Early English law reporting

Michael Bryan

Introduction

Over the years the Law Library at the University of Melbourne has built up an impressive collection of early English law reports. This is not the outcome of a deliberate acquisitions policy; until recently there was no such policy, and various serendipitous gifts and bequests are responsible for the collection of reports, extending from the 16th to the 19th centuries. The library has no holdings of medieval reports. On the other hand, it has a complete run of the Selden Society editions of medieval year books so that, one way or another, the entire history of English law reporting until 1865 is represented. It was in that year that the legal profession instituted the Incorporated Council of Law Reporting which took over the publication of law reports from the private reporters. It would not be practical for the library to obtain copies of all the privately published reports—most of which have anyway been republished in the English Reports—but most of the principal series of reports are well represented in its holdings.

The year books

'Over a million sheep, during six centuries, gave their skins to make the "record" [of the proceedings of the central courts].'[1] The sheep made their selfless contribution to the administration of justice by donating their hides to what became known as the plea rolls. These were the formal parchment record of the proceedings which ran continuously from (at least) 1194 until the reign of Queen Victoria. They were written in Latin which was the language of record until 1732. The plea rolls noted the plaintiff's writ, the defendant's reply and subsequent pleadings, the process of summoning a jury in jury actions, judgement and process. The record created and evidenced what later became known as *res judicata*, or estoppel by judgment, so that a party could not re-litigate matters later which had been the subject matter of the earlier decision.

The plea rolls were the closest approximation to official reports until official law reporting itself was established in England in 1865. But they tell us little about the development of the law. They recorded who won a case but not why it was won, or which arguments prevailed and which others were rejected. For the flavour of early common law the reader has to turn to the year books.

The year books reported what judges actually said in court, and so may be considered the earliest form of law reports. The early year books bore little resemblance to a modern law report. The reporter showed little interest in setting out the facts of a case. Moreover, few reports carried any discussion of legal doctrine. On the other hand, the year book reports contained matter which would not be found in a modern law report, including extra-curial opinions of judges and practitioners on the law, as well as the opinions of the reporter on a disputed question. The name 'year book' is misleading since only a minority of the books are chronologically arranged, and the work of modern scholars has imposed a retrospective sense of order on the books that they lacked at the time of publication. The earliest identifiable year book was published in 1268[2] and they were published until the 16th century. In contrast to the Latin of the plea rolls most of the year books were published in the English version of French known as Anglo-Norman. This language appears to have been used even after English became usual for forensic arguments.

Some mysteries still surround the publication of the year books. One concerns the regularity of publication for over a century after 1400. Who was responsible for ensuring the regular production of year books? Were there official reporters of some kind? Were institutions such as the

Inns of Court or Chancery supervising the production of the later year books? No wholly convincing answers have been given to these questions, although there has been no lack of speculation.

But recent scholarship has given us a clearer idea of the authorship of the reports and the functions which the reports served.

At any rate until the 16th century authorship of the year books was anonymous.[3] It is unlikely at this distance of time that the identity of individual compilers will ever be discovered. But it is possible to deduce their occupation. Some were clerks or other court officials who wrote down the out-of-court utterances of the judges, as well as their curial remarks. Others seem to have been lawyers involved in the case or attorneys reporting back to clients. Some lawyers reported cases as observers, as their 20th century successors were to do, rather than as participants. Finally, law students reported cases. Writers on the year books have drawn attention to the fact that, not long after the series was initiated, the layout of the Court of Common Bench was altered so that it contained a 'crib' for the use of apprentices, which would have facilitated their writing of the reports.[4]

The diversity of authors reflects the diversity of purposes for which the year books were used. These included reminding judges and counsel of points which had been decided during the course of protracted litigation, noting disagreements between judges as to the availability of a particular writ or the correct procedures to be followed. They were also used by barristers who wanted ideas on the arguments likely to succeed in particular kinds of case as well as arguments that cut no ice with the judges. Finally, they were used by law students for instructional purposes. The later year books, which are more uniform in presentation, were prepared solely for the profession and for students enrolled in the Inns of Court.

Edmund Plowden: The first law reporter

The year books ceased to be published in the 16th century. Their successors were reports published by individual barristers. One of the earliest and greatest reporters was Edmund Plowden. Copies of Plowden's reports are held in the Rare Books Collection of the Law Library, not in the original (which was written in Anglo-Norman) but in an 18th century translation.[5] Plowden can be described as a 'modern' reporter in the sense that he gave a full account of the facts of a case, as well as the reasoning of the judges. The year books principally reported pre-trial procedures of cases which would ultimately be heard by a jury. Most of Plowden's reports concern directions to juries and the consideration of questions of law after a jury verdict had been returned. Plowden sometimes appended notes to his reports on the legal issues raised by a decision. Such was his standing in the profession and among later lawyers that his comments on a case carried as much authority among lawyers as the judgments he reported.

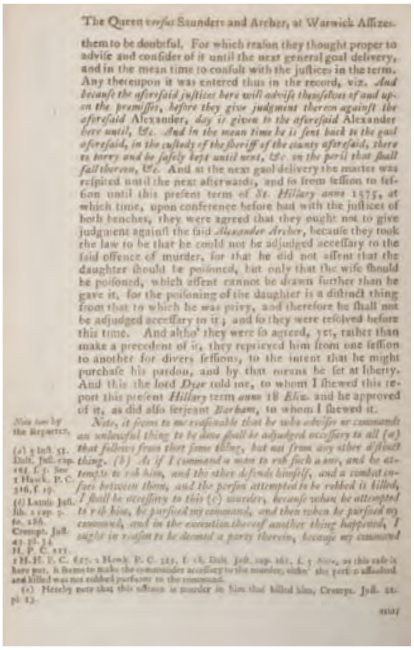
An example drawn from Plowden's reports is the celebrated case of *R v Saunders*, in which Saunders handed his wife a poisoned apple, intending to kill her. His wife gave the apple to their daughter who died in consequence of eating it. The significance of the decision was that the judge recognised the concept of 'transferred malice': someone who intends to kill X but when the plan goes astray in fact kills Y—whom he had no intention of killing—is guilty of murder.

At the end of the report of *R v Saunders* Plowden wrote up his comments on another aspect of the case which had caught his attention. A co-defendant, Archer, had bought the arsenic for Saunders which had

Extract from 'The Queen versus Saunders and Archer, at Warwick Assizes', in Edmund Plowden, *The commentaries, or Reports of Edmund Plowden ... containing divers cases upon matters of law* …, 2 vols, Dublin: Printed for H. Watts and W. Jones, 1792. Law Rare Books Collection, Law Library, University of Melbourne.

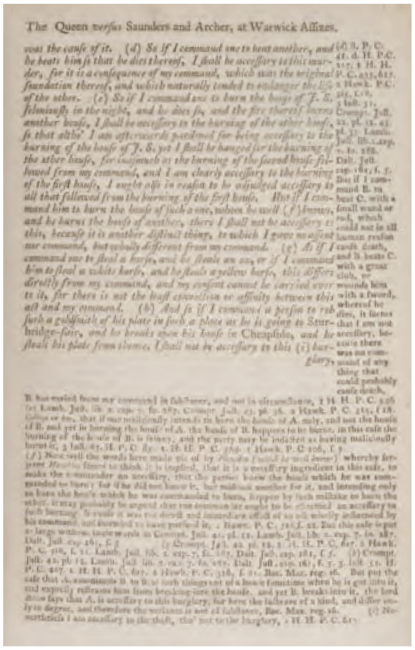
been placed in the apple. Archer's acquittal on the charge of being an accessory before the fact prompted Plowden to set out his views on the nature of accessory liability. When was the purchase of poison by a third party a direct cause of the murder, so that the purchaser was an accessory to the crime, and when, as in Archer's case, was it a 'distinct thing' from the murder itself? Plowden's analysis of accessory liability was as significant for the development of accessory liability in the criminal law as *R v Saunders* itself was to the development of the concept of 'malice aforethought' in the law of murder.

Why was Plowden so influential? In order to answer this question we must briefly examine his career. Plowden was a recusant Catholic who gave good service to Queen Elizabeth's Protestant administration. He had previously been an independently minded member of parliament in Queen Mary's reign who had opposed the reintroduction of heresy laws. But he remained a Catholic upon Elizabeth's ascent to the throne, and defended Catholics in the law courts in the early years of her reign. He was fined for not subscribing to the Articles of Religion laid down by the Elizabethan government. Nonetheless, in spite of his recusant status, he proved too useful to the government for his services to be ignored. He advised the Queen on questions relating to the creation of uses of land which affected royal fiscal interests (he was a counsel in *Sharrington v Strotton*,[6] a landmark decision holding that the *Statute of uses* did not apply where the consideration for the creation of a use was natural love and affection) and was made Counsel to the Duchy of Lancaster, a royal appointment. He never became a serjeant or a judge, probably due to his religious affiliation, but on his death the Queen bestowed land in Shiplake, Oxfordshire, on his widow and children. Even though Plowden was prevented by political circumstances from attaining judicial office, he was held in as high regard as those who were appointed to the bench.


The Queen *verſus* Saunders and Archer, at Warwick Aſſizes.

them to be doubtful. For which reaſon they thought proper to adviſe and conſider of it until the next general goal delivery, and in the mean time to conſult with the juſtices in the term. Any thereupon it was entered thus in the record, viz. *And becauſe the aforeſaid juſtices here will adviſe themſelves of and upon the premiſſes, before they give judgment thereon againſt the aforeſaid* Alexander, *day is given to the aforeſaid* Alexander *here until, &c. And in the mean time he is ſent back to the goal aforeſaid, in the cuſtody of the ſheriff of the county aforeſaid, there to tarry and be ſafely kept until next, &c. on the peril that ſhall fall thereon, &c.* And at the next goal delivery the matter was reſpited until the next afterwards, and ſo from ſeſſion to ſeſſion until this preſent term of *St. Hilary anno* 1575, at which time, upon conference before had with the juſtices of both benches, they were agreed that they ought not to give judgment againſt the ſaid *Alexander Archer*, becauſe they took the law to be that he could not be adjudged acceſſary to the ſaid offence of murder, for that he did not aſſent that the daughter ſhould be poiſoned, but only that the wife ſhould be poiſoned, which aſſent cannot be drawn further than he gave it, for the poiſoning of the daughter is a diſtinct thing from that to which he was privy, and therefore he ſhall not be adjudged acceſſary to it; and ſo they were reſolved before this time. And altho' they were ſo agreed, yet, rather than make a precedent of it, they reprieved him from one ſeſſion to another for divers ſeſſions, to the intent that he might purchaſe his pardon, and by that means be ſet at liberty. And this the lord *Dyer* told me, to whom I ſhewed this report this preſent *Hillary* term *anno* 18 *Eliz.* and he approved of it, as did alſo ſerjeant *Barham*, to whom I ſhewed it.

Note, it ſeems to me reaſonable that he who adviſes or commands an unlawful thing to be done ſhall be adjudged acceſſary to all (a) that follows from that ſame thing, but not from any other diſtinct thing. (b) As if I command a man to rob ſuch a one, and he attempts to rob him, and the other defends himſelf, and a combat enſues between them, and the perſon attempted to be robbed is killed, I ſhall be acceſſary to this (c) murder, becauſe when he attempted to rob him, he purſued my command, and then when he purſued my command, and in the execution thereof another thing happened, I ought in reaſon to be deemed a party thereto, becauſe my command


The Queen *verſus* Saunders and Archer, at Warwick Aſſizes.

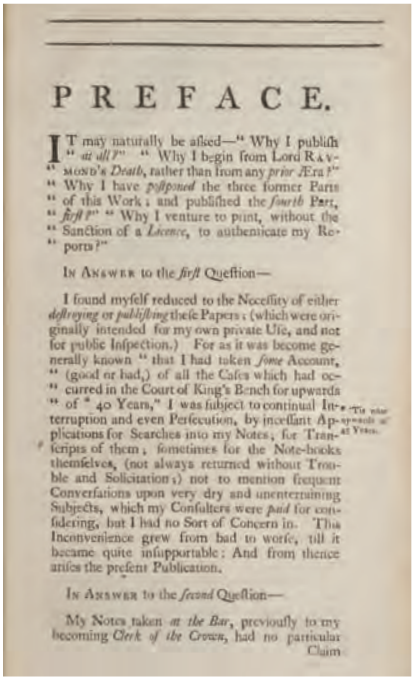
The 17th century: Holt and the memorialists

The standard of law reporting declined during the 17th and early 18th centuries and it was left to

Preface from vol. 1 of James Burrow, *Reports of cases adjudged in the Court of King's Bench, since the death of Lord Raymond: In four parts; distributed according to the times of his four successors, Lord Hardwicke, Sir William Lee, Sir Dudley Ryder, and Lord Mansfield. Part the fourth,* 5 vols, Dublin: Printed by R. Moncrieffe, 1778–1785.
Law Rare Books Collection, Law Library, University of Melbourne.

Burrow in the 18th century to restore its reputation. The most significant series of reports in the early 17th century is Coke's reports. The contribution the reports make to an understanding of the constitutional disputes of that century cannot be underestimated, but the reports themselves do not meet the high standards set by Plowden, and the reader cannot always be certain whether the opinions expressed are those of the judges, or simply of Coke himself. Unfortunately, Coke is the one major series which the Law Library does not hold except in the English Reports reprint.[7] The other reporters of that century were memorialists more than they were reporters; their reports were tributes to admired judges as much as they were contemporaneous law reports.

An example, drawn from the late 17th century, is Holt's reports, of which the library holds a copy.[8] These reports were not written by the judge; they were compiled by barristers who hero-worshipped him. The volume takes the form of an alphabetical abridgement, or dictionary, of all the areas of law to which Holt made a contribution. Compilers of abridgements of that era claimed, somewhat portentously, to be the intellectual heirs of the compilers of Justinian's *Digest*, but volumes such as



PREFACE.

IT may naturally be asked—"Why I publish "*at all?*" "Why I begin from Lord RAYMOND's *Death*, rather than from any *prior* Æra?" "Why I have *postponed* the three former Parts "of this Work; and published the *fourth* Part, "*first?*" "Why I venture to print, without the "Sanction of a *Licence*, to authenticate my Reports?"

IN ANSWER to the *first* Question—

I found myself reduced to the Necessity of either *destroying* or *publishing* these Papers; (which were originally intended for my own private Use, and not for public Inspection.) For as it was become generally known "that I had taken *some* Account, "(good or bad,) of all the Cases which had occurred in the Court of King's Bench for upwards "of *40 Years," I was subject to continual Interruption and even Persecution, by incessant Applications for Searches into my Notes; for Transcripts of them; sometimes for the Note-books themselves, (not always returned without Trouble and Solicitation;) not to mention frequent Conversations upon very dry and unentertaining Subjects, which my Consulters were *paid* for considering, but I had no Sort of Concern in. This Inconvenience grew from bad to worse, till it became quite insupportable: And from thence arises the present Publication.

*To what Years.

IN ANSWER to the *second* Question—

My Notes taken *at the Bar*, previously to my becoming *Clerk of the Crown*, had no particular Claim

Holt cannot bear comparison with the great compilation of the late Roman Empire. Nonetheless, Holt's reports are not without interest. They include many early decisions on defamation, in which Holt drew the distinction, only recently eliminated by legislation, between libel and slander, as well as his famous judgment in *Ashby v White*,[9] which established the common law right to vote.

Another memorialist whose reports are held in the Rare Books Collection of the Law Library is Lord Robert Raymond, the author of Raymond's reports.[10] He also hero-worshipped Sir John Holt. Unlike most of the anonymous contributors to Holt's reports, however, Raymond pursued a successful legal practice. He was a barrister, politician and judge, his career culminating in his appointment as Chief Justice of the King's Bench in 1724. His reports are reliable but his summaries of the judgments delivered by Holt's colleagues are perfunctory. Raymond's interest in law reporting declined after Holt's retirement and his later reports are very scrappy.

Law reporting was at a low ebb in the early 18th century. The turning point came with Burrow's reports, which are well represented in the Rare Books Collection.[11]

Burrow's reports

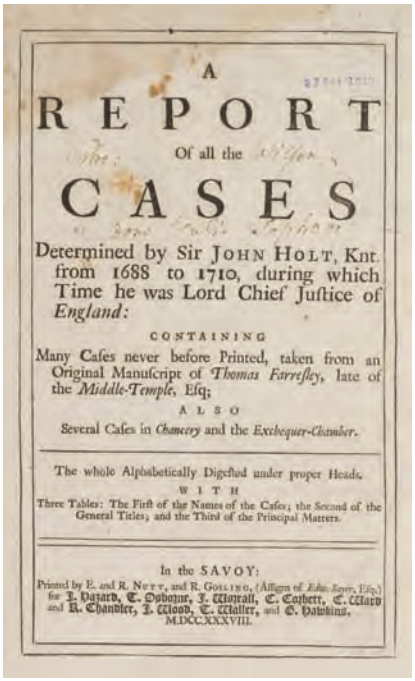
Sir James Burrow can justly be described as the father of modern law reporting. Like the memorialists he was a hero-worshipper. His hero was the great Chief Justice, Lord Mansfield. The relationship between Mansfield and Burrow can plausibly be described as the legal counterpart of the relationship between Samuel Johnson and James Boswell. Burrow faithfully wrote up the great man's

Title page from *A report of all the cases determined by Sir John Holt, Knt, from 1688 to 1710, during which time he was Lord Chief Justice of England …*, Printed by E. and R. Nutt, and R. Gosling …, 1738. Law Rare Books Collection, Law Library, University of Melbourne.

judgments in the first part of the latter's career from 1756 to 1772. It is likely, but not certain, that Mansfield checked the judgments before they were published. Certainly the two men had a close working relationship. Burrow originated the practice of writing a headnote to each case. The note contained few, if any, facts and stated the relevant proposition of law as concisely as possible. Burrow had a well developed sense of the 'reportability' of a case, selecting cases for publication on the basis either of the public interest in the decision or because the case raised an important point of law.

For some years Burrow wrote up Lord Mansfield's judgments privately. The introduction to the first published volume of his reports conveys a strong sense of the private frustrations which motivated his decision to publish:

> I was subject to continual interruption and even persecution, by incessant applications for searches into my notes; for transcripts of them (not only returned without trouble and solicitation); not to mention frequent conversations upon very dry and unentertaining subjects, which my consulters were paid for considering, but I had no sort of concern in. The inconvenience grew from bad to worse, till it became quite insupportable: and from thence arises the present publication.[12]


A
REPORT
Of all the
CASES
Determined by Sir JOHN HOLT, Knt. from 1688 to 1710, during which Time he was Lord Chief Juſtice of *England:*
CONTAINING
Many Caſes never before Printed, taken from an Original Manuſcript of *Thomas Farreſley*, late of the *Middle-Temple*, Eſq;
ALSO
Several Caſes in *Chancery* and the *Exchequer-Chamber*.
The whole Alphabetically Digeſted under proper Heads.
WITH
Three Tables: The Firſt of the Names of the Caſes; the Second of the General Titles; and the Third of the Principal Matters.
In the SAVOY:
Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of Edw. Sayer, Eſq;) for T. Payard, E. Oſborne, J. Worrall, C. Corbett, C. Ward and R. Chandler, J. Wood, T. Waller, and O. Hawkins.
M.DCC.XXXVIII.

But if Burrow's reasons for publishing his reports were not high-minded they were nevertheless vindicated by the success of the publication. Burrow was the first commercially successful reporter of English law, and his success encouraged many imitators.

For example, Burrow reported the litigation arising out of John Wilkes's infamous issue no. 45 of the *North Briton*. Wilkes was accused of seditious libel after describing King George III's speech from the throne in opening parliament as 'the most abandoned instance of ministerial effrontery ever attempted to be imposed upon mankind'.[13] Lord Mansfield held that the criminality of a libel was a matter for the judge, not the jury, a ruling that was later overturned by legislation. Burrow's reports give us a vivid account of the legal strategies adopted by the government to silence Wilkes.

The Wilkes decision was a landmark decision in the history of civil liberties. But Burrow reported less sensational decisions which were nonetheless crucial to the development of the common law. They include *Carter v Boehm*,[14] still a leading decision on the duty of disclosure in insurance law, and *Millar v Taylor*,[15] the foundation case of the law of copyright.

Burrow led a full life and had numerous interests outside the law. He was President of the Royal Society and wrote a tract entitled 'A few thoughts on pointing' (the name given to punctuation). When he died in 1772 the epitaph on his tombstone read, 'The convivial character was

what he chiefly affected, and it was his constant wish to be easy and cheerful himself and to see others in a like disposition.'

Many lawyers like to do good and to do well. Burrow showed the profession that law reporting was an indispensable legal service that was also lucrative. The second half of the 18th century and the first half of the 19th century was the great era of the private reporter. It was a system which produced the best and the worst reports. By the mid-19th century it was said that a barrister wanting coverage of all the courts of record of the day needed to possess 17 different sets of reports. The University of Melbourne's Law Library holds numerous private reports from this period. In 1865 the professional bodies decided to wrest control of law reporting from the private reporters. The Incorporated Council of Law Reporting was established by the Inns of Court in London to supervise the production of official reports. Most private reporters had the good economic sense to take employment with the Council.

The fears that lawyers entertain today—that too many cases are reported, that 'more means worse', that too much dross is reported along with the gold—are recurrent themes in the history of law reporting. In 1885, Nathaniel Lindley, later a law lord, wrote that 'A multiplicity of law reports is a great evil. The evil was once intolerable; it may become so again.'[16] It is possible to have too many cases reported. Discrimination in the selection of cases is a virtue. The holdings in the Rare Books Collection in the Law Library of the University of Melbourne are a tribute to an age in which professional knowledge of the law depended on pioneers such as Plowden and Burrow, as well as on the anonymous compilers of the medieval year books.

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Notes

1 J.H. Baker, *The common law tradition: Lawyers, books and the law*, London: Hambledon Press, 2000, p. 133.
2 Paul A. Brand (ed.), *The earliest English law reports*, vol. 4, London: Selden Society (vol. 123), 2007, p. 11.
3 The authors of some later year books have been identified. An example is Caryll's reports; see J.H. Baker (ed.), *Reports of cases by John Caryll*, London: Selden Society (vols 115–116), 1999–2000.
4 Brand, *Earliest English law reports*, p. 13.
5 Edmund Plowden, *The commentaries, or Reports of Edmund Plowden ... containing divers cases upon matters of law* …, 2 vols, Dublin: Printed for H. Watts and W. Jones, 1792. Law Rare Books Collection, Law Library, University of Melbourne.
6 (1565), Plowden, *Commentaries*, vol. 1, p. 298.
7 Sir Edward Coke, *The reports of Sir Edward Coke, Knt., in English in thirteen parts complete, with references to all the ancient and modern books of the law ...: to which are now added the respective pleadings in English*, 7 vols, London: Printed for J. and F. Rivington …, 1776–1777. Law Rare Books Collection, Law Library, University of Melbourne.
8 *A report of all the cases determined by Sir John Holt, Knt, from 1688 to 1710, during which time he was Lord Chief Justice of England* ..., Printed by E. and R. Nutt, and R. Gosling …, 1738. Law Rare Books Collection, Law Library, University of Melbourne.
9 *Ashby v White (the Aylesbury voters' case)* (1703), Holt Kings Bench 524, 90, in *A report of all the cases determined by Sir John Holt*, p. 1188.
10 Robert Raymond, *Reports of cases argued and adjudged in the Courts of Kings Bench and Common Pleas … taken and collected by the Right Honourable Lord Raymond, late Chief Justice of the Court of King's Bench*, 3 vols, London: Printed by his Majesty's law-printers …, 1790. Law Rare Books Collection, Law Library, University of Melbourne.
11 James Burrow, *Reports of cases adjudged in the Court of King's Bench, since the death of Lord Raymond: In four parts; distributed according to the times of his four successors, Lord Hardwicke, Sir William Lee, Sir Dudley Ryder, and Lord Mansfield. Part the fourth*, 5 vols, Dublin: Printed by R. Moncrieffe, 1778–1785. Law Rare Books Collection, Law Library, University of Melbourne.
12 Burrow, *Reports of cases*, vol. 1, Introduction.
13 (1770), Burrow, *Reports of cases*, vol. 4, p. 2527.
14 (1766), Burrow, *Reports of cases*, vol. 3, p. 1905.
15 (1769), Burrow, *Reports of cases*, vol. 4, p. 2303.
16 Nathaniel Lindley, 'History of the law reports', *Law Quarterly Review*, no. 2, April 1885, p. 149.