

The first, which is more closely aligned with the general purpose of law reports in a common law system, was to provide lawyers with precedents to cite in support of a legal principle relevant to advice being given or an argument being advanced in court. Yet the lack of authority of nisi prius rulings meant that they were of use as precedents only in very limited circumstances: before the court in banc, they were influential on matters of evidence law, at least until the middle of the century, but they were otherwise not given any weight as authorities on their own terms; at nisi prius, they may have been more useful where authority was scarce and the judge was happy to base his decision on anything, however weak - a reason, of course, why those rulings were of so little worth in the first place.

The second factor was the educational value of the nisi prius reports: at a time when there was no formal system of legal education, when both trainee and newly-called barristers would not necessarily have a great deal of experience of the trial process, and when legal textbooks were little more than lists of cases, the reports served to introduce those practitioners to how the nisi prius system worked in real life, and assisted in the practical requirements for preparing cases for trial. However, this feature also only applied to a limited extent, as there was no substitute

[994] *Fearn v Board of Trustees of the Tate Gallery* [2024] AC 1 at [98] per Lord Leggatt JSC (with whom Lord Reed PSC and Lord Lloyd-Jones JSC agreed).

for attendance at the nisi prius courts to appreciate and understand the operation and potential pitfalls of the process.

Whilst these reasons explained - barely - the continuation of the nisi prius reports up to the 1850s, there can be no justification for the treatment of nisi prius rulings as influential authorities by the modern courts. After all, this did not happen as a result of a deliberate and principled decision on the part of the judiciary: on the contrary, no attempt has been made to explain why those cases are now apparently regarded as no different from the courts in banc and modern courts of first instance. Whilst this issue is of limited relevance today, when old caselaw has largely been superseded by more recent decisions, the examples (discussed in Chapter 9) of aspects of the common law that are still influenced by nisi prius rulings, out of all proportion to their worth, should be cause for at least some concern.

What is the solution? As with any problem caused by ignorance, the answer is education, but in what forum? Universities and law schools would seem the most appropriate forum, given that that is where trainee lawyers will first come across the doctrine of precedent, with which this issue is most closely associated. Perhaps the judiciary could be more directly targeted, through the training programmes operated in England and Wales by the Judicial College. Or perhaps all it needs is for an appellate court to take the opportunity, when a nisi prius ruling is next cited to it, of reiterating the warnings made repeatedly by their nineteenth-century counterparts about reliance on such cases.

This thesis ends where it began. The front page is adorned with a miniature thought to be of Isaac Espinasse, and the fact that it is the only likeness of him known to be in existence is proof of the obscurity into which he has fallen as an historical figure. However, as a reporter, his name lives on in infamy, as the worst of his kind, the butt of jokes whenever law reporters are discussed. Yet the more the reasons given for his incompetence are scrutinised, and the more his reports are analysed by reference to other available sources, the less justification there is for his abject reputation. Espinasse as a law reporter was by no means perfect – few, if any, of the nominate reporters were - but there is virtually no evidence to justify either the destruction of his good name by a few Victorian judges or the opprobrium that continues to be heaped upon him by the legal profession.

APPENDIX 1

A CHRONOLOGY OF NISI PRIUS REPORTING

Early reports

One of the consequences of the separation between fact-finding and the determination of the legal issues relevant to the case inherent in the nisi prius system was that, for centuries, such cases proved to be of little interest to the law reporters. For example, the lack of information explaining the process of the jury trial in the times of the Year Books has been attributed to the fact that their compilers were almost solely concerned with reporting events in Westminster Hall.[995] This can no doubt be largely explained by the fact that those cases did not generally involve any discussion of or rulings on legal principles, and were mainly confined to the facts of the particular case, from which it was considered that nothing of future interest or use could be gleaned.

It is sometimes said that the reporting of nisi prius decisions began with Isaac Espinasse and Thomas Peake in the mid-1790s,[996] but that is not so. As can be seen from the schedule at the end of this Appendix, over 650 nisi prius cases were reported by over thirty different reporters before that period.

The first examples were several cases heard at Guildhall in the mid-sixteenth century, which were included in one of the earliest sets of nominate law reports, collected by Sir James Dyer.[997] One of those cases was tried by Dyer in 1563 when he was Chief Justice of the Common Pleas.[998] It concerned a debt claim brought against Sir Nicholas Poyntz (or Poines), an MP and the son of a prominent courtier of Henry VIII, by the executors of a mercer, for payment in respect of silk and velvet material ordered by Sir Nicholas's wife without his permission. Even though the evidence showed that Sir Nicholas had agreed to pay the tailor who made the dress from the material, the jury said that they would have found against the plaintiff: as to the reason why – perhaps the extravagance of the material[999] or the status of Sir Nicholas – the jury was, as ever, inscrutable: Dyer, however, found that verdict to be very doubtful.

[995] T.F.T. Plucknett, *A Concise History of the Common Law*, 5th ed, Boston, 1956, 166; Dawson, *Oracles*, 54; Morris S. Arnold, 'Law and Fact in the Medieval Jury Trial: Out of Sight, Out of Mind', 18 *American Journal of Legal History* (1974), 267 at 272. Similarly, as special damages recoverable on an action in assumpsit or covenant was a matter for the jury, information as to the principles upon which such damages were to be assessed was scanty before the age of the nisi prius reports: J.L. Barton, 'Contractual Damages and the Rise of Industry', 7 *Oxford Journal of Legal Studies* (1987), 40 at 46.

[996] For example, Baker, *Introduction*, 439n; Cornish *et al*, *Oxford History vol.XI*, 1212; W.S. Holdsworth, *Some Lessons From Our Legal History*, New York, 1928, 21n.

[997] Sir James Dyer, *Les Reports des Divers Select Matters & Resolutions des Reverend Judges & Sages del Ley etc.*, London, 1585. The best English edition is John Valliant, ed. and trans., *Reports of Cases in the Reigns of Hen.VIII Edw.VI Q. Mary, and Q. Eliz., Taken and Collected by Sir James Dyer*, London, 1794.

[998] *Sir Nicholas Poines' Case* (1563) 2 Dyer 234b.

[999] See Christopher W. Brooks, *Law, Politics and Society in Early Modern England*, Cambridge, 2008, 365.

Whilst many of these early reports contained only a handful of nisi prius cases, some reported many more. Two sets of reports of particular note in this respect, collected by Lord Raymond and Sir John Strange, are discussed in Chapter 1.

Clayton's assize reports

In addition to these early reporters, the first dedicated book of assize cases was published by John Clayton of the Inner Temple in 1651,[1000] containing brief accounts of mainly nisi prius cases decided at the York assizes between 1631 and 1650. Although Veeder suggests that the reports throw some light on early practice,[1001] Wallace describes them as being of not much practical use, noting that: 'The lovers of quaint records, however, may still enjoy them for other merits'.[1002] Perhaps for this reason, they were not included in *The English Reports*, and there is only one reported case in which a ruling from them has been cited.[1003]

Early digests and manuals

Aside from the law reports, records of nisi prius cases were included in digests and manuals on nisi prius practice and evidence published in the late seventeenth and eighteenth centuries.[1004] Three of them merit particular mention.

The first work is an early practitioners' manual: *Trials per Pais, Or the Law, Concerning Juries by Nisi Prius*. The first edition, published in 1666, was the work of Samson Euer,[1005] but subsequent editions were produced by Giles Duncombe, and the book is commonly associated with his name. The second to ninth editions of this book, published between 1682 and 1793, refer to a number of otherwise unreported nisi prius cases from the 1650s onwards, principally in a long section dealing with evidence.[1006]

The second work is a short treatise on assize practice written by John Lilly in 1719,[1007] which included Latin and English reports of seven assize cases heard between 1688 and 1693. The book itself is described by Wallace as 'worthless', having been padded out with a preface

[1000] Anon., *Reports and Pleas of Assizes at Yorke: Held before Severall Judges in that Circuit*, London, 1651: the dedication and preface are signed with Clayton's name, but it does not appear on the title page.

[1001] Veeder, 'The English Reports', 14-15.

[1002] Wallace*, The Reporters*, 272.

[1003] *Powel v Milbank* (1772) 2 W. Bl. 851, 853 per De Grey CJ. A number of cases from Clayton's book are cited in Duncombe's *Trials per Pais*, discussed below: see, for example, 5th ed., London, 1718, 389.

[1004] See, generally, Horwitz, 'Nisi Prius Trial Notes', 154-155. Horwitz also refers to unpublished manuscripts of nisi prius cases, including the main subject-matter of his article.

[1005] See *Shenton v Tyler* [1939] Ch 620, 644 per Luxmoore LJ.

[1006] For example, in the 5th ed., London, 1718, there is reference (at 307) to a ruling of St John CJ at the Lent Suffolk assizes of 1657, preventing a convicted petty larcenist from being a witness. Other unreported nisi prius cases are referred to at ibid., 307-308, 309-310, 325, 333-334, 340-341, 361, 362, 363, 364, 368-369, 376, 384-385, 377, 388, 389, 390, 396-397, 398, 399, 413, 414.

[1007] John Lilly, *Reports and Pleadings of Cases in Assise, for Offices, Nusances, Lands and Tenements*, London, 1719: this was published in the same year as Lilly's much more influential *Practical Conveyancer*.

described as 'long, rambling and nonsensical',[1008] and Willes CJ called it 'a book of no great authority'.[1009] It is mentioned here only because the editors of *The English Reports* deemed it fit to reprint the book in its entirety – preface included – at the beginning of the volumes containing the nisi prius reports.[1010]

The third work is Francis Buller's *An Introduction to the Law Relative to Trials at Nisi Prius*, the first treatise to be written specifically on the laws relevant to nisi prius and the standard book on the subject for many years, held in high esteem by the profession.[1011] The first edition was published in 1772, although it derived from an earlier, anonymous, book published in 1767 under the same title, which was the work of Buller's uncle, Henry, Lord Bathurst.[1012] The book ran to seven editions, the final edition (a reprint of the sixth) being published in 1817. Although the book was intended to be a practical collection of rules and points for the practitioner on circuit rather than a collection of reports of cases,[1013] a substantial number of nisi prius rulings unreported elsewhere were cited in support of those principles.[1014]

The first dedicated nisi prius reporters

After centuries of being largely ignored by the law reporters and publishers, not one but two volumes of reports dedicated to nisi prius cases were produced at virtually the same time, by Isaac Espinasse and Thomas Peake.[1015]

The first editions of Peake's and Espinasse's reports are dated 1795 and 1796 respectively; and nineteenth-century legal bibliographies accordingly state that those were the years in which those reports were originally published.[1016] However, the belief that the publication of Peake's reports predated those of Espinasse is inconsistent with Peake's comment in the preface to his reports (which was dated April 1795) that, with certain exceptions, he had 'forborne … to report any of the cases with which Mr Espinasse has lately favoured the profession'.[1017] This has led Peter Luther to assert that Espinasse's work was clearly published first, and to imply that Peake's preface may have been misdated;[1018] and further support for the earlier publication of Espinasse's reports comes from the fact that they were also published in Baltimore in

[1008] Wallace, *The Reporters*, 423.

[1009] *Hickman v Walker* (1737) Willes 27, 29.

[1010] 170 ER 1.

[1011] See, for example, Anon., *British Public Characters of 1798*, London, 1798, 175; Anon., 'Life of Mr Justice Buller', 17 *Law Magazine: Or Quarterly Review of Jurisprudence* (1837), 27 at 30.

[1012] Selwyn, *Abridgment*, 2nd ed., London, 1810, vol.1, v-vi: see, generally, Oldham, 'Law-Making', 240-241.

[1013] Buller, *Introduction*, 6th ed., London, 1793, 1.

[1014] Ibid., 2nd ed., London, 1772, 10, 16, 19, 27, 28, 33, 34, 35, 36, 37, 39, 40, 47, 58, 64, 65, 68, 71, 84, 85, 100, 101, 102, 104, 105, 106, 108, 128, 129, 136, 137, 138, 142, 145, 146, 149, 150, 165, 166, 173, 178, 182, 183, 184, 190, 225, 232, 234, 239, 250, 251, 257, 269, 270, 284, 285, 290, 291, 292, 307.

[1015] Espinasse, *Reports*; Peake, *Cases*.

[1016] Bridgman, *Legal Bibliography*, 110, 247; Charles C. Soule, *The Lawyer's Reference Manual of Law Books and Citations*, Boston, 1883, 117n.

[1017] Peake, *Cases*, v.

[1018] Luther, 'Text and Context', 531n.

1795.[1019] However, this needs to be reconciled with the fact that Espinasse's volume contains reports of cases that were tried as late as March 1796.

Which reports were published first? The answer is: both of them. The reports by Espinasse which made up the first volume were published in three different parts, in late 1794, mid-1795 and mid-1796;[1020] by contrast, Peake's reports were not published in parts, but in a single volume, in mid-1795,[1021] whereas the complete first volume of Espinasse's reports was published in late 1796.[1022] Thus, whilst Espinasse was the first to have parts of his reports published, Peake was the first to have a complete volume published.[1023] This is how Espinasse's reports could be published in America the year before the complete volume was published in England, and explains how Peake could comment on his rival's reports in his April 1795 preface: he was referring to cases in the first part of the reports.[1024]

Peake produced no further volumes of reports, having said in the preface to his volume that he did not wish to compete with Espinasse, who had made clear his intention to continue reporting. Espinasse went on to produce a further four volumes, published in 1799,[1025] 1802, 1804 and 1807; after a hiatus due to illness,[1026] he added a slim sixth volume of reports in 1811.

Despite Peake's promise, a single volume of further cases from his notes was published in 1829 by his son, Thomas Peake, Jnr.[1027] The cases in this volume were decided between 1795 and 1812 and included a number of further cases that had also been reported by Espinasse.

The early nineteenth-century reporters

After Espinasse initially stopped reporting in 1807, the mantle was taken up by John Campbell, then a young barrister but later to be appointed Chief Justice of the King's Bench and ultimately Lord Chancellor.[1028] Campbell, like Espinasse, published his reports in parts before combining

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[1019] Soule, *Reference Manual*, 117n; Erwin C. Surrency, 'English Reports Printed in America', 3 *Legal Reference Services Quarterly* (1983), 9 at 11. Surrency states that this was apparently the earliest English law report to be printed in America, but it appears that Latch's King's Bench reports had been published in Newbern, Tennessee in 1793: John D. Gordan III, 'Publishing Robinson's *Reports of Cases Argued and Determined in the High Court of Admiralty*', 32 *Law and History Review* (2014), 525 at 529. Peake's reports were also published in Hartford, Connecticut in 1795 (ibid.).

[1020] The first part was advertised in *The Star*, 22 Nov. 1794, 1 col.2; the second was advertised in *The Morning Post*, 29 Apr. 1795, 5 col.1; and the third was advertised in *The Star*, 23 Jul. 1796, 1 col.2.

[1021] This was advertised in *The Star*, 2 May 1795, 2 col.1.

[1022] This was advertised in *The Oracle*, 12 Nov. 1796, 9 col.3.

[1023] Peake's reports are included before those of Espinasse in *The English Reports*, vol.170.

[1024] The three cases referred to by Peake were all reported in the first part of Espinasse's reports: *Ashley v Harrison* (1793) 1 Esp. 48, *Knibbs v Hall* (1794) 1 Esp. 84 and *Smith v Jameson* (1794) 1 Esp. 114. Later parts of Espinasse's reports contained further cases also reported by Peake.

[1025] Not 1798, as stated by Soule, *Reference Manual*, 117n.

[1026] As he explained in the preface to vol.6.

[1027] Peake Jnr, *Cases*. These reports are known as 'Peake's Additional Cases'.

[1028] John Campbell, *Reports of Cases Determined at Nisi Prius, in the Courts of King's Bench and Common Pleas, and on the Home Circuit*, London, 1809, vol.1.

them into a single volume: he produced a total of four volumes, published between 1809 and 1816, until he was forced to stop due to '[w]ant of leisure'.[1029]

Thereafter, a steady stream of nisi prius reports appeared during the first part of the nineteenth century.[1030]

Cases tried between 1814 and 1820 were covered by two reporters: Thomas Starkie, who produced two volumes of reports in 1817 and 1820;[1031] and Francis Ludlow Holt, who produced a single volume in 1818.[1032]

Apart for some summaries of cases from the Western Circuit included in the second edition of James Manning's Digest of Nisi Prius Reports published in 1820,[1033] no further such reports were published until 1823, when two separate parts of what were presumably intended to be larger collections appeared, without title pages or indices. These were the first part of the third volume of Starkie's reports, totalling 188 pages and covering cases decided between 1819 and 1823,[1034] and the first part of a volume of reports by James Dowling and Archer Ryland, in which twenty-six cases decided in 1822 and 1823 were reported in sixty-two pages.[1035] Neither of these resulted in completed volumes.

In 1825, the first volume of nisi prius reports by two Old Bailey counsel,[1036] Frederick Augustus Carrington and Joseph Payne, were published, covering cases decided between 1823 and 1825.[1037] A further eight volumes of these reports were published, the final volume appearing in 1841. The scope of these reports, which were published every other year, changed over time: the first four volumes covered the usual ground of nisi prius cases in the King's Bench and Common Pleas together with trials at the assizes; but for the fifth volume (published in 1833), nisi prius cases from the Exchequer were added, together with criminal trials at the Old Bailey.

[1029] Ibid., London, 1816, vol.4, preface.

[1030] In addition, the proprietor of the York Herald edited and published a volume containing all the business of the 1811 Lent assize at York: Alexander Bartholoman, ed., *Bartholoman's Complete Law Reports of all the Trials and Causes that came on at the Yorkshire Lent Assize, March 9, 1811*, York, 1811. As explained in the editor's address (ibid., vi), the publication was intended to be the first of a regular series, replacing the assize reports previously contained in the newspaper, which had to be cut back due to pressure of space; however, it appears that the venture did not survive Bartholoman's death later that year. The nisi prius cases in that book were reported by John Payne Collier, then a young barrister but later better known as a controversial literary scholar and forger: see Chapter 4.

[1031] Thomas Starkie, *Reports of Cases Determined at Nisi Prius in the Courts of King's Bench and Common Pleas and on the Circuit*, London, 1817.

[1032] Holt, *Reports.*

[1033] James Manning, *Digest*. In the Advertisement, Manning said that he intended to publish a separate volume of Western Circuit cases, but he did not do so.

[1034] Starkie, *Reports*, vol.3, part 1, London, 1823.

[1035] Dowling and Ryland, *Cases*. They were better known for their nine volumes of King's Bench reports, published between 1822 and 1831. The single part of their nisi prius reports was sometimes bound up with vol.1 of their King's Bench reports: Soule, *Reference Manual*, 100n.

[1036] Allyson May, *The Bar and the Old Bailey*, Chapel Hill, 2003, 51.

[1037] Carrington and Payne, *Reports.*

A number of additional sets of nisi prius reports were published during the years of Carrington and Payne's reports, resulting in a considerable overlap of reported cases.[1038] In 1827, a volume of reports was produced by Edward Ryan and William Moody, covering cases decided between 1823 and 1826.[1039] In 1828, Niel Gow issued a volume of reports of cases decided some years before publication, between 1818 and 1820.[1040] In 1831, William Moody and Benjamin Heath Malkin produced a volume of reports, comprising cases decided between 1826 and 1830.[1041] Moody's final contributions to nisi prius reporting were two volumes published in 1837 and 1844, produced in conjunction with Frederic Robinson and covering cases decided between 1830 and 1844.[1042] It appears that Robinson intended to continue these reports with a Mr Pollock,[1043] but nothing came of this.

After the final volume of Carrington and Payne's reports was published in 1841, Carrington continued to report nisi prius cases, producing a volume with Joshua Ryland Marshman in 1843, covering cases decided between 1841 and 1843,[1044] and two volumes with Andrew Valentine Kirwan in 1845 and 1850, covering both nisi prius cases and cases in the newly-created[1045] Court of Crown Cases Reserved decided between 1843 and 1850.[1046] Two parts of the third volume of Carrington and Kirwan's reports were produced in 1853, but that volume remained incomplete.

The final nisi prius reporters

Thereafter, the reporting of nisi prius cases became a much more sporadic exercise.

[1038] In addition, a few nisi prius cases tried in 1828 and 1829 were included in F.M. Danson and J.H. Lloyd, *Reports of Cases Relating to Commerce, Manufacturers etc. etc.*, London, 1830.

[1039] Edward Ryan and William Moody, *Reports of Cases Determined at Nisi Prius in the Courts of King's Bench and Common Pleas, and on the Oxford and Western Circuits*, London, 1827.

[1040] Niel Gow, *Reports of Cases Argued and Ruled at Nisi Prius, in the Court of Common Pleas ... and on the Oxford Circuit*, London, 1828.

[1041] William Moody and Benjamin Heath Malkin, *Reports of Cases Determined at Nisi Prius in the Courts of King's Bench and Common Pleas, and on the Western and Oxford Circuits*, London, 1831. This volume was favourably reviewed, the reporters being described as 'models for the nisi prius reporter', and the reports featuring the points neatly and correctly reported, the opinions of the court condensed and clearly stated and the subjects well selected: Anon., 'Review: Law Reporting', 1 *Legal Observer* (1831), 247 at 248.

[1042] William Moody and Frederic Robinson, *Reports of Cases Determined at Nisi Prius in the Courts of Queen's Bench, Common Pleas and Exchequer and on the Northern and Western Circuits*, London, 1831. These reports were well received: "J.P.T.", 'Modern Common Law Reports', 335.

[1043] *Butterworth's General Catalogue of Law Books*, London, 1850, 142. "Mr Pollock" was presumably Charles Edward Pollock, who instead reported Exchequer cases from 1850 with John James Lowndes and Peter Benson Maxwell, and who subsequently became a Baron of the Exchequer.

[1044] F.A. Carrington and J.R. Marshman, *Reports of Cases Argued and Ruled at Nisi Prius in the Courts of Queen's Bench, Common Pleas & Exchequer, together with Cases Tried on the Circuits and in the Central Criminal Court*, London, 1843. These reports were heavily criticised in "J.P.T.", 'Modern Common Law Reports', 335-342.

[1045] By the Crown Cases Act 1848.

[1046] F.A. Carrington and A.V. Kirwan, *Reports of Cases Argued and Ruled at Nisi Prius, in the Courts of Queen's Bench, Common Pleas, & Exchequer, together with Cases Tried on the Circuits, and in the Central Criminal Court*, London, 1845.

After a gap of eight years, in 1860 a volume of nisi prius reports was produced by T. Campbell Foster and W.F. Finlason,[1047] covering cases decided between 1856 and 1860.[1048] Three further volumes in this series were published in 1862, 1864 and 1867.

Finally, after a further gap of eighteen years, the final set of nisi prius reports, by Michael Cababe and Charles Gregson Ellis, were published, in 1885, covering cases decided between 1882 and 1885.[1049]

This marked the end of the nominate nisi prius reports, their demise reflecting the decreased relevance of nisi prius rulings on evidence law,[1050] the decline of the nisi prius system,[1051] and the increasing dominance of the quasi-official *Law Reports*, whose usual practice was not to report nisi prius cases.[1052]

Taking into account the prolonged interruptions in the later period, dedicated nisi prius reports existed for less than sixty-five years; and only a small fraction of the nisi prius cases that were tried were reported in this way: Oldham has calculated that, of the over 13,300 nisi prius cases recorded in Lord Ellenborough's trial notes as having been tried by him between 1802 and 1818, less than nine per cent of those cases were reported.[1053]

Journal and newspaper reports

Finally, mention should be made of the reporting of nisi prius cases in legal journals and newspapers.

Foremost amongst the journals in this respect was the *Law Times*. From the outset, it appointed a reporter for each circuit, and boasted that it had no rival in its circuit reports and that it reported important cases which would be found in no other work.[1054] The journal subsequently felt it necessary to clarify that it only reported nisi prius cases 'in which the decision of a single judge is an authority, such as those on practice and evidence.'[1055] Its reports were described as 'frequently inaccurate … and always excessively diffuse,' being the product of a shorthand writer rather than a reporter.[1056]

[1047] The latter of whom became the chief law reporter for *The Times* and was described by the barrister and MP Sir Edward Clarke as 'the prince of reporters': Sir Edward Clarke KC, *The Story of My Life*, London, 1918, 86.

[1048] T. Campbell Foster and W.F. Finlason, *Reports of Cases Decided at Nisi Prius and at the Crown Side on Circuit with Select Decisions at Chambers*, vol.1, London, 1860.

[1049] Cababe and Ellis, *Reports.*

[1050] See Chapter 8.

[1051] See Chapter 9.

[1052] This practice would be departed from where the ruling in question was considered to be of general interest: see, for example, *Moran, Galloway & Co v Uzielli* [1905] 2 KB 555n.

[1053] Oldham, 'Law-Making', 233.

[1054] Anon., 'Circuit Reports', 1 *Law Times* (1843), 563.

[1055] Anon., 'The Reports', 4 *Law Times* (1844), 127.

[1056] Anon., 'Law Reports', 1 *Law Chronicle* (1854), 35 at 36.

Nisi prius cases were also occasionally reported in the *Law Journal Reports*, on points of law which did not afterwards come before the court in banc,[1057] and in the *Jurist*.

London newspapers featured reports of many trials, both in London and on circuit, that were not featured in the more formal law reports, although many would concentrate on cases which were of general public interest, featuring interesting and often salacious facts, such as actions for libel and criminal conversation. Some newspapers faithfully reported trials on more serious constitutional or commercial topics, most notably *The Daily Universal Register*, which became *The Times*, and which began to report nisi prius cases in the first year of its publication in 1785.[1058] Oldham, who has compared cases reported in *The Times* with printed reports and manuscript notes taken by judges and barristers of the same cases, has concluded that the former reports are generally trustworthy.[1059] Another London newspaper with a strong reputation for law reporting was *The Morning Chronicle*.[1060] In addition to the London papers, regional newspapers would also report, in varying degrees of detail, nisi prius cases tried in the local assize courts.

Judges would often be wary of treating newspaper reports as authorities, as they were generally reported for their facts rather than the law,[1061] although such reports were permitted to be cited where verified by an affidavit of the barrister who reported the case.[1062]

[1057] (1822) 1 L.J. Rep. (o.s.) 2.

[1058] For example, *Bradford v Plomer*, tried on 15 December 1785 and reported the following day.

[1059] James Oldham, 'The Law of Negligence as Reported in *The Times* 1785-1820', 36 *Law and History Review* (2018), 383 at 387.

[1060] James Oldham, 'Law Reporting in the London Newspapers, 1756-1786', 31 *American Journal of Legal History* (1987), 177 at 179.

[1061] *R v Labouchere* (1884) 12 Q.B.D. 320, 328 per Lord Coleridge CJ.

[1062] *Walter v Emmott* (1885) 54 L.J. Rep. (n.s.) Ch. 1059, 1061n.

SCHEDULE TO APPENDIX 1

NISI PRIUS CASES REPORTED BEFORE 1795[1063]

Report	Number of cases	Date range
2 & 3 Dyer	7	1554-1571
Benloe	1	1558
Noy	1	1600
Gouldsborough	2	1562-1563
13 Coke	1	1572
Hobart	2	1618
1 & 2 Rolle	2	1615-1620
Aleyn	11	1648
1 Siderfin	1	1680
1 & 2 Levinz	9	1674-1687
3 Keble	4	1685-1686
2 Wms Saunders	1	1671
1 Ventris	2	1669-1681
6 Modern	12	1703-1704
7 Modern	1	1702
8 Modern	2	1721
10 Modern	6	1712-1714
11 Modern	9	1710
12 Modern	34	1703-1706
1 & 2 Shower	17	1681-1692
Skinner	31	1692-1696
Comberbatch	30	1695-1699
Carthew	2	1692-1700
Holt KB	41	1690-1705
1-3 Salkeld	51	1690-1712
1 & 2 Lord Raymond	101	1692-1705
Fortescue	1	1712
Comyns	2	1697-1722
Sessions Cases	2	1717-1728
Bunbury	4	1720-1725
1 & 2 Strange	172	1716-1748
1 & 2 Barnardiston KB	56	1729-1734
Fitzgibbon	2	1728
Cas Temp Harwicke	21	1733-1736
1 W Blackstone	11	1760-1763
Lofft	4	1772-1774
3 Douglas	1	1782

[1063] Source: *The English Reports:* King's Bench, Common Pleas and Exchequer reports.

APPENDIX 2

OFFICIAL STATISTICS ON THE DURATION OF NISI PRIUS TRIALS

Introduction

This Appendix presents an analysis of the time spent on trying nisi prius cases in the nineteenth century and corresponding civil trials on circuit in the twentieth century, by reference to government statistics as opposed to anecdotal evidence. As will be explained, obtaining an accurate and consistent set of results from those statistics is severely hampered by a number of factors. The official figures on which the duration of nisi prius trials are based are accordingly approximate and subject to several qualifications.

The factors identified below relate to gaps in, and difficulties in interpreting, the data. There is no reason to believe that the figures in fact supplied were defective or deliberately manipulated to suit a particular agenda; the court officials tasked with supplying the requested figures were frank in identifying where they were unable to do so; and there is no reason why the social factors which are thought to have led to the distortion of (for example) official crime statistics in the Victorian era,[1064] should apply to the collection of civil trial statistics.

One other factor which must be taken into account when assessing the accuracy of the average amount of the day taken per trial, which applies throughout the nineteenth century and well into the twentieth century, was the irregular hours kept by the court. How long the judge sat each day was a matter for his discretion, and judges on assize and at nisi prius in Guildhall or Westminster Hall would often sit late into the night in order to complete a trial or clear the cause list.[1065]

1835 to 1844

The earliest statistics relevant to the duration of nisi prius trials were collected on behalf of the Circuit Regulation Commission, established in 1845 under the chairmanship of Sir James Parke.

The relevant information sought by the Commission from the Clerks of the Assize was the number of causes tried at nisi prius, and the number of days occupied in the transaction of civil business. Even assuming that the former information related only to trials rather than the disposal of business by other means, it is unlikely that the latter information was limited to the time taken on trials; however, there is no information on what other civil business was required to be disposed of during that time, or how long that other business took.[1066] It will therefore be assumed for current purposes that the entirety of each recorded day was taken up with trials.

[1064] As to which, see Chris A. Williams, 'Counting Crimes or Counting People: Some Implications of Mid-nineteenth century British Policing Returns', 4 *Crime, Histoire & Sociétés* (2000), 77 at 78-79.

[1065] For example, the short duration of the 1854 Lent Western Circuit meant that the judges had repeatedly to sit until ten and eleven o'clock at night: Anon., 'Legal Intelligence: The Assizes', 23 *Law Times* (1854), 27.

[1066] Serjeant Ballantine, recalling his days on circuit in the mid-nineteenth century, said that undefended causes would be dealt with at the beginning of the opening day of the assizes, followed by the judge consulting with counsel as to the most convenient time to summon special juries, after which the remainder of the day would be

Further, the returns from the North Wales, South Wales, Northern and Western Circuits did not include the number of days spent on civil business, so these circuits have been omitted from the following table; and the number of days spent on civil business on the Home Circuit were only recorded for the years 1836 to 1838, so only trials for those years are included below. Moreover, returns were only sought from the circuits, so there were no statistics for the substantial number of nisi prius sittings for London and Middlesex cases.

Table 1: figures for period 1835 to 1844[1067]

Circuit	Number of trials	Number of days	Average part of day per trial
Norfolk	839	314	0.37
Midland	1571	585	0.37
Oxford	2120	531	0.25
Home	517	95	0.10
Yearly average	**504.7**	**152.5**	**0.30**

1845 to 1856

A further twelve years of statistics were compiled for the Common Law (Judicial Business) Commissioners, established in 1856 under the chairmanship of Lord Campbell.

The same information as for the Circuit Regulation Commission was sought, so that it remains impossible to determine precisely how much of the civil business day was spent on trials: the same assumption that the entirety of each recorded day was taken up with trials is therefore made. However, the data set is much more substantial for this period as only the Midland and South Wales Circuits did not record the number of civil business days, and the returns included the nisi prius sittings for London and Middlesex cases.

Table 2: figures for period 1845 to 1856[1068]

Circuit	Number of trials	Number of days	Average part of day per trial
Home	3139	552[1069]	0.17
Western[1070]	1290	432	0.33
Norfolk	765	441	0.58
North Wales	588	150	0.27
Northern	3899	989	0.25

spent on the trial of usually trifling cases; the heavier cases would be tried on the following days: Ballantine, *Experiences*, vol.1, 63-65.

[1067] Source: *Report of the Royal Commission for Inquiring into the Expediency of Altering Circuits of Judges in England and Wales*, C.638, 1845, Appx.VI.

[1068] Source: *Report from the Royal Commission to inquire into Arrangements for transacting Judicial Business, Civil and Criminal, of Superior Courts of Common Law in England and Wales*, C.2268, 1857, Appx.

[1069] As estimated by the Clerk of the Assize.

[1070] Excludes the Bristol assizes, which did not record civil business days separately.

Oxford	1709	713	0.42
London/Middlesex Exchequer Queen's Bench Common Pleas	 6127 5189 3681	 1484 1356 1281	 0.24 0.26 0.35
Yearly average	**2538.7**	**739.8**	**0.29**

1857 to 1893

In 1856 an attempt was made to establish a system of judicial statistics for all courts in England and Wales. In that year Lord Brougham introduced a Bill to require the Home Office to take measures to obtain from every court of justice in the United Kingdom, civil or criminal, a full account of the business transacted during the year. Whilst that Bill did not become law, in 1857 the Home Secretary introduced a scheme of judicial statistics, published annually as the so-called 'Blue Book'; and in 1858 the first returns from all the courts appeared.

Unfortunately for current purposes, whilst those returns included a substantial amount of information, much of which was new, no figures were collected for the numbers of days spent by judges on nisi prius business, either on circuit or for London and Middlesex cases. The original forms only sought figures for the number of days sat by judges each year from the High Court of Chancery. In the following few years, figures were obtained for the number of days sat by county court judges, by judges of the High Court of Admiralty, by the House of Lords and the Privy Council and (after the Judicature Acts) by the Court of Appeal, but the corresponding figures for the judges of the common law superior courts did not begin to be obtained until a substantial reorganisation of the returns for civil judicial statistics was undertaken for 1894. It is therefore not possible even to estimate the average duration of nisi prius trials from any court from the first thirty-six years of official annual statistics.

During this period, however, there were two occasions on which returns of circuit business were sought and obtained for a particular period, which included the days spent on civil causes.

The first such returns were pursuant to a request made in 1864 by George Hadfield, an attorney and MP with an interest in legal reform: the returns sought included the numbers of causes tried at all the assizes in England and Wales during the years 1862 and 1863, and the number of days on which the judges sat at each assize. The returns from the Midland, North Wales and Chester, Western and Oxford Circuits did not separately record the number of days spent on civil business, so those circuits have been omitted from the following table.

Table 3: figures for period 1862 to 1863[1071]

Circuit	**Number of trials**	**Number of days**	**Average part of day per trial**
Home	519	138	0.26
Norfolk	95	53	0.56
Northern	238	71[1072]	0.30

[1071] Source: *Return of Numbers of Prisoners and Causes tried at Assizes of every County, Division and City in England and Wales, 1862 and 1863*, HC Paper 148, 1864.

[1072] A part of thirteen days of this period was spent on criminal business.

Durham	36	15	0.42
Lancaster	431	98	0.22
South Wales	56	42[1073]	0.75
Yearly average	**687.5**	**208.5**	**0.30**

The other returns for this period were obtained pursuant to a request made in 1876 by Sir William Harcourt, the former Solicitor-General, and comprised the numbers of causes tried at all the Summer circuits in the years 1875 and 1876, and the number of days on which the judges sat at each such circuit. The returns from the North Wales and Chester Circuit did not separately record the number of days spent on civil business, so that circuit has been omitted from the following table.

Table 4: figures for period 1875 to 1876[1074]

Circuit	**Number of trials**	**Number of days**	**Average part of day per trial**
Home	201	47	0.23
Midland	202	64.5	0.32
Norfolk	80	27	0.34
Oxford	154	54	0.35
Northern	27	12	0.44
North-Eastern	121	68	0.56
Western	115	53	0.46
Yearly average	**450**	**162.7**	**0.36**

1894 to 1921

The revision of the civil judicial statistics in 1894 led to the first recording of the number of days the judges sat on civil business at each circuit. This, combined with the figures for the amount of civil business at each circuit (which had been obtained from the outset), allows the duration of nisi prius trials on circuit to be estimated. It is not, however, possible to estimate the duration of the trials of London and Middlesex cases because, although separate figures were recorded for the number of days on which judges of the Queen's Bench Division sat, those figures did not distinguish between trial and non-trial business.

As a factor causing difficulties in estimating the duration of trials, the effect of the disposal of business by means other than trial needs to be reconsidered in the context of these (and subsequent) returns, as separate figures are provided for "Actions disposed of by Verdict or Judgment" and "Actions otherwise disposed of", but no such distinction is made in the

[1073] The number of days actually occupied in the trial of causes was not recorded: the number recorded was the number of days remaining for the trial of causes after the trial of prisoners.

[1074] Source: *Return of Dates of Summer Circuits, 1875 and 1876; Number of Judges and Days set apart for Business at Assize Towns; Number of Prisoners and Causes,* HC Paper 59, 1877. Taking evidence as a member of the Royal Commission on Judicature on 24 March 1870 from Russell Gurney QC, Sir George Bramwell, a Baron of the Exchequer, said that 'we do not get through more than two [nisi prius trials] a day, on an average, in the superior Courts', to which Gurney replied: 'the cases have got very much longer since my time, from what I see in the papers.': *Second Report of the Royal Commission to inquire into Operation and Constitution of High Court of Chancery, Superior Courts of Common Law, Central Criminal Court, High Court of Admiralty, and other Courts in England, and into Operation and Effect of Present Separation and Division of Jurisdictions between Courts*, C.631-1, 1870, vol.II, para.458.

information provided for the "Number of Days on which Actions were Tried". Despite the fact that the figures show that at least 10% of causes each year were disposed of other than in a trial, for the sake of consistency with the above tables it will again be assumed that the entirety of each recorded day was taken up with trials.

Table 5: figures for period 1894 to 1921[1075]

Year	**Number of trials**	**Number of days**	**Average part of day per trial**
1894	883	412	**0.47**
1895	754	381	**0.50**
1896	753	477	**0.63**
1897	817	440	**0.54**
1898	818	438	**0.54**
1899	826	457	**0.55**
1900	764	461	**0.60**
1901	734	418	**0.57**
1902	792	507	**0.64**
1903	739	451	**0.61**
1904	804	546	**0.68**
1905	734	536	**0.73**
1906	600	446	**0.74**
1907	561	458	**0.82**
1908	644	478	**0.74**
1909	678	528	**0.78**
1910	612	458	**0.75**
1911	659	493	**0.70**
1912	653	496	**0.76**
1913	573	417	**0.73**
1918	416	308	**0.74**
1919	600	392	**0.65**

1922 to 1970

Analysis of the figures provided for circuit business for part of this period is further complicated by matrimonial actions becoming triable at the assizes from October 1922. The vast majority of such actions were undefended and are therefore discounted from the trial figures in the same way as the disposal of causes other than by trial: the annual number of trials in the table below therefore includes the handful of defended matrimonial actions,[1076] and excludes undefended actions. It is not possible to determine from the statistics how much (if any) of the court day was taken up with disposing of the undefended matrimonial actions, the number of which grew considerably in the 1920s and 1930s, reaching 4145 in 1938. Again, it will be assumed that these cases did not take up any of the time recorded in the returns as spent

[1075] Source: *Returns of Judicial Statistics of England and Wales (Part II: Civil Statistics)*, 1894 to 1921. The statistics for 1914 to 1916 and 1920 to 1921 were published as non-parliamentary papers and are not available on the UK Parliamentary Papers website.

[1076] Other than for the years 1922 to 1924 and 1949 to 1953, where the number of defended actions is not separately recorded.

trying actions, although this may cause the average time spent on trials recorded below to be understated. The practical effect of matrimonial actions on circuit figures ended in 1946, when special commissioners became authorised to try such actions away from the assizes.

Table 6: figures for period 1922 to 1970[1077]

Year	**Number of trials**	**Number of days**	**Average part of day per trial**
1922	1009	534	**0.53**
1923	927	480	**0.52**
1924	732	470	**0.64**
1925	722	514	**0.71**
1926	773	523	**0.68**
1927	936	532	**0.57**
1928	863	525	**0.61**
1929	887	509	**0.57**
1930	1065	608	**0.57**
1931	1076	656	**0.61**
1932	1310	655	**0.50**
1933	1365	683	**0.50**
1934	1319	709	**0.54**
1935	1507	650	**0.43**
1936	1544	674	**0.44**
1937	1764	625	**0.35**
1938	2556	788	**0.31**
1949	1604	943	**0.59**
1950	1694	1022	**0.60**
1951	1939	1099	**0.57**
1952	2926	1501	**0.51**
1953	2580	1438	**0.56**
1954	1965	1807	**0.91**
1955	1212	1601	**1.32**
1956	1122	1531	**1.36**
1957	1023	1396	**1.36**
1958	1025	1361	**1.32**
1959	1124	1426	**1.27**
1960	1156	1308	**1.13**
1961	1210	1479	**1.22**
1962	1383	1522	**1.10**
1963	1517	1790	**1.18**
1964	1707	1980	**1.16**
1965	1715	2120	**1.24**
1966	1688	2120	**1.26**

[1077] Source: *Returns of Judicial Statistics of England and Wales (Part II: Civil Statistics)*, 1922-1970. The statistics for 1939 to 1948 are not available on the UK Parliamentary Papers website; and the annual return for 1971, which was the last year of the assize courts, did not include statistics for those courts.

1967	1696	2305	**1.34**[1078]
1968	1739	2261	**1.30**
1969	1716	2186	**1.27**
1970	2026	2073	**1.02**

[1078] The average duration of non-matrimonial cases not involving personal injuries tried at the assizes in 1967 was 7.11 hours: *Report of the Royal Commission on Assizes and Quarter Sessions*, Cmnd.4153, 1969, appx.11.

APPENDIX 3

A COMPARATIVE EVALUATION OF ESPINASSE'S REPORTS

This Appendix contains an analysis of cases reported by Espinasse, by way of comparison between his report and the report of the same case in: (1) other printed reports of the same trial; (2) judges' manuscript notebooks; (3) the notebook of Sir Vicary Gibbs; (4) the law reports published in *The Times*; (5) reports of the case when heard by the court in banc; (6) the law reports published in *The Counsellor's Magazine*; and (7) other miscellaneous sources.

A total of 282 cases have been compared in this way, representing a third of the 836 cases reported by Espinasse.

Comparison with other printed law reports

One case reported by both Espinasse and Peake which is not included in this analysis is *Burnett v Kensington*.[1079] That is because, although both reporters record that the case they were reporting was tried on the same day,[1080] Peake's report was of the first trial whereas Espinasse was reporting the subsequent trial following the granting of a motion for a new trial.

Ashley v Harrison (1793) 1 Esp. 48; Peake 256

The proprietor of a music hall sued for loss of profits arising from the non-appearance of a performer who had been libelled by the defendant for the alleged purpose of deterring her from performing. The plaintiff was nonsuited after Lord Kenyon CJ declared that the injury was too remote and caused by the performer's fears.

The reports are similar in substance, save in two respects: Espinasse records Kenyon's objections to the action expressed at the opening of the case, whereas Peake records them, more fully, when the judge stopped the defendant's counsel from proceeding with the defence; and Espinasse alone reports the judge's ruling on whether a witness could be called to prove the loss allegedly sustained by the plaintiff. The concentration by Espinasse on the admissibility issue (which was given its own separate sidenote), rather than on the reason for the nonsuit, is consistent with the stated purpose of Espinasse's reports to record decisions on points of evidence.

In the preface to his reports, Peake explained that the reason for reporting this case was not due to any deficiency in Espinasse's report, but because that case was so finely distinguished in another case reported by Peake,[1081] that the latter would have been barely intelligible without the former.

[1079] (1795) 1 Esp. 416; Peake Add. Cas. 71 (sub nom. *Burnet v Kensington*).

[1080] Friday 18 December 1795 (although Peake wrongly says Friday 17 December 1795).

[1081] *Tarleton v M'Gawley* (1794) Peake 270.

The case was subsequently cited by the Queen's Bench in *Lumley v Gye*,[1082] where Crompton J said that the reason for the decision - the remoteness of the damage - appeared more clearly from Espinasse's report.[1083]

Allesbrook v Roach (1795) 1 Esp. 351; Peake Add. Cas. 27

The issue in this case was whether the defendant's written acceptance of an indorsement of a bill of exchange was a forgery, and the question arose as to whether the jury should be allowed to compare the handwriting on the acceptance with other documents which were admitted as being written by the defendant, and which were adduced for the sole purpose of enabling such a comparison.

Espinasse reported Kenyon as ruling that, although some judges had doubted whether the jury should be allowed to compare handwriting because away from the metropolis the jury was often illiterate, he had always inclined to allow it, and would do so in this case. Peake's report, however, differs from this in two respects: first, Kenyon refers to the former reluctance of judges to allow inspection at all, without limiting their reluctance to cases of potentially illiterate juries; secondly, the problem of illiterate juries in the country is put forward as a reason why judges now would not permit them to compare handwriting, but that Kenyon would allow it in the present case because juries in London and Westminster were composed of tradesmen, whose business brought them into contact with different handwriting.

Whatever the correct basis was for Kenyon's ruling, it did not survive first contact with the court in banc: in *Doe d Perry v Newton*,[1084] the King's Bench held that the jury could only compare handwriting on documents which had been adduced in evidence for other purposes; and the court unanimously disapproved Kenyon's ruling, which was cited as reported by Espinasse. Williams J went further, doubting that the facts in *Allesbrook* were correctly reported:[1085] but if he was implying that the documents in issue in that case had in fact been adduced for other purposes, that is not supported by Peake's report (which was not cited to the court), which also made it clear that the documents were only offered in evidence so that they could be compared with the acceptance.

Botham v Swingler (1794) 1 Esp. 164; Peake 285

A witness was called to prove the payment of a sum of money to the defendant on behalf of a bankrupt, which the plaintiff now claimed. On a *voir dire*, the witness admitted that he was a creditor of the bankrupt, which led to the defendant objecting to his evidence. However, in response to a question from the plaintiff's counsel, the witness said that he had subsequently become bankrupt and had obtained his certificate of bankruptcy, so that the debt was no longer owed to him. The defendant's counsel objected to this evidence, contending that the bankruptcy could only be proved by production of the certificate itself.

Kenyon's ruling is shortly reported by Peake: if by his answer to a question the witness is made incompetent, he may restore his competency by the same means, and it is impossible for the

[1082] (1853) 2 E. & B. 216.

[1083] Ibid., 227-228.

[1084] (1836) 5 A. & E. 514.

[1085] Ibid., 518.

plaintiff to come prepared with the materials necessary to show him to be a bankrupt. Espinasse's report is more extensive: in addition to ruling that a witness who renders himself incompetent by parol evidence can restore himself to competency by the same means, Kenyon is reported to have added that, had the fact appeared in evidence in any other manner, it would have been necessary to have answered the objection by the best evidence, i.e. production of the certificate.

Peake himself accepts the accuracy of Espinasse's report, as the additional part of the judge's ruling contained in Espinasse's report is recorded, under the citation of that case, in Peake's treatise on evidence.[1086]

Bourdillon v Dalton (1794) 1 Esp. 233; Peake 312

Kenyon nonsuited the plaintiff lessee's claim for rent against the defendants, who were the assignees of the bankrupt lessor's estate, on the basis that the defendants had never taken possession of the estate. Peake's report of the case is very short; Espinasse's report is a little longer on the facts, but there is no material difference in their reports of the brief ruling of the judge.

Bristow v Eastman (1794) 1 Esp. 172; Peake 291

This was an action for assumpsit, whereby the plaintiffs, who were the assignees of the estate of two bankrupts, sought to recover money which the defendant had embezzled from the bankrupts while he was an infant.

Peake's report of the case is short, dealing with a single ground of defence: the infancy of the defendant. Kenyon was reported as ruling against that defence, as the facts disclosed a tort (to which infancy would not be a defence), even though the form of action was contractual. However, Peake went on to report that this point was not determined, because the plaintiffs got a verdict on the evidence that the defendant had acknowledged the fraud and promised payment after he came of age.

Espinasse reported Kenyon's ruling on infancy in materially the same terms as Peake, but did not go on to record the basis on which Peake maintained the plaintiff obtained a verdict. Instead, Espinasse reported a second ground of defence advanced by the defendant: that one of the assignees had agreed to accept a smaller sum from the defendant in full satisfaction and gave the defendant a receipt for the sum, although the other assignee had refused to accept it. Kenyon was reported to have dismissed that defence on the basis that, whilst a receipt in full of all demands, when given with complete knowledge of all the circumstances, was a conclusive defence to the action, one assignee cannot give a valid receipt where the other assignee had expressly dissented.

This second ground of defence has not been the subject of any English reported authority, although it is apparently contrary to another ruling of Kenyon given a few months earlier, as reported by Espinasse.[1087]

[1086] Peake, *Compendium*, 135.

[1087] *Smith v Jamesons* (1794) 1 Esp. 114: although note the differences in Peake's report of that case, referred to below.

Butler v Rhodes (1794) 1 Esp. 236; Peake 315

This was a claim of assumpsit for goods sold and delivered to which the defendant pleaded a composition with his creditors. Both Espinasse and Peake reported Kenyon's ruling on the sufficiency of the defence in materially the same terms, although the former's report is slightly fuller. The only difference is that Espinasse records the judge directing the jury to find for the defendant, whereas Peake records the plaintiff as having been nonsuited.

Ford v Fothergill (1794) 1 Esp. 211; Peake 301

Both Espinasse and Peake reported Kenyon's ruling that a merchant was required to make enquiries before contracting with an infant, to determine whether the infant's circumstances rendered the goods in question necessaries. However, Espinasse also reported Kenyon as ruling that proof that the infant had contracted other debts at the same time for the same sort of goods was good evidence to rebut the presumption of necessaries: this formed no part of Peake's report. That additional ruling was subsequently followed by Alderson B at nisi prius.[1088]

Godfrey v Turnbull (1792) 1 Esp. 371; Peake 209n.

The plaintiff brought proceedings against a partnership on a promissory note made on 6 April 1793. One of the partners, pleading prior dissolution of the partnership, sought to rely on a notice of dissolution published in the London Gazette on 19 March: the issue was whether the plaintiff had been duly notified of the dissolution.

Espinasse reported Kenyon as ruling that, where there had been no previous dealings with the partners, the advertisement of the dissolution in the Gazette in the ordinary and usual way was sufficient to leave to the jury the question of whether notice was to be inferred.

Peake included, as a note to the third edition of his reports published in 1820, his verbatim notes of the case, because they materially differed from Espinasse's report. According to Peake, Kenyon ruled that publication in the Gazette was not evidence of notice any more than any other newspaper, save where (as in the case of bankruptcies), legislation directed otherwise. The jury was directed to consider the point merely by reference to the probability of the plaintiff having seen the Gazette.

Both Peake and Espinasse reported that the jury found for the partner: if Peake's report is correct, the jury must have been satisfied that the plaintiff did see the Gazette, despite Peake reporting that that the plaintiff took two daily newspapers but not the Gazette. Peake makes no reference to any evidence that would have caused the jury to infer that the plaintiff had notice of the dissolution in the Gazette, other than the fact that he lived in London.

Whichever report is correct, subsequent cases confirmed the law to be as reported by Espinasse.[1089]

[1088] *Burghart v Angerstein* (1834) 6 C. & P. 690, 699.

[1089] *Newsome v Coles* (1811) 2 Camp. 617; *Wrightson v Pullan* (1816) 1 Stark. 375.

Hodges v Hodges (1796) 1 Esp. 441; Peake Add. Cas. 79

The plaintiff, who was the defendant's son, claimed to recover money for maintenance, after his mother had left the matrimonial home, with several of her children, due to the defendant's ill-treatment of her. Both Espinasse and Peake reported Kenyon's ruling that, if a husband behaved in such a way as to render it unsafe and dangerous for her to stay, he would be liable for her maintenance even though he had not thrown her out of the house. However, only Peake went on to report that the husband would not be liable in a court of law to pay for the education of the children, as the law required the husband to provide only for the nurture of his children, which expired when the child turned seven.

Jones v Brown (1794) 1 Esp. 217; Peake 306

Espinasse and Peake both reported in materially the same terms Kenyon's ruling that a father may sue for the loss of his son's services in an action for battery, without evidence that the son was employed in his father's business, where the son lived in his father's house and under his protection.

Knibbs v Hall (1794) 1 Esp. 84; Peake 276

The plaintiff claimed rent for rooms let to the defendant attorney. The defendant sought to set off various sums from the rent due. The reports of Espinasse and Peake concerned rulings made on different items of set-off. Espinasse reported Kenyon's ruling on whether an allegedly excessive rental payment made by the defendant for other rooms, which he was required to pay to avoid distraint by the plaintiff, constituted a payment by compulsion so as to permit the defendant to set off the overpayment against the other rent. Peake, on the other hand, reported the judge's ruling on whether the defendant was entitled to set off from the rent claim professional fees owed to him by the plaintiff.

This is one of the cases which Peake referred to in his preface as being reported because it contained points not reported by Espinasse.

Miles v Dawson (1795) 1 Esp. 405; Peake Add. Cas. 54

Both Espinasse and Peake reported Kenyon's ruling that a witness served with a subpoena duces tecum could not be compelled to produce a power of attorney in his possession. However, Peake's report on the point was much more extensive than that of Espinasse, and Peake in addition reported three further rulings made by the judge during the course of the trial.

Espinasse's report is cited by Peake in his treatise on evidence.[1090]

Parry v Collis (1795) 1 Esp. 399; Peake Add. Cas. 47

This was a defamation action by an attorney against his former client, who was alleged to have spoken ill of the plaintiff's conduct of the case. The plaintiff called a witness to prove his proper conduct of the case, but the defendant objected to the existence of the cause being proved by oral evidence. Espinasse reported Kenyon's ruling that the existence of the cause had to be proved other than by oral evidence.

[1090] Peake, *Compendium*, 3rd ed., London, 1808, 200.

The note of the report in Peake's Additional Cases explains that that report goes further to show in what manner such proceedings are to be proved, and Kenyon is reported to have said that the best evidence which can be produced to prove that a cause went down to trial is the nisi prius record, after which the marshal's book containing an entry of the record would be better and stronger evidence than that offered.[1091]

It is certainly correct that Peake's report goes further than that of Espinasse, although the latter did report Kenyon referring to 'the roll' as being alternative evidence to the witness. Perhaps more surprisingly, Peake's report did not state that the judge actually rejected the oral evidence; and it did not follow that the failure of the plaintiff to adduce such evidence meant the rejection of the oral evidence, although that is the import of the sidenote. The inference is that Peake's report was intended to supplement, but not to replace, Espinasse's report.

Peake's report concluded with the statement that the parties agreed to withdraw a juror, which does not necessarily signify the failure of the plaintiff's case.[1092] Espinasse's report, however, explains that the plaintiff was about to be nonsuited, when the defendant's counsel offered to waive his right to a nonsuit, and to withdraw a juror on condition that the proceedings were put to an end, which was agreed to by the parties.

R v Cole (1794) 1 Esp. 169; Peake 284

The defendant was charged with the statutory offence of having naval stores in his possession. The prosecution sought to call as a witness the person who had informed against the defendant, and the defendant objected to the witness's competency.

Peake reported the ground of objection as being that the informer was entitled to part of the statutory penalty for the offence, and that Kenyon rejected the objection, on the basis that the court was not obliged to impose a pecuniary penalty, and that no such objections should be taken in the future. As a footnote to the report, Peake refers to *R v Blackman*,[1093] in which Kenyon ruled to the contrary on the same objection. Thus, it appears from Peake's report that there then existed two inconsistent decisions on the same issue.[1094]

However, Espinasse's report records the defendant's objection as being expressly based on *R v Blackman*, Kenyon's reconsideration of the issue following that case, and his change of mind because of the uncertainty that a pecuniary penalty for the offence would be imposed, with the result that the objection went to credit rather than competency.

[1091] The notes to Peake's report also mention a reference to the averment in the declaration to which the issue related, which was not mentioned in Espinasse's report. However, that averment was not relevant to the judge's ruling.

[1092] The result is that the trial immediately ends with each party paying its own costs: see *Stodhart v Johnson* (1790) 3 Term Rep. 657.

[1093] (1794) 1 Esp. 95.

[1094] Similarly, Peake in his treatise cited these two cases as being inconsistent: Peake, *Compendium*, 101n.

R v Lord Abingdon (1794) 1 Esp. 226; Peake 310

A peer was charged with libel, in relation to a passage from a speech delivered by him in the House of Lords which was critical of his former attorney, which was subsequently printed by the defendant in a newspaper.

The case was very shortly reported by Peake, solely on the question of whether the prosecution had the right to reply after the defendant called no witnesses. Espinasse reported that aspect of the case in materially the same terms, and also reported Kenyon's direction to the jury that the defendant's claim of parliamentary privilege did not apply to the report of his speech, and that the jury could infer malicious intent in the absence of any other explanation for the publication.

Read v Passer (1794) 1 Esp. 213; Peake 303 (sub nom. *Reed v Passer*); *The Times,* 3 Dec. 1794

The issue was whether the plaintiff's parents had ever been married. Both Espinasse and Peake reported in similar terms Kenyon's rulings that an entry in one of the Fleet registers was not good evidence of marriage,[1095] and that registration was no part of the validity of a marriage.

Peake also reported Kenyon's ruling that a general declaration by a witness that a marriage took place in the Fleet was nevertheless good and strong evidence.

Espinasse in addition reported Kenyon's rulings that evidence of cohabitation and reception by the family as man and wife were admissible and prima facie evidence of marriage; and that a party's attorney who had received a notice for the party to produce a document was not required to do so himself. Espinasse further reported the fact that the alleged marriage took place the year before the statute which introduced the registration requirement for marriages.

The report of this case in *The Times* also recorded Kenyon's rejection of the Fleet registers as evidence, in more colourful terms than Espinasse and Peake.[1096] *The Times* also reported Kenyon's rulings that the marriage need not be registered to be valid and that cohabitation and reputation were good evidence of marriage.

Rich v Topping (1794) 1 Esp. 176; Peake 293

The indorsees of a bill of exchange brought an action of assumpsit against the acceptor, who proposed calling the indorser to prove that he had given it to the indorsees as part of a usurious transaction, having been released by the acceptor.

Peake reported that Kenyon overruled the indorsees' objection to the witness, on the ground that the acceptor's release meant that the witness could no longer be liable to him. Kenyon dismissed the indorsees' objection that the indorser could not be a witness to an action for usury, saying that he would not anticipate what would happen in such an action, but that the judgment in the present action could not be evidence in another action.

[1095] Clergymen who operated out of the area surrounding the Fleet Prison were known to conduct dubious marriage ceremonies, and to insert or delete marriages from their registers, for a fee: Rebecca Probert, 'The Presumptions in Favour of Marriage', 77 *Cambridge Law Journal* (2018), 375 at 378.

[1096] 'I wish the Fleet registers were all ordered to be committed to the flames.'

Espinasse reported Kenyon's dismissal of those objections in the same terms, but in addition he recorded the indorsees' argument, and Kenyon's reasoning for rejecting the authority cited by the indorsees during that argument. Espinasse also reported the judge's summing up to the jury as to what was needed to prove the usury.

Smith v Clarke (1794) 1 Esp. 180; Peake 295

The issue was whether the negotiability of a generally-indorsed bill of exchange could be restricted by a subsequent special indorsement, such that the subsequent holder would have to prove the handwriting of the special indorsee.

Espinasse reported the arguments of each side before reporting Kenyon's ruling that favoured the plaintiffs' argument that the bill could not be so restricted, as to do otherwise could clog the circulation of bills which were intended to be generally negotiable.

Peake reported the case more shortly, summarising the defendant's argument and the judge's conclusion on the issue very briefly, without reference to his reasoning for that conclusion. Peake also referred to a further piece of evidence adduced by the plaintiffs, which the judge ruled was not necessary to prove their case.

Smith v Jamesons (1794) 1 Esp. 114; Peake 279 (sub nom. *Smith v Jameson*)

One of the defendants was a joint assignee of a bankrupt's estate with the plaintiffs, but subsequently his interest was reassigned to the plaintiffs on his removal. Prior to his removal, the defendant had received money which he applied to the use of himself and the other defendant, his business partner, with the approval of that other defendant. Both defendants having become bankrupt, the question for the court was whether the estates of both defendants were liable to the plaintiffs. That question was reserved to the court in banc,[1097] but both Peake and Espinasse provided brief reports of other issues which were raised at the trial.

Espinasse's report concerned the validity of the discharge by the non-assignee defendant of the assignee's debts due to the partnership, including the money in question, on the dissolution of the partnership, which Kenyon ruled was a valid discharge.

Peake's report concerned whether the assignee could be a defendant, as he was entitled to receive the money, could not have maintained an action against himself, and had only assigned such interest as he himself had. Peake reported Kenyon as ruling that, when an assignee assigns his interest, he divests himself of all rights, and becomes a debtor to those who remain assignees.

This was one of the cases which Peake in his preface said that he was reporting because it contained points not reported by Espinasse. Luther describes this as a veiled criticism of Espinasse; [1098] but it is notable that Peake did not include in his report the point dealt with by Espinasse, so that the same criticism could equally be made of Peake.

[1097] See *Smith v Jameson* (1794) 5 Term Rep. 601.

[1098] Luther, 'Text and Context', 531-532.

Snell v Rice (1794) 1 Esp. 222; Peake 309

The defendant, a married woman, was permitted to set aside a default judgment obtained by a plaintiff in respect of an assumpsit claim for work done, on condition that she would not defend the claim on the basis of her married status. Both Espinasse and Peake reported her attempt to adduce evidence that the plaintiff had done the work for her husband and not for her, and Kenyon's ruling that the evidence was inadmissible as it constituted reliance on her married status.

Apart from this, there were differences in the way in which the case was reported. Some of these were immaterial to the reported ruling, such as the scope of the claim and the source of the condition. In addition, Peake merely reported the defendant's counsel as justifying the evidence on the basis that it was usually admitted and that he was not relying on the defendant's married status, and he reported the judge as saying that the condition only permitted the defendant to dispute the quantum or justice of the debt, and not that her husband was liable. Espinasse reported the defendant's counsel as also arguing that the condition only prevented her from setting up a fraudulent or pretend marriage, and not a bona fide defence based on her married status, and he reported Kenyon's rejection of this argument on the basis that the condition only permitted her to dispute the demand and to exclude any issue relating to her married status.

White v Cuyler (1795) 1 Esp. 200; 6 Term Rep. 176

The plaintiff brought an action for assumpsit for money due under a deed, made between the plaintiff and the defendant's wife, and which was also executed by a Mr Low. Espinasse reported both the trial and the hearing by the court in banc, the latter of which was also reported in the *Term Reports*.

Espinasse reported that the defendant's case at trial was that, as the agreement was under seal, the present action could not be maintained because the claim was based on a simple contract; he also reported the plaintiff's response, that the deed was void as against the defendant because it was made by his wife, and it was therefore merely evidence of a simple contract. Both reports referred to the defendant's argument before the court in banc that the deed was validly executed by the wife as attorney for her husband: Espinasse reported the court's rejection of that argument on the basis that the alleged agency capacity did not appear in the deed; the *Term Reports* reported the court as saying that the proper way to execute a deed for the principal under a power of attorney was to sign the name of the principal.

Espinasse also reported the court's judgment as to the effect of the execution of the deed by Mr Low, despite this argument not being referred to in the report. Espinasse reported the court as holding that Low's execution of the deed did not extinguish the obligation of the principal, on the bases that he did not agree to anything in the deed and that, in any event, a collateral agreement by him did not discharge the agreement of the parties. The *Term Reports*, which did report this argument, reported its rejection on the latter basis only.

Christian v Coombe (1796) 2 Esp. 489; Peake's Add. Cas. 38n

This case is referred to in a short footnote in Peake's Additional Cases, which recorded Kenyon's ruling that the adjustment of an average loss in a marine insurance policy was prima facie evidence of the circumstances in which the adjustment was made, but would not prevent

the party from showing that he was not liable for the stated sum on the basis of misinformation, imposition or mistake.

Espinasse also reported that ruling in the same terms, as well as an additional ruling on whether the captain's objection to the adjustment was admissible evidence-in-chief of the matters contained in it. This case is considered in more detail below.

George v Claggett (1797) 2 Esp. 557; Peake Add. Cas. 131

Espinasse and Peake reported in similar terms Kenyon's ruling that, where a factor sold goods on his own behalf without disclosing his principal and was subsequently made bankrupt, the purchaser may set off a debt owing to him from the factor in an action by the principal for the amount of the goods sold.

The reports differed, however, in two minor respects regarding the citation of authority: first, Espinasse referred to Kenyon relying on a determination of Lord Mansfield CJ without naming the case, whereas Peake named the case in question;[1099] secondly, Espinasse reported the plaintiff's counsel as citing *Escott v Milward*[1100] in his favour, whereas Peake said that that case was not cited at the trial, and was only discussed when the case was referred to the full court.[1101]

Stacey Ross v Decy (1789) 2 Esp. 469n; 7 Term Rep. 361n (sub nom. *Stracey v Deey*)

The plaintiffs were partners who allowed one of their number (Ross) to be regarded as the only person engaged in the business: Ross sold partnership goods to the defendant, and the defendant incurred expenses on behalf of Ross on his own account. In an action for the sums owed by the defendant to the partnership, Kenyon allowed the defendant to set off the sums owed solely to Ross, ruling that he had been held out by the sleeping partners as trading on his own account, and that the plaintiffs should not be allowed to rely on the partnership to prevent the defendant from relying on the set-off.

This case was referred to in footnotes to other cases reported by Espinasse and in the *Term Reports*. They both report Kenyon's ruling in broadly the same terms, save for two differences. Espinasse reported Kenyon as relying on the possibility that the defendant only incurred debts to Ross because he could then set them off against the sums he owed to Ross, whereas it was suggested in the *Term Reports* that that was in fact a reason for the defendant incurring those debts. Only Espinasse went on to report that Kenyon confirmed his ruling in the face of counsel's observation that the defendant thereby had a double advantage: if he had only dealt with Ross as a sole partner and had a claim against the partnership, he would have an action against them all; whereas here he was permitted to consider Ross as the only partner.

Ward v Haydon (1797) 2 Esp. 552; Peake Add. Cas. 126 (sub nom. *Ward v Ventom*)

The action was for the recovery of the plaintiff's coach which had been wrongfully distrained from a coach-maker's yard by the first defendant, Haydon. The second defendant, Ventom, was

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[1099] *Rabone v Williams* (1785) 7 Term Rep. 360n.

[1100] At nisi prius, reported in William Cook, *A Compendious System of the Bankrupt Laws*, Dublin, 1786, 236.

[1101] *George v Clagett* (1797) 7 Term Rep. 359.

Haydon's broker. Haydon having let judgment go by default, the action proceeded solely against Ventom.

Espinasse reported two aspects of the case, one of which concerned whether Haydon could give evidence in support of Ventom's defence that he did no more than make an inventory and never had possession of the carriage. As to this, Espinasse reported that the plaintiff objected to Haydon being called as a witness on the grounds that he was personally interested in the verdict, because either of the defendants could be called upon to pay the whole sum to be recovered and the costs of the issue, so that Haydon would be liable for the costs of a verdict against Ventom. Espinasse reported Kenyon as ruling that Haydon was not an interested witness: in a case where one defendant actively defended the case and others suffered judgment in default, Kenyon, although he had some doubts, did not think that the other defendants would be liable to pay costs if the active defendant lost; and in any event if the active defendant won, the plaintiff would not be liable for the costs of the other defendants. Espinasse recorded that Kenyon cited a case from Barnes's reports to that effect, although the name of that case was not reported.

Peake also dealt with this issue, similarly reporting Kenyon as ruling that the objection was not well founded, as by the judgment in default Hayden's interests were settled and would not be liable for the costs of the trial.

The editor of Peake's Additional Cases said in a note that: 'This case, as far as relates to … the admissibility of the witness, has been before reported by Mr Espinasse without comment or observation; but still it seems to admit of some doubt how far the witness was admissible.'

This is not a criticism of Espinasse's reporting of the case, but of his failure to query whether Kenyon's ruling was correct. The editor's note goes on to contrast the ruling with what he considered to be the practice, which was to tax the costs of the proceedings against active and defaulting defendants jointly, with no allowance made for the defaulting defendant.

But Espinasse would have been justified in not doubting the ruling because of Kenyon's reliance on the decision in Barnes' reports. As to this, the editor of Peake's Additional Cases claimed that 'No case is to be found there which can be supposed to have the most remote bearing on the subject', save for one case which only decided that a defendant who succeeded in an action and who was indemnified by the other defendant who failed, should not have his costs.[1102] But the case relied on by Kenyon was surely *Goodright v Tregurtha*:[1103] in an action for ejectment in respect of certain tenements, one of the two defendants admitted partial liability; the other defendant actively defended the action and lost: the plaintiff sought costs against the active defendant, and was granted them after the active defendant failed to show why he should not be so liable. The editor's implied criticism of Espinasse in this note – referred to by Luther as a 'gentle dig'[1104] – therefore seems misplaced.

[1102] *Thrustout dem. Jenkinson v Woodyear* (1742) Barnes 131 (not 2 Barnes, as the editor says).

[1103] (1734) Barnes 121.

[1104] Luther, 'Text and Context', 532.

Buller v Fisher (1799) 3 Esp. 67; Peake Add. Cas. 183; *The Times*, 12 Dec.1799

This case concerned whether a collision at sea between two vessels came within the "perils of the sea" clause in the charterparty so as to exempt the defendant shipowners from liability for loss of the plaintiff's goods.

Espinasse reported Kenyon's direction to the jury that, if the defendants were guilty of any negligence and the accident could have been prevented, they would have been liable, but they were exempt 'from misfortunes happening during the voyage, which human prudence could not guard against, - against accidents happening without fault in either party.' The judge went on to say that he was of the opinion that neither ship was at fault, and that the misfortune was within the clause.

Thus, Espinasse's report of the judge's direction made it clear that the evidence showed that neither of the ships in question were at fault for the collision.

Similarly, Peake reported the judge's view that the collision was a peril of the sea, as 'it appears to have been an accident which no prudence or skill in navigation could have avoided…'.

Despite this, Lowrie CJ, in the Supreme Court of Pennsylvania in 1862, said that the case was better reported by Peake, because he made clear in the statement of facts that the collision was an accident without blame on either side, although the judge went on to say that, while Espinasse did not present the facts as clearly as Peake, he plainly gives this as the ground of the judge's direction to the jury.[1105] Despite this, Espinasse's report has been cited in England in preference to Peake's report, as authority for the proposition that a loss caused by a collision for which neither ship was at fault was a peril of the sea, both in cases[1106] and in treatises.[1107]

One aspect of Kenyon's ruling which Peake reported, but Espinasse did not, was that the question of whether the collision was a peril of the sea was purely a matter for the jury and that the judge was merely giving his opinion: whilst Espinasse also described Kenyon's ruling as his opinion, he did not specifically refer to the issue as being for the jury, although that is implicit in the fact that the question was left for the jury to reach a verdict.

The trial was also reported in *The Times*, where it was recorded that the judge's view was that the question of whether the collision was a peril of the sea was a matter of fact, not of law. It was also recorded that this was the second trial of the claim, the first trial having resulted in both the judge and jury regarding neither party to have been at fault for the collision.[1108] This may explain why Espinasse did not refer to this matter in his report of the evidence.

[1105] *S.B.&C. Hays v Kennedy* (1862) 4 W.L.M. 337, 355.

[1106] *Pandorf & Co v Hamilton, Fraser & Co* (1885) 16 Q.B.D. 629, 634 per Lopes LJ.

[1107] C.G. Addison, *A Treatise on the Law of Contracts and Rights and Liabilities Ex Contractu*, 1st ed., London, 1847, 795; Charles Abbott, *A Treatise of the Law Relative to Merchant Ships and Seamen*, 10th ed., rev. by William Shee, London, 1856, 529; Joseph Arnould, *The Law* of *Marine Insurance*, 3rd ed., rev. by David MacLachlan, London, 1866, vol.2, 1088.

[1108] This trial was heard on 11 June 1798 and reported in *The Times* on 29 September. Neither Espinasse nor Peake referred to it.

Habershon v Troby (1799) 3 Esp. 38; Peake Add. Cas. 181

The defendant had previously brought an action for money had and received against the plaintiff, who was arrested and bailed. The defendant's case was referred to arbitration which, after inspecting the defendant's books and examining the parties, found that the plaintiff had no claim. The plaintiff then brought a claim for malicious arrest and sought to call the arbitrator as a witness. Both Peake and Espinasse reported the grounds for Kenyon's refusal to admit the evidence in materially similar terms, although Peake's report was a little fuller in that regard. Further, Peake reported that the purpose of calling the arbitrator was to prove that the defendant must have known that the plaintiff was not his debtor, whereas Espinasse merely reported that the witness was to be called to prove the facts which appeared before him: however, his report of Kenyon's ruling made it clear that the purpose of calling the witness was to prove that the arrest was malicious.

Tabbs v Bendelack (1802) 4 Esp. 108; 3 Bos. & P. 207n

A claim under an insurance policy for loss of freight caused by the capture of a ship by enemy forces was resisted by the defendant on the ground that the ship was not, as was warranted, American property. The plaintiff contended that, on the evidence, the ship was to be deemed to be an American vessel, because the owner was an American citizen, although he presently resided and carried on trade in England.

Espinasse reported that Kenyon nonsuited the plaintiff on the basis that, under the law of nations, persons in a country carrying on trade were considered as subjects of the country, and their property was to be treated as such if captured in war. Espinasse reported the judge's reliance on cases involving the *St Eustasia* and the *Argonaut*.

This case was also reported by Bosanquet and Puller, as a footnote to *Baring v Clagett*,[1109] in which the case was cited. The statement of facts and the ruling of the judge were reported there in materially the same terms as by Espinasse.

Amey v Long (1808) 6 Esp. 116; (1807) 1 Camp. 14; *The Times*, 5 Dec. 1807 (sub nom. *Amay v Long*)[1110]

This was an action brought against a sheriff's officer for failing to produce a warrant pursuant to a subpoena duces tecum in a previous action brought by the plaintiff against the sheriff, as a consequence of which the plaintiff was nonsuited in that action.

Campbell's report of the facts is longer and clearer than that of Espinasse, although there is nothing in Espinasse's description which is misleading or materially deficient.

Espinasse and Campbell then report, in materially the same terms, an objection by the defendant to the evidence adduced by the plaintiff of the judgment in the original action, and Lord Ellenborough CJ's rejection of that objection.

[1109] (1802) 3 Bos. & P. 201.

[1110] Espinasse (reporting several years after the event) records the case as tried in 1808, whereas Campbell and *The Times* date it in 1807.

A second objection by the defendant was then reported by Campbell: that the action constituted an attack on the defendant's testimony at the former trial, and that an indictment for perjury was the only remedy against him; he also reported Ellenborough's rejection of that objection, on the basis that civil actions for damages lie where a person is injured by the commission of a misdemeanour. Espinasse did not report this as a separate objection, although Ellenborough's rejection of that argument is referred to in Espinasse's report of the judge's direction to the jury.

Espinasse and Campbell then proceeded to summarise the evidence adduced and the argument of defendant's counsel on the principal issue: again, although Campbell's report is a little fuller and clearer, nothing material is omitted or misreported by Espinasse.

Finally, both reporters report Ellenborough's direction to the jury on the principal issue in materially the same terms: indeed, on the key question for the jury, their reports are virtually identical.[1111]

The case was also reported in *The Times* in terms which were materially consistent with the reports of Espinasse and Campbell.

Daniel v Pitt (1806) 6 Esp. 74; Peake Add. Cas. 238 (sub nom. *Daniel v Pit*); 1 Camp. 366n

This is the only instance of a case being reported by all three of the early regular nisi prius reporters, although Campbell includes it only as a short note.

This was an action to recover the price of goods sold by the plaintiff to the defendant, who denied receiving the goods. The plaintiff's case was that the goods were sent to the defendant in a waggon driven by a Mr Coombes who was now dead. A witness said in evidence that the defendant had said that, if Coombes said that he delivered the goods, I will pay for them; and that Coombes had said that he had delivered the goods to the defendant. The defendant objected on the basis that the witness's evidence of what Coombes said was inadmissible.

Espinasse (who appeared as junior counsel in the case) reported Ellenborough's ruling that the evidence was admissible and had been so decided by the twelve judges in the trial of Warren Hastings: evidence from someone who said: 'if such a person says I received the money I'll pay it' was, if the person referred to was dead, evidence of what that person said in the matter in issue.

Peake and Campbell's reports were shorter: Peake reported the judge as admitting the evidence - without reporting the ground on which it was admitted - and as adding that the very point had been decided in the Hastings trial; Campbell's note records the ruling as: 'wherever a party refers to the evidence of another, he is bound by it – and this is constantly good evidence'. Campbell's note is somewhat confusing, as it does not distinguish between the subject and object of the evidence, and there is no reference in that note either to the Hastings trial or to the requirement for the subject of the evidence to be dead.

[1111] Espinasse: 'The question is, whether [the defendant] had the warrant in his custody, and then could have produced it?'; Campbell: 'The only question here to be considered is, whether the defendant had the warrant in his custody, with the capacity of producing it?'

Espinasse's report of this very short point accordingly stands up well: indeed, it is the best of the three reports.[1112]

Goodtitle ex d Pinsent v Lammiman (1809) 6 Esp. 128; 2 Camp. 274

Both Espinasse and Campbell reported in materially the same terms that the plaintiff in an action of ejectment was nonsuited because of a misdescription in the pleadings of the location in which the property in question was situated. The only, immaterial, difference between the two reports was the name of one of the misdescribed parishes.

Pride v Stubbs (1810) 6 Esp. 131; 2 Camp. 397

Both Espinasse and Campbell reported in materially similar terms that an action under a 1592 statute for following a trade without having served an apprenticeship did not lie because the profession in question – coachmaking – did not exist at the time the statute was passed.

R v Howe (1806) 6 Esp. 124; 1 Camp. 461

Espinasse and Campbell reported in materially similar terms Ellenborough's ruling that the record of a previous conviction, which referred to evidence given by witnesses in that case, was not admissible to contradict the testimony given by witnesses in the present case.

Stilk v Meyrick (1809) 6 Esp. 129; 2 Camp. 317 (sub nom. *Stilk v Myrick*)

This case involved a claim by a sailor for extra wages which were promised by the master of the ship following the desertion of two of the crew during the voyage. Espinasse (who appeared as junior counsel in the case) reported Ellenborough's ruling that the plaintiff could not recover on the basis of public policy. Campbell, by contrast, reported that Ellenborough doubted whether public policy was the true principle on which the case was to be supported, and preferred to rest his decision on absence of consideration.

This difference in the reports of Ellenborough's decision is the best-known example of its kind: as is discussed in Chapter 9, it has led to considerable academic and judicial debate about the case, which has given it a prominence out of all proportion to its status as a nisi prius ruling.

In addition, the reference to the defendant in the third sentence of Espinasse's report should have been a reference to the plaintiff.

Two reports of decisions of the court in banc

Finally, in the third volume of his reports Espinasse included three cases decided by the King's Bench sitting in banc, on the basis that they had not been hitherto reported. Two of those cases,

[1112] There is a relatively minor discrepancy between Espinasse's report of the case and the note of the case by Sir Vicary Gibbs, referred to below, concerning the basis of the defendant's objection to the admissibility of the witness evidence. Espinasse reported the objection as being that the statement was a mere declaration without oath, whereas Gibbs noted that the objection was that the witness did not make the statement in the presence of the defendant. Gibbs's version is supported in this respect by Peake's report.

decided in 1785 when Espinasse was still a student barrister,[1113] were also reported in the fourth volume of Sylvester Douglas's King's Bench reports covering the period 1784 to 1785, which were edited from the reporter's and others' manuscripts by Henry Roscoe and not published until 1831.[1114]

The first case was *Proprietors of the Trent Navigation v Ward*.[1115] This was a claim by a common carrier for the recovery of sums expended in the recovery of the defendant's goods following the sinking of the plaintiffs' ship in the river Humber. The plaintiffs were nonsuited at trial, and the King's Bench affirmed the nonsuit on the established principle that common carriers were liable for all accidental damage to the goods being carried, save for Acts of God or the King's enemies. The majority of the court was also of the view that, although it was not an issue at trial, the facts were sufficient to prove negligence on the part of the plaintiffs.

The case is fully reported by both Espinasse and Douglas:[1116] save in some minor respects, their reports are consistent and indeed very similar to each other. The minor differences were as follows: Douglas recorded the trial judge's report of the evidence, the parties' cases and the ruling at trial, whereas Espinasse said very little about the trial, simply quoting from the declaration and recording the verdict; Espinasse recorded the arguments of the four counsel retained for the parties, whereas Douglas summarised the arguments for each party without identifying which counsel advanced which argument; Espinasse misspelt the names of the junior counsel for each party; Douglas recorded two authorities cited in argument, whereas Espinasse did not identify those authorities (although neither was referred to in the judgments); and Douglas reported Willes J as stating that it was not necessary for negligence to be proved and Buller J as disagreeing with that view, whereas Espinasse did not report either of those matters, simply noting Buller's view that negligence in law was sufficient to establish liability.

The other case was *Cooper v Booth*.[1117] The claim originated in the Common Pleas, where the defendant brought an action for trespass. The plaintiffs were excise officers conducting a search of the defendant's premises pursuant to a statutory warrant granted on an oath made by one of the plaintiffs that he had reasonable cause to suspect that the defendant was concealing goods on which duties were owed. No such goods were found during the search. Following a special verdict at trial, the Common Pleas found for the defendant, and the plaintiffs brought a writ of error in the King's Bench, which reversed the earlier judgment. Lord Mansfield CJ, who delivered the judgment of the court, overruled the authority relied upon by the earlier court,[1118] and held that the excise officers were not guilty of trespass when acting under a lawfully-granted warrant.

[1113] He was admitted to Gray's Inn in December 1780 and was called to the Bar in February 1787. He does not (as he does with other cases) say that they were reported from notes taken by others, so presumably he was present when they were argued and decided.

[1114] Marvin, *Legal Bibliography*, 274.

[1115] 3 Esp. 127; 4 Doug. K.B. 286 (sub nom. *The Company of the Proprietors of the Navigation from the Trent to the Mersey v Wood*). The case was also reported in *The Times*, 26 Apr. 1785 (sub nom. *Proprietors of the Staffordshire Navigation v Wood*) in terms that were consistent with the reports of Espinasse and Douglas.

[1116] Espinasse's report was 1,420 words long; Douglas's report 1,564.

[1117] 3 Esp. 135; 4 Doug. K.B. 339 (sub nom. *Cooper v Boot*).

[1118] *Bostock v Saunders* (1773) 2 W. Bl. 912.

Both Espinasse and Douglas reported the particulars of the special verdict and the arguments of counsel for the parties in error, together with interjections of the judges during those arguments. Both fully reported Mansfield's judgment.[1119] There is no inconsistency as between the reports,[1120] and the judgment is reported by both in very similar terms.

Comparison with judge's notebooks

The surviving manuscript notebooks of three judges refer to cases reported by Espinasse: of those, the notebooks of Lawrence J and Lord Kenyon CJ refer to only a handful of such cases; whereas the notebooks of Lord Ellenborough CJ refer to a considerably greater number - 120 in total.

Lawrence J's notebooks

An edition of manuscript case notes taken by Lawrence J in the King's Bench between 1787 and 1800, edited for the Selden Society by James Oldham in 2013,[1121] includes notes of ten cases which were also reported in the first two volumes of Espinasse's reports. However, the case notes are of limited assistance in determining the accuracy of those reports, as they concern the proceedings before the court in banc rather than at the trial as reported by Espinasse.

In *Holmer v Viner*,[1122] Espinasse reported the jury finding a verdict for the defendant, whereas Lawrence's notes recorded the plaintiff being nonsuited.[1123] Oldham says that, in a crowded courtroom, it would have been hard to tell the difference; and that Kenyon often instructed the jury to return a verdict for the defendant as there was no basis for the plaintiff to recover, at which point the plaintiff's counsel would often request a nonsuit so that the plaintiff would be able to bring the same suit again if better evidence could be found.[1124]

Espinasse's report of *Stonehouse v Elliot*[1125] was consistent with the very short summary of the trial in Lawrence's case notes.[1126]

Espinasse's report of *Withnell v Gartham*[1127] was of the new trial granted on the motion which was the subject matter of Lawrence's note.[1128] Oldham notes two minor discrepancies between the report and the notes, relating to the identity of counsel and the precise number of voters in a particular majority: neither was material to the issue or the ruling.

[1119] Espinasse's report of the judgment was longer than that of Douglas: 1,134 words compared to 927.

[1120] The editors of Barnewell and Adolphus's reports criticise Espinasse's report for, in some measure, confusing two different statutes relating to the collection of customs duties: *R v Watts* (1830) 1 B. & Ad. 166, 179n. However, this appears relate only to his reporting of the argument for the plaintiff in error, and was not a criticism of his (or indeed Douglas's) reporting of the court's judgment, where there is no such confusion.

[1121] Oldham, *Case Notes*.

[1122] (1794) 1 Esp. 132.

[1123] Oldham, *Case Notes*, 56, sub nom. *Holman v Viner*.

[1124] Ibid., lix.

[1125] (1795) 1 Esp. 272.

[1126] Oldham, *Case Notes*, 62.

[1127] (1795) 1 Esp. 322.

[1128] Oldham, *Case Notes*, 47.

In *Gordon v Harpur*,[1129] Espinasse reported the judge as being of the opinion that the action was not maintainable, but reserved the point for the court in banc. Lawrence's notes of the argument before the court[1130] recorded the jury finding for the plaintiff. The report of the subsequent argument and decision of the court does not refer to the trial at all.[1131]

Espinasse's report of *Smith v Bowles*[1132] was consistent with the very short summary of the trial in Lawrence's case notes.[1133]

The references to the trial in the notes of the other cases noted by Lawrence[1134] were too short to permit a fair comparison with the reports.

Oldham is of the view that a comparison of Espinasse's reports with the case notes shows that, on the whole, the reports and notes correspond.[1135] Oldham also says that, where there was a difference between the report and the note, there is reason to favour the former: Espinasse was reporting the trial, whereas Lawrence's notes related to the argument and disposition of the post-trial phases of the cases heard by the court in banc; and Espinasse was reporting first-hand, whereas Lawrence's notes were mostly derivative. Oldham concludes that, from the small sample of cases, Lawrence's notes in some measure substantiate Espinasse's reporting.[1136]

Lord Kenyon CJ's notebooks

Of the surviving known judicial notebooks of Lord Kenyon CJ, twenty-three are held on microfilm at the Flintshire Record Office of the North East Wales Archives[1137] and thirty-two are held in the Lancashire Archives in Preston.[1138] Most of these notebooks cover cases heard by Kenyon sitting in banc, and only six nisi prius cases reported by Espinasse are included.[1139]

Whilst there are no apparent discrepancies between the notes of those cases and Espinasse's reports of them, the former are of very limited assistance in assessing the latter, as Kenyon confined himself to recording the name of the case, the cause of action, the evidence of the witnesses and the verdict: he did not record the submissions of counsel, the rulings on any

[1129] (1796) 2 Esp. 465.

[1130] Oldham, *Case Notes*, 134.

[1131] (1796) 7 Term Rep. 9, sub nom. *Gordon v Harper*.

[1132] (1797) 2 Esp. 578.

[1133] Oldham, *Case Notes*, 175.

[1134] *Burnett v Kensington* (1795) 1 Esp. 416 (Oldham, *Case Notes,* 104); *Hubert v Groves* (1794) 1 Esp. 148 (Oldham, *Case Notes*, 50)*; R v Munton* (1793) 1 Esp. 62 (Oldham, *Case Notes*, 54)*; Doe v Davis* (1795) 1 Esp. 358 (Oldham, *Case Notes*, 101)*; Sikes v Marshal* (1799) 2 Esp. 705 (Oldham, *Case Notes*, 189).

[1135] Oldham, *Case Notes*, lix.

[1136] Ibid., lx

[1137] North East Wales Archives MF 883-889.

[1138] LA MS Kenyon, DDKE 5/4/1, Boxes 115-120.

[1139] *Compton v Chandless* ((1801) 4 Esp. 18; Box 115/Book 17/page 53); *Harman v Tappenden* ((1801) 3 Esp. 278; 115/16/33); *Tabbs v Bendelack* ((1802) 4 Esp. 108; 117/17/76); *Thelluson v Coppinger* ((1801) 3 Esp. 283; 117/17/80); *White v Baring* ((1801) 4 Esp. 22; 117/17/73); *Wyndham v Wycombe* ((1801) 4 Esp. 16; 117/17/29).

issues which arose during the trial or his summing-up to the jury, which are generally the subject of the reports.

Lord Ellenborough CJ's notebooks

Harvard Law School holds 187 judicial notebooks written by Lord Ellenborough CJ, covering the years 1802 to 1818.[1140] Of these, 141 have been digitised and made available for study.[1141] These notebooks cover trials heard either in sittings at Westminster or Guildhall or on circuit, and contain 120 cases reported by Espinasse in the fourth to sixth volumes of his reports.[1142]

[1140] HLS MLS 1267.

[1141] https://listview.lib.harvard.edu/lists/hollis-990046612960203941.

[1142] *Amey v Long* ((1808) 6 Esp. 116; HLS MLS 1267 vol.21, book 25, 39); *Archer v Willingrice* ((1802) 4 Esp. 186; 16/2/38); *Ardern v Rowney* ((1805) 5 Esp. 254; 4/17/23); *Barbaud v Hookham* ((1803) 5 Esp. 109; 17/10/18); *Bayley v Wylie* ((1806) 6 Esp. 85; 5/22/3); *Berkley v Walmsley* ((1803) 5 Esp. 12; 17/6/8); *Birk v Guy* ((1802) 4 Esp. 184; 16/2/27); *Blake v Lawrence* ((1802) 4 Esp. 147; 16/1/13); *Brown v Allen* ((1802) 4 Esp. 158; 16/1/35); *Brown v M'Dermot* ((1805) 5 Esp. 265; 4/18/21); *Bryan v Horseman* ((1803) 5 Esp. 81; 17/8/41); *Burney v Jennings* ((1806) 6 Esp. 8; 19/18/38); *Doe d Buross v Lucas* ((1804) 5 Esp. 153; 18/11/72); *Burt v Palmer* ((1804) 5 Esp. 145; 13/12/23); *Camfield v Gilbert* ((1802) 4 Esp. 221; 16/3/41); *Chalie v Duke of York* ((1806) 6 Esp. 45; 19/19/3); *Chaters v Bell* ((1802) 4 Esp. 210; 1/3/31); *Cheek v Roper* ((1804) 5 Esp. 175; 18/13/4); *Clark v Gray* ((1802) 4 Esp. 177; 1/1/88); *Clark v Wisdom* ((1804) 5 Esp. 147; 18/11/53); *Coates v Wilson* ((1804) 5 Esp. 152; 18/11/57); *Dalison v Stark* ((1802) 4 Esp. 163; 16/1/54); *Dangerfield v Wilby* ((1802) 4 Esp. 159; 16/1/37); *Daniel v Pitt* ((1806) 6 Esp. 74; 20/20/62); *Davey v Lowe* ((1803) 5 Esp. 70; 2/8/88); *Dean v Branthwaite* ((1803) 5 Esp. 35; 17/7/22); *Delany v Jones* ((1802) 4 Esp. 191; 16/2/56); *Dimsdale v Lanchester* ((1802) 4 Esp. 201; 1/2/12); *Doe dem Cox* ((1802) 4 Esp. 185; 16/2/31); *Doe d Holcomb v Johnson* ((1806) 6 Esp. 10; 19/18/33); *Doe d Macartney v Crick* ((1805) 5 Esp. 196; 18/13/54); *Doe v Spiller* ((1806) 6 Esp. 70; 20/20/48); *Duckham v Wallis* ((1805) 5 Esp. 251; 4/16/89); *Duffield v Creed* ((1803) 5 Esp. 52; 2/8/25); *Eaken v Thom* ((1803) 5 Esp. 6; 16/5/41); *Edmonstone v Plaisted* ((1802) 4 Esp. 160; 16/1/38); *Everett v Tindall* ((1804) 5 Esp. 169; 18/12/68); *Field v Mitchell* ((1806) 6 Esp. 71; 20/20/59); *Right dem Fisher v Cuthell* ((1804) 5 Esp. 149; 18/11/58); *Fisher v Fallows* ((1804) 5 Esp. 171; 18/12/69); *Freeland v Glover* ((1806) 6 Esp. 14; 4/19/42); *Grant v King* ((1802) 4 Esp. 175; 1/1/64); *Gwyllim v Scholey* ((1807) 6 Esp. 100; 5/23/67); *Harris v Hudson* ((1802) 4 Esp. 152; 16/1/22); *Harrison v Stratton* ((1802) 4 Esp. 218; 16/3/31); *Hayman v Molton* ((1803) 5 Esp. 65; 2/8/69); *Heath v Hubbard* ((1802) 4 Esp. 205; 1/3/28); *Henry v Adey* ((1802) 4 Esp. 228; 1/3/59); *Heron v Granger* ((1805) 5 Esp. 269; 4/18/64); *Hesketh v Gowing* ((1804) 5 Esp. 131; 17/10/62); *Hildyard v Blowers* ((1803) 5 Esp. 69; 2/8/82); *Hills v Hills* ((1802) 4 Esp. 196; 16/2/85); *Holland v Smith* ((1806) 6 Esp. 11; 4/19/32); *Holsten v Jumpson* ((1802) 4 Esp. 189; 16/2/53); *Hoskins v Duperoy* ((1806) 6 Esp. 55; 5/21/37); *Hovill v Lethwaite* ((1804) 5 Esp. 158; 3/12/68); *Howard v Wemsley* ((1806) 6 Esp. 53; 19/19/68); *Hullman v Bennett* ((1805) 5 Esp. 226; 18/14/84); *Hurd v Leach* ((1804) 5 Esp. 168; 18/12/68); *Johnson v Lewellin* ((1807) 6 Esp. 101; 5/23/51); *Kendray v Hodgson* ((1805) 5 Esp. 228; 19/15/21); *Langdon v Hulls* ((1804) 5 Esp. 156; 3/12/56); *Leach v Buchanan* ((1802) 4 Esp. 226; 1/3/52); *Leame v Bray* ((1803) 5 Esp. 18; 2/6/85); *Levy v Wilson* ((1804) 5 Esp. 180; 3/14/15); *Lubbock v Rowcroft* ((1803) 5 Esp. 50; 2/8/20); *Lynbuy v Weightman* ((1805) 5 Esp. 198; 18/13/84); *Mallet v Thompson* ((1804) 5 Esp. 178; 3/13/79); *Mawson v Hartsink* ((1802) 4 Esp. 101; ibid., 1/1/8); *Meazcan v Pearsall* ((1806) 6 Esp. 1; 19/18/30); *Miles v Rawlyns* ((1802) 4 Esp. 194; 16/2/74); *Mullett v Hulton* ((1803) 4 Esp. 248; 16/4/32); *Nutt v Butler* ((1804) 5 Esp. 176; 3/13/78); *Parish v Burwood* ((1803) 5 Esp. 33; 17/7/19); *Parker v Harcourt* ((1805) 5 Esp. 249; 19/16/45); *Parslow v Dearlove* ((1803) 5 Esp. 78; 17/8/27); *Penn v Scholey* ((1805) 5 Esp. 243; 4/16/64); *Peto v Hague* ((1804) 5 Esp. 134; 17/10/75); *Pike v Ledwell* ((1804) 5 Esp. 164; 18/12/40); *Pimm v Grevill* ((1807) 6 Esp. 95; 20/21/60); *Plunkett v Cobbett* ((1804) 5 Esp. 136; 18/11/8); *Potts v Reed* ((1806) 6 Esp. 57; 5/21/19); *Powell v Roach* ((1806) 6 Esp. 76; 20/20/74); *Pride v Stubbs* ((1810) 6 Esp. 131; 22/34/71); *R v Brett* ((1805) 5 Esp. 259; 19/16/18); *R v Budd* ((1805) 5 Esp. 230; 19/15/28); *R v Cassano* ((1805) 5 Esp. 231; 19/15/51); *R v Howe* ((1808) 6 Esp. 124; 30/HC1808/21); *R v Lafone* ((1804) 5 Esp. 154; 3/12/59); *R v Lewis* ((1802) 4 Esp. 225; 16/4/6); *R v Lloyd* ((1802) 4 Esp. 200; 16/3/1); *R v Locker* ((1803) 5 Esp. 107; 17/10/12); *R v Smith* ((1802) 4 Esp. 109; 1/1/25); *Rambert v Cohen* ((1802) 4 Esp. 213; 1/3/41); *Robson v Kemp* ((1802) 4 Esp. 233; 1/4/21); *Robson v Kemp* ((1803) 5 Esp. 52; 2/8/38); *Rusby v Scarlett* ((1803) 5 Esp. 76; 17/8/15); *Sammell v Wright* ((1805) 5 Esp. 263; 19/17/37); *Severin v Keppell* ((1802) 4 Esp. 156; 16/1/28); *Shippey v Derrison* ((1805) 5 Esp. 190; 18/13/41); *Shutt v Lewis* ((1804) 5 Esp. 128; 17/10/56); *Sly v Edgley* ((1806) 6 Esp. 6; 19/18/36); *Smith v Chambers* ((1802) 4 Esp. 164; 16/1/56); *Smith v Kelby* ((1803) 4 Esp. 249; 16/4/51); *Spurrier v Elderton* ((1803) 5 Esp. 1; 2/6/48); *Stears v Smith* ((1810) 6 Esp. 138; 30/HC1810/90); *Stevens v Hill* ((1805) 5 Esp. 247;

In addition to the greater number of cases, Ellenborough's notes are more valuable than those of Kenyon in that they occasionally go beyond recording the name, cause of action and evidence, and say something about the argument or ruling which was the subject of Espinasse's report. However, the notes again focus on the witness evidence, which is unsurprising given that the primary purpose of the notebooks was to enable the facts to be recorded in case they were relevant to any further hearings when the case returned to Westminster Hall. In this respect, the notes are still of limited assistance in assessing the accuracy of Espinasse's reports, as they tend to provide only a very succinct summary of those facts that were relevant to the particular issue being reported; and the vast majority of the cases noted by Ellenborough are silent as to the arguments or the rulings as reported by Espinasse.

However, where the cases noted by Ellenborough do make reference to arguments or rulings, they are generally consistent with Espinasse's reports: examples include the evidential objection in *Chaters v Bell*, a question put to the witness after an objection to admissibility in *Mawson v Hartsink*; legal submissions on an issue in *Surtees v Hubbard*; the judge's ruling in *Thornton v Dick*; the first objection raised in *Fisher v Cuthell*; the judge's ruling in *Levy v Wilson*; the evidential objection in *R v Lafone*; the judge's refusal to allow a witness to be called in *R v Locker*; the case cited to the judge in *Duckham v Wallis*; the summary of the action in *Meazcan v Pearsall*; and the summary of the pleadings in *Thomas v Ansley* and *Pimm v Grevill*. Moreover, documents in evidence recited in Ellenborough's notes are consistent with how they were recorded by Espinasse in the following cases: *Clark v Gray*; *Delany v Jones*; *Doe dem Cox*.

Finally and more generally, as with the Kenyon notebooks there is nothing in Ellenborough's notes to suggest that the substance of Espinasse's reporting of the events at trial was in error. In particular, the key issues in the pleadings and the verdict, where they were noted by Ellenborough, were generally consistent with the references to them in Espinasse's reports.

Comparison with Sir Vicary Gibbs's notebook

The Middle Temple library holds a notebook kept by Sir Vicary Gibbs containing nisi prius cases decided between 1782 and 1811.[1143] The cases noted by Gibbs, in some of which he appeared as junior or leading counsel, included twenty-nine which were also reported by Espinasse.[1144]

19/16/18); *Stiles v Rawlins* ((1804) 5 Esp. 133; 17/10/72); *Surtees v Hubbard* ((1802) 4 Esp. 203; 1/2/20); *Taylor v Croker* ((1802) 4 Esp. 187; 16/2/42); *Thelluson v Cosling* ((1803) 4 Esp. 266; 2/6/1); *Thomas v Ansley* ((1806) 6 Esp. 80; 5/21/85); *Thornton v Dick* ((1803) 4 Esp. 270; 2/6/19); *Waddington v Francis* ((1804) 5 Esp. 182; 3/14/16); *Warrington v Furber* ((1806) 6 Esp. 89; 5/22/26);*Wharam v Routledge* ((1805) 5 Esp. 235; 19/15/66); *White v Jones* ((1804) 5 Esp. 160; 3/12/45); *Wilde v Griffin* ((1804) 5 Esp. 142; 18/11/37); *Wilkes v Lister* ((1806) 6 Esp. 78; 20/20/84); *Williams v Walsby* ((1802) 4 Esp. 220; 16/3/26).

1143 MTL Sir Vicary Gibbs manuscript collection MS 17.

1144 *Berry v Young* (1788) 2 Esp. 640n, Gibbs MS 49; *Smith v Clarke* (1794) 1 Esp. 180, Gibbs MS 112; *Miles v Dawson* (1795) 1 Esp. 405, Gibbs MS 113; *Leveck v Shaftoe* (1796) 2 Esp. 468, Gibbs MS 115; *Rohl v Parr* (1796) 1 Esp. 444, Gibbs MS 128; *Franks v Duchess de la Pienne* (1797) 2 Esp. 587, Gibbs MS 136; *Northey v Field* (1798) 2 Esp. 613, Gibbs MS 119; *Stitt v Wardell* (1798) 2 Esp. 610, Gibbs MS 119; *Sikes v Marshal* (1799) 2 Esp. 705, Gibbs MS 126; *Barber v Gingell* (1799) 3 Esp. 60, Gibbs MS 135; *Dean v Allalley* (1799) 3 Esp. 11, Gibbs MS 127 (sub nom. *Dean v Allaley*); *R v Walter* (1799) 3 Esp. 21, Gibbs MS 141; *Runquist v Ditchell* (1799) 3 Esp. 64, Gibbs MS 130; *Abel v Sutton* (1800) 3 Esp. 108, Gibbs MS 143; *Clarke v Bradshaw* (1800) 3 Esp. 155, Gibbs MS 145; *Dennis v Morrice* (1800) 3 Esp. 158, Gibbs MS 145 (sub nom *Denny v Morice*); *Parr v Eliason* (1801) 3 Esp. 210, Gibbs MS 151; *Richards v Borrett* (1800) 3 Esp. 102, Gibbs MS 142 (sub nom. *Richards v*

With one exception, Gibbs's notes, which were invariably shorter and usually less detailed than Espinasse's reports, were wholly consistent with those reports. Two of the cases noted by Gibbs merit specific consideration.

Clarke v Bradshaw (1800) 3 Esp. 155; Gibbs MS 145

As reported by Espinasse, the issue was whether a statement by the defendant that he was discharged from a debt by his subsequent bankruptcy, as well as by law due to the length of time since the debt had accrued, was such as to prevent the defendant from relying on the statute of limitations. Espinasse reported Lord Kenyon as saying that 'it had been decided that any acknowledgment of the debt was sufficient to take the case out of the statute; and he was bound to hold it so', and that the plaintiff had a verdict.

Gibbs's note recorded both the defendant's statement relying on the bankruptcy as the reason for his non-liability for the debt, and Gibbs's submission as counsel that the whole admission should be taken together; the note recorded Kenyon as holding that the defendant could not under the circumstances avail himself of this defence accompanying his acknowledgment without proving the commission.

Although Gibbs did not record the ground for Kenyon's ruling as reported by Espinasse, there is no inconsistency between them: Gibbs's submission was that, even if the defendant's statement acknowledged the debt, it must be accepted that he was not liable for that debt due to his subsequent bankruptcy; but Gibbs noted that Kenyon would not accept the defence without distinct proof of the bankruptcy. The note thus implicitly accepts that, in the absence of such a defence to liability, the statement was sufficient acknowledgment to prevent reliance on a limitation defence.[1145]

Penton v Robart (1801) 4 Esp. 33; Gibbs MS 160

This was an action for trespass by entering onto the plaintiff's land and removing certain buildings. The defendant was a former tenant whose term had expired but who remained in possession at that time: he claimed that he was entitled to remove the buildings for the purposes of his trade during that time.

Espinasse reported that there were two issues at trial: whether the building was of the type that a tenant was authorised to remove at the expiration of his term; and whether a tenant was entitled to do so after the expiry of the term. On the first issue, Espinasse reported the plaintiff's submission that the building was permanent and Kenyon's ruling that the defendant was warranted in removing the building, citing the (apparently unreported) case of *Dudley v Dudley* and referring to the case of cider-mills 'familiar to us all', but agreeing to reserve the point.

Borrell); *Doe d Stephenson v Walker* (1801) 4 Esp. 50, Gibbs MS 162; *Penton v Robart* (1801) 4 Esp. 33, Gibbs MS 160; *Savill v Barchard* (1801) 4 Esp. 53, Gibbs MS 162; *Turner v Hulme* (1801) 4 Esp. 11, Gibbs MS 159; *Wade v Beasley* (1801) 4 Esp. 7, Gibbs MS 157; *Evans v Beattie* (1803) 5 Esp. 26, Gibbs MS 172; *Pearson v Fletcher* (1803) 5 Esp. 90, Gibbs MS 173; *Plunckett v Cobbett* (1804) 5 Esp. 136, Gibbs MS 179; *Meazcan v Pearsall* (1806) 6 Esp. 1, Gibbs MS 184; *Daniel v Pitt* (1806) 6 Esp. 74, Gibbs MS 190; *Warrington v Furber* (1806) 6 Esp. 89, Gibbs MS 191.

[1145] Similar acknowledgments have been held to deprive the defendant of the protection of the statute: *Bryan v Horseman* (1804) 4 East 599; *Leaper v Tatton* (1812) 16 East 420.

Espinasse then reported the argument and ruling on the second issue, without any reference to the reservation of that point.

According to Gibbs's note, however, the only live issue at trial was the second issue, as: '[i]t was admitted that during the term the tenant had a right to carry this building away'. As to the second issue, Gibbs noted that Kenyon was inclined to think that the building could be validly removed but reserved the point.

The report of the case before the court in banc[1146] provides some support for Gibbs's version: it recorded the result of the trial as a verdict taken for the plaintiff subject to the question of whether the defendant was warranted in pulling down the building after the expiration of the term; and it recorded the plaintiff's counsel admitting to the court in banc that the building might have been removed during the term. However, there is nothing in that report which conclusively endorses Gibbs's reference to the plaintiff's position on the first issue at trial.

Comparison with cases reported by *The Times*[1147]

Christian v Coombe (1796) 2 Esp. 489; *The Times*, 1 Jul. 1796 (sub nom. *Christian v Combe*)

This was an action on a marine insurance policy, following the capture of the insured ship by enemy forces.

Espinasse first reported the plaintiff's contention that the adjustment of the loss by the defendant underwriter's agent, following disclosure of all relevant papers, was conclusive of the case, to which Kenyon was reported to have said that, whilst that was good as a general principle, there could be exceptions for fraud or mistake of law or fact by the underwriter. The report then recorded the plaintiff's proof that the adjustment took place before the captain's protest was received, to which the defendant sought to rely on the protest to open up the adjustment, for which purpose he intended to adduce the protest in evidence. Kenyon was reported to have ruled that the protest was inadmissible to prove those matters in chief, although it could be used to contradict evidence which the captain who made the protest may have given at the trial.

The Times also reported the plaintiff's argument as to the conclusiveness of the adjustment and Kenyon's rejection of that argument, although there was reference only to fraud or mistake of fact as exceptions, not mistake of law. The report also recorded Kenyon's refusal to admit the protest in evidence, going further than Espinasse's report in explaining the reason as being that the protest was not given under oath. The report went on to deal with another aspect of the defence which was not the subject of Espinasse's report.

Lacaussade v White (1798) 2 Esp. 629; *The Times*, 19 Feb. 1798

A claim for recovery of money deposited on an illegal wager was very shortly reported by *The Times* in terms which were consistent with Espinasse's fuller report. A promise by the newspaper to report the case more fully at the first opportunity appears to have been overtaken by the reference of the case to the court in banc, which was reported by *The Times* on 28 April 1798.

[1146] (1801) 2 East 88.

[1147] Some of these cases are referred to in other sections above and below.

Bellis v Burghall (1799) 2 Esp. 722; *The Times*, 14 Feb. 1799

The issue was whether a statute prohibiting keeping a house for public dancing and music without a licence applied to the defendant, a dancing-master whose pupils were specifically invited following the advance purchase of a ticket, and who did not permit persons to be admitted indiscriminately. Espinasse reported these facts and the defendant's contention that the statute did not apply to this situation but was intended to prevent disorderly meetings where persons were admitted for hire, not where the company was select and who met only for the purpose of improvement. Kenyon was reported as ruling that the meeting was not within the statute, so that the plaintiff was nonsuited.

The report of *The Times* concentrated on counsels' speeches, particularly that of Erskine for the defendant, who launched a scathing attack on the plaintiffs' morality.[1148] Shorn of its colourful context and language, this report was consistent with Espinasse's report, save that the result was recorded as a verdict for the defendant.

M'Namara v Fisher (1799) 3 Esp. 18; *The Times*, 14 Jun. 1799

A wife's defence to a claim for goods sold based on her married status was countered by a plea of feme sole, by reason of her husband living abroad and paying her a weekly sum for her subsistence. Espinasse reported these facts, and Kenyon's rejection of the plea. Whilst the report in *The Times* is somewhat shorter, all the matters reported there are contained in, and consistent with, Espinasse's report.

Cuthbert v Haley (1799) 3 Esp. 22; *The Times*, 20 Jun. 1799

The reports by Espinasse and *The Times* of this case, which involved a defence of usury to a claim on a bond, were in materially the same terms.

Barber v Gingell (1799) 3 Esp. 60; *The Times*, 14 Dec. 1799 (sub nom. *Bouber v Gingell*)

An action of assumpsit on a bill of exchange was defended on the basis (amongst others) that the acceptance of the bill was a forgery.

Espinasse (who appeared as junior counsel) reported two aspects of the evidence: whether proof of the defendant's acceptance of the bill precluded a defence of forgery; and whether evidence from the drawer of the bill (one Taylor), who was alleged to have forged it, was admissible to prove that the defendant had paid bills from the same party under similar circumstances.

The context for the second aspect was that the plaintiff had proved that the defendant had previously paid several bills drawn by Taylor in similar circumstances, and the defendant sought to rebut that evidence by calling Taylor himself, who was at the time in prison on a forgery charge and had been brought up by habeas corpus. The plaintiff objected to Taylor's evidence, and Kenyon ruled that it was admissible; it was then reported that Taylor refused to

[1148] 'Nothing could be more infamous than the characters of those men who had brought that cause before the Court'.

answer any questions regarding the bill, and that, as the defendant had no other witness, the plaintiff had a verdict.

As to the first aspect, the report of the case in *The Times* was in materially similar terms to Espinasse's report. As to the second aspect, however, the former report was very different to the latter. *The Times* first recorded that the plaintiff's evidence of the defendant's previous conduct was given by a witness called Corden, who was a Quaker; the report then said that it was on that evidence that Kenyon ruled that the defendant was bound to pay and that the jury found a verdict for the plaintiff: no mention was made of the attempt to call Taylor or of the judge's ruling on the admissibility of Taylor's evidence.

Instead, it was reported by *The Times* that, in response to Corden's evidence that the defendant had paid several similar bills to the person now in custody for their forgery, one of the plaintiff's counsel (Garrow) said that he had been retained by that prisoner on the criminal charge, and that he was certain that, if Corden would give evidence at the trial, his client would be acquitted. However, as a Quaker, Corden would not swear an oath, and would only give his evidence on an affirmation: it appears that Garrow asked Kenyon whether Corden's evidence could be used in the criminal trial, hoping no doubt that a ruling in his favour would influence the judge at that trial.[1149] Even though Garrow obtained some support in this respect from his opponent Erskine, Kenyon was reported as confirming the rule that evidence in criminal cases must be given by oath as 'I think that some men would affirm that which they would not swear.' Although the prisoner in question was not named, it must have been Taylor.

Whilst there is no necessary inconsistency between the two reports, it is perhaps surprising that Espinasse did not record the debate regarding the admissibility of a Quaker's testimony (which was not at the time the subject of any reported nisi prius case), and that *The Times'* report omitted to mention Taylor's presence at the trial as a witness.

Bedford v McKowl (1800) 3 Esp. 119; *The Times*, 27 Feb. 1800

This was an action for the seduction of the plaintiff's daughter. Espinasse reported the case for the point that the plaintiff could admit evidence to support a claim for loss of comfort and injury to feelings as a parent, as well as for loss of service. The salacious facts of the case were of more interest to *The Times*, although it also reported Eldon's direction to the jury on the scope of the damages claim in materially the same terms as Espinasse's report.

Hoare v Allen (1801) 3 Esp. 276; *The Times*, 5 Dec. 1800 & 10 Sep. 1801

This was an action for criminal conversation which was tried twice: Espinasse reported a single point of evidence which arose in the second trial, namely whether the plaintiff's witness could be asked about the plaintiff's wife's statements to her husband and about her husband's reaction to those statements. *The Times* reported the facts of both trials, and the judge's directions to the juries, in considerable detail: this included the judge's direction on the evidential issue reported by Espinasse, in terms which were materially the same as in his report.

[1149] Garrow could not have been asking the judge to permit Corden to give evidence at the criminal trial, as the Quakers Act 1695, which permitted Quakers to substitute an affirmation where the law previously required an oath, expressly did not apply to criminal cases: perhaps Garrow was asking for Corden's evidence in the civil trial to be admitted as hearsay evidence in the criminal trial.

Robinson v Hindman (1800) 3 Esp. 235; *The Times*, 10 Dec. 1800 (sub nom. *Robinson v Hyndeman*)

As reported by Espinasse, this was a claim, based on general usage, for one month's wages by a servant who had been discharged without notice by the defendant. The defendant proved that the plaintiff had been negligent, which led Kenyon to think that he was not entitled to recover, but Kenyon went on to say that, where there was no fault, it was reasonable for a servant dismissed without notice to have a month's wages.

The Times, which described the case as of great importance to the public, concentrated on the other aspect of the plaintiff's case which was not referred to at all by Espinasse: the recovery of "board wages", which was an allowance for food and lodging incurred by the plaintiff while accompanying the defendant on trips to Scotland. After the plaintiff's misconduct had been proved, Kenyon was reported as agreeing that the only issue was the proper level of board wages, and there was no reference in the report to the judge giving his view on would be a reasonable claim for general wages following the dismissal of a non-negligent servant.

Nevertheless, the principle stated by Kenyon, as reported by Espinasse, became generally recognised in English law.[1150]

Abel v Potts (1800) 3 Esp. 242; *The Times*, 29 Dec. 1800

This was an action on a marine insurance policy in respect of loss of cargo: the ship in question was captured by the French and forced to take her cargo to a French colony; thereafter, the ship was recaptured by the British and taken to a British colony, where the cargo was condemned.

Espinasse reported two points taken on behalf of the defendant insurers: that the defendant did not have notice of the loss of the ship within the stipulated period; and that the plaintiff ought to have elected to abandon the cargo in the French colony rather than the British colony, in order to claim a total loss. As to these, Espinasse reported that Le Blanc J allowed the first issue to go to the jury on the evidence adduced and, as to the second issue, the judge considered that there was insufficient evidence that the plaintiff knew of the loss of cargo at the French colony for him to elect whether to abandon it.

The report in *The Times* of the material facts was consistent with the facts reported by Espinasse, but Le Blanc's summing-up was very shortly reported, and contained no details of his directions to the jury.

Edmonstone v Webb (1801) 3 Esp. 264; *The Times*, 16 Feb. 1801

The plaintiff sought to execute a judgment debt against a defendant, who defended it on the basis that he had become bankrupt. The plaintiff impeached the certificate of bankruptcy on the ground of fraud, contending that persons had been admitted to prove fictitious debts in the defendant's bankruptcy. The plaintiff sought to prove the fraudulent nature of the debts by collateral evidence, and justified the failure to prove them by calling the "creditors" on the basis that it would not be proper to call them, as they would be perjured on one side or the

[1150] *Beeston v Collyer* (1827) 4 Bing. 309, 313 per Gaselee J; *Fawcett v Cash* (1834) 5 B. & Ad. 904, 908 per Littledale J. It was described in Tyrwhitt's Exchequer reports as 'one of the general customs of the land judicially taken notice of without further proof': *Nowlan v Ablett* (1835) 5 Tyr. 709, 715n.

other. Espinasse reported Kenyon as requiring the "creditors" to be called, as the objection should lie in the mouth of the defendant, not the plaintiff. It was reported that one of the "creditors" was then called, who established the act of fraud, following which the plaintiff had a verdict.

The Times reported the facts of the case in materially the same terms but the report focused on the evidence given by the "creditor", and did not record the ruling which led to her being called as a witness.

Harman v Tappenden (1801) 3 Esp. 278; *The Times*, 24 Feb. 1801 (sub nom. *Harman v Tapenden*)

By this action (in which Espinasse acted as junior counsel), the plaintiff claimed damages against the officers of a corporation for being deprived of his office as a member of that corporation, to which he was restored by a mandamus ordered by the King's Bench: amongst the damages claimed were the costs of those proceedings.

Espinasse reported the two objections taken by the defendants which were dealt with by Kenyon: first, that damages for the costs of obtaining the mandamus could not be recovered, as the court made no order for such costs when granting the relief; secondly, that the defendants acted in their corporate capacity, and so no action lay against them personally. Espinasse reported Kenyon as ruling in favour of the defendants on the first point, and as being disposed to the opinion that the defendants were acting in a corporate capacity, as there was no suggestion that they acted maliciously: Kenyon, however, was prepared to reserve the latter point for the court in banc, and so suffered the plaintiff to take a verdict, with leave for the defendants to move to set it aside and have a nonsuit entered.

The report in *The Times* was short, and referred (albeit obliquely) only to the second point reported by Espinasse. *The Times* did not refer to Kenyon's reticence on this point, instead reporting the judge as saying that 'he thought it was a peevish, silly action and wished it had not been brought', which is somewhat at odds with the report's subsequent reference to Kenyon's direction to the jury to find for the plaintiff, with leave for the defendants to move for an arrest of the judgment.

Weldon v Gould (1801) 3 Esp. 268; *The Times*, 24 Feb. 1801 (sub nom. *Wildon v Gould*)

The plaintiff claimed recovery of calicoes which he had delivered to his agent for printing: the agent passed them on to the defendant, a calico-printer who kept the goods for the balance of a general running account between him and the agent, not knowing the calicoes were the property of the plaintiff. Espinasse reported Kenyon's rulings that the plaintiff[1151] had a lien for a general balance, provided that the sums owing were for work done in the course of that business; and that the lien extended to the goods of another where the defendant was ignorant of that fact, citing *George v Clagett*.[1152]

The report in *The Times* of the facts was consistent with those reported by Espinasse, although it was also reported that the agent was a bankrupt at the material time. The report dealt only with the first issue ruled on by Kenyon, although it did not report the ruling in any detail, save

[1151] *sic* – this must have been a reference to the defendant.

[1152] (1797) 7 Term Rep. 359 – as to which, see above.

to record that, when referred by counsel to an unnamed case of his on the existence of the lien, Kenyon responded that he had relied on the authority of Lord Mansfield CJ in *Green v Farmer*.[1153] Espinasse's report on that issue, although it recorded Kenyon as saying that the point had been decided before, did not name the case in question.

George v Perring (1801) 4 Esp. 63; *The Times*, 1 Dec. 1801

In this action (in which Espinasse appeared as junior counsel), the plaintiff sought to recover from the defendant, who was the sheriff of Middlesex, a sum taken for a bail-bond which was in excess of the amount permitted by statute. The plaintiff's case was that he was arrested and taken to the house of the sheriff's officer, where he entered into the bail-bond with the officer for the excessive sum. Espinasse reported Kenyon as ruling that the action was not maintainable against the sheriff, as he was not connected with the extortion practised by his officer, against whom any such action should be brought.

The case was shortly reported by *The Times* in terms which were consistent with Espinasse's report.

Wright v Lawes (1801) 4 Esp. 82; *The Times*, 18 Dec. 1801

The case (in which Espinasse appeared as junior counsel) involved a claim for recovery of goods, and an issue arose as to the whether the seller's right to stop the delivery of the goods in transit ended when they came into the possession of the recipient before they reached his warehouse. The facts and the ruling of Kenyon on that issue were reported by Espinasse and *The Times* in materially the same terms. Espinasse also reported a ruling relating to the proof of the plaintiff's title to the property in question. Espinasse's report stated the sum recovered by the plaintiff as £75, whereas *The Times* report stated it as £80.

Clark v Gray (1802) 4 Esp. 177; *The Times*, 18 Jun. 1802 (sub nom. *Clarke v Gray*)

The plaintiff sought to recover from the defendant stagecoach proprietor the value of a trunk sent by the defendant's coach, which was lost by the negligence of the guard. The defendant relied on a notice limiting liability to £5. Espinasse reported Ellenborough's ruling on three issues: whether the loss in question came within the scope of the limitation; whether there had been sufficient notice of the limitation; and whether the plaintiff could in any event have a verdict for the £5 in an absence of a specific plea. *The Times* reported the facts in materially the same terms, but referred only to the third issue, on which both Espinasse and *The Times* recorded the plaintiff's agreement to take a verdict for that sum subject to the point being reserved for the court in banc.

Espinasse reported the defendant's reliance on this point on *Clay v Willan*,[1154] whereas *The Times* referred to the defendant relying on *Yates v Willan*.[1155] It is not clear which of these (if either) was the incorrect reference, as both of those cases were referred to in Ellenborough's judgment when the case came before the court in banc.[1156]

[1153] (1768) 4 Burr. 2214.

[1154] (1789) 1 H. Bl. 298.

[1155] (1801) 2 East 128 – the correct title of this case is *Yate v Willan*.

[1156] *Clarke v Gray* (1805) 6 East 564.

Delany v Jones (1802) 4 Esp. 191; *The Times*, 13 Jul. 1802

In this case (in which Espinasse appeared as junior counsel), the plaintiff contended that a newspaper advertisement taken out by the defendant, which offered a reward for information as to whether the plaintiff had entered into a marriage prior to marrying his present wife, was libellous. Espinasse reported Ellenborough's direction to the jury that, if (as the defendant contended) the advertisement had been taken out bona fide on the authority of the plaintiff's wife for the purpose of investigating whether the plaintiff was in fact previously married, the publication would not be a libel even if it imputed a charge of bigamy. The report in *The Times* of the facts and the judge's direction was consistent with Espinasse's report.

Davey v Chamberlain (1802) 4 Esp. 229; *The Times*, 15 Dec. 1802

One of the defendants had been in a carriage on the wrong side of the road when it struck and killed the plaintiff's horse: the other defendant was the passenger. Espinasse reported the case on the question of whether the passenger could be liable for the accident, which Ellenborough ruled depended on whether he was party to the hiring of the carriage. The report in *The Times* instead concentrated on the facts of the case (which were reported in the same terms as in Espinasse's report), and on reproving the defendants for their conduct.

Thelluson v Cosling (1803) 4 Esp. 266; *The Times*, 4 Mar. 1803 (sub nom. *Telluson v Curling*)

This was an action on an insurance policy for the loss of a ship by capture during hostilities between Spain and France. It became relevant to determine the date on which war had been declared, and Espinasse reported Ellenborough's ruling that that could not be proved by newspapers or unauthenticated publications, but that a declaration by the Spanish government, relayed by the British Ambassador to the Secretary of State's Office, was sufficient.

The report in *The Times* focused on the substantive defence to the claim and recorded the facts in much greater detail: there was no mention of the evidential point reported by Espinasse.

Helyear v Hawke (1803) 5 Esp. 72; *The Times*, 1 Dec. 1803 (sub nom. *Helyar v Hawke*)

The plaintiff claimed on a warranty as to the age of a horse given by the defendant's groom at the time of the sale; the defendant denied giving any warranty other than as to the horse's soundness. The defendant objected on the basis that the groom had not been made the agent of the defendant for the purpose of giving the warranty and that, in any event, proof of such agency should have been given by the defendant, who had not been called. Espinasse (who appeared as junior counsel) reported Ellenborough as ruling that a warranty given by a servant at the time of sale was evidence of agency, but acknowledgment at another time was not such evidence. Espinasse reported that subsequent evidence, in the form of a letter written by the defendant to the plaintiff the day after the sale, did not admit the warranty, so that further evidence would be necessary.

The Times, having reported the basic facts in terms which were materially the same as reported by Espinasse, merely referred to the 'great deal of evidence' produced on behalf of the plaintiff without reference to the evidential issues reported by Espinasse.

This case is also referred to below.

Bryan v Horseman (1803) 5 Esp. 81; *The Times*, 5 Dec. 1803

Espinasse's report of this case is considered in more detail below. The report in *The Times* was consistent with the Espinasse's report, although *The Times* also recorded submissions by counsel and rulings by the judge on the evidence which were not dealt with by Espinasse.

Dover v Maestaer (1803) 5 Esp. 92; *The Times*, 22 Dec. 1803 (sub nom. *Dover v Mestaer*)

This was a claim under statute concerning bribery at an election. Espinasse reported the evidence in some detail, and three evidential and procedural points which arose during the trial: whether a witness who had been convicted of perjury but had been subsequently pardoned was competent to give evidence; whether an unstamped promissory note was admissible evidence to corroborate oral testimony; and whether the plaintiff had a right to reply in circumstances where the defendant, having called no witnesses, had raised the new factual matter of the perjury conviction.

The Times reported the facts, submissions and rulings in respect of the first and third of these points in terms which were materially the same as Espinasse's report.

R v Cassano (1805) 5 Esp. 231; *The Times*, 6 Jun. 1805 (sub nom. *R v Cassino*)

The plaintiff was charged with attempting to bribe a customs officer to allow entry of certain books imported from Holland: the charge stated that the bribe was to let the goods be conveyed to another place 'than the quay or wharf appointed for the landing of them'. The evidence showed that the goods were delivered from the quay or wharf to the King's warehouse. Espinasse reporting Ellenborough as ruling that the charge contained a misdescription, as the King's warehouse was not a quay or wharf.

The Times recorded the ruling in materially the same terms as in Espinasse's report.

Meazcan v Pearsall (1806) 6 Esp. 1; *The Times*, 27 Feb. 1806 (sub nom. *Merzeau v Pearsall*)

In an action against the defendant for carrying on the trade of silk throwster without having served an apprenticeship, Espinasse reported Ellenborough's ruling that the defendant was not within the statute, as he was a mere trustee of the business carrying it on for the benefit of others, and he did not take part in any of the business.

The report in *The Times* was consistent with Espinasse's report.

Reports of cases heard by the court in banc

Over one hundred of the trials reported by Espinasse were the subject of subsequent proceedings before the court in banc which were themselves reported by the authorised reporters of the King's Bench and the Common Pleas. Most of those reports contained short summaries of the trial, and those summaries can be checked against Espinasse's report of the trial for similarities and discrepancies.

Whilst of some help in this respect, these summaries are of limited assistance as a point of comparison with Espinasse's reports for three reasons. First, the summaries of the trial were

reported second-hand, as the reporter would not be likely to have been present at the trial and would not have been taking notes for the purposes of producing a report: those summaries are likely to have been produced from either court documents such as the trial judge's report to the court in banc,[1157] or discussions between the reporter and the counsel involved in the case. The second limitation is the brief and diffuse nature of most of those summaries: consistency between them and Espinasse's report of the trial in question is therefore not in itself a sure indication that that report was accurate in all material respects. Finally, the reporter of the decision of the court in banc would rarely report the arguments of counsel at trial or, most importantly, the ruling of the trial judge, as they would have been superseded by the arguments before the court in banc and the judgments of that court.

Because of these limitations, an extended comparison of each individual case as reported by Espinasse and the reporters of the subsequent proceedings is not included in this Appendix. Instead, the Schedule to this Appendix consists of a table setting out a summary comparison of each of those cases. The table deals only with those cases where the summary of the trial in the report of the subsequent proceedings was sufficiently substantial to provide a meaningful comparison (albeit limited for the reasons referred to above) because the summary includes at least one issue dealt with at trial which was also the subject of Espinasse's report.

Reports in *The Counsellor's Magazine*

Cases were reported in a short-lived law journal called *The Counsellor's Magazine*, including six cases also reported by Espinasse. Two volumes of the editions of *The Counsellor's Magazine* were published, the first covering the period 1795 to 1796 and the second covering the period 1796 to 1800.

The editors of *The Counsellor's Magazine* stated, in an address in the first edition, that its purpose was to provide reports of cases for the benefit of lawyers and law students. However, the reports of nisi prius cases were more in the style of the newspaper court reports of that period, with a focus on the substantive facts, rather than on any evidential or other legal issues which may have arisen during the trial.[1158] For this reason, there was only a limited overlap between the reports in *The Counsellor's Magazine* and Espinasse's reports of the following cases.

<u>*Wood v Wain* (1796) 1 Esp. 442; 1 *Counsellor's Magazine* 45 (sub nom. *Wood v Vane*)</u>

The plaintiff sold goods on credit to one Harris, who subsequently absconded without paying. The plaintiff claimed for the value of the goods against the defendant, who when asked by the plaintiff gave a good character reference for Harris. Both Espinasse and *The Counsellor's Magazine* reported the facts in similar terms, although Espinasse reported them more fully. Espinasse reported Kenyon's direction to the jury on the facts, including his opinion that nothing was imputable to the defendant, and recorded the jury's verdict for the plaintiff. *The Counsellor's Magazine* simply reported the question for the consideration of the jury and the same verdict.

[1157] See, for example, the reporter's reference to the trial judge's report in *Bennett v Francis* (1801) 2 Bos. & P. 550.

[1158] A number of Old Bailey and other criminal trials were also reported, adding to the impression that those cases were selected for purposes other than the promotion of legal education.

Hodges v Hodges (1796) 1 Esp. 441; 1 *Counsellor's Magazine* 46

Espinasse's report of this case, which was also reported by Peake, is considered above. *The Counsellor's Magazine* reported the facts consistently with, although in slightly more detail than, each reporter, but did not report any ruling by Kenyon: instead, it concentrated on the (ultimately successful) attempt by the judge to persuade the parties to settle their dispute before a verdict was given.

Smith v Prager (1796) 2 Esp. 486; 1 *Counsellor's Magazine* 109

This was an action for usury which Espinasse reported on the competency of a witness called by the plaintiff. Espinasse summarised the witness's testimony and reported the argument for the defendant and Kenyon's ruling on the issue in favour of the plaintiff. *The Counsellor's Magazine* reported the witness's evidence in more detail (and consistently with Espinasse's report) but did not refer at all to the defendant's challenge to the witness: it merely recorded the verdict 'after a very excellent summing up from the Lord Chief Justice'.

R v Crossley (1797) 2 Esp. 526; 2 *Counsellor's Magazine* 28

Espinasse reported this perjury trial solely on the issue of whether the King's Bench Master's office book containing the names of all the attorneys of the court was sufficient to prove that the defendant was one of their number, and none of the facts was reported. By contrast, the report of the case in *The Counsellor's Magazine* concentrated on the facts and the speeches of counsel and judge's summing up on the substantive issue, in which there was nothing inconsistent with Espinasse's report: there was no reference to the evidential issue reported by Espinasse.

Bedford v McKowl (1800) 3 Esp. 119; 2 *Counsellor's Magazine* 246

This case, already referred to above, was an action concerning the seduction of the plaintiff's daughter. Espinasse's report dealt only with the evidential issue of whether loss of comfort and injury to feelings of the mother was admissible, or whether the evidence should be limited to loss of service; and he reported Lord Eldon CJ's ruling permitting the former evidence. *The Counsellor's Magazine* concentrated on the substantive facts, although it did report the defendant's counsel as submitting that the court should only consider pecuniary loss. *The Counsellor's Magazine* did not report the judge's direction on that issue in an evidential context, other than his direction that the jury consider what loss the mother had sustained from the seduction of her daughter. In that respect, as well as in the reporting of the verdict for the plaintiff and the size of the award, the reports were consistent with each other.

Burton v Lloyd (1800) 3 Esp. 207; 2 *Counsellor's Magazine* 271

This was an action on the case for giving a false character reference. Espinasse reported an objection to the competency of the plaintiff's witness as being an interested party, and Kenyon's ruling that he was competent; the judge's direction to the jury was also shortly reported. *The Counsellor's Magazine* gave a short summary of the facts and a lengthy report of the opening speech of the plaintiff's counsel; it went on to report the facts in some detail, and the speech of the defendant's counsel. There was no reference to the evidential issue reported by Espinasse. The judge's summing up was reported in *The Counsellor's Magazine* in greater detail than by

Espinasse, but not inconsistently with his report: both recorded the judge's statement that the action was founded in morality.

Other sources

Finally, cases reported by Espinasse were also reported or noted in other publications. The first nine noted below were also reported in *A Collection of Remarkable and Interesting Criminal Trials, Actions at Law*, a three-volume collection of notable trials published at the beginning of the nineteenth century.[1159]

Leeds v Cook (1803) 4 Esp. 256; *Collection*, vol.1, 68 (sub nom. *Leeds v Cooke*)

This was an action for breach of promise of marriage as to which the defendant admitted liability but contended that only nominal damages should be awarded, because the plaintiff had no affection for the defendant, and had therefore suffered no injury from the breach. The jury agreed, and awarded the plaintiff one shilling in damages.

Espinasse reported two aspects of the case: whether parol evidence was admissible to prove the contents of a letter written by the plaintiff to the witness who was unable to produce the letter on a subpoena duces tecum because she had returned it to the plaintiff; and Ellenborough's summing up as to whether the plaintiff's conduct towards the defendant should be taken into account by the jury in the award of damages. The *Collection* recorded in full the speeches of the parties' counsel and the evidence tendered: it referred to the letter sent to the witnesses, but only recorded what the witness recalled of the letter, not the issue of whether her recollection was admissible. The *Collection* also recorded the summing up of the judge in greater detail and in different terms than Espinasse, but not in any way that was inconsistent with his report of it.

Thornton v Dick (1803) 4 Esp. 270; *Collection*, vol.1, 1

This was an action of assumpsit by the plaintiffs as indorsees of a bill of exchange, against the defendants as the acceptors. The defendants denied that they had accepted the bill as, although they had written words of acceptance on the bill after it was lodged by the plaintiffs, they had tried to erase those words before the plaintiffs sought to recover the bill.

Espinasse reported the relevant facts and counsel's arguments on the issue. He then recorded Ellenborough's view that, once it was established that the bill had been accepted, the act was irrevocable and could not be retracted. Espinasse also recorded a member of the special jury asking whether it mattered whether the bill was payable after sight or after date, and the judge's response that it did not matter as, once an acceptance had been given, it could not be recalled. The report concluded by recording the verdict for the plaintiff. The *Collection's* report, although it recorded the arguments of counsel and the interjections of the jury in more detail, was the same in all material respects.[1160]

[1159] William M. Medland and Charles Weobly, *A Collection of Remarkable and Interesting Criminal Trials, Actions at Law etc.,* vol.1, London, 1803; vol.2, London, 1804; vol.3, London, 1805. The authors, who do not appear to have been barristers, do not disclose by whom the cases included in the book were reported. I am grateful to Hannah Miller-Kim, Special Collections Librarian at Georgetown Law Library, for allowing me access to a digitised copy of the third volume of this work, which appears to be unavailable in the UK.

[1160] The consistency of the reports contradicts the suggestion by Best J in *Cox v Troy* (1822) 5 B. & Ad. 474, 480 that Espinasse may have misreported the judge's ruling, implicit in the judge's comment that a later case suggested

Strutt v Bovingdon (1803) 5 Esp. 56; *Collection*, vol.1, 324 (sub nom. *Strutt v Bonington*)

This case,[1161] involved a claim by a millowner for obstruction and diversion of water and want of repair of riverbanks.

Espinasse reported two evidential issues: the admissibility of hearsay evidence of testimony given by a now-deceased witness[1162] in a former trial between the plaintiff and one of the three defendants involving similar grievances; and whether the verdict of the former trial was conclusive evidence against all three defendants. Ellenborough was reported as finding for the plaintiff on both issues, after which the defendant undertook to remove the obstructions, and the plaintiff took a verdict for nominal damages. The *Collection* recited broadly the same facts as Espinasse, save that it recorded the earlier trial as having been brought by the plaintiff's father. The record of the judge's ruling on the first evidential issue was also consistent with Espinasse's report. The *Collection* then recorded the hearsay evidence in detail.[1163] The report did not deal with the second evidential issue and concluded with a record of the defendant's undertaking and verdict in the same terms as reported by Espinasse.

Helyear v Hawke (1803) 5 Esp. 72; *Collection* vol.2, 124 (sub nom. *Hellyer v Hawke*)

This was an action of assumpsit, on the warranty of a horse sold by the defendant to the plaintiff. As explained above, Espinasse's report concentrated on the extent to which statements made to the plaintiff as to the soundness and age of the horse by the defendant's groom bound the defendant as principal, and he reported Ellenborough's ruling that only the groom's statements made as part of the sale transaction were binding. Espinasse went on to record the contents of a letter written by the defendant in response to the plaintiff's call on the alleged warranty, which the plaintiff said constituted an admission of that warranty, and to report the judge's view that the letter did not constitute such an admission. Espinasse concluded by recording that, after the evidence had been given, the plaintiff was nonsuited following the close of evidence. The *Collection* reported the facts in detail as stated by counsel, in terms that were consistent with the facts reported by Espinasse. The *Collection* did not report the background to, or the substance of, the rulings reported by Espinasse but did briefly record the judge's reasons for nonsuiting the plaintiff, which Espinasse's report did not.

Rusby v Scarlett (1803) 5 Esp. 76; *Collection* vol.2, 158 (sub nom. *Rusby v Scarlet*)

This case[1164] was an action of assumpsit for goods sold for the benefit of the defendant by the plaintiff to the defendant's servant. The defence was that the defendant had given money to his servant to pay the bills, which he had embezzled: it appeared that the servant recorded the goods procured by the defendant and the money advanced to him, but there was no connection

that Ellenborough 'seems to have changed the opinion which he is reported to have delivered in [*Thornton v Dick*]'.

[1161] Espinasse says it was tried at the Hertford Summer assizes on 27 July; the *Collection* says the trial was at the Hereford assizes on 26 July. As Espinasse, who appeared for the defendant, was a member of the Home Circuit, his record can be taken as the more accurate.

[1162] The actor and dramatist Charles Macklin.

[1163] The whimsical nature of the evidence appeared to be the principal reason for the inclusion of the case in the *Collection*.

[1164] Espinasse records the trial as taking place on 2 December; the *Collection* says it took place on 1 December.

between the goods and the sums advanced. Espinasse recorded a short summary of the facts and the argument of counsel for the plaintiff. He also reported Ellenborough's ruling that, if the goods were taken up and the money given afterwards to the servant to pay, the master is liable if the servant did not pay over the money, as the master had given the servant authority to take up goods on credit, which resulted in a verdict for the plaintiff. The *Collection* recorded that the defendant was 'James Scarlet', described as 'a gentleman of eminence at the bar',[1165] which was presumably one of the reasons for reporting the case. The *Collection* reported the facts in much more detail than Espinasse - although consistently with his brief factual summary - together with the speech of the defendant's counsel. Ellenborough's ruling on the law was also reported in full, in terms that were materially aligned with Espinasse's report, and concluded with a reference to the verdict for the plaintiff.

Bryan v Horseman (1803) 5 Esp. 81; *Collection,* vol.2, 161

This case[1166] was an action of assumpsit for goods sold to the defendant more than six years before the commencement of the action, to which the defendant relied on the Statute of Limitations. Espinasse reported the plaintiff's reliance on the defendant's comments, made to a sheriff's officer on the defendant's arrest, as an acknowledgment of the debt within the limitation period. Espinasse reported Ellenborough's ruling that an acknowledgment that the debt was due raised a promise to pay grounded on his antecedent liability, which took the case outside of the statute. The report in the *Collection* was more extensive than in Espinasse, both on the facts and the rulings of Ellenborough. The *Collection* recorded two such rulings: the first on whether it was proper for the sheriff's officer to ask the questions which elicited the alleged acknowledgment and then to make use of the responses; and the second on whether the words uttered by the defendant were sufficient to take the case out of the statute. The report of the latter ruling was consistent with Espinasse's report, but went further in recording the judge's comment on the conduct of officers extorting confessions from persons they had arrested. Notwithstanding that the report of the *Collection* was more extensive, the aspect of the case reported by both it and Espinasse was the more important, as the sufficiency of the acknowledgment was the only issue argued by the defendant on his subsequent motion to set aside the verdict against him.[1167]

R v Lee (1804) 5 Esp. 123; *Collection*, vol.2, 331

This was an information for libel[1168] against the proprietors of a newspaper for an article concerning an excise officer who was charged with the murder of a smuggler. The alleged libel consisted of a statement of the depositions taken before the magistrate before whom the officer was charged, which contained a number of prejudicial statements as to the officer's character. Espinasse reported these facts, and the argument of the defendant's counsel that a newspaper had a right to publish a fair account of all public transactions which were matters of public notoriety, provided they were given fairly and impartially. Espinasse reported on the admissibility of the evidence of the clerk to the magistrate by whom the depositions were taken,

[1165] The *Collection* misspelt the name of James Scarlett, later (as Lord Abinger) Chief Baron of the Exchequer. Perhaps not entirely coincidentally, Abinger had a reputation on the bench of telling juries how to decide the case: Edward Foss, *The Judges of England*, London, 1864, vol.9, 260.

[1166] Espinasse records the trial as taking place on 3 December; the *Collection* says it took place on 6 December.

[1167] *Bryan v Horseman* (1803) 4 East 599.

[1168] Espinasse records the trial as taking place on 20 March; the *Collection* says it took place on 19 March.

recording Heath J's ruling that, not only was the evidence inadmissible, but the publication of ex parte evidence of the prosecutor before the trial was itself highly criminal. The report by the *Collection* was more extensive, noting that the information contained a second libel relating to the report of the trial itself. However, the *Collection* was silent on the evidential issue reported by Espinasse: indeed, there is no reference at all to the defendant's attempt to adduce evidence from the magistrate's clerk.

R v Salter (1804) 5 Esp. 125; *Collection,* vol.2, 351

This case was an indictment against a number of defendants for conspiracy to extort money. Espinasse summarised the facts necessary to introduce the issue of the admissibility of certain evidence adduced against the defendants which was the subject of Espinasse's report. After reporting the arguments of counsel, Espinasse very shortly reported Heath's ruling that he was bound by the previous cases to hold the evidence admissible. The *Collection* reported the facts more fully than, but consistently with, Espinasse's report, but did not refer at all to the arguments or ruling on the evidential issue.

Plunckett v Cobbett (1804) 5 Esp. 136; *Collection*, vol.3, 13 (sub nom. *Plunket v Cobbett*)

The case[1169] was an action for libel against the Solicitor-General of Ireland. Espinasse's report first focused on the proof of publication, from a witness who said that he had purchased the newspaper in which the alleged libel was contained and had also purchased one of the same title and description at the same place two days earlier. Ellenborough admitted the evidence as showing that the newspaper was published deliberately and regularly for public perusal, but was not admissible on the question of damages. The next issue involved another witness, the former Speaker of the Irish House of Commons, who was asked by the defendant whether he had heard the plaintiff deliver his sentiments in parliament on matters of a public nature: Ellenborough ruled that the witness could refuse to disclose what had taken place in a debate in parliament but was bound to answer whether the plaintiff had, as a matter of fact, spoken in a debate.

Espinasse then reported the defendant's counsel telling the jury that damages may be mitigated if the plaintiff had published the views alleged to be libellous on other occasions, and reading a paragraph of a book to establish that fact. On the plaintiff's objection, Espinasse reported Ellenborough as ruling that the passage could be read as part of the address to the jury if it was a speculative opinion bearing on the question under discussion, but if the passage was read as stating a thing having real existence, it could not be read unless it was afterwards given in evidence.

The *Collection* reported the facts in much greater detail, including the libellous passages. The two witnesses who were the subject of Espinasse's report were mentioned, but the objection to their evidence and the judge's rulings were not reported. In the report of the defendant's counsel's address to the jury, there was no mention of the matter reported by Espinasse, and the report of Ellenborough's direction to the jury did not refer to him ruling on that issue.

[1169] Espinasse records the trial as taking place on 25 May; the *Collection* says it took place on 26 May.

Klinitz v Surry (1805) 5 Esp. 267; Paley's Treatise on Agency, 124n (sub nom. *Kinnitz v Surry*)

The plaintiff, through his brokers, sold the defendant a quantity of wheat by sample to the defendant, who refused to receive it on the basis that the bulk did not correspond with the sample, and that the sale was void for want of writing pursuant to the Statute of Frauds. The plaintiff responded that: first, the case was not within the statute as there had been part delivery; and secondly, the entry in the broker's book was sufficient writing for the statute.

Espinasse reported Ellenborough as ruling that the issue of part delivery turned on the manner in which the sample was taken: if it was taken from the bulk to be delivered, it would be part delivery, otherwise it was a part of another parcel and so collateral, and that matter was left to the jury. As to the second issue, after considering the entry in the broker's book, the judge was reported to have ruled that, because of the absence in the entry of the seller's name, 'he was clearly of opinion, that that was not a note in writing within the Statute of Frauds'.

This second issue was reported somewhat differently in a footnote in William Paley's Treatise on Agency:[1170] the judge was said to have ruled that, although the entry was not sufficient by itself, as he was prima facie only the agent of the seller, but it appeared that the buyer acted on the order, by sending his servant to examine the bulk on the authority of the order, that constituted an adoption of the broker's agency so as to make him agent for both parties, so that the entry was sufficient for the purposes of the statute.

Espinasse did not mention the judge ruling on the relevance of the broker's agency to the sufficiency of the entry, although earlier in the report he referred to the broker's evidence that he considered himself to be the agent of the seller only, and to the plaintiff's argument that the broker was to be considered agent for both parties.

In his treatise on sales of goods,[1171] Colin Blackburn noted this difference between the two reports, and recited Paley's version, although he said that, because the defendant obtained a verdict on the merits (a fact only reported by Espinasse) the case in fact decided nothing.

Leigh v Mather (1795) 1 Esp. 412; Park's Treatise on Marine Insurance, 38; *The Times*, 18 Dec. 1795

The facts, as reported by both James Allan Park (who was junior counsel for the defendant) and Espinasse, were that the claim concerned a marine insurance policy on both the ship and the goods on board, on a voyage from Georgia to Jamaica. The ship arrived at Montego Bay in Jamaica. She remained there for nearly a month, and then sailed for St. Ann's in Jamaica but was lost on her way there.

Espinasse also reported that the policy covered the ship and goods until the ship was moored twenty-four hours in safety, apparently as a specific term of the policy. Park did not mention such a term.

[1170] William Paley, *A Treatise on the Law of Principal and Agent*, 1st ed., London, 1812, 124n. This was the first treatise produced on the subject, and ran to three editions.

[1171] Blackburn, *Treatise*, 97-98. See also his comment, as Blackburn J, to counsel in *Durrell v Evans* (1862) 1 H. & C. 174, 180. Paley's version of the case was cited by Best CJ in *Maclean v Dunn* (1828) 4 Bing. 722, 726 as authority for the proposition only reported by Paley.

Park reported the facts in greater detail, including what happened to the cargo while it was in Montego Bay: most of the cargo was sold to local merchants, who entered into a charterparty with the captain to proceed to St Ann's and to pick up a cargo for London. It was verbally agreed that the remainder of the cargo, which was lumber, should be carried as ballast to St Ann's.

Espinasse reported the defence as being that the policy ended twenty-four hours on arriving at Montego Bay, so that the subsequent loss was not within the policy. Park said nothing about the defendant's case.

According to Espinasse, the plaintiff's case was that the policy was in general terms "to Jamaica", which included all the ports in that island to which any part of her cargo was to be delivered; and it was a matter of evidence to show to what port she was, in fact, bound: in this regard, there was a difference where the policy was on the ship and on the goods, and the policy covered the latter, not the former. Park's report of the plaintiff's case was in substantially the same terms: that, under an insurance on goods, the ship might go from port to port and that, in any event, the goods were protected by the policy, until they were all discharged and safely landed.

Espinasse reported Kenyon's opinion as being that, where a ship was under a general policy to Jamaica and came into any port and discharged part of her cargo, that put an end to the policy after remaining there twenty-four hours, whether the policy was on the ship or the goods. However, Kenyon was reported as leaving the jury to state their views on the policy, and that the jury set up the following distinction: where a person insured goods to a particular port, the policy would remain in force even where the ship landed at a different port and remained there for twenty-four hours; however, where the same person insured both ship and goods, as in the present case, the policy was wholly discharged by landing at any port and remaining there twenty-four hours. Espinasse reported Kenyon as agreeing to this distinction, whereupon the plaintiff withdrew his record.

Park recorded Kenyon's opinion, as confirmed by the jury (which was a special jury) that the loss of the goods were irrecoverable because: the risk on the ship ceased, after she had been moored at anchor twenty-four hours in the first port of the island, for the purpose of unloading; the facts disclosed that Montego Bay was also the original destination of the cargo; and the delivery of the entirety of the cargo there was only prevented by a new agreement. A ship insured to Jamaica generally could not be permitted to go round the whole island, from port to port, for the purpose of unloading her cargo, especially where, as in this case, the owner of ship and goods was the same person. Park reported that the plaintiff was nonsuited.

In his treatise,[1172] Park said that this case confirmed the doctrine that the coverage of a policy on a ship ended twenty-four hours after its arrival in the first port of the island to which it was headed, but the coverage on a policy on the goods continued until they were landed. In this respect, there is no inconsistency between the decision as reported by Espinasse and Park, although the former reported this distinction as a matter of principle, whereas, according to the latter, the distinction appeared to rest, at least in part, on the facts of the particular case.

[1172] James Allan Park, *A System of the Law of Marine Insurances*, 5th ed, London, 1802, 39.

By contrast, Joseph Arnould's treatise on marine insurance[1173] cited the case as authority for the proposition that, where the great bulk of the cargo had been sold, and only a trifling quantity remained on board, for instance to be used as ballast, the risk on the cargo is terminated at the port of sale. Whilst the case as reported by Park is certainly consistent with that proposition, it does not appear in the report as a matter of principle: the termination of the coverage occurred when the goods were unloaded at Montego Bay because that was the destination of the cargo as a matter of fact, and because they would have been completely unloaded there but for the existence of a new agreement. Arnould submits that the case as reported by Espinasse was not consistent with that principle or with the law, but it is not clear that the case as reported by Park constitutes authority for that principle.

Further doubt is thrown on Arnould's use of this case as authority for his proposition by the report of the case in *The Times*, which records Kenyon as being of the view that the insurance coverage ceased when the ship arrived at some delivering port and that, having moored, she delivered part of her cargo there.

Arnould's criticism of Espinasse's report is, however, justified as regards the apparent irrelevance of the unloading of the goods on the jury's construction of the coverage of the policy in respect of them: that part of the report must accordingly be read as including, as a condition for the termination of coverage, the unloading of the goods – although whether that meant all the goods or only a substantial part of the goods is not clear from any of the reports.

Raven v Dunning (1799) 3 Esp. 25; Peake, *Compendium*, 178

In an action of assumpsit against two defendants, one of whom was a certified bankrupt, an issue arose as to whether the bankrupt could be called to give evidence for the other defendant.

In the Appendix to his treatise on evidence,[1174] Peake briefly reported the facts and then the objection of the plaintiffs' counsel that while the defendant was on the record, he could be a witness until the jury had deliberated, as there was the possibility that the bankruptcy certificate may be discharged by reason of fraud or other misconduct. Peake went on to report Kenyon's view that, although he wished to admit the testimony for the sake of the plaintiffs (who had clearly proved their case), in case there needed to be a new trial, if the plaintiffs' counsel insisted on the objection, he would reject the evidence as he was clearly on the view that the bankrupt could not be a witness. Peake recorded counsel's persistence in the objection, the rejection of the witness, and the verdict for the plaintiff.

Espinasse's report of the case was consistent with Peake's report, but his more extensive reporting of the arguments of counsel and the judge's ruling disclose that the basis for the argument on the admissibility of the bankrupt's evidence was as to his interest in the outcome of the action: the defendant was reported as contending that, because of his bankruptcy, the witness was entitled to be discharged from the present demand and was therefore disinterested in the outcome; the plaintiff was reported as contending that the potential liability of the bankrupt to pay the costs of the action as a defendant on the record meant that he did have an interest in its outcome; and the judge was reported as ruling that the witness was not admissible because he was liable for the costs of the action if the plaintiff won, which was an interest from which the bankrupt could not be discharged.

[1173] Joseph Arnould, *Treatise on the Law of Marine Insurance and Average*, 1st ed., London, 1849, vol.1, 437.

[1174] Peake, *Compendium*, 178.

Both Peake and Espinasse also reported the defendant's reliance on an analogy with the calling of co-defendants in actions for trespass: Espinasse reported only that the judge adopted the reasoning of the plaintiff's counsel as to why that analogy did not apply, whereas Peake briefly reported the judge's reason for rejecting the defendant's argument; but both reports are consistent with each other on that issue.

SCHEDULE

COMPARISON OF CASES REPORTED BY ESPINASSE AND BY REPORTERS OF THE CASE HEARD IN BANC

Case name	Trial report	Court in banc report	Matters covered by both reports	Are the reports materially consistent?	Differences (if any)
Allen v Keeves	3 Esp. 281	1 East 435	Facts; defendant's argument; basic ruling; verdict	No	Espinasse reported that the judge at trial did not accept the defendant's argument but that the judge changed his opinion when the case came before the court in banc. East reported that the judge at trial was inclined to accept the defendant's objection and then confirmed his opinion in banc.
Alves v Hodgson	2 Esp. 528	7 Term Rep. 241	Cause of action; facts; verdict	Yes	The facts were more extensively reported in the *Term Reports*.
Anderson v May	3 Esp. 167	2 Bos. & P. 237	Facts; defendant's argument; ruling; verdict	Yes	Both reported the verdict for the plaintiff, but only Bos. & P. referred to the reservation of the issue for the court in banc.
Anderson v Pitcher	3 Esp. 124	2 Bos. & P. 164	Cause of action; facts; ruling; verdict	No	There were minor differences in the reporting of the facts. Bos. & P. reported the judge as ruling that there were some circumstances in which sailing instructions might be dispensed with, although not in the present case. Espinasse reported the judge as ruling that, as the law stood, a ship could not be said to sail with a convoy, unless she had her sailing instructions on board.
Arding v Flower	3 Esp. 117	8 Term Rep. 534	Cause of action; facts; verdict	No	Espinasse reported the verdict as for the defendant; the *Term Reports* recorded the verdict as for the plaintiff, with liberty for the defendant to move for a nonsuit. Both the ruling and the nature of the proceedings in the court in banc support the latter's report of the verdict.

Baptiste v Cobbold	2 Esp. 536	1 Bos. & P. 7	Basic facts; verdict	Yes	There were minor differences in the reporting of the consideration for the agreement.
Barlow v Bishop	3 Esp. 266	1 East 432	Facts; verdict	Yes	
Bennet v Francis	4 Esp. 28	2 Bos. & P. 550[1175]	Cause of action; pleas; facts; verdict	Yes	
Berkley v Walmsley	5 Esp. 11	4 East 55[1176]	Cause of action; facts; defendant's objection; verdict	Yes	Both reported that the plaintiff was nonsuited, but only Espinasse reported that liberty was given to the plaintiff to move for the setting aside of the nonsuit.
Boehm v Sterling	2 Esp. 575	7 Term Rep. 423	Cause of action; facts; counsel's arguments; basic ruling; verdict	Yes	The *Term Reports* reported that the trial judge left to the jury the question of whether the plaintiffs received a banker's draft bona fide and said that, if they did, the length of time it had been left outstanding did not exonerate the defendants from liability, although he was not without some doubt. Espinasse reported the judge's ruling regarding the length of time, without referring either to the question being left to the jury or to the judge's doubt.
Bolton v Reichard	1 Esp. 106	6 Term Rep. 139[1177]	Cause of action; basic facts; verdict	Yes	Espinasse shortly reported the facts, the positions taken by the parties at trial and the judge's ruling; the *Term Reports* recorded the facts at much greater length, as part of the case on which the court's opinion was sought, but did not refer to the objections or the ruling, only the verdict.

[1175] Sub nom. *Bennett v Francis.*

[1176] Sub nom. *Barclay v Walmsley.*

[1177] Sub nom. *Bolton v Richard.*

Bouerman v Radenius	2 Esp. 653	7 Term Rep. 663[1178]	Cause of action; declaration; facts; verdict	Yes	
Bourdenave v Gregory	5 Esp. 115	5 East 107[1179]	Basic facts; defendant's objections; verdict	Yes	There were minor differences in the reporting of the facts.
Bowman v Nicoll	1 Esp. 81	5 Term Rep. 537[1180]	Cause of action; facts; basic objection of the defendant; basic ruling; verdict	No	The *Term Reports* reported the defendant's objection as being that the last of several alterations to a bill of exchange required a new stamp as it amounted to a new bill. In reporting that objection, Espinasse did not link either the objection or the judge's acceptance of that objection to the final alteration: the judge is reported as ruling that every alteration required a new stamp.
Brown v Turner	2 Esp. 631	7 Term Rep. 630	Cause of action and plea; facts; verdict	Yes	
Bryan v Horseman	5 Esp. 81	4 East 599	Cause of action; plea; facts; basic ruling; verdict	Yes	Both reported a verdict for the plaintiff, but only Espinasse reported that liberty was given to the defendant to move to set the verdict aside.
Burnett v Kensington	1 Esp. 416	7 Term Rep. 210	Cause of action; facts; verdict	Yes	There were minor differences in the reporting of the port of origin and the ports of destination. Espinasse reported the facts in slightly greater detail. He reported a point of evidence as well as the judge's ruling on the meaning of the policy: the former was not referred to by the court in banc. Only Espinasse reported counsel's arguments at trial.
Call v Dunning	5 Esp. 16	4 East 53	Cause of action; facts; brief ruling; verdict	Yes	

[1178] Sub nom. *Bauerman v Radenius.*

[1179] Sub nom. *Bordenave v Gregory.*

[1180] Sub nom. *Bowman v Nichol*.

Cary v Longman	3 Esp. 273	1 East 358	Case of action; facts; verdict	Yes	East reported the facts slightly more extensively than Espinasse.
Champion v Plummer	5 Esp. 240	1 Bos. & P. N.R. 252	Cause of action; facts; defendant's objection; verdict	Yes	There was a minor error in Espinasse's report of the facts.
Clark v Denovan	1 Esp. 137	5 Term Rep. 694[1181]	Cause of action; basic facts; verdict	Yes	Only Espinasse reported the submissions of the parties and the judge's ruling at trial.
Cobb v Selby	6 Esp. 103	2 Bos. & P. N.R. 466	Cause of action; facts; ruling; verdict	Yes	Bos. & P. reported the facts and the ruling more extensively than Espinasse: in particular, their report of the judge's ruling included matters which provided greater justification for his eventual direction to the jury.
Collins v Martin	2 Esp. 520	1 Bos. & P. 648	Cause of action; facts	Yes	Only Espinasse recorded the arguments at trial and the judge's ruling.
Curry v Walter	1 Esp. 456	1 Bos & P. 525	Cause of action; basic facts; defendant's objection; ruling; verdict	Yes	The facts were more fully reported in Bos. & P. Espinasse reported a point of evidence which was not referred to by the court in banc.
Cuthbert v Haley	3 Esp. 22	8 Term Rep. 390	Cause of action; plea; reply; verdict	Yes	There were minor differences in the reporting of the facts. Espinasse did not clearly record the judge at trial reserving the point for the court in banc.
Davis v Trotter	3 Esp. 40	8 Term Rep. 475	Cause of action; facts; verdict	Yes	
Dawes v Peck	3 Esp. 12	8 Term Rep. 330	Cause of action; facts; basic ruling; verdict	Yes	
Doe d Bowerman v Sybourn	2 Esp. 496	7 Term Rep. 2	Cause of action; facts; basic ruling; verdict	Yes	

[1181] Sub nom. *Clarke v Donovan.*

Doe d Lord Say and Sele v Guy	4 Esp. 154	3 East 120[1182]	Cause of action; facts; defendant's arguments; verdict	Yes	
Doe d Martin v Watts	2 Esp. 501	7 Term Rep. 83	Case of action; facts; verdict	Yes	There were minor differences in the reporting of the facts. Both reported the plaintiff as having been nonsuited, but only the *Term Reports* reported that he was given liberty to move to set aside the nonsuit without costs. Only Espinasse reported the arguments at trial and the judge's ruling.
English v Darley	3 Esp. 49	2 Bos. & P. 61	Cause of action; facts; verdict	Yes	
Exall v Partridge	3 Esp. 8	8 Term Rep. 308	Cause of action; facts; basic ruling; verdict	Yes	There were minor differences in the reporting of the facts.
Feize v Randall	1 Esp. 224	6 Term Rep. 146[1183]	Facts; verdict	Yes	Espinasse reported the defendant's objection and the judge's ruling in some detail; the *Term Reports* simply referred to the objection and the judge's rejection of it, without reporting the grounds for that rejection.
George v Claggett	2 Esp. 557	7 Term Rep. 359[1184]	Cause of action; facts; basic ruling; verdict	Yes	There were minor differences in the reporting of the facts. Only Espinasse recorded the arguments at trial and the full ruling of the judge.
Glassington v Rawlins	4 Esp. 224	3 East 407	Cause of action; facts; verdict	Yes	There were minor differences in the reporting of the facts.
Gordon v Harpur	2 Esp. 465	7 Term Rep. 9[1185]	Cause of action; facts.	Yes	After reporting the arguments, Espinasse recorded the judge as giving an opinion that the action was not maintainable but reserving the point. The *Term Reports* did not record the

[1182] Sub nom. *Doe d Lord Saye and Sele v Guy.*

[1183] Sub nom. *Feise v Randall*.

[1184] Sub nom. *George v Clagett.*

[1185] Sub nom. *Gordon v Harper*.

					arguments at trial, but reported that a verdict was found for the plaintiff subject to the opinion of the court.
Groome v Potts	1 Esp. 396	6 Term Rep. 548	Cause of action; defendant's plea; basic facts; defendant's argument; verdict	Yes	Espinasse reported that the plaintiff was nonsuited at trial, and that the plaintiff then moved for a new trial and the setting aside of the nonsuit, which the court in banc refused. The *Term Reports* reported that the plaintiff took a verdict at trial, with liberty to the defendant to move to set it aside and enter a nonsuit, which the court granted.
Harman v Tappenden	3 Esp. 278	1 East 555	Facts; verdict	Yes	East reported the facts more extensively than Espinasse.
Hartshorn v Slodden	4 Esp. 60	2 Bos. & P. 582	Cause of action; facts; plaintiff's basic argument; verdict	Yes	
Henry v Adey	4 Esp. 228	3 East 221	Cause of action; basic facts; verdict	Yes	
Hickey v Hayter	1 Esp. 313	6 Term Rep. 384	Cause of action; basic facts; plaintiff's case and defendant's response; verdict	Yes	There was a very minor difference as to the amount of the deceased's estate; Espinasse reported the arguments at trial more fully than the *Term Reports* and only he set out the judge's ruling.
Hill v Humphrys	3 Esp. 254	2 Bos & P. 343[1186]	Facts; ruling; verdict	Yes	Both reported that the plaintiff was nonsuited, but only Bos. & P. reported that liberty was given to the plaintiff to move for the setting aside of the nonsuit.
Hills v Hills	4 Esp. 196	3 East 16[1187]	Cause of action; plea; facts; verdict	Yes	Espinasse reported that the plaintiff was nonsuited; East reported that a verdict passed for the defendant.
Holland v Hopkins	3 Esp. 168	2 Bos. & P. 243	Cause of action; facts; arguments; verdict	Yes	Both reported that the plaintiff was nonsuited, but only Bos. & P. referred to the nonsuit being reserved for the opinion of the court in banc.

[1186] Sub nom. *Hill v Humphreys.*

[1187] Sub nom *Hicks v Hicks.*

Hulle v Heightman	4 Esp. 75	2 East 145	Cause of action; facts; defendant's argument; basic ruling; verdict	Yes	There were minor differences in the reporting of the facts. Espinasse additionally reported evidential points which were not referred to the court in banc.
Hurry v Royal Exchange Assurance Co	3 Esp. 289	2 Bos. & P. 430	Facts; basic ruling; verdict	Yes	
Jekyll v Moore	6 Esp. 63	2 Bos. & P. N.R. 341	Cause of action; facts; verdict	Yes	
Jones v Brindley	3 Esp. 205	1 East 1[1188]	Facts; defendant's argument; verdict	Yes	
Kidd v Rawlinson	3 Esp. 52	2 Bos. & P. 59	Cause of action; facts; basic ruling; verdict	Yes	The facts were more extensively reported by Bos. & P. There were minor differences in the reporting of the facts.
Lacaussade v White	2 Esp. 629	7 Term Rep. 535	Cause of action; facts; verdict	Yes	Only Espinasse reported the arguments at trial and the judge's ruling.
Lacon Knight v Hooper	1 Esp. 246	6 Term Rep. 224[1189]	Nature of the claim; basic facts; principal objection of the defendant; verdict	Yes	The only difference in the report of the facts was that, according to Espinasse, Carton Bay was a small port in Norfolk, whereas the *Term Reports* reported it as being on the Suffolk coast.[1190] Espinasse's report of the arguments at trial and the judge's rulings on the points raised was much fuller than the summary in the *Term Reports*, which referred only to one of the two objections of the defendant (that being

[1188] Sub nom *Jones v Brinley*

[1189] Sub nom *Lacon v Hooper.*

[1190] The reporters were probably referring to Corton, a small village on the Suffolk coast very close to the Norfolk border.

					the only objection raised before the court in banc) and did not report the ruling on that objection.
Leeds v Wright	4 Esp. 243	3 Bos. & P. 320	Cause of action; facts; verdict	Yes	Espinasse reported that the plaintiff was nonsuited; Bos. & P. reported that a verdict was found for the defendant.
Marriott v Hampton	2 Esp. 546	7 Term Rep. 269[1191]	Cause of action; facts;	Yes	Only Espinasse recorded the arguments at trial and the judge's ruling.
Mayhew v Hill	2 Esp. 683	8 Term Rep. 110[1192]	Cause of action; facts; plaintiff's basic case; verdict;	Yes	
Moises v Thornton	3 Esp. 4	8 Term Rep. 303	Cause of action; facts; basic ruling; verdict	Yes	
Page v Fry	3 Esp. 185	2 Bos. & P. 240	Facts; defendant's argument; verdict	Yes	
Park v Mears	3 Esp. 171	2 Bos. & P. 217[1193]	Cause of action; plea; basic facts	Yes	Both reported the verdict for the plaintiff, but only Bos. & P. reported the judge giving the defendant liberty to move to set the verdict aside and have a nonsuit entered.
Parker v Gordon	6 Esp. 41	7 East 385	Cause of action; facts; defendant's objection; ruling; verdict	Yes	The facts and the ruling were more extensively reported by East, who also reported a dictum of the trial judge which was not reported by Espinasse.
Parr v Eliason	3 Esp. 210	1 East 92	Cause of action; facts; plaintiff's argument; basic ruling; verdict	Yes	
Parslow v Dearlove	5 Esp. 78	4 East 438	Cause of action; plea; facts; verdict	Yes	

[1191] Sub nom. *Marriot v Hampton.*

[1192] Sub nom. *Mayhew v Parker.*

[1193] sub nom. *Parke v Mears.*

Penton v Robart	4 Esp. 33	2 East 88	Cause of action; basic facts; verdict	Yes	There is one minor difference: Espinasse reported that the first point in issue was reserved by the trial judge, whereas East records the judge reserving the second point.
Price v Messenger	3 Esp. 96	2 Bos. & P. 158	Claim; Plea; facts; arguments on central issue; verdict	Yes	The facts were more extensively reported by Bos. & P. Espinasse reported other issues which did not come before the court in banc.
Quick v Staines	2 Esp. 657	1 Bos. & P. 293	Cause of action; facts; basic ruling; verdict	Yes	
R v Gilham	1 Esp. 285	6 Term Rep. 265[1194]	Indictment; basic facts; defendant's plea; verdict	Yes	Espinasse reported an evidential issue which was not referred to by the *Term Reports* and which was not persisted with before the court in banc. The variance issue was reported more fully by the *Term Reports.* There was a slight but immaterial difference between the figures quoted in the indictment.
Rich v Parker	2 Esp. 615	7 Term Rep. 705	Cause of action; facts	Yes	There were minor differences in the reporting of the facts. Only Espinasse reported the arguments at trial and the judge's ruling.
Right ex d Fisher v Cuthell	5 Esp. 149	5 East 491	Cause of action; facts; defendant's objection; verdict	Yes	The facts were more extensively reported by East.
Robinson v Drybrough	1 Esp. 243	6 Term Rep. 317	Cause of action; basic facts; defendant's objection; verdict	Yes	Espinasse reported that an attempt to prove at trial that the agreement was unstamped at the time of execution failed on the evidence; the *Term Reports* said that: 'At the trial … it appeared that the deed when executed had no stamp affixed on it; but when it was produced at the trial it was stamped with a 6s. agreement stamp.'

[1194] Sub nom. *R v Gillham.*

Rodgers v Lacy	3 Esp. 43	2 Bos. & P. 57	Facts; basic ruling; verdict	Yes	There were minor differences in the reporting of the facts.
Seddon v Tutop	1 Esp. 401	6 Term Rep. 607	Cause of action; defendant's plea; plaintiff's replication; basic facts; defendant's basic argument; verdict.	Yes	There were minor differences in the amount of the sums at stake. Both reports recorded a verdict for the plaintiff, but only the *Term Reports* reported that the judge gave the defendant liberty to move to enter a nonsuit. Espinasse also reported a very short point of evidence which was not referred to by the court in banc. Only Espinasse reported the judge's ruling.
Singleton v Butler	3 Esp. 215	2 Bos. & P. 283	Cause of action; facts; ruling; verdict	Yes	There were minor differences in the reporting of the facts. Bos. & P. reported the facts more extensively than Espinasse.
Slipper v Stidstone	1 Esp. 47	5 Term Rep. 493	Cause of action; pleas; basic facts, basic argument, basic ruling; verdict	Yes	The *Term Reports* referred to the plaintiff being nonsuited, because the defendant's set-off was greater than the plaintiff's claim; Espinasse simply referred to the judge allowing the set-off.
Smith Q.T v Kendal	1 Esp. 231	6 Term Rep. 123[1195]	Cause of action and pleas; facts; verdict	Yes	The *Term Reports* referred to two objections taken by the defendant, whereas Espinasse reported only one of those objections, that being the only objection which concerned the court in banc.
Smith v Prager	2 Esp. 486	7 Term Rep. 60	Cause of action; facts; verdict	Yes	Only Espinasse reported the arguments of counsel at trial and the judge's ruling.
Sparenbergh v Bannatyne	2 Esp. 581	1 Bos. & P. 163[1196]	Cause of action; plea and replication; facts; verdict	Yes	Only Espinasse reported the ruling of the trial judge.
Steers v Lashley	1 Esp. 166	6 Term Rep. 61	Cause of action; facts; basic ruling; verdict	Yes	The reports of the facts were very similar, save for an immaterial difference as to the number of arbitrators; the *Term Reports* did not refer to the arguments at trial and

[1195] Sub nom. *Smith v Kendall.*

[1196] Sub nom. *Sparenburgh v Bannatyne.*

					provided only a very short summary of the ruling; Espinasse reported the arguments and the ruling in much more detail.
Stonehouse v Elliot	1 Esp. 272	6 Term Rep. 315[1197]	Cause of action; facts; defendant's objection	Yes	Espinasse reported the arguments at trial and the judge's ruling in some detail; the *Term Reports* briefly referred to the objection and did not report the ruling.
Turner v Eyles	5 Esp. 8	3 Bos. & P. 456	Cause of action; facts; defendant's objection; verdict	Yes	Bos. & P. reported the facts more extensively than Espinasse.
Walker v Constable	2 Esp. 659	1 Bos. & P. 306	Cause of action; declaration; basic facts; basic ruling; verdict	Yes	There were minor differences the reporting of the declaration.
Walwyn v St Quintin	2 Esp. 515	1 Bos. & P. 652	Cause of action; facts; verdict	Yes	The facts were more extensively reported by Espinasse, and only he recorded the contentions of the parties. He reported on two issues put to the jury: a third issue was reported by Bos. & P. as being put to the jury, but Eyre CJ, who was the trial judge, was reported by Bos. & P. (at 656) as saying in banc that he did not recollect that point being urged at trial.
Warrington v Furber	6 Esp. 89	8 East 242[1198]	Cause of action; facts; defendant's objection; ruling; verdict	No	East reported on two issues taken at trial, whereas Espinasse reported on only one: as to that issue, Espinasse recorded that the judge ruled in favour of the plaintiffs on the basis of an authority; East reported that the judge reserved the point, on the basis that the authority may have been distinguishable in the present case.[1199]
Webb v Herne	2 Esp. 671	1 Bos. & P. 281	Cause of action; facts; verdict	Yes	

[1197] Sub nom. *Stonehouse v Elliott.*

[1198] Sub nom. *Warrington v Furbor.*

[1199] Sir Vicary Gibbs's short note of this case (MTL Gibbs MS 191) supports Espinasse's version.

Weedon v Timbrel	1 Esp. 16	5 Term Rep. 357[1200]	Cause of action; basic facts; basic ruling; verdict	No	The *Term Reports* reported the absence of evidence of adultery before the separation of the husband and wife and that that was the basis of the nonsuit; Espinasse reported that the action could not be maintained where the husband and wife lived in a state of separation when the offence was committed, without reference to when evidence of separation was required.
White v Cuyler	1 Esp. 200	6 Term Rep. 176	Cause of action; facts; defendant's objection; basic ruling; verdict	Yes	Only the *Term Reports* reported that the evidence at trial showed that the defendant did not enter into the agreement relied on by the plaintiff while acting under written authority from her husband.
Withnell v Gartham	1 Esp. 322	6 Term Rep. 388	Nature of the claim; facts; verdict	Yes	Only Espinasse reported two evidential issues which were not the subject of the subsequent proceedings; each report of the facts relating to the substantive issue contained elements not found in the other report, but not so as to render the reports materially inconsistent. Only Espinasse reported the arguments at trial and the judge's ruling on the substantive issue.
Ximenes v Jaques	1 Esp. 311	6 Term Rep. 499	Cause of action; facts; defendant's objection; verdict	Yes	Only Espinasse reported both objections to the claim and the judge's rulings on them: the *Term Reports* only reported the objection which was relied upon before the court in banc and made no reference to the judge's ruling on that objection.

[1200] Sub nom. *Weedon v Timbrell.*

APPENDIX 4

A SURVEY OF TREATISES

Introduction

The tables in this Appendix record the results of two surveys of treatises on areas of law which regularly arose at nisi prius: the first table relates to treatises published at the end of the nineteenth century; and the second table relates to treatises published in the middle of the twentieth century.

The tables show the number of cases from the nominate nisi prius reports cited in each of the works, together with the number of times cited cases were specifically identified as having been decided at nisi prius, and whether any qualifications were included as to the authority of those cases.

If more than one report is cited for each nisi prius decision, only the first-cited report is included; a cited nisi prius ruling on a case is excluded if a subsequent decision in banc on that case is also cited; and nisi prius cases which are said to have been overruled or doubted are also excluded.

Table 1: Late nineteenth-century treatises

	Chitty on Contracts[1201]	**Clerk & Lindsell on Torts**[1202]	**Arnould on Marine Insurance**[1203]	**Benjamin on Sale of Personal Property**[1204]	**Byles on Bills of Exchange**[1205]
Peake/Peake's Add Cas	26	4	6	7	15
Espinasse	57	12	27	26	52
Campbell	78	15	89	52	89
Starkie	54	12	17	16	55
Holt	10	2	8	6	9
Gow	4	0	0	1	2

[1201] Joseph Chitty Jr, *A Treatise on the Law of Contracts*, 13th ed., rev. by J.M. Lely, London, 1896.

[1202] J.F. Clerk and W.H.B. Linsdell, *The Law of Torts*, 2nd ed., London, 1896.

[1203] Sir Joseph Arnould, *The Law of Marine Insurance*, 7th ed., rev. by E.L. de Hart and R.I. Simey, London, 1901

[1204] Judah Philip Benjamin, *A Treatise on the Law of Sale of Personal Property with References to the French Code and Civil Law*, 5th ed., rev. by W.C.A. Ker and A.R. Butterworth, London, 1906.

[1205] Sir John Barnard Byles, *A Treatise on the Law of Bills of Exchange, Promissory Notes, Bank-Notes and Cheques*, 16th ed., rev. by M.B. Byles and W.J.B Byles, London, 1899.

Dowling & Ryland	2	0	2	0	3
Ryan & Moody	11	1	4	3	13
Moody & Malkin	12	5	3	3	25
Moody & Robinson	17	7	4	10	22
Carrington & Payne	78	43	7	26	52
Carrington & Marshman	7	1	1	0	3
Carrington & Kirwan	16	7	0	8	4
Foster & Finlason	4	16	4	1	5
Cababe & Ellis	4	0	2	0	0
Total	**380**	**125**	**174**	**159**	**349**
Identification of nisi prius cases	1	4	12	17	3
Qualification of authority of nisi prius cases	0	0	1[1206]	1[1207]	1[1208]

[1206] 'It was only a nisi prius ruling': supra, 326.

[1207] '… but there has been no case decided in Banc': supra, 853.

[1208] 'But this is only a Nisi Prius decision': supra, 228.

Table 2: Mid twentieth-century treatises

	Chitty on Contracts[1209]	Clerk & Lindsell on Torts[1210]	Arnould on Marine Insurance[1211]	Benjamin on Sale of Personal Property[1212]	Byles on Bills of Exchange[1213]
Peake/Peake's Add Cas	16	5	6	7	11
Espinasse	36	20	28	25	30
Campbell	63	20	101	66	76
Starkie	33	16	17	23	37
Holt	7	1	9	6	6
Gow	3	0	0	0	2
Dowling & Ryland	0	0	1	0	4
Ryan & Moody	8	2	4	10	13
Moody & Malkin	12	8	4	6	18
Moody & Robinson	13	10	2	9	19
Carrington & Payne	67	55	8	28	36
Carrington & Marshman	3	3	1	1	4
Carrington & Kirwan	18	12	0	7	1
Foster & Finlason	32	30	4	7	4
Cababe & Ellis	15	2	2	9	9
Total	**326**	**184**	**187**	**204**	**270**
Identification of nisi prius cases	0	2	9	4	0
Qualification of authority of	0	0	0	0	0

[1209] 20th ed., rev. by Harold Potter, London, 1947.

[1210] 10th ed., rev. by Harold Potter, London, 1947.

[1211] 13th ed., rev. by Lord Chorley, London, 1950.

[1212] 8th ed., rev. by Sir Donald Lesie Finnemore and Arthur E. James, London, 1950.

[1213] 21st ed., rev. by Maurice Megrah, London, 1955.

nisi prius cases					

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