

# The Law Emprynted and Englysshed

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The Printing Press as an Agent of  
Change in Law and Legal Culture  
1475 - 1642

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This thesis, like Tolkien's *The Lord of the Rings* grew in the telling. What began as a plan to research and write about information technology and its effect upon the law changed into an historical study addressing the impact of the first information technology upon the law primarily because the reverberations of the introduction of digital technologies are still being felt and will be for some time. A distance of four to five hundred years allows for more detached and objective observation.

I must thank my supervisor, Professor David Williams of the Faculty of Law at Auckland University for his patience and guidance over the years, Ms Judith Bassett of the History Department of the Faculty of Arts for her helpful comments about Elizabeth Eisenstein's work, and the way in which that work should be approached in the context of this study and Dr. Lindsay Diggelmann, also of the History Department of the Auckland University Faculty of Arts for his gentle and very helpful detailed critique of this work as it moved, like the common law, from a disorganised mass of apparently related concepts to some coherent and structured form.

Thanks are also due to Associate-Professor Bernard Brown of the Faculty of Law who taught me Legal History as an undergraduate in what now seems to be an immemorial past and who consented to read the finished product, and to Guy Charlton, Joy Liddicoat and Arthur Tse who also read the work through. The comments and assistance of all are greatly appreciated.

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forgotten and of little seeming relevance. Without their support and continued love this work would never have been finished.

## ABSTRACT

This thesis takes the theory of Professor Elizabeth Eisenstein in her book *The Printing Press as an Agent of Change* and considers it within the context of the intellectual activity of the English legal profession in the Sixteenth and Seventeenth Centuries. The legal profession had developed a sophisticated educational process and practice based upon an oral\aural system along with the utilisation of manuscript materials, largely self-created. The printing press provided an alternative to this culture as printed law books - law reports, abridgements and treatises - became increasingly available and were used by lawyers and students. At the same time movements were afoot to discard the arcane language of the law and make printed legal materials available in English. A tension arose as the advantages of print were recognised by the authorities – the Church and the State. Those very qualities also turned out to be disadvantages as the authorities struggled to regulate the vastly increased flow of information that the printing press enabled. The law proved to be an unwieldy instrument in this tension.

The legal works printed in the Sixteenth Century were primarily law reports and abridgements with a new style of law report becoming evident with the printing of Plowden's *Commentaries* and, in the Seventeenth Century, the works of Sir Edward Coke. Print enabled legal writers to concentrate upon principle rather than pleading and procedure. The Seventeenth Century saw a shift from printed reports to printed treatises and guide books for administrators and members of the “lower branch” of the legal profession. Legal information for the purposes of standardising procedures and for educational purposes as a supplement to a troubled traditional legal education system began to dominate.

The study closes on the eve of the English Civil War - a time that saw for a short period the end of press licensing and the demise of Star Chamber which had played a significant albeit largely unsuccessful role in attempting to regulate the output of the printing press and the printing trade.



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## Chapter One - Introduction.

In this study, I consider the impact of the printing press upon sixteenth and early seventeenth century lawyers and legal culture. Did the introduction of the new communications technology act as an agent of revolutionary change, as Professor Elizabeth Eisenstein might suggest, in the way in which lawyers were educated, practised and carried out their professional duties?

The introduction of the printing press represented a paradigm shift from the scribal means of communicating written information. The elements of the printing press identified by Professor Eisenstein<sup>1</sup> which were not possessed by manuscripts, provided a different means by which those using printed material could approach information and its use. This was important for lawyers. The substance of law is information in various forms, and the process and practice of law depends entirely upon its analysis and communication. The printing press brought a totally new dimension to the way in which the law was communicated, be it by way of law report, proclamation, statute, compilation or commentary.

The printing press facilitated the availability, flow and communication of legal information in a way that was absent in the memorial/manuscript culture. It provided the foundation for the subsequent development of reliance upon printed material by Judges and advocates as a record of law. It enabled a new communications context for a discipline that was, and still is at its most fundamental level, based upon the sharing of information for the purposes of arriving at a decision, be it a judicial decision or decisions by citizens about how they organise their affairs.

The changes in the legal intellectual environment that took place in the sixteenth and early seventeenth centuries developed as publishers and printers seized on the new technology to print law books, and new types of text became available. The use of the new texts spread through the student community. Specific texts of a *vade mecum* nature were utilised by local officials, enabling the spread of common standard practices throughout the realm. Print also provided the foundations for the spread of royal power and the disseminatory outward

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<sup>1</sup> Elizabeth Eisenstein *The Printing Press as an Agent of Change* (Cambridge University Press, Cambridge, 1979) 2 Vols. Reference will be made to the 1 volume 1980 edition; Elizabeth Eisenstein, *The Printing Revolution in Early Modern Europe* (Cambridge University Press (Canto), Cambridge, 1993).

flowing of printed legal material from London had, as a consequence, the centralisation of royal power as administrative practices became common throughout the realm. At the same time the nature of the information disseminated in print became a target of State control.

The cultural context of the legal profession is a matter that demands consideration in this examination of the impact of printing upon law and lawyers. The works of Wilfrid Prest and Christopher Brooks, which examine the rise of the barristers and the Inns of Court and the development of the various other branches of the legal profession, provide an essential background to an examination of the culture and education of the lawyers in the sixteenth and early seventeenth centuries.<sup>2</sup>

Printing of legal information was also encouraged by the English humanists, especially in the early part of the sixteenth century. The humanists advocated an educated and informed citizenry and the printing press was seen as a means of disseminating the information necessary to ensure an informed populace and for what was referred to as the “common weal” or the good of the community.<sup>3</sup> The concept of the “common weal” underwent subtle changes during the period under examination but it was seen as an essential objective of a properly functioning legal system and a peaceful society. The title of this thesis reflects two themes that were of interest to the humanists of the time – the use of printing to disseminate information needed for the education of the citizenry and making the law and legal information available in the vernacular.<sup>4</sup>

Nevertheless, lawyers were comfortable using both printed and manuscript sources although, apart from habit or availability there does not appear to be an analysis of why it was that this

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<sup>2</sup> See generally W. Prest *The Rise of the Barristers: A Social History of the English Bar, 1590-1640* (Clarendon Press, Oxford, 1986); C. Brooks *Lawyers Litigation and English Society Since 1450* (Hambleton, London, 1998); C. Brooks *Pettyfoggers and Vipers of the Commonwealth: The ‘Lower Branch’ of the Legal Profession in Early Modern England* (Cambridge University Press, Cambridge, 1986); W. Prest *The Inns of Court under Elizabeth I and the Early Stuarts 1590 – 1640* (Longman, London, 1972); C.W. Brooks “The Common Lawyers in England c. 1558-1642” in W. Prest. (ed) *Lawyers in Early Modern Europe and America*, (Croom Helm, London, 1981) p.42; W. Prest “The English Bar 1550 – 1700” in W. Prest (ed) *Lawyers in Early Modern Europe and America*, (Croom Helm, London, 1981) p.65.

<sup>3</sup> The concept of the “common weal” is subtle and many faceted. For discussion see below Ch.5 p.123. Generally see Fritz Caspari *Humanism and the Social Order in Tudor England* (Teachers College Press, New York, 1968) p.1.

<sup>4</sup> The term “emprynted” appears in *The Ordenaunces of Warre* (Richard Pynson, London, 1492) STC 9332. The word “englysshe” or “englysshed” appears in a number of sixteenth century law texts including Christopher St German *Hereafter foloweth a dialoge in Englysshe, bytwyxt a Doctour of Dyuynyte, and a student in the lawes of Englande of the groundes of the sayd lawes and of conscyence* (Robert Wyer, London, 1530) STC 21561 and John Rastell – see *The statutes prohemium Iohannis Rastell* (John Rastell, London, 1519) STC 9515.5.

“co-existence” of sources continued throughout the period.<sup>5</sup> One explanation may be found in the culture of the lawyers in the Inns of Court. Another may be the way in which lawyers participated in the creation of printed legal material and were influenced in using it by the types and quality of legal works that were printed. Despite this there was a significant increase in the availability of printed treatises or texts on legal matters in the early part of the seventeenth century which were not only for the use of lawyers but also for administrators. There was an interest in making legal information available to achieve administrative consistency and eliminate perceived malpractice or corruption that ran counter to the interest of the lawyers in keeping their specialised knowledge within their profession.<sup>6</sup>

## **The Argument**

The purpose of this thesis is to test Eisenstein’s theory within the context of a literate English elite.

The principal theme of the thesis is that the printing industry (comprising the press and the printers) was not of itself an agent of change for the law and lawyers. The development of printed legal materials was, as a result of a complex interaction between lawyers, printers, the Stationers Company and the State, influenced by the regulatory structures that were put in place. And these structures were in turn designed, directly or indirectly, to regulate primarily content and, secondarily, the technology itself. Among these structures, in addition to those imposed by the Stationers Company, was the patent system allowing for monopolistic elements to dominate law printing. It will be suggested that the grant of the patent to print common law books contained ingredients of co-operation between the patentee and his patrons that had an influence upon the direction of legal printing.

In addition, it will be shown that there were a number of competing interests and tensions within the legal culture and the legal education system of the time, along with Renaissance humanist thought, that encouraged or inhibited the utilisation of the new technology. In addition to the interests that were directly concerned with the output of material, there were

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<sup>5</sup> J.H Baker *Oxford History of the Laws of England* (Oxford University Press, Oxford, 2003) Volume VI Ch 27 p. 491 et seq.; J.H Baker “The Books of the Common Law” in L. Hellinga and J. B. Trapp (eds) *The Cambridge History of the Book in Britain Volume III 1400 – 1557* (Cambridge University Press, Cambridge, 1999) p. 411 et seq.; E.W Ives “A Lawyers Library in 1500” (1969) 85 LQR 104.

<sup>6</sup> For example see Michael Dalton *The Countrey Iustice*. (Adam Islip for the Societie of Stationers, London, 1618) STC 6205.

the interests of those who were in the market for the material – the lawyers, administrators and others who, for various purposes, sought or required legal texts. There is a temptation to look solely at the common lawyers as the market for law texts and primarily they were but there were others involved in the administration of law, as well as those of the “lower branch”<sup>7</sup> of the legal profession, who required access to legal information that print facilitated.

Although Eisenstein suggests that the qualities of fixity, quantity and standardization in particular differentiated print from the manuscript system of recording information, nevertheless the broader context within which printing was undertaken must be considered, for there are elements within that context that influenced both the development of printing, the use of printed output and attitudes to printed material. This context also introduced a dynamic aspect both to printed information and the way in which the various participants interacted with it that contrast with some of the qualities of print that Eisenstein has identified.

### **The Outline**

The thesis, which comprises six substantive chapters, will develop the arguments and themes outlined in the following way.

Chapter two considers Eisenstein’s theory which the thesis is to test. The chapter will outline the points that are particularly significant for this study and some of the literature that is critical of her theories. In particular it will become clear as this study progresses that the views of Adrian Johns and David McKitterick – essentially that the printing press cannot be viewed in isolation as an agent of change but that any consideration of a new communications technology requires a consideration of the way that people involved themselves in its use – have some merit. This becomes particularly so in the later examination of the reaction of the lawyers to print, the way in which they carried on certain practices that were pre-print in origin and the role played by the printers in printing law texts.

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<sup>7</sup> Attorneys and solicitors. The main focus of the thesis is upon texts for the common lawyers and administrators and it should be acknowledged that the use of printed texts in Chancery, the ecclesiastical and Admiralty Courts has not received attention. The use of printed texts and the authority given them in these courts would warrant further study.

Chapter three looks at the way in which the printing press and its output were regulated in the period under study. While lawyers were mainly concerned about the content of the new technology and were little interested in how it was printed, the dynamics of the printing industry and its development from one or two printers into an industry that was regulated not only by the State – whose main interest was content – but also by a trade organization – the Stationers Company - whose interest was in the protection of the industry for the benefit of its members – had an impact upon legal printing.

At the same time the State recognized that the new technology provided benefits for itself, especially in the communication of matters of State policy, that it was anxious to harness and utilise. For this reason it is necessary to consider the way in which printing technology and its output was subject to various regulatory activities imposed both by the State and by the Stationers Company. This aspect of the context within which the printing trade took place is important because it demonstrates that the new technology and its output were not as independent a force as Eisenstein should like to imagine.

It is necessary not only to consider what was printed, how it was printed and the circumstances under which it was printed, but also of importance is the audience for whom it was printed and that audience's culture and background that may (and often did) have an impact upon its receptivity to the output of the new technology. The various audiences for printed law books will be examined in the fourth chapter – their education, the “culture” of the early modern English lawyer and those other groups who had a potential interest in printed law texts. This short chapter will set the context for the one that follows.

The fifth chapter deals with the various drivers for and obstacles to putting the law into print. The business of law printing is itself considered as a contributing element to the drive to put the law into print, and the impact of the printers themselves upon legal printing is a relevant element in this consideration. Law printing was not undertaken by all printers, primarily for economic reasons. Law printing was the province of a few printers. Yet the evidence will show that the printers were not alone in developing the market and printing the texts for it. There was another influence that lay within the market itself. The lawyers themselves played a role in the printing of law and, as will be demonstrated, in offering manuscript law reports which complemented printed output or filled a gap in the availability of legal materials which print did not – and probably for economic reasons could not – fulfil. It will be shown that the

lawyers ensured that certain printers were patronized and, as time developed were favoured until the grant of the patent to print common law texts to Richard Tottel. It will be argued that that this grant was as a result of a mixture of elements and influences both from within and without the printing trade. This demonstrates that there was an interaction of a number of interests that underpinned legal printing at the time.

The grant of the patent and the monopolistic advantages that this gave Tottel are an example of the way in which regulatory structures described in the third chapter had an impact upon the development of printing and the spread of printed material. The role of the Royal Printer, also described and discussed in the third chapter, provides another example of the way in which regulatory structures had an influence on the printing of legal material. Because the Royal Printer was involved in the printing of statutory material, the promulgatory effect of print fell within his purview. But at the same time the monopolistic aspects of his grant had other consequences not the least of which were the metes and bounds of his patent. Did it, for example, extend to the printing of abridgements of the Statutes, or did such works fall within Tottel's common law patent? This example demonstrates that the restriction of competition as a result of monopolistic structures could have an impact in limiting the dissemination of printed material – an important item of Eisenstein's print properties.

It is also demonstrated that the development of printing coincided with the development and rise of humanism, and that humanism played an important part in the acceptance and encouragement of the use of print and, incidentally and probably because of the availability of the new technology, the move towards making legal information available in the vernacular. Although some matters such as the importance of promulgation and of a populace informed of their legal obligations predated humanism, the humanists provided a focus for these existing concepts and coalesced them into the general humanist ideal of the good, educated citizen living within an ordered community and acting for the common good.

The final section of the fifth chapter will consider what is referred to as the co-existence of print and manuscript and will offer suggestions as to why it was that lawyers appeared to be comfortable with the utilisation of printed and manuscript materials. The evidence suggests that there are cultural norms that drove this co-existence, among them the attitude that

lawyers had to their learning or *notre erudition*<sup>8</sup> that, although common to them was esoteric to others. Lawyers also were a discrete group or coterie within the audience for printed material and had developed their own systems for recording – note-taking, reporting and common-placing – and sharing information. These practices coupled with the largely oral-aural systems of training that was undertaken by lawyers may have inhibited the widespread adoption of printed legal material.

The sixth and seventh chapters address the product of legal printing.

The sixth chapter considers the texts that were printed during the late fifteenth and sixteenth centuries – the time during which early competition in legal printing took place and was supplanted by Tottel’s grant of the common law patent. Although Year Books, Abridgements and other law texts were printed in this period, the influence of Tottel upon legal printing and his operation of the common law patent dominates the latter part of the sixteenth century. The ambitious legal printing projects of John Rastell were replaced by the more conservative and business-like approach of Tottel who, although he held the monopoly, was no doubt in continued contact and communication with his lawyer patrons, thus working co-operatively to fulfil perceived market needs. The printing of the Year Books is, I suggest, an example of this co-operative approach in that these books were considered by established practitioners as study guides for students – books that senior professionals would have recommended for their students and pupils. This approach may provide a reason why it was that a large amount of Tottel’s output comprised these texts.

The seventh chapter considers legal printing in the seventeenth century and observes the way in which the emphasis on printing shifted after the surrender by Tottel of the common law patent. The movement of the common law patent between grantees and reversioners had an impact upon the output of legal printing and the nature of the texts that were printed until the common law patent became a part of the English Stock and responsibility for legal printing fell within the influence of the Stationers Company. A thematic consideration of the texts that were printed at this time will demonstrate the various shifts that had occurred in legal printing over the period. Some of the themes developed in the fifth chapter, such as the use of the vernacular, will be revisited in the light of changing or continuing attitudes on the part of law

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<sup>8</sup> The terms *notre erudition* and *nos erudition* are used interchangeably for the same concept.

writers. By the seventeenth century law printing was becoming common and certain elements were becoming clear such as the way in which printed works developed a system of “self-validation” by means of cross-referencing texts, and the beginnings of the focus upon the text itself as the source of law arising from its textualisation – an aspect of fixity – and the beginnings of legal hermeneutics. At the same time opportunistic legal printing provided challenges to the quality to legal materials that printers such as Tottel had tried to ensure. These challenges demonstrate that there were perceived advantages in the printing of legal texts notwithstanding low quality, and suggests that the market for law texts was established and had matured.

Included in the output of books on legal topics were books that were not directed towards the common law audience, but which provided examples of the way in which an interest in legal topics was expanding and also the way in which an audience beyond the common lawyers was becoming apparent. The chapter will also consider the printing of the *oeuvre* of Sir Edward Coke – an important milestone in legal printing and one which dominated the first half of the seventeenth century.

The work will conclude with a review of the major arguments advanced and assessment of the arguments advanced in light of the evidence presented.

The primary materials which will be considered are all available in facsimile form on Chadwyck-Healey’s database Early English Books On-Line which is available by subscription to most University Libraries. All of the works on that database are cross referenced to recognised bibliographies such as Pollard and Redgrave’s *Short Title Catalogue*<sup>9</sup> and Wing.<sup>10</sup> This centralised location of otherwise widely scattered primary resources has been extremely helpful. All citations to primary printed materials also contain a reference to Pollard and Redgrave’s *Short Title Catalogue* (STC) or Wing as applicable.

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<sup>9</sup> A. W. Pollard & G. R. Redgrave *A short-title catalogue of books printed in England, Scotland & Ireland, and of English books printed abroad, 1475-1640* (2nd ed. / rev. & enlarged, begun by W. A. Jackson & F. S. Ferguson, completed by Katharine F. Pantzer Bibliographical Society, London, 1976). The English Short Title Catalogue has recently become available on-line through the British Library. Whilst it does not provide access to copies of the texts themselves as is the case with Early English Books On-Line it provides helpful information on the location of texts and how they may be accessed along with bibliographical references which include those to the Short-Title Catalogue. See [http://estc.bl.uk/F/?func=file&file\\_name=login-bl-estc](http://estc.bl.uk/F/?func=file&file_name=login-bl-estc) (last accessed 9 July 2011).

<sup>10</sup> Donald Goddard Wing *Short-title catalogue of books printed in England, Scotland, Ireland, Wales, and British America, and of English books printed in other countries, 1641-1700*. 2<sup>nd</sup> ed (Index Committee of the Modern Language Association of America, New York, 1972-1994).

Other primary materials have been sourced from the Gale CEngage Learning database “Eighteenth Century Collections Online”<sup>11</sup> In the footnotes I have used a shortened form for the titles of primary materials to make the footnotes less cluttered and more readable. The full, and often lengthy, title of the primary materials used may be found in the Bibliography.

### **A Note on Quotation Conventions**

Quoting early printed resources poses a number of problems. Should the quoted material be “modernised” and adjustments be made to standardise spelling? Should the spelling and grammatical conventions of the times be maintained but reproduced using modern formats? In this thesis when quoting primary printed material I have opted to reproduce, as closely as possible, the typefaces and spelling conventions of the times. In this way the reader will be able to experience the text as it was originally printed. Quotes from primary printed materials are not surrounded by quote marks but are identifiable by typeface. Where it has been impossible to locate a copy of an original primary text, quotes will be included in quote marks and will be in a modern typeface.

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<sup>11</sup> Published by the Gale Group, Farmington Hills, Michigan [http://find.galegroup.com.ezproxy.auckland.ac.nz/ecco/start.do?prodId=ECCO&userGroupName=auckland\\_ecco](http://find.galegroup.com.ezproxy.auckland.ac.nz/ecco/start.do?prodId=ECCO&userGroupName=auckland_ecco) (last accessed 22 July 2010).



## **Chapter 2 – Elizabeth Eisenstein and the Printing Press as an Agent of Change**

### **Introduction**

The purpose of this chapter is to introduce and outline Elizabeth Eisenstein's theory that the printing press was an agent of change in the intellectual history of Early Modern Europe.

The chapter first outlines Eisenstein's theory and identifies the properties of print that Eisenstein considered critical in the paradigm shift that took place in textual information communication. The chapter then outlines the debate that surrounded the publication of Eisenstein's work – a debate that continues.

The chapter sets the context and a point of focus for the examination of the printing press upon lawyers and legal culture in Early Modern England.

### **Eisenstein's Theory**

The impact of the printing press as an agent of change has been the subject of an extensive study by Elizabeth Eisenstein. In two books<sup>1</sup> she attempted to redefine the importance of a new communications technology as an influence upon culture in Europe between 1450 and 1750. It is critical to understand that Eisenstein was not advocating that print was deterministic of the changes that followed in Early Modern Europe, nor did she suggest that it was the only element or driver of change in the early modern period but that, as one of a number of elements, its importance has been underrated.

Eisenstein's argument is that the printing press and the culture that developed as a result of the availability of printed material must be considered when examining the activities of literate groups in Early modern Europe.<sup>2</sup> When compared with the scribal culture, the printing press radically changed the environment within which the production and reproduction of written material took place although scribes and scriveners, hand-written material and

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<sup>1</sup> Elizabeth Eisenstein *The Printing Press as an Agent of Change* (Cambridge University Press, Cambridge, 1979) 2 Vols. Reference will be made to the 1 volume 1980 edition; Elizabeth Eisenstein, *The Printing Revolution in Early Modern Europe* (Cambridge University Press (Canto), Cambridge, 1993).

<sup>2</sup> Ibid. *The Printing Press* p. 158.

copyists would still be required until the nineteenth century and the invention and commercialisation of the type-writer.

Eisenstein's theory is a generalised one. In her work she examines the nature of the agency of the press upon the great cultural movements of the early modern period – the later Renaissance and the spread of humanism, the Reformation and the Scientific Revolution. Absent from her discussion is any reference to the impact of the printing press directly or as an agent of change in the law, although part of her thesis depends upon the ability of the printing press to distribute information efficiently (hence the wide dissemination of Renaissance ideas and thought from Northern Italy to the rest of Western Europe). Brief mention is made of the work of the Rastells in England but beyond that, a consideration of the impact of the printing press upon the intellectual activity of lawyers is not examined.<sup>3</sup> However, Eisenstein's work must be kept in mind in the consideration of the impact of print upon the legal culture of Early Modern England.<sup>4</sup>

Eisenstein's theory holds that the capacity of printing to preserve knowledge and to allow the accumulation of information fundamentally changed the mentality of early modern readers, with repercussions that transformed Western society.<sup>5</sup> Ancient and Medieval scribes had faced difficulties in preserving the knowledge that they already possessed which, despite their best efforts, inevitably grew more corrupted and fragmented over time. The advent of printed material meant that it was no longer necessary for scholars to seek rare, scattered manuscripts to copy. The focus shifted to the text and the development of new ideas or the development of additional information.

The new technology enabled volume. Once a book had been set, theoretically there was no limitation upon the number of copies that could be produced. Volume enabled greater distribution – a quality Eisenstein identifies as dissemination – together with a greater opportunity for preservation.<sup>6</sup> The ability to print large runs of a book cheaply and quickly

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<sup>3</sup> Ibid. p. 362.

<sup>4</sup> For historians the term “Early Modern period” is a generalisation for a roughly three hundred year historical period covering the late fifteenth to early eighteenth century.

<sup>5</sup> Eisenstein *The Printing Press as an Agent of Change* above n. 1 p. 159.

<sup>6</sup> Thomas Jefferson observed that because a larger number of books were printed than available in manuscript, the chances of more copies surviving were greater. Thomas Jefferson to Ebenezer Hazard, 18 February 1791 in M.D Peterson (ed) *Thomas Jefferson: Writings* (Library of America, New York, 1984) p. 973. Jefferson also expounded on the preservative power of print in a letter to George Wythe dated 16 January 1796 stating of his

meant that as a source of information printed books were both available and plentiful. It is no accident that more printed books survive within a given period since 1475 than those in manuscript. Historians bewail the paucity of information available when research requires the use of manuscripts. Manuscript material becomes available often by serendipitous accident.<sup>7</sup> Although some readers copied a printed text in hand, a throwback to the only way a text could circulate in pre-print days, it was quicker for the reader or scholar to buy the book even if that meant sending an order and waiting for it to be delivered. Upon receipt access to the text was immediate and there was no need to copy it and return the exemplar to the owner. In this way printed texts circulated in larger quantities to a more widely dispersed audience.<sup>8</sup>

Eisenstein identifies six features or qualities of print that significantly differentiated the new technology from scribal texts.

- a) dissemination
- b) standardisation
- c) reorganization
- d) data collection
- e) fixity and preservation
- f) amplification and reinforcement.<sup>9</sup>

Some of these features had an impact, to a greater or lesser degree, upon communication structures within the law.

Dissemination of information was increased by printed texts not solely by volume but by way of availability, dispersal to different locations and cost. For example, dissemination allowed a greater spread of legal material to diverse locations, bringing legal information to a wider audience. The impact upon the accessibility of knowledge was enhanced by the greater availability of texts and, in time, by the development of clearer and more accessible typefaces.<sup>10</sup>

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researches into the laws of Virginia “our experience has proved to us that a single copy, or a few, deposited in MS in the public offices cannot be relied on for any great length of time.” see p.1031.

<sup>7</sup> See Professor John Baker’s discovery of the notebooks of Sir John Port. J.H. Baker (ed) *The Notebook of Sir John Port* (Selden Society, London, 1986).

<sup>8</sup> Eisenstein *The Printing Press* above n.1 generally p. 43 et seq; especially p.71 et seq. *The Printing Revolution* above n. 1 p. 42 et seq.

<sup>9</sup> Ibid.

<sup>10</sup> Early print fonts, especially in legal works, imitated scribal forms but later gave way, in the seventeenth century, to the more legible roman font.

Standardisation of texts, although not as is understood by modern scholars, was enabled by print. Every text from a print run had an identical or standardized content.<sup>11</sup> Every copy had identical pagination and layout along with identical information about the publisher and the date of publication. Standardised content allowed for a standardised discourse.<sup>12</sup> In the scribal process errors could be perpetuated by copying, and frequently in the course of that process additional ones occurred. However, the omission of one word by a compositor was a “standardised” error that did not occur in the scribal culture but that had a different impact<sup>13</sup> and could be “cured” by the insertion of an “errata” note before the book was sold.<sup>14</sup> Yet standardisation itself was not an absolute and the printing of “errata” was not the complete answer to the problem of error. Interaction on the part of the reader was required to insert the “errata” at the correct place in the text.

In certain cases print could not only perpetuate error but it could be used actively to mislead or disseminate falsehood. The doubtful provenance of *The Compleate Copyholder* attributed to Sir Edward Coke is an example.<sup>15</sup> Standardisation, as a quality of print identified by Eisenstein, must be viewed in light of these qualifications.

Print allowed greater flexibility in the organization and reorganization of material and its presentation. Material was able to be better ordered using print than in manuscript codices. Innovations such as tables, catalogues, indices and cross-referencing material within the text were characteristics of print. Indexing, cross-referencing and ordering of material were seized upon by jurists and law printers.<sup>16</sup>

Print provided an ability to access improved or updated editions with greater ease than in the scribal milieu by the collection, exchange and circulation of data among users, along with the

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<sup>11</sup> Note however the use by Tottel of mixed sheets from different printings. J.H. Baker “*The Books of the Common Law*” in Lotte Hellenga and J.B. Trapp (eds) *The Cambridge History of the Book in Britain* (Vol 3) (Cambridge University Press, Cambridge 1999) p. 427 et seq. Thus some of his printings were compilations. This suggests that the economics of printing may have contributed to circumstances that might have challenged the uniformity that standardisation required.

<sup>12</sup> Eisenstein *The Printing Press* above n. 1 p 80 et seq and generally Ch.4.

<sup>13</sup> *Ibid.* p. 81.

<sup>14</sup> If errors were not detected print could facilitate the dissemination of false, incorrect or misleading information, despite Eisenstein’s claims that such problems could be met by error trapping which presupposed subsequent printings.

<sup>15</sup> For a further example see Douglas Osler “*Graecum Legitur: A Star is Born*” (1983) 2 *Rechtshistorisches Journal* 194 which demonstrates the falsehood perpetuated by the founder of legal humanism, Alciatus, that he had consulted non-existent manuscripts as well as a surviving manuscript of the *Digest* (the Florentine Codex) when in fact he had not.

<sup>16</sup> Eisenstein *The Printing Press* above n.1 p. 103.

error trapping to which reference has been made. This is not to say that print contained fewer errors than manuscripts.<sup>17</sup> Print accelerated the error making process that was present in the scribal culture. At the same time dissemination made the errors more obvious as they were observed by more readers. Print created networks of correspondents and solicited criticism of each edition.<sup>18</sup> The ability to set up a system of error-trapping, albeit informal, along with corrections in subsequent editions was a significant advantage attributed to print by the philosopher, David Hume, who commented that “The Power which Printing gives us of continually improving and correcting our Works in successive editions appears to me the chief advantage of that art.”<sup>19</sup>

Fixity and preservation are connected with standardisation. Fixity sets a text in place and time. Preservation, especially as a result of large volumes, allows the subsequent availability of that information to a wide audience. Any written record does this, but the volume of material available and the ability to disseminate enhanced the existing properties of the written record. For the lawyer, the property of fixity had a significant impact.

Fixity and the preservative power of print enabled legal edicts to become more available and more irrevocable. In the scribal period Magna Carta was published (proclaimed) bi-annually in every shire. However, by 1237 there was confusion as to which “Charter” was involved. In 1533, by looking at the “Tabula” of Rastell’s *Grete Abregement of the Statutys*<sup>20</sup> a reader could see how often it had been confirmed in successive Royal statutes. It could no longer be said that the signing of a proclamation or decree was following “immemorial custom”. The printed version fixed “custom” in place and time. In the same way, a printed document could be referred to in the future as providing evidence of an example which a subsequent ruler or judge could adopt and follow. As precedents increased in permanence, the more difficult it was to vary an established “custom”. Thus fixity or preservation may describe a quality inherent in print as well as a further intellectual element that print imposed by its presence.

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<sup>17</sup> The issue of error was a matter which had an impact upon the reliability of printed legal material – see Chapter 5 p. 104 et seq; p. 111 et seq.

<sup>18</sup> Eisenstein *The Printing Press* above n. 1 p. 107 et seq.

<sup>19</sup> Cited by J.A. Cochrane *Dr Johnson’s Printer: The Life of William Strahan* (Routledge and K Paul, London, 1964) p.19 at n.2. See also Eisenstein, *The Printing Press* above n.1 p. 112.

<sup>20</sup> (John Rastell, London, 1531) STC 9521.

Sixteenth and seventeenth century individuals were not as ignorant of their letters as may be thought.<sup>21</sup> There are two aspects of literacy that must be considered. One is the ability to write; the other being the ability to read. Reading was taught before writing and it is likely that more people could read a broadside ballad than could sign their names. Writing was taught to those who remained in school from the ages of seven or eight, whereas reading was taught to those who attended up until the age of six and then were removed from school to join the labour force.<sup>22</sup> Proclamation of laws in print was therefore within the reach of a reasonable proportion of the population.<sup>23</sup>

Although the features that I have discussed did not impact upon legal doctrine immediately, recent research would suggest that a preference developed for printed “authorities” was not slow in developing.<sup>24</sup>

### **Eisenstein’s Critics**

Eisenstein’s approach has not been universally accepted and has been the subject of debate. A particular critic has been Adrian Johns, who has devoted a book to a critique of some of Eisenstein’s principal propositions and who embarked upon an exchange of articles in the *American Historical Review* in 2002.<sup>25</sup> Johns challenges Eisenstein’s concepts of standardisation and preservation, suggesting that printed material was inherently unreliable<sup>26</sup> although Eisenstein counters, suggesting that Johns conflated standardisation and preservation “under the rubric of fixity.”<sup>27</sup> Eisenstein suggests that printing itself did not make a text more reliable, acknowledging that the quality of texts depended upon the

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<sup>21</sup> I Bennett p. 19 et seq.

<sup>22</sup> Tessa Watt *Cheap Print and Popular Piety: 1550 – 1640* (Cambridge University Press, Cambridge, 1991) p. 7. In 1600 52% of East Anglian tradesmen and craftsmen could sign their names compared with 80% in London. By the 1640’s roughly 30% of adult males in rural England could sign their names. David Cressy *Literacy and the social order. Reading and writing in Tudor and Stuart England* (Cambridge, Cambridge, 1980) p. 72. The upper classes, both nobility and gentry, men and women were on the whole literate in both English and French and often in Latin as well. John Feather *A History of British Publishing* (Croom Helm, London, 1988) p. 20.

<sup>23</sup> This does not automatically mean that there was understanding of some of the technical language. The ability to read does not necessarily import deep understanding.

<sup>24</sup> I.S. Williams, “He Creditted More the Printed Booke – Common Lawyers Receptivity to Print 1550 – 1640” (2010) 28 *Law and History Review* 38.

<sup>25</sup> Adrian Johns, “How to Acknowledge a Revolution” (2002) *American Historical Review* 106; Elizabeth Eisenstein, “An Unacknowledged Revolution Revisited” (2002) *American Historical Review* 87; Elizabeth Eisenstein “A Reply – AHR Forum” (2002) *American Historical Review* 126.

<sup>26</sup> Adrian Johns, *The Nature of the Book* (University of Chicago Press, Chicago, 1998) p. 36; Johns, “How to Acknowledge a Revolution” *Ibid.*

<sup>27</sup> Eisenstein, “An Unacknowledged Revolution Revisited” above n. 25 at p.91.

printer.<sup>28</sup> Matters such as non-uniform spelling did not concern sixteenth and seventeenth century readers<sup>29</sup> although my observations are that in legal texts there had developed a general uniformity of spelling by the beginning of the seventeenth century.

Johns' major critique was that Eisenstein's theory was too generalised. His interest lies in how printing's role came to be shaped. "Where she is interested in qualities, I want to know about processes"<sup>30</sup> suggesting, for example, that a conclusion about creditworthiness of a book may involve an awareness about its conditions of production.<sup>31</sup> This theme is developed at length in *The Nature of the Book*.<sup>32</sup> Johns does not negate the historical importance of printing but suggests that the development and consequences of print should be explained in terms of how communities involved with the book in various roles put the press and its products to work.<sup>33</sup> Eisenstein characterised Johns' view as that of a retrospective historian, his construct being a modern one and not of the Eighteenth Century.

In a lengthy critique David McKitterick<sup>34</sup> focuses upon similar areas, holding that print did not engender fixity but that texts were unstable and error ridden, thus reflecting lack of credit on the part of readers.<sup>35</sup> Although Moxon's book on the art of printing<sup>36</sup> suggested orderliness and responsibility within the trade, McKitterick's opinion was that early printed books revealed compromise, inconsistency, changes of mind, botched work, errors and incomplete publications.<sup>37</sup> It took a much longer time frame than that suggested by Eisenstein for print to gain credibility.<sup>38</sup> The element of fixity as a determinant of textual accuracy and "truth" has been the subject of challenge by others apart from Adrian Johns and David McKitterick.<sup>39</sup> along with the significance of dissemination.<sup>40</sup>

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<sup>28</sup> Ibid. p. 92.

<sup>29</sup> Ibid p.93.

<sup>30</sup> Johns, "How to Acknowledge a Revolution" above n. 25 at p. 110.

<sup>31</sup> Ibid. p. 120.

<sup>32</sup> Johns, *The Nature of the Book* above n. 26 at p. 31et seq.

<sup>33</sup> Johns, "How to Acknowledge a Revolution" above n. 25 at p. 124.

<sup>34</sup> David McKitterick, *Print, Manuscript and the Search for Order 1450 – 1830* (Cambridge University Press, Cambridge, 2003).

<sup>35</sup> Ibid pp. 97 – 99.

<sup>36</sup> Joseph Moxon *Mechanick Exercises or the Doctrine of Handyworks Applied to the Art of Printing The Second Volume* (Printed for Joseph Moxon on the Westside of Fleetditch at the Sign of the Atlas, London, 1683).

<sup>37</sup> McKitterick above n.34 p. 147.

<sup>38</sup> Ibid. p. 169.

<sup>39</sup> Eric J Leed "Elizabeth Eisenstein's The Printing Press as an Agent of Change and the Structure of Communications Revolutions" (Review) (1982) 88 American Jnl of Sociology 413; Diederick Raven, "Elizabeth Eisenstein and the Impact of Printing" (1999) 6 European Review of History 223

<sup>40</sup> Richard Teichgraber "Print Culture" (1984) 5 History of European Ideas 323; Ibid. Raven.

However, the development of printed law titles and the growth of legal publishing suggests that those known problems notwithstanding, the benefits of print outweighed its disadvantages. Nevertheless, at the same time lawyers created and used manuscript texts and there was in fact a co-existence between the new medium and the old. As will be shown, this developed from cultural norms rather than from any distrust of print, although there were some early difficulties with reliability, which will be discussed in Chapter 5.

Other criticism of Eisenstein's work encompasses her methodology and utilisation of secondary sources rather than archival material.<sup>41</sup> Her identification of the qualities of print is also the subject of challenge. In addition, the nature of her discursive analysis and interpretation of evidence,<sup>42</sup> the tentative nature of the outcome,<sup>43</sup> the overstatement of her conclusions,<sup>44</sup> the lack of empirical evidence,<sup>45</sup> the counter-blast that the printing press caused nothing<sup>46</sup> and the ethnocentric European focus of the study<sup>47</sup> are all indicative of a significant academic reluctance to unreservedly accept her "bold hypothesis".<sup>48</sup>

Eisenstein herself attempted to answer her critics and offer further justification.<sup>49</sup> Indeed the publication of *The Printing Revolution in Early Modern Europe*<sup>50</sup> was not only a popular and available text for a wider audience than that contemplated for *The Printing Press as an Agent of Change* but was also an opportunity for her to restate her theory in a more accessible presentation.

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<sup>41</sup> William J Bouwsma "The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe" (Review) (1979) 84 *American Historical Review* 1356; Jack Censer "Publishing in Early Modern Europe" (2001) *Jnl Social History* p.629; Leed above n. 36; Charles B Schmitt "The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe" (1980) 52 *Jnl Modern Hist* 110.

<sup>42</sup> *Ibid.* Schmitt.

<sup>43</sup> Carolyn Marvin "The Printing Press as an Agent of Change: Communications and Cultural Transformations in Early-Modern Europe" (Review) (1979) 20 *Technology and Culture* 793.

<sup>44</sup> Schmitt above n. 41.

<sup>45</sup> Censer above n. 41.

<sup>46</sup> Renato Rosaldo "The Cultural Impact of the Printed Word" (1981) 23 *Comparative Studies in Society and History* 508.

<sup>47</sup> Raven above n. 39.

<sup>48</sup> Censer above n. 41.

<sup>49</sup> Eisenstein, "An Unacknowledged Revolution Revisited" see above n. 25; Elizabeth Eisenstein "The End of the Book?" (2001) *The American Scholar* p.541; Elisabeth Eisenstein "From Scriptoria to Printing Shops: Evolution and Revolution in the Early Printed Book Trade" in K. Carpenter, (ed) *Books and Society in History*, (Bowker, New York, 1983) p. 29; Elizabeth Eisenstein "Gods Devils and Gutenberg – The Eighteenth Century Confronts the Printing Press" in Julie C. Hayes and Timothy Erwin, (eds) *Studies in Eighteenth Century Culture* (The American Society for Eighteenth Century Studies, Baltimore Johns Hopkins University Press, 1998) pp. 1-24.

<sup>50</sup> Eisenstein *The Printing Revolution* above n. 1.

However, the nature of her theory - and the controversy that it still manages to provoke - is evidenced by the fact that the debate continues.<sup>51</sup> Nonetheless the fundamental thesis is worthy of consideration and provides a context for the examination of print within an intellectual community for whom the communication of information was essential – the lawyers of sixteenth and seventeenth century England.

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<sup>51</sup> Sabrina Alcorn Baron, Eric N Lindquist, Eleanor F Shevlin (eds) *Agent of change : print culture studies after Elizabeth L. Eisenstein* ( University of Massachusetts Press, Amherst, 2007).



## **Chapter 3 - Regulating the Printing Press – How the Law Struggled to Cope With A New Communications Technology**

### **Introduction**

The way in which the printing press could enable the widespread communication of ideas received early recognition from the authorities. Attempts were made to use the law to regulate the way in which the printing press was used through until 1641 when the Court of Star Chamber was abolished.

This chapter argues that the regulation of printing had two aspects. The first, which is the focus of many writings on the subject, is that of content regulation or censorship. The second is that of industry regulation either by industry encouragement or industry restriction. Associated with this is the internal regulation of the industry itself, which sometimes provoked State interference. The purposes of such regulation are often conflated with those of content control. On occasion this is correct, but it is argued that there were often other drivers and interests that motivated industry control apart from content control and these will be identified.

The imposition of these various constraints is indicative of the following:

- a) That there was an early recognition of some of the qualities of print identified by Eisenstein.
- b) That from an early stage there was State involvement with printing both to foster and restrict the trade and its output.
- c) That this had an impact upon the potential of printing to act as an agent of change and upon the way in which law printing was carried on.

Without an understanding of the regulatory constraints imposed upon print and its output, an understanding of law printing suffers from the absence of this important context.

The attempts that were undertaken by the Tudors and early Stuarts to regulate the printing press were of limited success. As was typical of early modern governance the efforts were ad hoc in nature, inconsistent in application, opportunistic, ineffective and suffered from uneven enforcement. In addition to all these problems there was a more basic one. The fundamental

structure upon which all efforts to regulate content were based originated some fifty or so years before printing was invented. This structure was designed to deal with the dissemination of information in the manuscript culture and was ill-equipped to deal with a new technology that was not only relatively mobile but which possessed characteristics that differed from the manuscript “technology”, not the least being a semi-mechanised output coupled with a vastly superior ability to effect speedy dissemination to many readers.

It is suggested that most of the direct attempts by the State to regulate the printing press were not primarily about content regulation but about trade or technology regulation, initially by the use of statute to regulate alien participation in the printing trade between 1484 and 1536, and subsequently, at the behest of the Stationers Company, by two decisions of the Court of Star Chamber in 1586 and 1637.<sup>1</sup> Other statutory regulation of the content of printed material was vague and imprecise and is part and parcel of the various efforts of the Crown to stem treason, sedition and heresy. Although it became an element of those three offences to write certain material, the possession of such writings was viewed more as supporting evidence of other major charges in indictments alleging treasonous or heretical acts.<sup>2</sup> Another means employed to regulate printing was by means of proclamation, a more immediate way of addressing urgent issues of content regulation. In the reign of Henry VIII there were a number of proclamations that addressed and banned specific titles. In the reign of Elizabeth I there was but one.

The final way in which the Crown was able to directly affect the printing trade was by use of the Royal Prerogative and the grant of exclusive rights to print particular titles or classes of titles. These patent privileges, a form of industry control by means of the grant of a limited monopoly, benefitted the grantees as was their intent, but indirectly resulted in the establishment of the “English Stock” which although intended for the benefit of poor printers, enriched and empowered the Stationers Company. In addition, grantees of a general patent, such as the common law patent, could choose the works that they printed, thus impacting upon the availability of texts.<sup>3</sup> Dissatisfaction with the patent system, along with other

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<sup>1</sup> Although there are some collections of the decisions of Star Chamber, the decisions involving the printers are collected in the Records of the Stationers Company and which are reproduced in E. Arber (ed) *Transcript of the Registers of the Company of Stationers of London 1554-1640* 1 Arber p.xxii.

<sup>2</sup> Cydnia Susan Clegg *Press Censorship in Elizabethan England* (Cambridge University Press, Cambridge, 1997) p. 32-34.

<sup>3</sup> For the use of the common law patent by Tottel see Ch. 5 p.109 – 112.

concerns about the trade itself, led to Star Chamber litigation with the resulting decisions of 1586 and 1637.<sup>4</sup>

I use the term “industry regulation” to distinguish “content regulation”, the former being, as I have argued throughout, a subset of the overall regulation of an information communication technology. One of the difficulties that arises in considering communication technology regulation is that so often the regulation of the content of communication is the point of focus. This necessarily gives rise to a discussion about censorship, which frequently becomes an argument about the morality of censorship, the values of free speech, democracy vs tyranny, absolutism and empowerment and a range of issues that confuse the overall examination and consideration of regulatory systems. Much (I would venture to say most) of the historiography of the early history of the print technology has been in the nature of an examination of the issue of content restriction or censorship without a co-equivalent examination of the technology and its communicative elements.<sup>5</sup> This is not to minimise the importance of content regulation but it is important to note the fact that there is more often than not a difference between the two.

This chapter will consider the early steps to address content regulation in the early pre-print days of the fifteenth century, which formed the basis of all subsequent content regulation systems up until 1641, and which were largely ineffective. It will also consider the rise of the Stationers Company from its foundation as a guild in 1403, along with its role in the management of the printing trade, and it will examine the various steps that were taken to effect regulation of the industry or technology and how these steps interacted with those taken to regulate content along with the differing methods that were employed such as the use of statute, proclamations and the grant of special printing privileges along with the decrees of Star Chamber following “disorders” in the printing trade which were litigated before that Tribunal.

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<sup>4</sup> For discussion see below p. 57 – 65 and p. 71 – 74.

<sup>5</sup> For examples see F.S. Siebert *Freedom of the Press in England 1476 – 1776* (University of Illinois Press, Urbana, 1963); Clegg *Press Censorship in Elizabethan England* above n 2; Cydnia Susan Clegg *Press Censorship in Jacobean England* (Cambridge University Press, New York, 2001); Philip Hamburger “The Development of the Law of Seditious Libel and the Control of the Press” (1985) *Stan. L.R.* 661; D.M.Loades “The Theory and Practice of Censorship in Sixteenth Century England” (1974) 24 *Transactions of Royal Historical Society* (5<sup>th</sup> Series) 141, p142 – 145; Pamela Neville Sington “Press, Politics and Religion” in L. Hellinga and J.B. Trapp (eds) *Cambridge History of the Book in Britain – Volume III – 1400 – 1557* (Cambridge University Press, Cambridge 1999) Volume 3 p. 576.

## **The Content Control Model: The Constitutions of Oxford 1407 and The Stationers Guild**

The teachings of John Wyclif, his English translation of the Bible and the rise of the heretical Lollard movement in England gave rise to the first structured approach to the regulation of information, and this was on the initiative of the Church.<sup>6</sup> The content control model that was developed formed the foundation for future attempts to regulate and monitor the output and content of printed books.

State support for religious orthodoxy was manifested by the Statute *De Heretico Comburendo* in 1402<sup>7</sup> which, among other things targeted the written expression of heretical opinions. The making or writing of any book contrary to the “Catholic Faith and the Determination of the Holy Church” was prohibited. There was particular attention to books, emphasising the importance that the Statute attached to ensuring the elimination of this means of dissemination of Lollard teaching.<sup>8</sup> The restrictions upon the dissemination of unorthodox written material were further addressed by the Constitutions of Oxford in 1407 prohibiting the translation of the Bible into English, or the teaching or writing of theology by the unlicensed laity, unless it had first been submitted for examination and approval.<sup>9</sup> It also provided that censors appointed by either of the two Universities were to approve books that were to be copied.<sup>10</sup> Once a book was approved it had to be delivered to and faithfully copied by the Stationers before it was sold. It can be concluded that the Stationers were seen as a reputable organisation which could be entrusted with the task of ensuring that error free and approved copies were made available for public consumption.

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<sup>6</sup> The dislocation of society following upon the Black Death and the instability of government in the final years of the reign of Richard II encouraged dissent and challenges to established ecclesiastical doctrine allowed the Lollards to continue to disseminate their teachings. The accession of the Lancastrian Henry IV in 1399 was followed by efforts to restore the constitutional authority of the State and the Church. For a recently published account of the life and reign of Henry IV see Ian Mortimer *The Fears of Henry IV: The Life of England's Self-made King* (Jonathan Cape, London, 2007).

<sup>7</sup> 2 Hen IV c.15.

<sup>8</sup> The Constitutions are summarized in Anne Hudson *Lollards and their Books* (Hambledon Press, London, 1985) pp. 146 et seq and are set out in John Foxe *Actes and Monuments of Matters most special and memorable happening in the Church* (Company of Stationers, London, 1610) STC 11227. The work by Foxe is more commonly known as Foxe's *Book of Martyrs*.

<sup>9</sup> Clause VII of the Constitutions of Oxford. For background see David Lawton “Englising the Bible” in David Wallace (ed) *The Cambridge History of Medieval English Literature* (Cambridge University Press, Cambridge, 1999) p 459; Henry Angsar Kelly “Lollard Inquisitions: Due and Undue Process” in Alberto Ferreiro (ed) *The Devil, Heresy and Witchcraft in the Middle Ages: Essays in Honor of Jeffrey B Russell* (Brill, Boston, 1998) p 279 esp p. 288.

<sup>10</sup> Clause VI Constitutions of Oxford.

## The Early Stationers

Who, then, were the Stationers? The Guild of Stationers was a trade organisation which was later to become pivotal in the development and use of the printing technology in the future. But in 1408 the Guild had been in existence only for a few years.<sup>11</sup>

Books were published prior to the invention of the printing press, although the process was lengthy, the output was very small and the entire process of book production was a manual one. Craft guilds had developed, even for those involved in the book production trade. The writers of Court Hand, text letters and limners had their own separate guilds. Manuscript producers had civic recognition as a separate craft.<sup>12</sup> On 20 May 1357 it was ordered by the Mayor and Aldermen of London that they should not be summoned as jurors in proceedings in the Sheriff's Courts, a recognition of their status.<sup>13</sup>

On 12 July 1403 members of the Crafts of Text-letter writers, limners and others who were involved in book binding petitioned the Mayor of London for leave to elect two Wardens of their trades, one a limner, the other a text letter writer.<sup>14</sup> The civic ordinances of incorporation were duly granted. Thus the trade interests of manuscript artists (limners), text-letter writers as well as binders and booksellers in London were brought together and by the 1440's were known as "The Mystery of Stationers"<sup>15</sup> although their appellation as Stationers was known in 1407 by Archbishop Arundel and the synod which settled the Constitutions of Oxford. The Guild did not, however, incorporate the Scriveners or Writers of the Court Letter. The Scriveners Guild maintained a separate identity and received its own Royal Charter of Incorporation from James I on 28 January 1617.<sup>16</sup>

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<sup>11</sup> Siebert above n. 5 p. 64; Cyprian Blagden *The Stationers' Company – A History 1403 – 1956* (Allen & Unwin, London, 1960) p. 22.

<sup>12</sup> Stationers Company Letter Book G, folio lxi – see 1 Arber. This subsisted in the days of Chaucer and William Langland.

<sup>13</sup> 1 Arber p.xxii.

<sup>14</sup> 1 Arber p.xxiii; Blagden above n. 11 p. 22.

<sup>15</sup> C. Paul Christianson "The Rise of London's Book-Trade" in L. Hellinga and J.B.Trapp (eds) *The Cambridge History of the Book in Britain – Volume III – 1400 – 1557*, (Cambridge University Press, Cambridge, 1999) p. 128.

<sup>16</sup> 'Rawlinson MS. D51: Letters Patent of incorporation, 1616/17', Francis W. Steer (ed) *Scriveners' company common paper 1357-1628: With a continuation to 1678* (London Record Society, London 1969), pp. 80-91. The full title is The Worshipful Company of Scriveners of the City of London and is also known as the Mysterie of the Writers of the Court Letter. This information was obtained from <http://www.scriveners.org.uk> (last accessed on 31 July 2011). The Stationers website may be found at <http://www.stationers.org/> (last accessed on 31 July 2011).

The formation of the Guild suggests that the book trade was well-developed and sufficiently competitive to make a form of governance desirable.<sup>17</sup> The area surrounding old St Paul's Cathedral had, by the 1390s, emerged as the book-craft area of London. Nearby, in the vicinity of Holborn and Chancery Lane were located the literate communities of lawyers, Chancery masters and scribes who were served by legal scriveners and who, by 1373, had formed their own Mystery of Writers of Court letter who also took up residence near St Pauls.<sup>18</sup>

The Guild itself was significant. Guilds were more than simple trade fellowships. They were a significant part of the economic and political life of the City and protected crafts and industries. The right to trade in the City was granted only to free men of the guilds and the status of free man had to be earned by a lengthy period of apprenticeship in a livery company. The Guilds provided elected officers to civic posts and thus, having an interest in the affairs of the City, defended its rights as well as ensuring the maintenance of the privileged position of guilds and their members. Those who were not free men of the Guild could not trade under their own name nor operate their own business. To have any chance of a commercial career in London, one had to belong to a Guild.<sup>19</sup>

Although the activities of the Guild were restricted to London they could and did regulate the sale of books beyond the city. In the suburbs and in those parts of the City known as "liberties" which were exempt from City jurisdiction, anyone could practice a trade without guild regulation. However, in the main most of those involved in the trade were in the City of London.<sup>20</sup>

This then was the organisation to whom Archbishop Arundel delegated the production of copies of approved books and it was this organisation, in a much more sophisticated and powerful form, that was to provide one of the arms of the regulatory systems that were used to deal with printed books. Clearly the Stationers were an organisation that had credit. In addition they were centrally located making control and surveillance of their activities easy. The final checking system lay in the deposit of an "authorised" copy in a "chest of the University."

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<sup>17</sup> Christianson above n. 15 p. 128.

<sup>18</sup> Ibid. p. 129.

<sup>19</sup> John Feather, *A History of British Publishing* (Croom Helm, London, 1988) pp 29 – 30.

<sup>20</sup> Ibid. p. 30.

## Further Statutory Activity

In 1414 further legislation was enacted by Parliament directly aimed at the suppression of the Lollards. It was designed to provide a “more open remedy and punishment than hath been had and use in the case heretofore, so that for fear of the same Laws and punishment, such heresies and Lollardries may rather cease in time to come.”<sup>21</sup>

Ecclesiastical officers could proceed against the makers and writers of heretical books in the King’s Courts. The statute thus allowed the enforcement of laws regarding the dissemination of heretical material in the Kings Courts as well as those of the ecclesiastical authorities. A number of penalties additional to those contained in *De Heretico Comburendo* were provided, including the forfeiture of land and goods of those convicted of heresy.

Thus a series of Statutes and Constitutions brought together Church and State to ensure control of the writing, possession and dissemination of questionable material regarding religious doctrine. A scheme was put in place for the approval or licensing of that material which could be published and a craft guild, the recently founded Guild of Stationers was charged with ensuring that correct copies were made available.

Although the Statutes specifically addressed books and the manner in which they might be approved, the association of the means of dissemination of ideas with heresy was later to extend to the political “heresies” of sedition and treason.<sup>22</sup> The books were often used as proof of the more serious charge.

It was this system that formed the basis and model for all the subsequent regulation of the content produced by the new information technology that was to be developed by Gutenberg in 1450, the products of which were to trickle into England thereafter, and which was to arrive in Westminster in 1476.

Although the Stationers were to effectively control the business of printing there was early resistance to the new technology. In an early attempt to use the law to address the threat to

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<sup>21</sup> 2 Henry V, 1, c.7.

<sup>22</sup> Clegg *Press Censorship in Elizabethan England* above n. 2, p. 15; Loades above n. 5, p. 142 – 145; Michael Mendle, “De Facto Freedom, De Facto Authority: Press and Parliament 1640 – 1643” (1995) 38 *The Historical Journal*, 307-332 p. 308.

manuscript production in the 1480's one Philip Wrenne, a stationer, in a complaint in a petition to Chancery claimed that "the occupation ys almost destroyed by printers of bokes."<sup>23</sup> Christiansen suggests that there is perhaps some hyperbole in the pleading which, although premature, was prophetic.<sup>24</sup>

### **Early Printing Industry Control**

The early history of print in England up until 1513 is characterised by two factors. The first is that within eight years of the introduction of the press there was legislation in place to enable the industry to develop. The second was an absence of native born English printers, with the exception of Caxton.<sup>25</sup> This was not unusual in the early history of the spread of the new technology. As the printing press spread through Germany, German craftsmen took it to other countries and in doing so passed on the skills of the craft to the natives of the new country, who in turn took the new craft with them to other countries.<sup>26</sup> John Lettou, of Lithuanian origin, established himself in the City in 1480 and in 1482 was joined in partnership by William de Machlinia, a native of Mechlin in Flanders.<sup>27</sup> Together, in 1481, they published the first English law book *Tenores Novelli*.<sup>28</sup>

However, English authorities were often concerned at the impact that aliens had upon trade and commerce in England and often steps were taken to limit the foreign dominance of aspects of trade important to England. Foreigners were divided into two categories – aliens and denizens – and in any new regulatory activities dealing with foreign trade, it was against the aliens that the steps were initially taken. Denizens, who were foreigners who had been admitted to residence and who had certain rights,<sup>29</sup> could find themselves restricted in their activities.

So it was that in 1483 Parliament petitioned Richard III to address grievances against Italians<sup>30</sup> who, it was claimed were price fixing, buying up imported goods and re-selling

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<sup>23</sup> Christianson, above n. 15, p.139.

<sup>24</sup> Ibid.

<sup>25</sup> I Bennett p. 30.

<sup>26</sup> Feather above n. 18, p. 14. Richard Pynson and William Faques were Normans and John Notary was probably French.

<sup>27</sup> Colin Clair *A History of Printing in Britain* (Cassell, London, 1965) p. 32.

<sup>28</sup> Littleton's *Tenures*. J.H Beale *A Bibliography of Early English Law Books* (Harvard University Press, Cambridge Mass, 1926) p. 182 The 1481 printing does not appear in the Short Title Catalogue but records Machlinia's printing of the *Tenures* in 1483 STC 15720.

<sup>29</sup> I Bennett p. 30.

<sup>30</sup> 1 Ric 3 c.9.

them, sending their profits and bringing in other foreigners to work with them. As a result, the King's subjects were unemployed and had turned to idleness with a consequent increase in the numbers of thieves and beggars. It was claimed that the inhabitants of "**Cities Burghes and Townes in late daies have fallen and dailly falle unto grete poverty and decay.**"<sup>31</sup>

However, this statute, designed to severely regulate the conditions under which aliens could trade in England, contained a proviso which reads as follows:

**"Provided alwey that this Acte or any part thereof, or any other Acte made or to be made in this present Parliament, in no wise extende or be prejudiciall any lette hurte or impediment to any Artificer or merchant straungier of what Pacion or Contrey he be or shalbe of, for bryngyng into this Kealme, or sellyng by retails or otherwise, of any man's bokes written or imprinted, or for inhabityng within the said Kealme for the same intent or to any writer lymner bynder or imprinter of suche bokes as he hath or shall have to sell by wey of merchaundise, or for their abode in the same Kealme for the exercising of the said occupacions; this Acte or any parte therof notwithstanding"**<sup>32</sup>

This is a most significant proviso. It has been suggested that its inclusion was at the behest of John Russell, a bibliophile and member of the King's Council, possibly influenced by the marketing activities of Peter Actors, who was an importer of books and who had been a supplier of books to the principal fairs with his partner Joannes de Aquisgrano.<sup>33</sup>

The importance of the proviso may be summarized as follows. First, it indicated quite clearly that a value was placed upon books and that there was recognition of the importance of the newly introduced craft of printing which was relatively poorly developed in England. Secondly, it ensured that the continued and future presence of foreign craftsmen who were skilled in the new technology would be encouraged to come to England and continue to develop the trade. Thirdly, although this was a most important encouragement for printing, the proviso also extends to writers, limners and binders – those involved in the *scribal* production of books. Thus the encouragement was for book production generally, and it is

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<sup>31</sup> Ibid.

<sup>32</sup> Ibid.

<sup>33</sup> Clair above n. 27 p. 104; Christianson above n. 15 p. 137. Actors was appointed Stationer to the King in 1485. See below.

probable that the Stationers' Company, which represented native craftsmen and shopkeepers, must have approved of this specific exclusion.<sup>34</sup>

The 1483 Statute demonstrates what was to become a trend – the use of statute to regulate the printing trade directed primarily towards *industry* regulation rather than *content* regulation.<sup>35</sup>

A recognition of the developing importance of print in government came in 1485 when, on 5 December, Peter Actors, an early beneficiary of the proviso, was appointed Stationer to King Henry VII. His patent was a valuable one and is the first example of a system of prerogative licensing privileges that were subsequently to be granted to printers. The grant provided Actors with

“license to import, so often as he likes, from parts beyond the sea, books printed and not printed anywhere in the kingdom and to dispose of the same by sale or otherwise, without paying customs etc. thereon and without rendering any accompt thereof.”<sup>36</sup>

Henry VII utilized print for propaganda purposes and was the first English monarch to do so.<sup>37</sup> And he also recognized the importance of print for the purposes of promulgating the law. In preparation for a military campaign in France in 1492, every officer was issued with a printed copy of a booklet entitled *The Ordenaunces of Warre*.<sup>38</sup> It was one of the first publications to recognize the wide dissemination that the new technology allowed, the advantages that it provided in the promulgation of law, and served as a model for subsequent government publications.<sup>39</sup> It also made very clear that ignorance of the law could not be claimed when material was available in print.<sup>40</sup> The way in which the purpose of putting the Ordinances in print was worded reflected a combination of the traditional means of

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<sup>34</sup> Blagden above n. 14, p. 24.

<sup>35</sup> Certainly there were later statutes which prohibited the use of writing or printing as a means of expressing or as a constituent of heresy or treason, e.g. the Treasons Act 1534. The objective of such legislation was directed more toward content.

<sup>36</sup> Clair, above n. 27, p. 105; Christianson above n. 15 p. 137. Actors was appointed Stationer to the King in 1485. E. Gordon Duff *A Century of the English Book Trade* (The Bibliographical Society, London, 1948) p.xii-xiii. Kevin Sharpe in *Selling the Tudor Monarchy* (Yale University Press, London 2009)p.65-6 notes a suggestion that Henry VII was slow to grasp the full potential of printing observing that Faques was not appointed the first Royal Printer until 1506. While the approach based on the title is correct, there can be no doubt that Faques fulfilled the same role under different nomenclature. Perhaps Henry was more alive to print potential than may be immediately apparent. Faques was followed in that position by Richard Pynson in 1508, Thomas Berthelet (1530), Richard Grafton (1547), John Cawood (1553) and Cawood with Richard Juge(1558). I Bennett p.38. For further discussion of the patent system see below p. 51 – 53.

<sup>37</sup> Ibid. Sharpe.

<sup>38</sup> Printed by Richard Pynson STC 9332.

<sup>39</sup> Neville-Sington above n. 5 p. 578.

<sup>40</sup> For a discussion of ignorance of the law generally see Ch. 5 p. 129-133.

announcing law, which was by verbal proclamation, along with greater dissemination facilitated the technology of print.

**“and to thentent they have no cause to excuse theim of their offences by pretense of ignorance of the saide ordenances, his highnesse hath obir and above the open proclamacion of the saide statutes communded and ordeyned by wey of emprynte diverse and many several bokes conteignyng the same statutes nto be made and delivered to the capitaignes of his ost charginge them as they wyl avoyde his grete displeasure to cause the same twyes or ones at the lest in every weke hooly to be redde in the presence of their retinue.”<sup>41</sup>**

Up until the 1520s there was a relatively unregulated market for printers and for printed books. The craft soon grew by leaps and bounds. The five printers in London had grown to thirty-three printers and booksellers by 1523 and the English market was becoming less dependent upon imported material.<sup>42</sup> John Rastell, a lawyer-printer, began printing in 1513 and was joined thereafter by a growing number of English printers.

The importance of printing and its status continued to be recognised by the Crown and the office of King’s Printer, which was not an honorary one, became a tool of Government.<sup>43</sup> The King’s Printer was granted the exclusive right to print all official publications and by 1512 Wolsey had ensured that all “Government legislation whether it concerned trade, apparel or religion, was made widely available and in an accessible and authoritative form.”<sup>44</sup>

The impact of this was that the State ensured the integrity of content by identifying one particular printer to produce the content. This, therefore, restricted others in the industry from printing such material thus conflating an aspect of content with a manipulation of the industry.

The importance of an informed public improved the potential for compliance with and enforcement of the law. No one could claim ignorance of the law if the law was well publicised, available and in a form that had the imprimatur of the State. By granting a monopoly for publication of such material the State was ensuring that there was one

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<sup>41</sup> STC 9332.

<sup>42</sup> Clair, above n. 27, p. 105.

<sup>43</sup> For further discussion of the office of the King’s Printer see below p.49 et seq.

<sup>44</sup> Neville-Sington above n. 5 p. 605-6.

authoritative version. This system displays a remarkable insight into the implications of the new technology. On the one hand the disseminative properties of printed material were recognised, with large numbers of identical publications potentially able to be readily spread throughout the Kingdom. On the other hand it was recognised that the new technology did not produce identical copies regardless whose press they came from. There was variation between printers not only in printing style and format but in the quality of product. By restricting publication to one printer the State could ensure that there was consistency and reliability of content.

For approximately thirty years the printing trade developed in England with little restriction, but it was with the advent of Luther's teachings on the Continent, coupled with economic concerns that were developing about the condition of the English labour market that restrictions on the trade and business of printing - and the control of the content of works being printed - attracted the attention of the State and the intervention of the law.

### **Industry Control Measures**

In 1515 the first of series of restrictive measures dealing with foreigners was passed which declared that a double subsidy was to be paid by all denizens. Although this was not directly aimed at the printing trade it would have had an effect, given that two thirds of those involved in the trade between 1476 and 1535 were aliens.<sup>45</sup> This was followed eight years later in 1523 by an Act "Concerning the Taking of Apprentices by Strangers" Every alien was under the supervision of the Warden of his craft. Apprentices had to be of English birth and no more than two foreign journeymen were allowed to be employed in the one printing house. This legislation did away with foreign apprentices and ensured that future members of the printing trade would be native-born Englishmen. In 1529 further legislation extended the provisions of that of 1523. Even although aliens may be carrying on their craft in the suburbs (beyond the City) they were required to pay quarterly dues nonetheless and "undenized aliens" – those who had not taken out letters of denization enabling them to live and trade on an equal footing with native born Englishmen – were unable to set up a business or carry on any handicraft.<sup>46</sup> In addition by legislation no new printing press could be set up by an alien although those established at the date of the legislation could continue to print.

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<sup>45</sup> 1 Bennett p 30; Christianson above n. 15, p. 140.

<sup>46</sup> Clair, above n. 27 105-106; 1 Bennett p. 31; Blagden, above n. 14 pp. 27 -28; Loades above n. 5, p. 145.

In 1534 was passed the last of what could be termed the trade regulatory provisions that had an impact upon printers. Whereas the legislation of 1515, 1523 and 1529 were generalized and impacted upon printers along with other aliens engaged in trade in England, the 1534 legislation was entitled “An Acte for Prynters and Bynders of Bokes.”<sup>47</sup> The preamble demonstrated the changes that had taken place since the Act of 1484.<sup>48</sup> The local printing industry had reached a point where it could manage without the continued presence of foreign craftsmen. It was time to protect native born tradesmen.

All the exceptions in the 1484 legislation were withdrawn. The retail purchase of a book from an alien was an offence, as was the purchase of a book which had been bound abroad. Denizens, however, were not included in this prohibition. Aliens could only sell their stock to an English-born printer or stationer.<sup>49</sup> The encouragement of foreign tradesmen was now reversed once the industry was well established.

The impact of this was significant. Native born printers were establishing their market dominance, aided by the Stationers Company and the Crown. Indeed, Blagden suggests that the 1534 Act was as a result of representations from the Stationers Company.<sup>50</sup> Company Officers took action, less than three years later, against the importation of bound books in particular Bibles by Francis Regnault of Rouen. Coverdale, who was overseeing the publication wrote to Cromwell accusing the Company of ruining Regnault’s business.<sup>51</sup>

Despite Blagden’s suggestion that the legislation was predominantly at the behest of the Stationers,<sup>52</sup> there were other factors motivating the restriction of printing books to “the Kynges naturall subjects” and that all has to do with the ability to control the dissemination of printed material.

Siebert<sup>53</sup> contends that this Act was part of a continuing arrogation of control assumed by the State over the printing trade, but I suggest that it was part of a continuing concern that the state had regarding the way in which the trade was carried on in England. There was no real

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<sup>47</sup> 25 Hen VIII cap 15.

<sup>48</sup> 1 Ric 3 c.9 above n. 30.

<sup>49</sup> Clair above n. 27 p. 105-106; 1 Bennett p. 31; Blagden, above n. 14 p. 27 -28; Loades above n.5 p.145.

<sup>50</sup> Ibid. Blagden.

<sup>51</sup> 1 Bennett p. 32.

<sup>52</sup> Blagden above n. 14 p. 26.

<sup>53</sup> Siebert above n. 5, pp. 30 – 31.

need for novel steps to assert state control over printing. The prerogative had always claimed an interest in and an ability to control new inventions for the benefit of the community, and printing was no exception.<sup>54</sup> The appointment of Royal printers by Henry VII and the grants of letters patent enabling the exclusive privilege to a certain printer to publish a certain title or class of titles was an established exercise of the prerogative that needed no added justification.<sup>55</sup>

The Act is also illustrative of a pragmatic approach to the introduction of new crafts and technologies from overseas, of which printing was a specific example. As new developments and innovations took place on the Continent the presence of foreigners was required to introduce the new crafts, technologies or knowledge to England and to set up the new trade. In the course of time local born craftsmen would be trained and could assume responsibility for the continuation of the new craft through the medium of trade or craft guilds. Although the 1528 Decree and the 1529 Act were not directed specifically at printing and were general in their application, it is clear that printing would have been affected.

### **Content Control Measures**

The printing press and its content, which had been free from direct regulation since its introduction in 1476 was in future to be subjected to sustained attempts to impose stringent controls by the State. It is at this point that the focus of the story shifts to the content of the printing press and the regulatory structures that were put in place address this aspect. The reality of the matter was that the problem was not so much the content or what was printed, but the underlying nature of the new technology that the regulators failed to recognize. Indeed, without the printing press, it is doubtful that the various steps that were taken to control the dissemination of written material would have been necessary and although there

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<sup>54</sup> Ibid. p.29.

<sup>55</sup> Ibid p. 30. The prerogative was invoked in the regulation and administration of economic policy and trade and its use was not new. Royal privilege to encourage new manufacture were demonstrated in 1331 when Edward III granted Letters of Protection to John Kempe, a Flemish weaver, as part of an effort to encourage foreign tradesmen to settle in England. As long as the Crown was acting in the general public good then it had the power, as part of the prerogative, to grant privileges promoting industrial and economic development by restricting competition. These privileges extended to the import and export of goods, the making or sale of a commodity or a general power to supervise a trade. It was perceived that by the end of the reign of Elizabeth I the grant of monopolies was not for the public good and there was an address made to her in 1597. It was not until 1624 that Parliament was able to address the problem with the enactment of the Statute of Monopolies. R Deazley. (2008) "Commentary on the Statute of Monopolies 1624" in L Bently and M. Kretschmer *Primary Sources on Copyright (1450 – 1900)* [http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22uk\\_1624%22](http://www.copyrighthistory.org/cgi-bin/kleioc/0010/exec/ausgabeCom/%22uk_1624%22) (last accessed 22 June 2011.).

was an awareness of this fact it took some time for a system to be put in place that addressed the printing press itself as a source of questionable content.<sup>56</sup>

### **The 1520s – The Revival of the Constitutions of Oxford**

The story of the way in which the law tried to grapple with the effects of the qualities of print becomes intertwined with the impact of the Reformation and, as was the case with Wyclif and the Lollards, the target of the State's concern was the content of publications. The new challenge for the State, however, came from the disseminative quality of print.

Luther had commented that printing was 'God's highest and extremest act of grace, whereby the business of the Gospel is driven forward' and by the same token the nature of print itself posed serious threats for the "establishment."<sup>57</sup> In addition to the wide dissemination of multiple copies, those who received the books and pamphlets were able to read them for themselves and pass them on to friends in far greater numbers than had been the case in the scribal culture. Importantly, the ability to read and absorb material and to contemplate what was written avoided the disputatious nature of an oral dialogue. Thus ideas spread without answer. Associated with the concerns about maintaining theological orthodoxy were the fears that criticism of the established order would follow fast behind.<sup>58</sup>

Late medieval and early modern establishment concerns about criticism arose out of a vision of society with the King at the head – a reflection of the Will of God. To challenge this vision and spread discord or disharmony whereby individuals were ranged against one another or, worse still, the ordained authority was not just disputatious behaviour contrary to the common weal but an offence against God.<sup>59</sup> In addition there was a developing reliance upon public authority to resolve issues and disputes. The legitimacy of the Tudor claim to the Crown in the first place, as was also the case with the Lancastrian Henry IV in 1399, and the need to bring firm measures to bear against any form of discord and strife lest it revive old challenges to Royal authority meant that there was considerable underlying insecurity for the

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<sup>56</sup> Note however More's proclamation of 6 March 1529 which included manuscript books in a list of prohibited titles. For discussion see below pgs. 42-43.

<sup>57</sup> The Established Church also hailed the printing press as a gift from God. Elizabeth Eisenstein *The Printing Press as an Agent of Change* (Cambridge University Press, Cambridge, 1979) 2 Vols., pp. 303-4.

<sup>58</sup> *Ibid.* 304-5.

<sup>59</sup> Loades, above n. 5 p. 141.

regime which necessitated the establishment of a significant propaganda system.<sup>60</sup> The need for this became even more acute when it was the King himself who was reordering the establishment. This, along with the responsibility of the monarch to protect society from disruptive influences leads to the conclusion that censorship was inevitable.<sup>61</sup>

Certainly, the very advantages that the new technology presented to the regime were also available to its opponents and critics. Even before printing there were well-known remedies in place such as *Scandalum Magnatum* that arose from a group of statutes.<sup>62</sup> These could be used as an alternative to treason which, in terms of publication, presented some difficulties because under the definition in 25 Edward III c. 2,<sup>63</sup> it was necessary to prove an overt act. Publications critical of the authorities may not go so far as to qualify as an “overt act.” Therefore it was difficult for traditional treason laws to be used to control the press.<sup>64</sup> Thus in 1534, a new Act<sup>65</sup> made it possible to commit treason “by words in writing.” But at this stage the campaign against the circulation of works which attacked the Church, and by implication the State, was in full swing.

The move towards the closer co-operation of Church and State control or regulation of printed content commenced in July 1520 with the Bull *Exurge Domine* by Leo X condemning the writings of Luther and ordering their confiscation and burning. In May 1521, Luther’s works were burned at St Paul’s Cross after a sermon by Bishop Fisher declaring Luther a heretic.<sup>66</sup> However, Lutheran books continued to find their way into England. Cardinal Wolsey arranged a second book burning in February 1524 and on 12 October 1524 the London booksellers were summoned by Bishop Tunstall of London and warned against importing books that had not been approved by ecclesiastical authorities.<sup>67</sup>

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<sup>60</sup> For a discussion of the Tudor approach to propaganda and the presentation of the monarchy see Sharpe above n. 36.

<sup>61</sup> Loades above n. 5 p. 142.

<sup>62</sup> 3 Edward I c. 34 (1275) (Chapter 34 of the Statute of Westminster entitled “None shall report slanderous news whereby discord may arise) ; 2 Richard II c. 5 (1378) (entitled “Against raisers of false news or seditious rumours) ; 12 Richard II c. 11 (1388) (entitled “The Punishment for him that telleth lies of the Peers or Great Officers of the Realm) and later 1&2 Philip and Mary c. 3 (1554) (entitled “An Act Against Seditious Words and Rumours) and 1 Elizabeth I c. 6 (1559)(entitled “An Act for the Explanation of the Statute of Seditious Words and Rumours’).

<sup>63</sup> 1352.

<sup>64</sup> Hamburger above n. 5, p.666, 718.

<sup>65</sup> 26 Henry VIII c. 13 - for a discussion of the development of Henry VIII's Treason Statute see G.F. Elton *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge University Press, Cambridge, 1972) especially at Chapter 7.

<sup>66</sup> STC 10898.

<sup>67</sup> A.W. Reed *Early Tudor Drama* (Methuen, London, 1926) p.165-6.

However ecclesiastical imprimatur on “new books.....or books...already imported” only applied to books that came in from abroad.<sup>68</sup> At this stage nothing was mentioned about domestically produced books. Bishop Tunstall was invoking the power of ecclesiastical licensing that was instituted in Archbishop Arundel’s Constitutions of Oxford and especially Constitutions 6 and 7. However, 1524 was not the start of this process. Reed notes a licence granted by the Bishop of London for a devotional work by Symon which was printed by Wynkyn de Worde before the publication of Luther’s theses in 1514.<sup>69</sup>

Acting under the authority of the Constitutions of Oxford and empowered by the Statutes of Henry IV and Henry V<sup>70</sup> charges were brought requiring printers to show cause why they had printed certain works. In October 1525 Wynkyn de Worde and John Gough were summoned before the Bishop of London to answer in respect of a book entitled *The Image of Love* which was alleged to contain heretical matter. In March 1526 Thomas Berthelet was required to explain the publication of three works of Erasmus. There was no issue of heresy and Berthelet’s error was technical in that he had failed to produce his copies before the consistory. The absence of a licence was sufficient for Berthelet to be at fault and he was admonished.<sup>71</sup> However, the presence of a licence did not of itself ensure that the content would not be revisited nor did the existence of a licence provide a complete shield. In 1633 William Prynne’s *Historio-mastix* was printed and had been properly licensed. Retrospectively the Court of Star Chamber determined that the licence should not have been issued and Prynne was pilloried and mutilated.<sup>72</sup>

Despite what appears to be a considerable amount of activity on the part of the Church, printed material still circulated, some of it printed locally and much of it imported. Copies of

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<sup>68</sup> Ibid. p 166; 1 Bennett p. 33.

<sup>69</sup> Ibid. Reed p. 163; Symon the Anchorite *The Fruyte of Redemption* (Wynkyn de Worde, London, 1514) STC 22557.

<sup>70</sup> 2 Hen IV c.15, 2 Henry V, 1, c.7.

<sup>71</sup> 1 Bennett pp. 33-34. ; Reed above n. 67, p.166-170.

<sup>72</sup> Hamburger above n. 5, p 678; Siebert above n. 5, p. 123-25; John Rushworth *Historical Collections Remarkable proceedings in five Parliaments. Beginning the sixteenth year of King James, anno 1618. And ending the fifth year of King Charles, anno 1629. Digested in order of time, and now published by John Rushworth of Lincolns-Inn*, (Tho. Newcomb for George Thomason, London, 1659) Wing / 2040:14 p 380; Thomas Bayley Howell *A complete collection of state trials : and proceedings for high treason and other crimes and misdemeanors from the earliest period to the year 1783 with notes and other illustrations* (Printed by T.C. Hansard for Longman, Hurst, Rees, Orme and Brown, London, 1816-1828) Volume 3 p. 711. The context of Prynne’s case differed from that of Berthelet a printer, whereas Prynne was an author who faced a charge of seditious libel. The case of Prynne and his co-defendants Leighton and Bastwick was controversial at the time and there was considerable sympathy for the defendants. Siebert above n.5. p. 125.

Tyndale's New Testament were coming into England in large quantities. In 1528 a London stationer named Van Ruremond caused 1500 copies of Tyndale to be printed in Antwerp, 500 of which were imported and he was required to abjure in 1528.<sup>73</sup> This would have been of concern to the authorities in light of a second admonition to a number of booksellers (of whom Van Ruremond was not one). On 25 October 1526, thirty-one booksellers appeared before the Bishop of London and his pro-registrar. They were warned against selling, directly or indirectly, any books containing "Lutheran heresies" in Latin or English. They could not print nor cause to be printed "any other works" whatsoever, except works previously approved by the Church, unless they exhibited them before the Lord Legate (Wolsey), the Archbishop of Canterbury or the Bishop of London. "Exhibiting" the books was a shorthand way of saying that the book had to be presented for approval by way of license before printing. The booksellers were warned that they could not import any book or works redacted in Latin or English (the vulgar tongue) that had been printed overseas, nor could they buy up and resell any imported books unless they exhibited them to the authorities. Failure to abide by this admonition would expose them to "pain of suspicion of heresy."<sup>74</sup>

The admonition and the threatened penalty for non-compliance demonstrates how seriously the ecclesiastical authorities viewed the printing and distribution of printed matter. Although their primary concerns were with heretical writings, their interest in Tyndale's English translation was a continuation of the control of the dissemination of vernacular scripture that was the object of the Constitutions of Oxford 1407. The restrictions that were imposed were more extensive than those of 1521, demonstrating a heightened concern by the authorities and indicating that earlier measures were not effective. Most significantly it brought the printing and sale of all books which had not been approved, whether of English or foreign origin, under the control of the ecclesiastical licensing system. The basis for the authority of the Church derived from the Statute *De Heretico*, the provisions of the Constitutions of Oxford, and the subsequent Statute of 1414 which effectively was a confirmation of the power of the Church to use the Court to prosecute offenders. If the threat of "suspicion of heresy" was not enough, the Church could utilise the Courts to enforce its decrees.

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<sup>73</sup> 1 Bennett p. 34.

<sup>74</sup> Reed above n. 67, p. 173 – 4. It is ironic that of those who were summoned to Bishop Tunstall's admonition in October 1526, most were members of the Stationers Guild and many were later to achieve high status in that organisation. Included among them were Richard Pynson, Robert Redman, Thomas Berthelet and John Rastell. They were not summoned in their capacity as members of the Guild but as members of the book trade.

It can be observed, therefore, that 50 years after the introduction of the printing press to England, the initial control of the dissemination of printed material was in the hands of ecclesiastical authorities whose principal objective was to stop the spread of Lutheran materials and vernacular Bibles but who extended their reach to cover all books, locally printed or imported. The method of control was to require that a copy of a book should be submitted for approval (exhibited) to the Lord Legate, the Archbishop of Canterbury or the Bishop of London. Clearly not every book would receive the personal attention of these individuals, and would probably have been “vetted” by members of their staff. The work could be printed if it was approved. The method of indicating approval was haphazard. Some books contained the approval as a part of the colophon. Many did not. Some were printed without official approval.<sup>75</sup> But ecclesiastical licensing was shortly to be overtaken as the interests of the Henrician establishment in the utilisation and control of the printing press came to the fore and fresh means were employed.

### **Printing and Proclamations**

The history of the use and regulation of print demonstrates a tension. The Crown could see that the new technology had extraordinary advantages and potential for ensuring the dissemination of State material, be it propaganda, legislative instrument or proclamation. There were advantages in developing and enforcing a common policy by distributing multiple identical copies in a tangible form more lasting than the spoken word or a reading in a marketplace. It meant that State power could be centralised and more effectively administered, a high priority for all the Tudor monarchs. The problem was that the new technology could also facilitate the spread of views that were not consistent with State policy or objectives and, as the Reformation made its way into England, further levels of dispute and conflict were to become apparent.

Printing technology provided certain advantages for State administration.<sup>76</sup> The use of double-spaced text was employed.<sup>77</sup> This format would be used in the printed proclamations

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<sup>75</sup> Siebert above n. 5 p. 44-46.

<sup>76</sup> Print facilitated the collection of subsidies first in 1512 under 4 Henry VIII c 19 and summonses to aldermen of London to appear and supply information in connection with the 1512 subsidy were printed by de Worde in 1513 (STC 7764). Two other documents setting out the information to be given by commissioners (STC 7766) and ordering certification of the names in each ward of London (STC 7767) were printed by Pynson in 1515. Forms were printed with blank spaces to fill in details although such forms had been present in manuscript. See Arthur J Slavin “The Gutenberg Galaxy and the Tudor Revolution” in G.P. Tyson and S.S. Wagonheim, (eds) *Print and Culture in the Renaissance* (Associated University Press, London, 1986) Neville-Sington suggests

and would change their appearance. The original size of a proclamation was roughly equivalent to the modern A4 but by 1526 this had doubled to accommodate double spacing. The advantage of double-spaced text was that the proclamation upon being posted could be read easily, in addition to being announced or “proclaimed.”<sup>78</sup>

### **Henry VIII’s Use of Proclamations**

In the reign of Henry VIII a steady and increasing stream of such proclamations were issued. Their effectiveness was limited by their very nature. They were inferior to statute and to common law. Elton defines them on the basis of what they could not do:

“They could not (and did not) touch life or member; though they might create offences with penalties, they could not create felonies or treasons. Nor could they touch common law rights of property...proclamations covered administrative, social and economic matters – though they included religion, as the sphere of the supreme head’s personal action – but never matters which both the judges and Parliament would regard as belonging to law and statute.”<sup>79</sup>

Proclamations had no force in the common law courts and relied on whatever administrative provisions were provided within the proclamation itself for enforcement. The legal authority underpinning a proclamation lay in the fact that it was a public ordinance issued by the monarch by virtue of the royal prerogative with the advice of the Council under the Great Seal and by royal writ.<sup>80</sup>

Statutory enforcement of proclamations was finally addressed in the 1539 Statute of Proclamations. That Act was meant to resolve doubts Thomas Cromwell himself held about the legality of any proclamation that was not supported by statute. Its practical significance lay in the clauses for its enforcement.<sup>81</sup> It was a feature of Henry VIII’s reforms that he consistently turned to Parliament to implement his policy and give his policy of supremacy the force of law.<sup>82</sup> Notwithstanding the constitutional basis for proclamations, Henry could not establish his reforms by proclamation alone. As Elton puts it:

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that the model for these early bureaucratic forms was the indulgence which provided blank spaces for the name of the buyer and the date of purchase Neville-Sington above n. 5 p. 576.

<sup>77</sup> The printing term is “leaded text” which was common in the school books of the period.

<sup>78</sup> Neville-Sington above n. 5 p. 580.

<sup>79</sup> G.R Elton *The Tudor Constitution - Documents and Commentary* (Cambridge University Press, Cambridge, 1960) p.22.

<sup>80</sup> I Hughes and Larkin p. xxiii Proclamations are referred to by Proclamation Number.

<sup>81</sup> G.R Elton *England Under the Tudors* (Folio Society, London, 1997) pp 168 – 9.

<sup>82</sup> *Ibid.* p 165.

“Until parliament has decreed that certain activities (such as the denial of the supremacy or the seeking out of appeals at Rome) are criminal and carry appointed penalties, there is no way in which the supremacy can be enforced on the country, especially on the laity: the king has no means of forcible and extra-legal coercion, and only statute can add felonies and treasons, involving loss of life or member, to the body of law. This disposes of the notion sometimes encountered that Henry could have established his supremacy by proclamation: had he wished to do so he would have had to give to proclamations powers they had never had.”<sup>83</sup>

Henry (and the other Tudors) used proclamations as a means of addressing regulatory matters or the fine tuning of policy.

### **Industry Regulation and Proclamations**

Print technology enabled the promulgation and distribution of proclamations. They were also used to regulate the technology itself, addressing specific problems as and when they arose. Regulation of print by proclamation was both direct and indirect. Direct examples may be found in proclamations prohibiting the printing of any book without the license of the King’s deputies,<sup>84</sup> prohibiting the printing of any book unless it contains the names of the author, printer and the date of printing,<sup>85</sup> authorising Cromwell to approve one Bible in English,<sup>86</sup> granting a monopoly for printing to one Anthony Marler<sup>87</sup> outlawing the translation of Tyndal<sup>88</sup> and granting an exclusive licence for printing the authorised English Primer to Richard Grafton and Edward Whitchurch.<sup>89</sup>

Other proclamations did not address printing directly, but had a consequential impact. The restatement or reinforcement of earlier statutes, implicitly referring to *De Heretico* and 2 Henry V c.7 and the prohibitions against unlicensed books,<sup>90</sup> a prohibition of “erroneous books”, targeting imported bibles<sup>91</sup> and a prohibition of the publication of Bulls or material from Rome, recognised the threat of dissemination of material that would challenge the

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<sup>83</sup> Ibid.

<sup>84</sup> 16 November 1538; 1 Hughes & Larkin 186.

<sup>85</sup> Ibid. 272; 8 July 1546.

<sup>86</sup> Ibid. 192; 14 November 1539.

<sup>87</sup> Ibid. 210; 12 March 1542.

<sup>88</sup> Ibid. 272; 8 July 1546.

<sup>89</sup> Ibid. 251; 28 May 1545.

<sup>90</sup> Ibid. 122; 6 March 1529.

<sup>91</sup> Ibid. 129; 22 June 1530.

supremacy of Royal authority.<sup>92</sup> This last proclamation was a step in the break with Rome and turned concerns about religious content to a specific political and constitutional issue.

Proclamations were used to establish the new religious orthodoxy<sup>93</sup> as well as furthering education by establishing a standard teaching text, directing the use of Lily's *English Introduction and Latin Grammar*,<sup>94</sup> this in turn indicating recognition of the standardisation of texts that print enabled, together with the volumes that could be distributed as a result of a semi-mechanised process. A standard level of education could be achieved by the use of a prescribed and printed text together with the use of a standard prayer book, known as a primer. Teachers were directed, after teaching pupils their ABC to "teach this Primer or book of ordinary prayers to them in English". The preamble states the high principle of the benevolent sovereign "we, much tendering the youth of our realms (whose good education and virtuous upbringing redoundeth most highly to the honour and praise of Almighty God)."<sup>95</sup>

### **Content and Proclamations**

The requirements of the various proclamations are indicative of the policies of their particular time and some were directed towards content. The restrictions on the importation of books were part of a campaign against the heretical teachings and it was the view of the authorities that books in print containing such material had to be suppressed. At the same time there was recognition of the reality that vernacular Scriptures were finding their way into England despite the best efforts of the authorities.<sup>96</sup> The Bishop of Norwich commented "It passeth my power, or that of any spiritual man, to hinder it now, and if this continue much longer, it will undo us all."<sup>97</sup>

More's Chancellorship (1529 – 32) saw the use of proclamations as a tool in a comprehensive campaign against heresy, of which censorship was a part. More's objective was to continue to keep heresy within the jurisdiction of the Church and his censorship regime was part of a wider program directed against the suppression of heresy. Although More issued only two

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<sup>92</sup> 12 September 1530; Ibid 130, 9 June 1535; Ibid. 158, 1 January 1536; Ibid. 16.

<sup>93</sup> April 1539 – Headed "Proclamation for Uniformity in Religion"; Ibid. 191; 6 May 1541; Ibid. 200.

<sup>94</sup> Ibid. 216; 25 March 1543.

<sup>95</sup> Ibid. 248; 6 May 1545.

<sup>96</sup> 1 Bennet p. 32 records which ecclesiastical authorities were tricked into purchasing parcels of Testaments, thus providing funds for further editions.

<sup>97</sup> Ibid.

proclamations, their effect was far reaching. The first<sup>98</sup> was aimed at the suppression of the Lutheran heresy. An inquisitorial system was put in place whereby all those in authority were to suppress deviationist teachings and were to assist in punishing the guilty. The power of secular officials was subordinated to the penal power of the bishops. Elton suggests that this proclamation created the nearest thing to an “Inquisition” that England was to experience, except perhaps with the exception of the High Commission.<sup>99</sup>

The second proclamation<sup>100</sup> added further titles to those already prohibited. As well as books printed “beyond the sea”, the availability of vernacular Bibles was considered unnecessary and should be prohibited because scriptural interpretation was the province of the Church.<sup>101</sup>

The effectiveness of More’s campaign is questionable. Elton is of the view that the proclamations were a part of a bigger issue – the King’s issues with Rome – and were possibly considered to be demonstrations of a desire to ensure doctrinal orthodoxy and “the effect of the these proclamations vanished with the policy that had inspired them; though never withdrawn, they also ceased to be regarded.”<sup>102</sup>

Proclamations and legislation continued to be used when Thomas Cromwell was the King’s most influential adviser. Cromwell, like Wolsey before him, saw the utility of print and embarked upon an active legislative program utilising the printing press as a means of conveying not only the Royal and statutory commands, but also the policy behind them.<sup>103</sup> Cromwell’s fall in 1540 resulted in a conservative reaction rather than an attempt at conservative reform.<sup>104</sup> That conservative reaction continued to use proclamations to

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<sup>98</sup> 6 March 1529 Hughes and Larkin 122 p. 181.

<sup>99</sup> G.R. Elton *Policy and Police* above n. 65, p. 219.

<sup>100</sup> 22 June 1530. 1 Hughes and Larkin 129 p. 193.

<sup>101</sup> Ibid. Elton *Policy and Police* above n. 65, p. 219-20.

<sup>102</sup> Ibid. Elton p.220.

<sup>103</sup> Cromwell gave legal statutory affirmation to Proclamations by the enactment of the Statute of Proclamations in 1539. The most important proclamation involving print was the Proclamation of 16 November 1538 (1 Hughes and Larkin 186) which removed licensing from the hands of the Church and to secular authorities. For discussion see below. Elton notes that throughout the 1530’s proclamations were used sparingly. Only 9 were issued which touched the major issues of the time and of those 4 appeared before July 1533. See Elton *Policy and Police* above n. 65, p.218 For Cromwell’s use of proclamations see Elton *Policy and Police* above n. 65 p. 220 – 222. As to the issue of identification of statutory policy and the wider issue of interpretation and the development of legal hermeneutics see Ch. 7 p 214 et seq.

<sup>104</sup> Neville-Sington, above n.5, p. 594.

communicate the Royal position.<sup>105</sup>

However, an important Tudor proclamation, and the one which significantly addressed books and printing was that of 16 November 1538.<sup>106</sup> That Proclamation did not contain any *index expurgatorius* yet it seemed to mark a retreat from the reformist position that had been taken by Cromwell. Elton suggests that the provisions of the proclamation were imposed upon Cromwell rather than devised by him,<sup>107</sup> and it is clear that the King had a part in the drafting of it.<sup>108</sup>

The purpose of the proclamation was “for expelling and auoydinge the occasion of errors and seditiouse opinions” What the proclamation attempted to do was to control the printing and the sale of books and also dealt with a number of other matters not relevant to this discussion.<sup>109</sup>

The proclamation had four major policies. The first was a prohibition against the importation of English books without a Royal licence. Secondly, all printing in England was to be licensed by the Privy Council. In addition if the work was to be published *cum privilegio regali* the words *ad imprimendum solum* were to be added. Furthermore the whole copy or the effect of the licence and privilege was “therewith printed, and plainly declared in the English tongue underneath them.” Thirdly, the printing or importation of English Bibles with any annotations in the margin, or any prologue or additions in the calendar or table was prohibited unless approved, and books of translations into English were prohibited unless the name of the translator was contained in the book “or else that the printer will answer for the same”. These two policies, which could be viewed as a form of industry regulation with a content goal as the prime objective, were directed towards the printing trade, placing an approval statement on printed books (although not required for manuscript books) and holding printers responsible if certain requirements were not met. Finally, no printer could “print, utter, sell or cause to be published any books of Scripture in the English tongue until such time as the

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<sup>105</sup> A 1546 proclamation made it clear that the works of reformers such as Coverdale and Tyndale would not be tolerated, and the directions for the use of the Primer underpinned the importance of standardising the doctrine that underpinned the return to a more conservative policy. 1 Hughes and Larkin 272 8 July 1546 at p. 373.

<sup>106</sup> STC 7790. 1 Hughes and Larkin 186.

<sup>107</sup> Elton *Policy and Police* above n. 65, p. 221.

<sup>108</sup> Siebert above n 5, p. 48.

<sup>109</sup> For example, the exile of Anabaptists, matters of church ceremony, married priest and the removal of Thomas Becket from the calendar of saints.

same books be first viewed, examined and admitted by the King's Highness or one of his Privy Council, or one bishop."<sup>110</sup>

The *cum privilegio* section is important. It can mean either "for sole or exclusive printing" or "for printing only," but an analysis of the reasons for its insertion in the proclamation by the king and the effect on contemporary printers as appears in a letter by Richard Grafton, the printer, clearly show that it was intended to mean "for printing only." The phrase "cum privilegio" conferred the exclusive rights of printing, while Henry intended by the additional words *ad imprimendum solum* – "only for printing" to absolve himself of responsibility for the contents of books, many of which were issued under a general privilege without previous examination.<sup>111</sup>

Perhaps the most important aspect of the 1538 Proclamation is that it shifted the monitoring of content from the hands of the Church, where it had been since the 1408 Constitutions of Oxford, and into the hands of the State – in particular the members of the Privy Council, probably as a reflection of wider content that was within the scope of the Proclamation. Siebert suggests that the shift in the administration of print licensing from the clergy to state officers was an important contribution to the regulation of the press.<sup>112</sup>

The Proclamation was both a censorship tool as well as an effort to establish a regulatory system over the printing trade thus addressing both matters of content and wider industry control. However as Elton observes heretical books, some of them promoted by Cromwell himself, were spreading in the 1530s and the King's censorship plan could not stop them. The machinery was not in place to enforce it and he suggests that More's censorship system, had it endured, would have been more formidable.<sup>113</sup>

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<sup>110</sup> Above n. 106.

<sup>111</sup> Siebert above n. 5, p.37; Clegg *Press Censorship in Elizabethan England* above n. 2, p. 10; Reed above n. 67, p. 185 – 186.

<sup>112</sup> Siebert above n. 5 p.49. Although it should be noted, as has been stated above, that a Bishop was able to approve books of scripture.

<sup>113</sup> Elton *Policy and Police* above n. 65, p. 221. Elton considered that at the time the endeavour proved overly ambitious.

## Proclamations in the Reigns of Edward VI and Mary

After the death of Henry VIII and the accession of Edward VI in 1547 a softening of controls on the press took place,<sup>114</sup> although Proclamations were promulgated that indirectly dealt with printing or information dissemination.<sup>115</sup> However, the considerable restrictions that were in place during the reign of Henry VIII were not increased to the same level during the reign of Edward VI. The overthrow of Somerset by the Earl of Warwick (later Duke of Northumberland) and the outbreak of rebellion in 1549 led to the re-imposition of prior censorship by the Privy Council. Nevertheless from 1547 to 1549 there was a level of press freedom that would not return until the Long Parliament's relaxation of censorship in 1641.

Although Mary's reign commenced with an attempt to reconcile the diversity of religious elements within the kingdom,<sup>116</sup> and her initial expressions of unwillingness to compel adherence to her faith, there were restrictions on popular discussion of dissenting views and the revival of the earlier heresy statutes.<sup>117</sup> An index of prohibited authors<sup>118</sup> was developed but enforcement seems to have fallen short of the strong language that was used in the proclamations and legislation.<sup>119</sup>

The domestic publication of Protestant propaganda was stifled, not because of the success of Mary's censorship regime but because Protestant printers left the jurisdiction and went to Europe and the book trade underwent a contraction.<sup>120</sup> Those reformist printers and publishers who remained relied upon surreptitious publication in order to confuse the authorities, primarily by the use of false colophons or place of publication details.<sup>121</sup> The absence of printers may have worked to the advantage of Richard Tottel who was granted the

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<sup>114</sup> Ibid. p. 37.

<sup>115</sup> 1 Hughes and Larkin 281; 337; 352; 353.

<sup>116</sup> On 18 August 1553 she issued the proclamation offering freedom of conscience; prohibiting religious controversy, unlicensed plays and printing - 2 Hughes and Larkin 390.

<sup>117</sup> Robert Steele *A Bibliography of Royal Proclamations of the Tudor and Stuart Sovereigns and of others published under authority, 1485-1714 : with an historical essay on their origin and use* (Burt Franklin, New York, 1967) p. 425, 28 July 1553; On 26 May 1555 the proclamation enforcing statutes for public order re-instituted the laws and statutes "heretofore made and provided concerning in anywise touching the punishment of heresy and lollardy". These statutes included those of Richard II, Henry IV and Henry V - 2 Hughes and Larkin 420.

<sup>118</sup> 2 Hughes and Larkin 422.

<sup>119</sup> Neville-Sington above n. 5, p. 604.

<sup>120</sup> In addition there were proclamations against seditious aliens which included foreign printers. 2 Hughes and Larkin 404.

<sup>121</sup> John N. King "The Book Trade under Edward IV and Mary I" in Hellinga, L and Trapp, J.B. (eds) *Cambridge History of the Book in Britain - Volume III - 1400 - 1557* (Cambridge University Press, Cambridge, 1999) p. 172.

common law patent by Mary.<sup>122</sup> Even although a proclamation was issued on 6 June 1558 providing for the execution of those in possession of heretical works, few printers or booksellers were prosecuted.<sup>123</sup>

### **The Elizabethan Use of Proclamations**

The royal proclamation was as effective as its own provisions made it and its real value lay in propaganda. Proclamations offered the government's version of events and rationale for action. They project an image of a unified commonwealth and its peace and stability in the hands of the Queen and her subjects. Following the Injunctions of 1559 proclamations dealing with publications and the press followed intermittently.

Elizabeth's proclamations that impacted upon printing included a proclamation prohibiting seditious books in matters of religion;<sup>124</sup> ordering arrest for circulating seditious books and bulls;<sup>125</sup> ordering discovery of persons bringing in seditious books and writings;<sup>126</sup> the content that was permitted in and prescribing the book of common prayer.<sup>127</sup> There was a proclamation ordering the destruction of seditious books,<sup>128</sup> for enforcing uniformity in common prayer,<sup>129</sup> providing rewards for information dealing with libels against the Queen,<sup>130</sup> and particularly the proclamation of 27 September 1579 which specifically denounced the book by Stubbs entitled "The Discovery of a Gaping Gulf".<sup>131</sup> Another specific title was dealt with in the proclamation of 3 October 1580,<sup>132</sup> along with books by Robert Browne and Robert Harrison, which were declared as seditious and schismatic.<sup>133</sup>

One printer, William Carter, was not the subject of a proclamation but was involved in clandestine printing. It was suggested that he had been involved in the publication of Catholic books and in 1579 was examined before the High Commission but refused to answer and after a term in prison he was released. In 1580 a new edition of a "Treatise of Schism"

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<sup>122</sup> See below Ch 5 p. 109.

<sup>123</sup> 2 Hughes and Larkin 443.

<sup>124</sup> 2 Hughes and Larkin 561 1 March 1569.

<sup>125</sup> Ibid. 577 1 July 1570.

<sup>126</sup> Ibid. 580 14 November 1570.

<sup>127</sup> Ibid. 597 11 June 1573.

<sup>128</sup> Ibid. 598 28 September 1573.

<sup>129</sup> Ibid. 599 20 October 1573.

<sup>130</sup> Ibid. 26 March 1576.

<sup>131</sup> Ibid. 642 27 September 1579. Stubbs was prosecuted and maimed for his book which spoke out against the proposed marriage of the Queen with the Duke of Alencon.

<sup>132</sup> Ibid. 652 3 October 1580.

<sup>133</sup> 30 June 1583, Ibid. 667.

appeared in London and this book by allegory was designed to incite the women at court to assassinate the Queen. The printing was traced to Carter (with the assistance of the Stationer's Company which demonstrates the co-operative relationship between the Crown and the Company) and copies of the book were found at his shop Tower Hill. He was arrested but would not confess under torture. On 10 January 1584 he was tried at the Old Bailey in London and convicted of high treason and the next day was executed.<sup>134</sup> For one Penry however, seditious writing was the only charge. Penry was convicted and hanged for felony in 1593 for writing an open letter to the Queen.<sup>135</sup> These cases illustrate the way in which the Crown responded to content it considered threatening. It is to be observed that "conventional" charges were preferred rather than any breach of a proclamation.

The concerns of the Crown as to content became more intense in the 1580's following the excommunication and consequent authorisation by the Pope of the deposition of the Queen – thus bringing a religious threat into the secular realm - the Jesuit conspiracies of Edmond Campion and the approaching threat from Spain. There was a proclamation ordering suppression of books defacing the true religion,<sup>136</sup> and a proclamation suppressing seditious rumours.<sup>137</sup> Other proclamations included ordering the application of martial law against the possessors of papal bulls, books and pamphlets,<sup>138</sup> an order for the destruction of Marprelate publications,<sup>139</sup> and a proclamation for the reform of patent abuses.<sup>140</sup>

The goal of Elizabethan censorship or content control was to suppress religious and political texts – either Catholic writings that denied the queen's supremacy and advocating placing a Catholic monarch on the throne, or radical Protestant texts that denied the queen's authority over religion.

Except for Stubbs's publication, the suppression of locally produced texts censored by proclamation was largely ineffective although as propaganda they served their purpose,

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<sup>134</sup> Clegg *Press Censorship in Elizabethan England* above n.2 p. 33; Siebert above n.5 p.90-91; Loades above n. 5 p.153. *Treatise of Schism* was written by Gregory Martin and printed in 1578 by Iohannem Follerum (W. Carter) in 1578 – see STC 17508.

<sup>135</sup> Ibid. Loades, p. 153 - 154.

<sup>136</sup> 2 Hughes and Larkin 672, 12 October 1584. Although the word "defaming" may appear to be the proper one, the word "deface" is used in the Proclamation's title by the editors and is used subsequently in the text – e.g. "and deface her majesty's most happy government".

<sup>137</sup> Ibid. 688 6 February 1587.

<sup>138</sup> Ibid. 699 1 July 1588.

<sup>139</sup> Ibid. 709 13 February 1589.

<sup>140</sup> Ibid. 812 28 November 1601.

particularly those that called for the suppression of Catholic texts that originated on the continent.

### **Proclamations as a Regulatory Tool – Some Observations**

The following observations may be made about regulatory efforts by use of proclamations:

- a) Whilst some proclamations addressed industry regulation, in the main they dealt with content control, reacted to specific problems and addressed specific titles.
- b) The exception was Henry VIII's proclamation of 16 November 1538 addressing matters of content control by means of strictures upon the printing trade itself. This model had difficulties arising from the disseminative quality of print in that questionable titles were already in circulation. Nevertheless, in attempting to stem the tide of erroneous and seditious opinions, the Crown recognised the nature of the problem and attempted to address it through the industry. The model, in defining an approval process, avoided the necessity of a piecemeal approach to title prohibition. Of all the proclamations it was the one that was most significant for the printing trade.
- c) Although subsequent proclamations in the period seem more directed at content than the industry, those such as Stubbs, Carter and Penry<sup>141</sup> faced more serious charges than those involving printing. Printing was evidence of the alleged seditious, scandalous or treasonable opinions.

### **The Stationers Company, Patents and the Royal Printer**

The wider regulation of the printing technology was approached in three ways – by the use of the appointment of the Royal Printer, by the grant of patents, and through the Stationers Company and much of the subsequent interference by the State with the trade was at its behest.

Within the context of an aspect of control of the printing trade there were a number of underlying policy reasons, apart from the financial benefit accruing to the Crown, why the publication of legal material should be in the hands of a Royal printer.

The first and most obvious was the concept that the law provided the foundation for order within the kingdom and that any printing or publication thereof should be of an official

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<sup>141</sup> And subsequently Leighton and Prynne.

nature. The second reason, associated with the first, was the concept that the law flowed from the King or the sovereign further emphasising the royal interest in printing, promulgation and publication of the law.<sup>142</sup> The third reason was the often expressed view that the law was published for the common good or the “common weal”.

One of the duties of the Royal Printer was to print legislative material. The qualities of print – dissemination, identical copies and a standard identical text – aided in the promulgation and communication of statutory information. Pre-print promulgation of statutes was done by sending manuscript copies of the statute of the latest Parliament or Session to the Sheriff of each county accompanied by a writ ordering him to proclaim it publicly in all the Cities and towns, at quarter sessions, markets and fairs or other occasions where people gathered together.<sup>143</sup>

The public promulgation of statutes was assisted by the publication of printed broadsides.<sup>144</sup> This represented a shift from the aural-oral promulgation that was the practice in the manuscript period. Broadsides allowed the material to be presented in visible and more lasting form. The broadsides could be affixed to posts and billboards. The earliest clear instance appears in 1529 and seems to have continued intermittently through the reigns of the later Tudors and the reigns of the early Stuarts.<sup>145</sup>

An important consequence was that this form of extended publication and promulgation, along with the availability of hitherto hard-to-find legislative material, placed greater emphasis upon the statutes. The direction by Henry VII that the statutes be published in English gave added weight to this emphasis, although initially publication in “the vulgar tongue” fulfilled the state policy of ensuring that the subject knew the law.<sup>146</sup> Print was

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<sup>142</sup> For discussion see above p. 35-36. Pynson viewed his appointment not just as a business but involved the representation of the King and the Government. For discussion in the context of the business of printing see below Ch. 5 p. 105. Printing by the Royal Printer could be seen as enhancing the authority and reliability of the printed material. The holder of the common law patent could arguably have occupied a slightly lesser status in terms of “authority” although the support of his legal and judicial patrons enjoyed by Tottel may have enhanced the respect accorded to his work. See below Ch. 5 p. 109 *et seq.*

<sup>143</sup> Katherine Pantzer “Printing the English Statutes 1484 – 1640” in K. Carpenter (ed) *Books and Society in History* (R.R. Bowker, New York, 1983).p. 73. Selected statutes were also read out at assizes.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.* p. 87. Note in Appendix D to Pantzer’s essay there are listed all the examples and references of Acts printed as broadsides.

<sup>146</sup> For the discussion of ignorance of the law see Ch 5 below p. 129-133.

present at a time when legislation was seen, especially by Thomas Cromwell, as a means of implementing the Henrician Reformation.

The printing work of the Royal Printers was not restricted to legal works<sup>147</sup> and the privilege grew over the years. By 1577, when Christopher Barker held the patent, it extended to “Statutes, Acts of Parliament, proclamations, injunctions, bibles and testaments, service-books, and all things issued by command of Parliament” either wholly or partly in English along with some specialized work.”<sup>148</sup> There were also occasions when a Royal Patent could issue to other printers for a special project even although such work might have been within the scope of the Royal Printer’s patent.<sup>149</sup>

The office of the Kings Printer was distinct from the common law patent, although it was another form of monopoly. The advantages of having a single reliable “printing shop” responsible for the printing of Statutes and official material are similar to those attached to the Common Law patent.<sup>150</sup>

The use of patents characterises any discussion of printing in the sixteenth and early seventeenth century. As has been noted, the Crown issued certain printers with patents granting them exclusivity in printing certain types of work or titles of books. Many of the disputes which were later to occur concerned patents and issues of infringement between competing printers or, of even more concern for the Stationers Company, printers who had not gone through the approval process set up by the Company.

Patents were granted for a number of reasons. The printer to whom they were granted may have patrons who supported a grant of exclusivity to print certain material.<sup>151</sup> Another may have been to put the printing of certain texts in the hands of a trusted printer. A further reason

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<sup>147</sup> For example when Christopher Barker was appointed Royal Printer his patent granted him the exclusive printing of all statutes, books, bills, acts of Parliament, proclamations, injunctions, Bibles and New Testaments and also of all service books to be used in churches. Clair above n. 27, p. 97-98.

<sup>148</sup> W.W. Greg *A Companion to Arber* (Clarendon Press, Oxford 1967) p. 97. Colin Clair *A History of European Printing* (Academic Press, New York, 1976) p. 269. The wording of the patent uses both the words “Statutes” and “Acts of Parliament” which we today consider synonymous. 5 Arber p.lix lists those who were appointed as Royal Printer.

<sup>149</sup> For example, notwithstanding that Berthelet was the Kings Printer, Richard Grafton and Edward Whitchurch received a patent to print service books in 1544. Clair *A History of Printing in Britain* above n. 27 p. 65

<sup>150</sup> For discussion see following and Ch. 5 below p. 109 et seq.

<sup>151</sup> As was the case with the grant of the Common Law patent to Totell – for full discussion see Ch. 5 p. 106 et seq and esp p. 109 et seq.

may have been as a form of reward. I suggest that underlying the grants of patents was an element of control. A patent could be very beneficial to the grantee. It provided him with a potentially lucrative monopoly which could be exploited. The reverse of the medal was that a grant of a patent could be revoked. Thus the grantee had an interest in ensuring that he did not print other material of which the authorities disapproved. It is for these reasons that I consider that the grant of patents were regulatory in effect even if originally they were not in intent and, as has been observed, disputes about patents and printing privileges did lead to the Star Chamber Decrees.

Associated with the monopolies created by patent were those inherent qualities of print that distinguish the new information technology from that of manuscript. From the shops of two printers (the common law patentee and the Royal Printer) emanated multiple copies of legal material, identical and stable in content as between each copy of each work. The quantities printed meant greater availability of material to the legal profession and the law community. That also meant a greater distribution of some texts<sup>152</sup> and proclamations throughout the kingdom and enhanced the recognition of London, Parliament and the Royal Courts as a centre of power, policy and doctrine.

However, the monopolies established applied only to the printing of legal material. Legal material was still available in manuscript and indeed there was a parallel distribution of legal information in manuscript form. But I suggest that the common law patent probably did more for the quest for quality than competition might have,<sup>153</sup> with a number of products on the market of varying quality which may possibly have driven lawyers even more towards their own manuscript resources. On the other hand, of course, a monopolist need not fear competition, and the incentive to print a quality product was reduced. It is to be noted that print quality attracted the attention of the members of the Commission reporting to the Privy Council in 1583.<sup>154</sup>

The other thing that monopoly printing did for the law was to underscore the “Eisensteinien” qualities of standardisation and fixity. One printer with a monopoly on common law printing could ensure, if not an “authorised” edition, at least an edition of common use. If there were

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<sup>152</sup> The works designed for local authorities such as the Court Leet or Justices of the Peace are examples.

<sup>153</sup> Or the approval system put in place by the Star Chamber Decrees – for discussion see below p.60 et seq for 1586 Decrees and p. 71 et seq for 1637 Decrees.

<sup>154</sup> For discussion see below p.61 – 63.

to be criticisms over content they would be directed towards one printer rather than a whole host. If there was to be criticism about content, the one printer could ensure an improved and therefore more reliable product as subsequent editions were released.

However, the patent system offered a challenge to the Crown's objectives in that the transferability of the patent for a set term meant that the printing of the law might leave the hands of the original and generally trusted patentee and become the property of another. Furthermore, in the early Stuart period, the distribution of patents was seen as much as a reward for past services as it was a guarantee for future reliability and perhaps the venal side of James I's character was reflected in the behaviour of his subjects as they traded their interests in patents granted by the King for a fee to others for a similar consideration.<sup>155</sup>

As printing and the utilisation of printed material increased, economic factors associated with monopolistic grants assumed a greater importance than that of the Crown in ensuring the availability of printed legal material. The activities surrounding the patents after the 1580s suggests that they became seen as "pawns" in the attempted economic restructuring of the printing trade that led to the creation of the English Stock. The economic advantage of the common law printing monopoly was seen as one which could be spread among the Stationers although this ultimately was not realised. Thus the importance of the patent shifted from one of information availability to one of economic advantage.<sup>156</sup> Furthermore, many of the disputes between printers arose out of patent disputes or the unfair advantage that they gave and which led to the cases that resulted in the Star Chamber decrees of 1586 and 1637.<sup>157</sup>

But the real control of the printing trade lay with the Stationers Company to which I shall now turn.

### **The Stationers Company and Print Regulation**

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<sup>155</sup> The advantages of the common law patent became of less importance once the patent became part of the English Stock. See p.108, 115.

<sup>156</sup> A printer such as Totell naturally was interested in a profit. Despite his links to the legal profession he was a businessman. The economic advantage was a perceived one, based upon the advantage derived from the exclusivity that the patent conferred.

<sup>157</sup> For discussion see below p. 60 et seq for 1586 Decrees and p. 71 et seq for 1637 Decrees.

On 4 May, 1557 the Stationers Guild received a Charter of Incorporation from Queen Mary.<sup>158</sup> The Stationers had considerable powers granted by the Charter of Incorporation and there is some justification for the perception that the Stationers could be utilised as an arm of the state, enforcing printing regulation. From the preamble to the Charter this was a matter that concerned the Crown.<sup>159</sup>

The manner in which the Company acted after incorporation seems to suggest an alternative view. The perception of the Stationers was that the initiative for Incorporation came from the Guild itself. In a letter written in 1583 from Christopher Barker and Francis Coldock<sup>160</sup> to Edmund Grindal, Bishop of London, it was stated that the Charter had been obtained because of disorders in printing that were undermining the profession.<sup>161</sup> They went on to say that incorporation had resulted in better management of such problems although “it is an endless toile to withstande the lewde attempts of manie of our profession beinge even within our citie and at our elbowes and dailie looked vnto.”<sup>162</sup> The Company’s primary objective – the interests of its members - continued. Any objective that might have been anticipated by the State that the Stationers Company would come to its aid in enforcing content regulation and censorship was, from the point of view of the Stationers, secondary.<sup>163</sup>

A more subtle, symbiotic relationship may be suggested. The Stationers sought wider powers to regulate and control the printing trade for the benefit of its members. The Crown sought to enlist the aid of the Stationers in the control of controversial content. It can be concluded that it was advantageous to the Crown to have an ordered printing trade that would be co-operative with Royal policy rather than be compelled to comply.

One common theme that appears in the various histories of printing is that the Stationers were the tool of the State in the struggle for content control, and that the Incorporation of the Company and the subsequent Star Chamber Decrees, which will be discussed below, were elements of that struggle.<sup>164</sup> However, the Company was able to take advantage of the

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<sup>158</sup> For the text see 1 Arber p.xxvii and following. See also Clair *A History of Printing in Britain* above n.27, p.107. The Charter was confirmed by Queen Elizabeth on 10 November 1559. 1 Arber xxxii.

<sup>159</sup> For the wording of the preamble see 1 Arber p.xxviii.

<sup>160</sup> Who were Wardens of the Stationers.

<sup>161</sup> 1 Arber p.xxvii; p. 247.

<sup>162</sup> Ibid.

<sup>163</sup> Clair *A History of Printing in Britain* above n. 27, p. 107.

<sup>164</sup> Ibid; Feather above n. 19, Siebert above n. 5 Clegg above n. 2, Blagden above n. 11 , Neville-Sington above n. 5.

State's interest in content control. Powers that may have been intended by the authorities to be used for censorship were used by the Stationers Company to regulate and control the industry. For example, powers of search that were given to the Stationers may have been intended to assist in content control but were also used by the Stationers to track down and shut down unlicensed printers.<sup>165</sup> The powers that were provided to them in the Charter of Incorporation along with subsequent decrees in 1566<sup>166</sup> and the provisions of the Star Chamber Decrees enabled the Stationers to enhance control of the printing trade and protect the interest of Company members.

Nevertheless the incorporation of the company in 1557 was significant in a number of ways. The book trade was centralised in London. That was of benefit to the authorities who at least had a centralised industry with which they could deal rather than one that was scattered throughout the country.<sup>167</sup> However, the company's main functions were to provide for registration of its members' rights to publish particular titles, to allow admission of apprentices and for the general regulation of the trade.

There were occasions from time to time, particularly during Elizabeth's reign, when the Stationers did assist in censorship or content control activities.<sup>168</sup> There was an additional advantage for the Company in doing so. Those in whom the Company was interested were printers who had not licensed their work and paid their licence fee through the Stationers' Company itself.

However, the Charter gave no power to the Stationers Company to undertake any acts of censorship or supervision over the content of material published, nor is there any suggestion in the Charter that the Company had any extraordinary arrangement with the Crown or the State to assist in censorship other than the amorphous reference in the Charter to "seditious and heretical books". But in all subsequent dealings between the authorities and the Company and especially in the rulings of the Court of Star Chamber in 1586 and 1637, the requirements for co-operation in censorship were accompanied by added powers to the Company or further

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<sup>165</sup> For the search power see Charter of Incorporation 1 Arber p.xxxi; J.R Tanner. *Tudor Constitutional Documents* (Cambridge University Press, Cambridge, 1930) p. 246. For confirmation of the search power in 1566 see Siebert above n 5, p. 83.

<sup>166</sup> Ibid. Siebert.

<sup>167</sup> Feather above n. 19, p. 34.

<sup>168</sup> For the period after the Star Chamber Decrees see Siebert above n. 5, p.62. By way of stricter licensing enforcement see Siebert above n. 5, p.83-87.

restrictions on or regulation of competition. Indirectly some of these may have been of benefit to the State. Directly they were to the benefit of the Company and its members.

The provisions specific to printing were quite clearly directed to industry regulation, and one provision enabled the Company to exert total control over the printing trade. No one in the realm should exercise the art of printing, either himself or through an agent, unless he were a freeman of the Stationers' Company of London or unless he had royal permission to do so.<sup>169</sup>

The way in which the Stationers authorised the printing of books was by a licensing system. This had little to do with the regulation of content but much to do with the protection of members of the Company, in that it ensured that members were guaranteed a continual flow of work and therefore a living. Although it was part of bringing order to the printing trade, it also protected the interests of those to whom licences were given and to ensure their exclusive right to print the licensed text.<sup>170</sup>

The interest of the stationers was in restricting the trade of printing to its own members and only a few of them had sufficient capital to maintain the cost of doing business. A monopoly was effectively held by a small number of wealthy tradesmen who in addition owned the rights to the most lucrative kinds of texts. This resulted in severe tensions within the company itself.<sup>171</sup>

One of the main administrative functions of the company was to ensure the proper recording and enforcement of ownership of copies and, where necessary, to arbitrate such questions. The Stationers Company licensed those who had the right to print a particular work. Thus the “right” was vested in the printer or publisher. The Stationers licence which allowed the licensee to make copies was a right to *produce* copies and ensured that only members of the Stationers Company would be entitled to publish certain works.<sup>172</sup> It was a protectionist move for the production of printed works.

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<sup>169</sup> The Stationers maintained a very strict control of who was entitled to print what works. In addition, some printers were authorised by Royal Patent to print certain types of books. One example may be found in the common law patent which gave the grantee a monopoly to print common law books to the exclusion of others. For discussion of the patent see above p. 51 and Chapter 5 p.109 - 113 for Tottel as patentee.

<sup>170</sup> Siebert above n. 5, p. 72; 1 Arber p.74.

<sup>171</sup> John Barnard “Introduction” in John Barnard and D.F. McKenzie (eds) *The Cambridge History of the Book in Britain 1557-1695* Vol IV (Cambridge University Press, Cambridge, 2001) p.11.

<sup>172</sup> John Feather “From Rights in Copies to Copyright: The Recognition of Authors Rights in English Law and Practice in the Sixteenth and Seventeenth Centuries” (1991) 10 *Cardozo Arts & Ent LR* 455 at 462.

The incorporation of the Stationers Company was of minimal assistance to the Crown in its steps to control the printing press. Certainly there were occasions when the Stationers Company was called upon by the Crown to assist in enforcement but the records reveal that in the 1580s - a significant decade which saw the delivery of the Star Chamber Decrees of 1586 and the appointment of a Panel of Authorisers in 1588 following which there was increased compliance - books licensed to be printed by the Stationers Company comprised only a percentage of the total number published and of the licensed books even less received approval from the authorities prior to publication.<sup>173</sup> This could be explained by inconsistent record keeping practices.<sup>174</sup> It is clear that in some cases the records reveal that books had been through the official content approval procedures and that approval was noted. On the other hand it could be inferred that the noting of the approval of the authorities for publication of the content was not a universal practice.<sup>175</sup>

The ease with which printers could set up and challenge the monopoly enjoyed by the Stationers indicated an awareness of the problems posed by a competing print product. The ability to produce a large volume of copies and the ease of dissemination posed significant market challenges especially if a potentially popular title was involved. The erosion of established printing businesses was taken seriously by the Company. Printing, with the exception of presses located in Oxford and Cambridge, was centralised in London and the Company was determined that it would stay that way. In addition, the Company was going to ensure that entry to the trade was limited, maintaining the “closed shop” ethos that was so essential for the protection of the established industry.

However, continuing problems, concerns and conflicts within the industry saw the Stationers involved in litigation before the Court of Star Chamber resulting in what have become known as the Star Chamber Decrees of 1586 and 1637.

### **The Star Chamber Decrees**

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<sup>173</sup> Clegg, above n. 2, 60 – 61 for details of the data of books licensed.

<sup>174</sup> Arber laments the absence of the records detailing the searches that were carried out. 2 Arber p.42.

<sup>175</sup> W.W. Greg *Some Aspects and Problems of London Publishing Between 1550 and 1650* (Clarendon Press, Oxford 1956) p. 43 – 48.

The context within which the decrees were issued may in part be found in what may be called the Elizabethan Settlement establishing religious orthodoxy primarily in the Injunctions of 1559.<sup>176</sup>

Injunction 51 was designed to address "great abuse in the printers of books, which for covetousness chiefly regard not what they print so they may have gain, whereby ariseth great disorder by publication of unfruitful, vain, and infamous books and papers" and established a new licensing system for printed works.<sup>177</sup>

The principal prohibition was against printing any sort of book without a licence. The Injunction provided for the appointment of Licensors. The subset of heretical and seditious works came within the purview of a new Court, the High Commission (of which the Archbishop of Canterbury and the Bishop of London were members).<sup>178</sup>

The way in which the content licensing structure was set up suggests that the High Commission was responsible for approving works that were potentially heretical, seditious or unseemly, along with books on religion, policy or governance. The wording of the general prohibition could be interpreted that no one could print a book (irrespective of content) without a licence - thus one had to have official sanction to print anything.

The Injunctions therefore provided a structure for the licensing scheme involving a number of different people or entities who could issue licenses but which, in the main, cast the content licensing burden upon members of the clergy, perpetuating a system that had been devised in 1407. The Injunctions were very general and there was no reference to the involvement of the Stationers Company. Their wide scope was consistent with the underlying policy behind Elizabethan censorship<sup>179</sup> which was principally political. Notwithstanding this structure, which anticipates a system of pre-release control, Clegg suggests that Elizabeth's government responded to printed dissent in an *ad hoc* manner, reacting to material that constituted a direct attack on the government or that was associated with an event that the government perceived

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<sup>176</sup> 2 Hughes and Larkin 460 p. 117 at pp. 128 -129. The Injunctions were a form of Proclamation. They did not have the force of Statute. The 1559 Injunctions were proclaimed for the purpose of "the suppression of superstition" and to plant true religion."

<sup>177</sup> Ibid. p.128-9.

<sup>178</sup> The reference to the High Commission is contained in the words "Her Majesty's Commissioners or three of them" The statutory basis for the High Commission may be found in Elizabeth 1 c 1 sec 8 (1559).

<sup>179</sup> Clegg *Press Censorship in Jacobean England* above n.5, p. 20.

as a threat to its policies.<sup>180</sup> Thus, although the Injunctions provided a structure for censorship, the use of that structure was limited.

The 1559 Injunctions were followed by the “Ordinances decreed for reformation of divers disorders in pryntyng and uttering of Bookes” of 1566 which enabled the Stationers to seize imported works.<sup>181</sup> The 1566 Ordinances were directed primarily towards the importation of continental Catholic works and are illustrative of the reactive nature of Elizabethan press controls. However, the Ordinances were not directed solely to this evil but also reinforced the patent privilege system for printing works that was utilised by the Crown. Importantly, they also defined illegality and sanctions thus clarifying the relationship between printing and the law – something that was not clear from the Stationers’ Charter or the Injunctions.<sup>182</sup> The reference to those who printed books “contrary to letter patent” reaffirmed the importance and legal force of the privilege granted to individual printers. However, Blagden suggests that the Company may not have promoted the Ordinances although aspects of them were to the advantage of the Stationers.<sup>183</sup>

The Elizabethan establishment was alive to the problem posed by the distributive powers of print. The dynasty, whose initial claim to the Crown was fragile to say the least and which had been through the social and political turmoil of the Henrician Reformation and the Marian Counter-Reformation, had to establish stability and orthodoxy.<sup>184</sup> The quality of print technology that allowed the dissemination of multiple copies to a wide audience throughout the realm posed a threat, especially if such material was critical of the Crown or the Church. But the Crown did not have absolute control over the Stationers, and did not assume such control when the Court of Star Chamber delivered its decision in 1586 known as the 1586 Decrees.<sup>185</sup> The reality of the matter was that content licensing was separate and distinct from an exclusive licence to print a work, which was granted and enforced by the Stationers Company. So how was it that the Court of Star Chamber became involved in the affairs of the Stationers?

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<sup>180</sup> Ibid. Elizabethan censorship was primarily directed towards the prevention of the importation and dissemination of Catholic texts that challenged the regime and radical Protestant texts that sought to challenge the Church settlement such as the Marprelate Tracts.

<sup>181</sup> Referred to hereafter as “the Ordinances.” The Ordinances were issued by the Privy Council sitting as Star Chamber at the request of the High Commission. Clegg *Press Censorship in Elizabethan England* above n. 2, p.44.

<sup>182</sup> Ibid. The penalties included book forfeitures, fines, imprisonment and exclusion from the trade.

<sup>183</sup> Ibid. p.44; Blagden above n. 11. p. 70.

<sup>184</sup> The first steps in this process were the Injunctions of 1559.

<sup>185</sup> As distinct from the 1566 Ordinances. See above p.59.

The Star Chamber was one of the Courts of the Realm, dealing with cases between parties. It was a conciliar or prerogative court as opposed to a Royal Court and its Judges were members of the Privy Council supplemented from time to time, and in the second half of the sixteenth century with one or other of the common-law Judges.<sup>186</sup> It was highly regarded and popular with litigants because it was relatively speedy, flexible and complete in its work.<sup>187</sup> Its procedure was similar to that of Chancery, commencing with a plaintiff's bill, a defendant's answer and a succession of written pleadings and witness examinations. Star Chamber normally imposed fines, or ordered the unsuccessful party to comply with an earlier decision, which was frequently an earlier decree.<sup>188</sup>

Some orders, like the 1586 Decrees dealing with printing, appear to be Orders in Council or proclamations issued by Star Chamber. The reality was that they were the outcome of law suits involving larger principles, and were embodied in a formal and public pronouncement, because they affected both policy and other suits.<sup>189</sup> Many of the cases that came before Star Chamber (as revealed from the papers of Sir Thomas Egerton) involved disorders in printing and "uttering" of books.<sup>190</sup>

### **The 1586 Star Chamber Decrees**

Since the Court was a regular venue for printing disputes, it was not unusual that it should have heard a number of printing cases between 1577 and 1586 that arose from challenges posed not only to the Stationers' Company powers, but also to the printing privileges extended by the Crown. The 1586 decrees responded to these matters. The Decrees, according to Elton, arose out of a judgment in a case of a breach of the Order of 1566. The breach is unrecorded, but the decrees appear to have resolved most of the cases presently before Star Chamber, by upholding royal privileges, Company authority and the 1566 Order. They were framed in response to all the disruptions in the printing trade and not just matters before the Court.<sup>191</sup>

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<sup>186</sup> Elton *The Tudor Constitution* above n.79, pp. 162 et seq.

<sup>187</sup> *Ibid.* p. 163.

<sup>188</sup> *Ibid.* p. 167 et seq.

<sup>189</sup> Clegg *Press Censorship in Elizabethan England* above n. 2, p. 55.

<sup>190</sup> *Ibid.* "Utter" in this context means to distribute or put goods on the market.

<sup>191</sup> Elton *The Tudor Constitution* above n.79, pp 105-107, 158 – 184.

The problems that affected the printing trade were considerable and were entangled with disputes and challenges to the privileges that had been made available by the patent system, by those who flouted those privileges and by calls for reform. Among the proceedings brought before Star Chamber were those of *John Day v Roger Ward and William Holmes* in 1582 claiming breach of the 1566 Ordinances by breach of patent<sup>192</sup> and *Day v Dunn, Robinson* and others in 1585 making a similar claim.<sup>193</sup> In November 1585 proceedings were brought in Star Chamber in *Flower v Dunn and Robinson*<sup>194</sup> claiming a patent infringement. Flower was involved in further proceedings against one Robert Bourne in 1586.

Against this backdrop of litigation before Star Chamber were attempts to resolve disputes by negotiation with Robert Wolfe who was a member of the Fishmonger's Company. Wolfe was an outspoken critic of the Company monopolies and an active participant in unlicensed printing. A petition against Wolfe and his associates, addressed to the Privy Council by the Stationers' company in 1583, related that, on being remonstrated with, Wolfe declared that he would print all their books if he lacked work.<sup>195</sup>

Complaints about abuses by the Stationers not only came before Star Chamber but travelled the political path. An appeal was made to Lord Burghley in October of 1582, and in December of that year Christopher Barker (the Queen's Printer since 1577) reported to Burghley on the advantages and disadvantages of the patent system. Among the issues that he raised were the often unprofitable nature of some of the patents, the surplus of printers in the trade meaning that there were a number of poor printers who were barely making a living in their trade.<sup>196</sup>

As a result of this Commissioners were appointed<sup>197</sup> to investigate the complaints which Gregg describes as “peevish” but the following report of 18 July 1583 “eminently judicial.”<sup>198</sup> The opening words “we find it proved and confessed” set the tone.<sup>199</sup>

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<sup>192</sup> 2 Arber p. 753; see also Siebert above n.5, p 93. ; 2 Bennett pp. 71-2; Blagden above n. 14 p. 67.

<sup>193</sup> Clair see above n. 27, p.110; 2 Arber p.792.

<sup>194</sup> 2 Arber p. 794.

<sup>195</sup> Ironically Wolfe and Francis Adams, a year or so later, appeared in a Star Chamber case righteously indignant at the lawless infringement of a printing patent in which they had acquired a share. See Barnard above n.171, p.12-14.

<sup>196</sup> Ibid. Barnard p. 7; Siebert above n.5, p. 74 et seq; Clair above n.27, p. 100.

<sup>197</sup> Bishop Aylmer, Dr John Hammond – a civilian and member of the High Commission – Thomas Norton – an eminent lawyer – Alexander Powell – Dean of St Pauls – and William Fleetwood – Recorder of London and compiler of the index to Plowden's *Commentaries*.

<sup>198</sup> W.W. Greg *A Companion to Arber* above n. 148, p. 122.

The report addressed matters of industry regulation. There was approval of the Stationers' licensing system<sup>200</sup> but concern was expressed that printers should have a reasonable number of presses according to their "qualitie and store of work" and it was observed that the Queen's Printer had five presses and the law printer (Tottel) but two.<sup>201</sup> Corrupt printing was sanctioned by a prohibition against keeping presses and the observation was made that printing was like coining because "so much importeth the state in the misuse thereof" that there were to be restrictions on other tradesmen setting up as printers.<sup>202</sup> The trade was not going to be open to everyone.<sup>203</sup> Printers were required to submit to searches conducted by the Wardens of the Stationers or the Privy Council and those who were involved in quality printing, which included school books, books of the common law and statute, could forfeit their privileges for corrupt printing.<sup>204</sup> Booksellers and bookbinders were to be responsible for their part in book production, there were provisions dealing with price cutting in circumstances that sound to be similar to modern remaindering and those who were to set up a printing shop had to provide a surety and there were restrictions on the casting of type by founders or the manufacture of presses by iron workers.<sup>205</sup>

Apart from a requirement that printers were to print material that was lawful, which more emphasised the need to comply with Stationers' Company requirements, there was no reference to content control, thus emphasising the industry control nature of the findings. Those controls addressed the long outstanding problems facing the printing trade and attempted to deal with the problems faced by "poor men" at the hands of privileged printer patent holders.<sup>206</sup>

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<sup>199</sup> Ibid. p. 126.

<sup>200</sup> "it is not meete nor can it be without their undoing of all sides that sundrie men shold print one boke." Ibid.

<sup>201</sup> Ibid. p. 131.

<sup>202</sup> Ibid. 132

<sup>203</sup> Ibid.

<sup>204</sup> Ibid. "Corrupt printing" was probably not such an issue for the law printers. They were situated in a fixed location near their market – see Chapter 5 p. 102 *et seq.* This is contrast to the printers of the Marprelate Tracts who were "mobile" – see below p.68. The law printing equivalent of "corrupt printing" could possibly be unauthorised printing or opportunistic printing which was a developing problem in the early seventeenth century and is discussed in Chapter 7 p. 226 *et seq.*

<sup>205</sup> Ibid.

<sup>206</sup> Ibid. p. 126-9.

It is unclear whether or not these recommendations were the subject of enforcement and the 1586 Decrees would suggest not. However, it should be remarked that many of the recommendations were incorporated into the Decrees which will be discussed below.

Further steps were taken to alleviate the problems posed by the patents and on 8 January 1584 a number of books were presented to the Company by their patentees for the use of the poor of the Company. Among those who surrendered some of their patents was Richard Tottel. This was an informal arrangement based upon goodwill and embarked upon in an endeavour to alleviate many of the complaints that were being made. It was at this time that Barker and Wolfe were able to resolve their differences and Wolfe became an active and committed member of the Stationer's Company.<sup>207</sup>

As has been observed, it is not possible to attribute to which case the Decrees apply, but they recognise many of the complaints that surfaced in litigation and also in the matters that passed in the petitions to Lord Burghley and the enquiry that he instituted and upon which Christopher Barker reported.<sup>208</sup>

The Decrees fulfilled two purposes. One was to settle certain long-standing disputes about infringement of printing privileges by those involved in the printing trade. The other was to confirm and refine existing content licensing procedures which had been in place since 1559 but which were a continuing reflection of a system that had been in place since 1407. Although the challenges posed by the new technology were apparent, and it was recognised that they had to be met, there was a lack of understanding that, to be effective, it was the *technology* and the industry associated with it rather than the *content* that should be regulated. The emphasis on content licensing involved the use of a model that was bound to be of limited effectiveness. Although there had been earlier involvement of the Crown with industry regulation, the focus of such policies had not been upon content with the limited extent of the *cum privilegio regali* requirements of the November 1538 Proclamation and the expectation that the Stationers would be active participants in the campaign against printing heretical works following the Company's incorporation in 1557. The opportunity was presented to apply more stringent controls and sanctions to the Stationers, but what was done

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<sup>207</sup> 2 Arber 786.

<sup>208</sup> Barnard above n. 171, pp. 7–9; Clegg above n.2, p.57.

enhanced their position and reinforced their market dominance.<sup>209</sup> However, as has been observed, the Elizabethan approach to censorship was more reactive than proactive.<sup>210</sup>

Provisions in the decrees providing for the registration of new presses,<sup>211</sup> the areas within which printing could be carried out,<sup>212</sup> limitations on the number of printers who could carry on the trade, whilst in the nature of industry regulation benefitted the established printers and were protectionist as was the restated power of search without warrant vested in the Wardens of the Stationers Company or their deputies.<sup>213</sup> The content licensing provisions of the 1559 Injunctions were confirmed.<sup>214</sup>

Industry protection, rather than regulation which benefitted the State, was the principal theme of the Decrees. They were designed to protect and enhance the advantages enjoyed by existing Stationers and to significantly restrict new entrants to the trade. It was recognised that there were those who would attempt to set up clandestine printing workshops. Who better to enforce industry protection than the industry itself. Members of the Stationers were best equipped to know for what and whom they were looking. Indeed, Wolfe the Fishmonger became an avid user of the search powers granted by the Decree as he turned from being an unauthorised printer to an enthusiastic enforcer for the Company.<sup>215</sup>

If the Council, sitting as the Court of Star Chamber, had been alive to the advantages inherent in advancing the goal of establishing orthodoxy by limiting the disseminative quality of print and weaving content regulation and industry regulation into one fabric, the 1586 Decrees may have been altogether different. The political climate in 1586 was quite different from that of 1559. The Queen's excommunication, the threat of foreign invasion and Rome's release of Catholic subjects from their obligation to obey the Royal Will meant that the threat of dissent now entered the realm of threats to State security and treason.<sup>216</sup> One would have thought that had the control of the power of print been the objective, the 1586 Decrees would have gone

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<sup>209</sup> The text of the 1586 Decrees is reproduced in 2 Arber 807 et seq. from the Records of the Stationers Company.

<sup>210</sup> See above p.47 – 48.

<sup>211</sup> Section 1.

<sup>212</sup> Section 2.

<sup>213</sup> Section 6.

<sup>214</sup> Section 4.

<sup>215</sup> Clegg above n. 2, pp. 56 et seq; Clair above n. 27, p. 100; 2 Bennett pp. 69 et seq.

<sup>216</sup> Loades above n.5, 155-6; Tessa Watt *Cheap Print and Popular Piety:1550 – 1640* (Cambridge University Press, Cambridge, 1991) p. 44.

further than they did. Elizabethan censorship policy and enforcement may provide an explanation why this did not happen. Another reason may be that such a level of control was beyond the limited nature of English early modern governance structures. The Stationers were interested, however, in preserving their monopoly and securing protection for members of the Company. The opportunity to mitigate some of the properties of print that might have had an impact upon the way people thought and thus restrict the effects of print as an agency of intellectual activity and change was lost.

### **Attempts at Statutory Regulation**

Statute was seen as a means of trying to regulate the printing trade. William Lambarde (1536 – 1601), a renowned jurist, drafted a Bill to address the printing trade.<sup>217</sup> There was a growing concern about the publication of popular literature and the proposal in the draft was that the opinions of "the godly learned" should set the literary standard. The proposal, which was refined in 1580, was that a licensing board of twelve to be known as The Governors of English Print be established. Licences would be approved by three members of the board of which one would be an ecclesiastic.<sup>218</sup>

The preamble set out the nature of the problem. It referred to the art of printing as "a most happie and proffitable invention"<sup>219</sup> which had been abused:

- a) partly by "covetousnesse of some that doe occupie the trades of printing..."<sup>220</sup>
- b) partly by the unadvised enterprise of various people responsible for writing or translating works for no other purpose than "to let in a mayne Sea of wickednesse, and to set up an arte of making lasciuious ungodly love.....to the manifest iniurie and offence of the godly learned whose prayse woorthie endeavours and wrytinges are therefore the lesse read and regarded to the intollerable corruption of common lyfe and manners."<sup>221</sup>

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<sup>217</sup> Greg above n. 175, p. 7. There appear to be no records that the draft was ever formally introduced as a Bill. In its manuscript form it is referenced as MS Lands. 43 fol 187 and it was transcribed and printed by Arber. This is the same William Lambarde who wrote, among other works, *Eirenarcha or The Office of the Justices of the Peace* (1581) and *Archeion or A Discourse Upon the High Courts of Justice in England* (1591) The latter work was published in print posthumously although *Eirenarcha* was published in print in 1581 (STC 15163). Lambarde's legal writings will be discussed in Chapter 7 below.

<sup>218</sup> Greg above n 175, p. 7.

<sup>219</sup> For a transcript of the 1580 draft see 2 Arber 751 above n. 8. I reproduce the text as it appears in Arber.

<sup>220</sup> 2 Arber 751.

<sup>221</sup> Ibid.

The document has been described as “curious”<sup>222</sup> but its rhetoric and its proposals reflect the concerns that were present in the printing trade and which had been present for some time. Twenty-one years earlier in the preamble to Injunction 51 reference had been made to the covetousness of the printers and the frivolous types of books that were being printed.

Lambarde's proposition was a modification of the existing content licensing scheme that had been set up in Injunction 51. The fundamental structure remained the same. Pre-print content had to be approved. What was different was that the number of those approving works for publication was expanded, and the occupations or callings of those approvers went beyond a pure ecclesiastical membership, although the Church was still represented. But the Governors of the English Print were not appointed. The Bill was never enacted, nor is there evidence that it was even introduced for reasons that cannot be ascertained. Greg is of the opinion that “it is doubtful whether the draft was anything but an exercise of Lambarde’s learned brain.”<sup>223</sup>

There was another bill introduced to Parliament in 1584-5.<sup>224</sup> Upon its introduction there was hostility shown by the Commons and it was not enacted. The Bill differed from Lambarde’s attempt which primarily addressed licensing although the anonymous proponent of the later Bill shared a common outlook with Lambarde.<sup>225</sup>

### **After 1586**

It was abundantly clear that the provision for content licensors or approvers was inadequate to meet the large volumes of material that required approval following the promulgation of the Star Chamber Decree.<sup>226</sup> Archbishop of Canterbury John Whitgift, an enthusiastic proponent and supporter of the Decree, welcomed the re-institution of ecclesiastical licensing.<sup>227</sup> I suggest that "reinstitution" can be the only way to describe this development for it revived Church supervision of content that had been established in 1408, that continued throughout the 1520s, but which was supplanted in Henry VIII's proclamation of 1538 with a State licensing system. Thus, after 50 years, ecclesiastical approval of content had returned.

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<sup>222</sup> Greg above n. 175, p. 7.

<sup>223</sup> Ibid. p. 8.

<sup>224</sup> 27 Elizabeth – A Bill exhibited for repressing printing of certain books. Greg above n. 148, p. 139 – 141.

<sup>225</sup> Ibid.

<sup>226</sup> Siebert above n. 5, p. 62.

<sup>227</sup> Ibid.

Although the clergy may well have been the state appointed licensors the management of the system returned from the Privy Council to the Church.

In 1588 Whitgift appointed a board of licensors to provide official authorisation for publication, giving to the system a bureaucracy that had been absent in earlier proposals. It would have been impossible for two men alone to approve all the material that was being printed in the later 1580s. Whitgift's proposal established eight senior authorisers and four junior authorisers.<sup>228</sup> Even with these increased numbers total content scrutiny was not achieved.<sup>229</sup> There was, however, an increase in the number of books that received official sanction before they were printed. Stationers Company records suggest that in the 1590s some 44% of books printed received official authorisation. This increased to 84% in the 1620s. However, the number of books that were entered in the Company Register for publication licensing decreased from 60% in the period 1590 - 99 to 49% in the decade 1620 - 29 demonstrating a significant non-compliance with Stationers Company Ordinances.<sup>230</sup> Interestingly the records indicate law books were submitted for licensing irregularly. Even although a large number of law books published in the latter part of the sixteenth century were common law books printed under the common law patent held, for the greater part of the period, by Richard Tottel, records indicate that it was as late as 18 February 1583 that Tottel was licensed by the Stationers to print a number of common law titles.<sup>231</sup>

### **The Effectiveness of the 1586 Decrees**

After the 1586 Decrees the process to get a book printed was a complex one requiring a number of steps which involved two bureaucracies. Bennett<sup>232</sup> describes the process as follows:

- (a) The Stationer brings the copy to one of the Bishop's Chaplains.
- (b) On the manuscript itself, the Chaplain indicates the copy may be printed and authorises or licenses the copy.
- (c) The stationer brings the manuscript to Stationer's Hall.

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<sup>228</sup> Clegg *Press Censorship in Elizabethan England* above n. 2. p.60.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid. pp. 60-61.

<sup>231</sup> 2 Arber 193.

<sup>232</sup> 3 Bennett, p. 40.

- (d) The Wardens peruse the copy, looking not only for official consent, possibly in the form a signature, but also for any remarks the licensor may have made concerning cancellation of certain passages or revision of certain pages.
- (e) The wardens then add their names to the copy.
- (f) The stationer brings it to the clerk.
- (g) The clerk examines the copy for its authorisations.

Having determined that it is licensed properly, the clerk enters the stationer's name, authorisation and title in the register, together with the fee of six pence for its entrance.

It was hoped that the Star Chamber Decrees would clarify and strengthen the regulation of printed content.<sup>233</sup> However, the publication of the Martin Marprelate letters from October 1588 to August 1589<sup>234</sup> demonstrated the ineffectiveness of the licensing and authorisation requirements and how it was so necessary for the printing industry to be centrally located for any sort of control to be exercised over it.

The Marprelate Tracts were a series of radical Protestant publications challenging the Established Church. Their printing involved activities by Robert Waldegrave and others, who exercised considerable mobility as a press was moved from Kingston to Eastern Molesley, to Fawsley House in Northamptonshire. Although Waldegrave dissociated himself from the Marprelate Tracts, those who printed them finally ended up in Manchester, where as a result of misadventure, they were apprehended.<sup>235</sup> The fact that the Tracts were published for a considerable period of time demonstrates the ineffectiveness of the even more stringent controls.

Clegg is of the view that neither the licensing requirements put in place by the decrees, nor the panel of Authorisers, could impose complete control of the printed word.<sup>236</sup> The institutions, which were employed – ecclesiastical authorisation and Stationers Company licensing – were in the hands of people who had different agendas. Clegg suggests that

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<sup>233</sup> Clegg *Press Censorship in Elizabethan England* above n. 2, p. 60.

<sup>234</sup> 2 Bennett pp. 83 to 84.

<sup>235</sup> The “misadventure” occurred when a sack containing type split open, distributing its contents on the ground. This happened in front of an official who, when he saw the type in these suspicious circumstances, alerted the authorities. 2 Bennett pp. 83 – 84. Waldegrave later went on to become Royal Printer to James VI of Scotland but became embroiled in difficulties involving the printing of Scottish statutes.

<sup>236</sup> Clegg *Press Censorship in Elizabethan England* above n. 2, pp. 60 et seq.

“Stationers Company practices actually subverted official scrutiny and authorisation.”<sup>237</sup> Furthermore, neither stationers nor authorisers could always be sure what should be approved and what should be censored, especially if the material before them fell outside their specific range of authority.

### **Prelude to the 1637 Star Chamber Decrees**

Following the 1586 Decrees there was further litigation before Star Chamber that resulted in a further decree in 1615 which limited printer numbers.<sup>238</sup> However, the effectiveness of this Order is questionable. It was unsuccessful in maintaining stability of numbers. By 1634 the number of master printers had grown to twenty-three and in 1636 there were nineteen establishments operated by twenty-one master printers.<sup>239</sup>

It must be remembered that although it occupied a privileged position, the Stationers’ Company was a small organization. It was not difficult for members to keep an eye on one another. During the period of the 1630s the Company was faced with foreign competition, with incidents of piracy and secret or unauthorized printing. However, the risk of being brought to book for disorderly or unlicensed printing was not great. Few offenders were reported and when they were the punishments and fines were hardly a deterrent. Even the orders of the Company received scant compliance. In 1622 the Court of Assistants of the Stationers Company stated that “noe printer shall print anie booke except that tis entered in the Hall Booke, according to the order.”<sup>240</sup> Yet approximately one third of the books printed were unregistered.<sup>241</sup> In January 1632 it was again ordered “that noe bookes (licensed by my

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<sup>237</sup> Ibid. p. 62. The main function of the Stationers’ licensing system was to secure the sole right to print a title. The issue of “official authorisation” was in the hands of the authorities. Clegg *ibid.* at 61 – 65 cites cases where official authorisation was given to a title in some cases only after reading a part of it. Such was the case with Spensers *Faerie Queen* and later Prynnes *Historio-mastix*. The Stationer’s licensing system was not a part of this authorisation process which encompassed only new books and did not apply to reprints or new editions. Only a few law books were licensed by the Stationers. Tottel surrendered a number of titles to the Stationers in 1584 (see above p. 62) but these were works to which he was entitled by virtue of the common law patent. It is likely that the existence of the patent gave its holder all the protection that he needed, thus obviating the need for a Stationers licence.

<sup>238</sup> 3 Arber p. 669.

<sup>239</sup> Siebert above n. 5, p. 137.

<sup>240</sup> W.A. Jackson (ed) *Records of the Court of the Stationers Company, 1602 – 1640*; (The Bibliographical Society London 1957) p. 149 Many organisations at this time had what they called “Courts” for the purposes of internal management or decision making. The decision making body of the Inner Temple in the Sixteenth Century was referred to as the Parliament. See F.A. Inderwick QC (ed) *A Calendar of the Inner Temple Records* (Stevens and Sons, London, 1896) Vol 1 p. xxxiii.

<sup>241</sup> Greg above n.175, p. 154.

Lord Bishop of London) should be printed by any printer whatsoever without the license printed with the booke.”<sup>242</sup> The fact of the matter was that between 1630 – 1640 the imprimatur affected only a third of the books printed.<sup>243</sup>

In addition, the shortcomings of the content control system were becoming apparent. Alexander Leighton was pilloried, whipped, lost both his ears and nose, was branded and sentenced to life imprisonment for publishing an attack on the episcopacy.<sup>244</sup> His book was published in the Netherlands and smuggled into England as were those of Prynne, Bastwick and Burton. Prynne was pilloried and lost both his ears, but the work, *Historio-mastix* was in fact approved and licensed by Thomas Buckner, one of the Archbishop’s chaplains. It turned out that the licensor was less than diligent in his job, having perused only sixty pages of the whole work.<sup>245</sup> The charges that were brought were not for breaches of the licensing rules. Instead they were charged with the most serious offences possible. In Leighton’s case the charge was one of seditious libel or *Scandalum Magnatum*. Prynne and his co-defendants faced a charge of seditious libel.<sup>246</sup>

Continuing enforcement problems with the Decrees may be found in some of the Proclamations issued during the 1620s. One problem that beset the Stuarts was the rise of publications known as “corontos” which were newsheets or newsbooks printed overseas, particularly in Amsterdam, and brought into England. It was not long before English printers imitated the Dutch and the first English “corontos” appeared in the summer of 1621. In December 1620, James had issued a proclamation directed against the “great liberty of discourse concerning matters of State”, and on 21 July 1621 revived the proclamation to suppress the “corontos”. The proclamation was unsuccessful “for they continue to take no notice of it, but print every week, at least, corrantos, with all manner of news, and as strange stuff as any we have from Amsterdam.”<sup>247</sup>

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<sup>242</sup> 3 Bennett p. 48.

<sup>243</sup> F.B. Williams “The Laudian Imprimatur” (1960) 15 The Library 5<sup>th</sup> Series p. 98.

<sup>244</sup> Leighton was accused in the Court of Star Chamber on 4 June 1630 with writing and publishing a pamphlet entitled *an Appeal to Parliament or a Plea against Prelacy*. The populace who observed the sentence subsequently imposed were more impressed with the severity of the sentence rather than the heinous nature of the offence.— The details of the case may be found in Siebert above n. 50, p. 122.

<sup>245</sup> For this, Buckner was fined fifty pounds. 4 Arber 222.

<sup>246</sup> Hamburger, above n. 5, p. 678. The charge Prynne faced commenced as High Treason but was reduced.

<sup>247</sup> Chamberlain to Carlton August 4, 1621 *Court and Times of James I* II p. 272 cited in Siebert above n. 5. For a detailed history of the “corontos” see Siebert above n. 5, Ch. 7.

On 25 September 1623 it was necessary to issue a Proclamation for the better enforcement of the 1586 Decree. The old Decree was confirmed, including the powers of search and seizure given to the Stationers Company. However, the basis for the proclamation was that the true intent and meaning of the decree had been frustrated. Books were being printed off-shore and were imported and this frustrated the protection afforded by patents to local printers. Prohibited books were also being imported.<sup>248</sup>

There were gulfs between the theory of printing trade regulation and its practice. Despite the 1586 Decrees there were incidents of secret printing, undetected importation and surreptitious sale of overseas publications in English as well as dissatisfaction within the trade both on the part of the Master and Wardens of the Company as well as the journeymen and those who were not beneficiaries of patents or privileges.<sup>249</sup> At the same time, members of the Stationers were not immune from official criticism which in my opinion suggests that they were not the effective content control tools of the State that had been hoped following the 1586 Decrees. In 1629 and again the following year Stationers members were summoned before the High Commission for having published unlawful and unlicensed pamphlets.<sup>250</sup>

In 1634 these grievances were brought to the attention of Sir John Lambe, Dean of Arches, who began a review of the system that was in place and which reflected the 1586 Decree. Siebert suggests that there were vagaries and inconsistencies in the operation of the licensing system that concerned the authorities.<sup>251</sup> Greg opines that Lambe's investigations were directed towards the drafting of recommendations for a review of the 1586 Decrees.<sup>252</sup> Lambe was not unaccustomed to receiving complaints and petitions from disgruntled members of the printing trade.<sup>253</sup> The 1637 Decree reflected the interests and wishes of the Stationers' Company<sup>254</sup> as well as providing for a more efficient content control system.

### **The Star Chamber Decrees 1637**

The Star Chamber Decree of 11 July 1637 was the most comprehensive attempt to regulate the printing trade since its reception into England. Although its provisions addressed content

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<sup>248</sup> Tanner above n. 164, p. 143.

<sup>249</sup> 3 Bennett p. 50 – 52.

<sup>250</sup> Siebert, above n. 50, p. 140.

<sup>251</sup> Ibid. p.143.

<sup>252</sup> Greg above n.175, p.10.

<sup>253</sup> Blagden above n.11, p. 120, 123.

<sup>254</sup> Mendle, above n.22, p. 310.

regulation they also dealt with aspects of the printing trade in a much wider way than had been the case in the 1586 Decree and was the first regulatory effort that involved itself with aspects of the new technology. The 1637 Decree was a decision of considerable detail comprising some 33 clauses.<sup>255</sup> Although it was plain that the full impact of printing as an information communication technology was not fully understood, the 1637 Decrees not only addressed the message but the medium as well.

The Decree perpetuated and enhanced the existing content control system<sup>256</sup> and linked content authorisation with the Stationers' publication licensing system. The issue of book importation, the power of search, and book distribution in addition to production were the subject of detailed provisions.<sup>257</sup> The Decrees allowed dissemination but ensured some form of monitoring of this important and potentially threatening quality of print. The parts of the Decrees concerning the printing and book trades contain a degree of detail not previously present in other regulatory instruments. They were largely for the protection of the local trade but also had a collateral goal of enhancing the monitoring of questionable content.<sup>258</sup>

For example, the overseas printing and/or importation of books printed *in English* was prohibited. It mattered not that the book in question had been the subject of an earlier edition. This item addressed two interests. First, limiting the availability of books in English to those printed in England facilitated content control and the ability to monitor questionable material and apply and enforce all of the licensing provisions – a matter of interest to the State.<sup>259</sup> Secondly, books in English which could only be printed in England benefitted the printers and the Stationers and had the effect of encouraging local industry.

Some categories of books had their own licensing provisions. Books about history or state affairs were to be licensed by Secretaries of State, books concerning heraldry by the Earl Marshal and books containing the common law by the Lord Chief Justices and the Lord Baron.

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<sup>255</sup> The full text is contained in 4 Arber 528 et seq and all references to the 1637 Decrees are taken from this source.

<sup>256</sup> Clauses 2 – 4.

<sup>257</sup> Clauses 5 – 10.

<sup>258</sup> Clauses 11 – 23.

<sup>259</sup> Clause 11.

Licensing approval for common law books was not new. Section 4 of the 1586 Decree required the approval of Heads of Bench for books printed by those who held patents to publish common law books.<sup>260</sup> In 1623 and on 15 August 1624 a proclamation confirmed the existing practice and ordered strict observation of the 1586 Decrees.<sup>261</sup> The continued licensing of common law books suggests that notwithstanding the monopoly accorded by the common law printing patent and its devolution to the English Stock, there were concerns about the material being printed. Although these concerns may have been unusual in 1586, by 1637 most of Coke's *Reports* which he intended to print had been printed along with one volume of the *Institutes*.<sup>262</sup> The controversy arising from the steps that were taken by the State to secure his papers both before and after his death,<sup>263</sup> as well as the various controversies that arose during his judicial career, suggests that the State wanted to control differing interpretation of the extent of the common law but if the concern was directed towards the printing of Coke's work, it was belated. However, in my opinion the licensing requirements for books addressing distinct subject matter, including the law, indicates that the State had, as far back as 1586, and continued to have an interest in the content of specialist publications. If it did not, it seems curious that the provisions for specific categories of books would have been included. This State interest in printed material could well explain why lawyers preferred to retain their manuscript collections and circulate them within coterie to avoid the attention that print may have attracted, and to prevent the wide circulation of what may have been questionable opinions. It must be conceded that there is no evidential foundation for such a suggestion and the way in which the authorities dealt with the papers of those such as

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<sup>260</sup> 2 Arber 804, 810.

<sup>261</sup> James F Larkin and Paul Hughes (eds) *Stuart Royal Proclamations – Royal Proclamations of James I 1603-1625* (Clarendon Press, Oxford 1973) p. 583 – 85 (1623 Proclamation) p. 599-600 (1625 Proclamation); Blagden above n. 11, p.119.

<sup>262</sup> The second volume of the *Institutes* was printed posthumously in 1642. Coke was subject to "content control" in 1616 when he was summoned before the Council, forbidden to go on circuit and to revise his Reports. He and the Lord Chancellor, Lord Ellesmere clashed and Ellesmere was critical of Cokes Reports. However, this did not prevent reprintings of the *Reports* starting in 1618. Thus despite Ellesmere's concerns, little was done to enforce them. Stephen D. White *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester University Press, Manchester, 1979) p. 7. See also Louis A. Knafla *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, Cambridge, 1977) p.297 – 318 for the critique of Coke's *Reports*.

<sup>263</sup> Catherine Drinker Bowen *The Lion and the Throne: The Life and Times of Sir Edward Coke* (Little Brown, Boston, 1985) pp. 533-534. Coke was not alone in having his papers seized. In November 1629 Charles I ordered the closure of the library of Sir Robert Cotton for having allowed his extensive collection of books and manuscripts to be used for the development of arguments detrimental to Royal Interests. Stuart Handley *Sir Robert Cotton* Oxford Dictionary of National Biography (Oxford University Press, Oxford 2004) In the Elizabethan period a similar examination of the library of Thomas Norton was carried out after his death. See Michael A.R. Graves *Thomas Norton: The Parliament Man* (Blackwell, Oxford, 1994) p. 270; see also S. Adams, I.W. Archer, G.W. Bernard "A Journal of Matters of State" in I.W. Archer, S. Adams, G.W. Bernard et al (eds) *Religion, Politics and Society in Sixteenth Century England* (University of Cambridge, Cambridge 2003 p. 35, 38.

Norton, Coke and Cotton, admittedly high profile individuals, suggests a desire to prevent their papers seeing print and their contents thereby disseminated more widely.<sup>264</sup>

Clause 14, which addressed the manufacture of presses and type is one of five<sup>265</sup> that deals with fundamental aspects of print industry and technology. The purpose appears to be to limit or control production – to limit the volume of potentially contentious material, the production and distribution of which was enabled by the new technology.<sup>266</sup> Once again the content control implications arising from limitations upon production worked in favour of existing printers. Such provisions would have had the effect of limiting competition from other printers, especially unauthorised ones by making it difficult for them to set up a printing shop. Reducing volume meant that licensors would be able to approve the output of presses without being inundated with new material. In addition, and echoing the provisions of the 1586 Decree, printing work could be spread among the members of the trade and for the benefit of those who were not patent holders. In addition, the Decrees placed restrictions upon training for the trade<sup>267</sup> and prescribed penalties for “unauthorised” printers – those who were not members of the Stationers Company.<sup>268</sup> The other industry provisions addressed the making and manufacture of presses and type.

Within the framework of the detailed provisions addressing industry and technology control, the final item in the 1637 Decree was unique and heralded the beginning of a new practice. It recognised that with the passage of time, books may be destroyed or disposed of and thereby the information therein would be lost. It made provision to ensure the retention of the book and its information, and in this respect, if one considers the 1637 Decree to be a repressive set of censorship rules, this provision is set against that view. It required that one book of every sort that was printed or reprinted be sent to the University of Oxford for the use of the University library there. Printers were required to reserve a new printed or reprinted book for that purpose. It would be brought to Stationers Hall and then delivered to the Library. This

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<sup>264</sup> See below Ch.5 p. 137 et seq. and Ch. 6 p. 179 et seq. for a discussion of print and manuscript co-existence and the manuscript law reports of the Grays Inn reporters.

<sup>265</sup> Clauses 27 – 30.

<sup>266</sup> The scope of the 1637 Decrees and their detailed nature, especially with regard to category licensing leads one to the conclusion that the regime wished to extend the scope of the material subject to content control, and could do this by regulating printing technology as well as specifically monitoring content itself. The practicality of content monitoring was enhanced by being spread among a number of agencies.

<sup>267</sup> Clause 28.

<sup>268</sup> For examples see clauses 8-9.

arose as a result of an agreement between the Stationers' Company and Sir Thomas Bodley, the founder of the University Library.<sup>269</sup>

## **Conclusion**

The conclusions that are reached about the success or otherwise of the Tudor and Stuart content regulation systems have been the result of a dialogue about the effectiveness of Decrees as a means of censorship rather than as a means of regulation of a new communications technology, and whether the regulatory systems demonstrate that there was an appreciation of the nature and apparent and underlying implications of a new communications technology. Much that has been written about the printing press in the sixteenth and early seventeenth centuries addresses not what was unique about the new technology but rather the content of a work that could, in any event, have been made available in manuscript. Such discussion about content regulation in the Tudor and Stuart period focuses almost exclusively on printed material and ignores suspect material that was available in manuscript although there were concerns about manuscript material as the seizure of the libraries of Sir Robert Cotton and Sir Edward Coke demonstrates.<sup>270</sup> However, despite these examples, the principal concern of the State was about print. Although it was not expressed as such, the multitude of copies produced by the press and their ease of dissemination underpinned the concerns of the authorities. One wonders whether or not there would have been a need for the state to embark upon measures such as the Ordinances of 1566 and the Decrees of 1586 and 1637 were it not for the fact that the content was in print.

In addition, a consideration of the regulatory measures that were taken to deal with both content and the industry or technology demonstrate the potential inhibitors that may be applied to a new technology to reduce its effectiveness as a means changing information communication. It is against this background of content regulation, licensing and the involvement of the Stationers Company, that disputes between printers as to the extent of patent privileges and two important patents themselves that law printing took place. Although

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<sup>269</sup> See John Feather, "Publishers and Politicians: The Remaking of the Law of Copyright in Britain 1775 – 1842 Part 1: Legal Deposit and the Battle of the Library Tax" in Feather, John *Publishing History* (Chadwyck-Healey, Cambridge, 1988).

<sup>270</sup> It may be arguable that it was the prominence of the person rather than the nature of the medium that motivated the authorities to seize their papers.

content control problems do not appear to have beset the law printers, there was to be a considerable impact arising from the patent system.<sup>271</sup>

There was a central tension that the regimes of the sixteenth and early seventeenth centuries faced and it was this. The print technology was beneficial in communicating governmental “message” and official publications. To eliminate the new technology would be counter-productive. But by the same token the regimes were sensitive to the fact that print enabled the dissemination of content that the regime deemed contrary to its interest. Thus there can be no doubt that content was a concern for the regimes and the essential properties of print – volume, dissemination, fixity, standardization – were also a recognised problem. And it is this problem that is haltingly addressed in all regulatory systems prior to 1637. The 1637 Decree is the first that carries out a detailed analysis of the underlying properties of print and addresses them in a unique manner. Item 14 dealing with the manufacture of presses, and items 27 to 30 dealing with an element of the press, the letters or type, recognize the validity of the comment (albeit anachronistic) by Charles Clarke<sup>272</sup> that “the answer to the machine is in the machine.”<sup>273</sup>

Beyond the immediate issue of content control and industry regulation, print regulation presents another issue and it is that of how the new technology was used and who could use it. These constraints necessarily imposed limitations upon Eisenstein’s qualities of print in part because print regulation implied a recognition of them. This moderation of print properties and the various means used were to have an impact upon law printing – how the press was used and who could use it. At the same time other elements played a part in influencing the use of the new technology. Books are written and printed for an audience and it is now necessary to consider those for whom law books were being printed – the lawyers - and the context of their education and practice.

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<sup>271</sup> For a discussion of Richard Tottel and the operation of the common law patent see below Ch. 5 p. 109 et seq.

<sup>272</sup> See C. Clark, ‘The Answer to the Machine is in the Machine’, in: P. Bernt Hugenholtz (ed.), *The Future of copyright in a digital environment : proceedings of the Royal Academy Colloquium organized by the Royal Netherlands Academy of Sciences (KNAW) and the Institute for Information Law ; (Amsterdam, 6-7 July 1995)*, (Kluwer Law International, The Hague, 1996).

<sup>273</sup> Or in the case of the printing press – the answer to the technology is in the technology.

## **Chapter 4 - Lawyers in the Sixteenth and Seventeenth Centuries**

### **Introduction**

The purpose of this chapter is to provide a social and intellectual context for the use of the printing press or printed material by lawyers. It examines the legal profession and how one became a lawyer in the sixteenth and early seventeenth centuries. It sketches out the way in which lawyers and law students acquired, preserved and communicated information about the law during the time that the use of the printing press was beginning to develop in England.

This chapter will consider the “structure” of the legal profession and identify a number of “groups” who might have been interested in legal information, other than the barristers. The legal education that was available will be discussed, along with the various “pedagogical methods” employed and how those were challenged during the period. The study methods that were employed will be discussed with a special focus upon the books that were available and in print.

This chapter will set the context against which the printing of legal information began to develop and spread and provide a context whereby the continued co-existence of print and manuscript legal information may later be explained.<sup>1</sup> It will be suggested that the Inns of Court provided the focus for this aspect of the discussion for the Inns not only provided a legal education for those who wished to become lawyers, but were also a form of “finishing school” for members of the gentry who administered many of the legal institutions and local courts in the counties of England and for whom an understanding of the law and legal process was necessary. Many of the gentry and the “middling sort” proceeded to a career in the bureaucracy or were in the Royal Court. The Inns, then, were a melting pot that brought a number of different professions, groups and interests into contact with one another, resulting in an exchange of ideas, values and attitudes.

Lawyers learned their craft from the unique professional training that was offered by the Inns of Court and the Inns of Chancery. The traditional methods of education were largely oral and practical, relying on the development of memory and mnemonic aids and the use and sharing of handwritten manuscript materials, largely created by the lawyers themselves,

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<sup>1</sup> See below Ch.5 p. 137 et seq.

primarily for their own use. These methods of education began to become inadequate. The rise in litigation that took place during the sixteenth and seventeenth centuries meant that there was more work available for lawyers. This had an impact upon the involvement of practitioners in the educational process, leaving students to acquire information in alternative ways, although practitioners' engagement in educational activities continued, often in a reduced fashion. There was also an increase in the number of men who were desirous of acquiring a legal education, which put added pressure upon educational facilities offered by the Inns. Many of these men came from the Universities, especially towards the end of the sixteenth and beginning of the seventeenth centuries – men used to obtaining their knowledge from texts. The rise in what has been referred to as “the lower branch” of the profession – the attorneys and solicitors – for whom the traditional educational system did not provide fully, but who, nevertheless, might spend some time primarily in the Inns of Chancery obtaining a smattering of a legal education, put added pressures on existing institutions and required alternative methods of obtaining legal information.

### **The Legal Profession**

The concept of a “legal system” with a unified hierarchical court system was unknown in the late fifteenth century. The administration of law lay within a complex web of courts often with convergent and parallel jurisdictions each governed by its own procedure and with its own administrative infrastructure. Like an umbrella over this infrastructure was the common law – a disorganised body of rules, causes of action, pleadings and customs that challenged classification and ordering.<sup>2</sup> Legislation there was but until the sixteenth century it was a little used tool. It was within this context that the lawyers practised.

The legal profession of the time was divided into two branches. The senior branch comprised the serjeants and barristers, professional and experienced pleaders of cases, who had undertaken a syllabus of training offered by the Inns of Court.<sup>3</sup> The junior or “lower branch”

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<sup>2</sup> The Royal Courts were those of Common Pleas, Kings Bench, Chancery and the Exchequer Court. In addition there were *inter alia* Star Chamber, the Court of Wards and the Court of Requests as well as local manorial Courts and Courts Leet and Baron. C. Brooks *Pettyfoggers and Vipers of the Commonwealth: The Lower Branch of the Legal Profession in Early Modern England*, (Cambridge University Press, Cambridge, 1986) p.12.

<sup>3</sup> J. H. Baker *The Order of Serjeants at Law : a chronicle of creations, with related texts and a historical introduction* (Selden Society London, 1984); For a history of the Inns of Court see W. Prest *The Rise of the Barristers: A Social History of the English Bar, 1590-1640* (Oxford Clarendon Press, Oxford, 1986); W. Prest *The Inns of Court under Elizabeth I and the Early Stuarts 1590 – 1640*, (Longman London 1972) and W.C. Richardson *A History of the Inns of Court* (Claitors Publishing Division, Baton Rouge, 1975) J.H. Baker *The Third University of England* (Selden Society, London, 1990).

comprised attorneys and solicitors who were accorded a lower standing. The Inns offered more than legal training, although that was their primary purpose. They were also used as a “finishing school” or “third university” – typically members of the gentry who became courtiers or returned to their home counties where they assumed a role within the local governing structures. In the 1470s when Fortescue was writing, the Inns were seen as self-contained “academies” of the common law with the Inns of Chancery as preparative for entry to one of the four great Inns.<sup>4</sup>

### **The Lower Branch**

There was no formal training for attorneys or solicitors although it was open to them to study at the Chancery Inns. Yet over the sixteenth and early seventeenth centuries the “lower branch” increased in numbers and activity.<sup>5</sup> Attorneys had a form of audience before a number of Courts and were involved in work of a more responsible nature than that of solicitors. Somehow they had to find their way around the complexities of the law and the multitude of procedures that abounded. Some of them would have attended an Inn of Chancery for a period although there was no formal “call” at an Inn as there was for barristers achieving a level competence. Statutes of Henry IV and James I were designed to control the entry of attorneys into practice and required that they be diligent and learned in the law, but were silent upon how such learning was to be acquired.<sup>6</sup> The attorney’s right to practice was conferred when a man secured admission as a sworn officer of a court.<sup>7</sup> Many, especially solicitors, would have “learned on the job” as a clerk to a more experienced practitioner.<sup>8</sup> It is my suggestion that, in the absence of any formalised training, many of those contemplating practice in the “lower branch” would have obtained much of their knowledge from printed books that were becoming available in increasing numbers during the period under study. I will develop this in the discussion that follows.

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<sup>4</sup> John Fortescue, *De Laudibus Legum Angliae* trans and ed. Chrimes S.B; (Cambridge University Press, Cambridge, 1949) Ch. 49 where the Inns were described as an academy. However the description of the Inns as the “Third University” may be found in Sir George Bucke’s *The Third Universitie* (Thomas Dawson, London, 1615) STC 23338. Fortescue’s writings are generally considered by Alan Cromartie *The Constitutionalist Revolution* (Cambridge University Press, Cambridge, 2006). The great Inns were Middle Temple, Inner Temple, Grays Inn and Lincolns Inn. The Inns of Chancery were Cliffords Inn, Thavies Inn, Clements Inn, Strand Inn, Lyons Inn, New Inn, Furnivals Inn, Staple Inn and Barnards Inn.

<sup>5</sup> C. Brooks *Pettyfoggers and Vipers* above n. 2 Ch. 6 p. 112 et seq.

<sup>6</sup> *Ibid.* p.152.

<sup>7</sup> C. W. Brooks “The Common Lawyers in England c 1558 – 1642” in W. Prest(ed) *Lawyers in Early Modern Europe and America* (Croom Helm, London, 1981. p. 43 From the mid-thirteenth century the Crown had allowed litigants to appoint agents to act on their behalf in London and organise the process of getting a case to trial. See p 44.

<sup>8</sup> C. Brooks *Pettyfoggers and Vipers* above n. 2 p.152.

Attorneys advised litigants as to whether or not they had an arguable case. Knowledge of the forms of action – such as debt, *assumpsit*, trespass etc – was arcane and technical and it is unlikely such information would be communicated to the client.<sup>9</sup> The oral pleadings which were recorded in the Year Books had, from the reign of Edward IV, been replaced by written pleadings which were settled by clerks and protonotharies. The issues were pleaded by an exchange of papers. These written pleadings were neither simple nor straightforward. But with the aid of a guide book written pleadings enabled a wider spectrum of advisers to be involved in the process. A book such as Thomas Powell's *The Attorneys Academy*,<sup>10</sup> while requiring a working knowledge of the legal process, sets out clearly and in a logical fashion the steps that needed to be undertaken for the preparation of written pleadings, the various types of documents and their requirements and finally the fees that were payable.

The availability of such a book would have been of considerable assistance to experienced and inexperienced attorneys alike for the preparation of pleadings. It provides an example of the type of printed material available in the early seventeenth century that was of a practical nature. It is impossible to determine the causative effect that the availability of such a book might have upon the growth and development of the attorneys, but there can be no doubt that for such a book to be printed there was a market for it.<sup>11</sup> Such a book would have served as an addition to the experiential training offered by apprenticeship or by the Inns of Chancery.

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<sup>9</sup> Part of the nature of the law at the time, and that contributes to the perception that there was a lack of system, was that there were no general abstract rules. Ibid. at p. 44 et seq.

<sup>10</sup> Thomas Powell *The Attorneys Academy* (George Purslowe for Benjamin Fisher, London, 1623) STC 20163.

<sup>11</sup> The development of the market can be extrapolated from print runs. Print runs gradually increased over the period of this study. Early data is fragmentary (Rudolf Hirsch *Printing, Selling and Reading 1450-1500* (Harrossowitz, Wiesbaden 1967)) The evidence suggests that in the earliest decades of printing the typical run was between 200-600 copies (Lucien Febvre, and Henri-Jean Martin, *L'Apparition du Livre* (Michel Albin, Paris, 1958); Peter W.M Blayney, *The Stationer's company before the Charter, 1403-1557* (The Worshipful Company of Stationers and Newspapermakers, Cambridge, 2003)). By the late 16<sup>th</sup> century runs of between 600-900 copies were typical and by the 17<sup>th</sup> century runs of up to 1000 volumes appear. (Adam Fox, *Oral and Literate Culture in England 1500-1700* (Clarendon, Oxford 2000); Asa Briggs and Peter Burke *Social History of the Media: From Gutenberg to the Internet* 3<sup>rd</sup> ed (Polity Press, Cambridge, 2009)). The figures are for books generally rather than for law texts. Given the specialised nature of law texts the print runs were probably smaller. 3 figure runs are suggested by Baker in the 1530 – 1550 period (J.H Baker "The Books of the Common Law" in L Hellinga and J.B. Trapp (eds) *The Cambridge History of the Book in Britain 1400 – 1557 Volume III* (Cambridge University Press, Cambridge 1999) p. 411 at p. 427. In 1607 the Stationers prepared a run of 1500 copies of 5 Cokes Reports (Damian Powell "Coke in Context: Early Modern Legal Observation and Sir Edward Coke's Reports" (2000) 21 *Journal of Legal History* 33 at p. 52 note 78. The economic aspects of law printing, a comparative study of the scribal publication and law printing and the impact that this might have had upon first, the types of titles printed, secondly the impact that this might have had upon the "authoritativeness" of titles and thirdly the market advantages of print or scribal publication justifies further study. Some of the economic aspects of law printing have been referred to in this study without deep analysis – see p. 12- 13, p. 99, p. 102, p. 114-115, p. 139 – 141 and p. 180

Judicial orders were issued from time to time to regulate the profession. They arose as a matter of consensus between the Judges, serjeants and senior members of the Inns of Court rather than as a form of judicial *fiat*.<sup>12</sup> By 1632 an educational requirement was in place. A judicial order stated that no one was to be admitted to the courts as an attorney “Unless hee hath [served] a Clarke or Attorney of the courts or such as for their education and study in the lawe shalbe approved by the Justices of this Court”<sup>13</sup> but its means of delivery or achievement were neither formalised nor stated. This was not the first time there had been attempts to regulate the attorneys. From 1294 there had been efforts to regulate attorneys as to their numbers<sup>14</sup> and their qualifications.<sup>15</sup> Attorneys were appointed to a particular court.<sup>16</sup> In addition, and in common with many who had legal learning, attorneys not only found work before the courts but within the court bureaucracy. Each of the Royal Courts along with the various prerogative courts had their own administrative structure which grew as the work before the various courts increased.<sup>17</sup>

Solicitors handled the affairs, and especially the legal affairs, of another person. It was an unregulated business and open to anyone. Solicitors did not require legal qualifications and although their work resembled that of attorneys, it was often performed by laymen.<sup>18</sup> There was no formal educational requirement and any learning for a solicitor was derived from experience or as a solicitor’s clerk.

There was a blurring of roles between attorneys and solicitors. Attorneys “solicited” work in various courts, although solicitors had no right of audience. Those with legal knowledge who worked within the bureaucracy had blurred roles as well. Clerks of the various courts

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<sup>12</sup> See E.W. Ives *The Common Lawyers of Pre-Reformation England – Thomas Kebell: A Case Study*, (Cambridge University Press, Cambridge, 1983) p. 17. Ives does not state that the different benches had different standards for attorneys. Brooks *Pettyfoggers and Vipers* see above n. 2 p. 152 suggests that orders with references to the clerks of attorneys emanated from Kings Bench and Common Pleas.

<sup>13</sup> Brooks *Pettyfoggers and Vipers* see above n. 2 p.152 citing PRO E 215/756. The practice of serving as a clerk to an older practitioner or studying in the Inns of Chancery was noted in Anon. *The Practick Part of the Law, Shewing the Office of a Complete Attorney* (Roycroft for Twyford, London,1653) Wing/ P3139 p.3.

<sup>14</sup> The ordinance *de attornatis* which provided for the judicial appointment of a limited number of qualified men to act as attorneys.

<sup>15</sup> 4 Henry IV C18. See also C. Brooks *Pettyfoggers and Vipers* above n.2 p.19 – 21.

<sup>16</sup> By the sixteenth century all the Royal Courts had their own attorneys along with the Court of Wards, the Court of Requests and the Court of Star Chamber. Admission in one Court did not automatically confer a right to appear in others. C. Brooks “The Common Lawyers in England c 1558 – 1642” see above n. 7 pp 43- 44.

<sup>17</sup> C Brooks *Pettyfoggers and Vipers* see above n. 2 p. 12 – 15, 24.

<sup>18</sup> Ibid. p. 26. Apart from the requirements of the 1402 legislation and the 1294 Ordinance which appeared to provide for an informal sort of admission or approval, there was no formal “call” for the attorneys.

supplemented their income derived from fees by performing lawyerly tasks such as giving advice, organising litigation or drafting pleadings. Many of the court officials had chambers in the Inns of Court or Chancery thus maintaining contacts with other branches of the profession, and those who would be its future members.<sup>19</sup>

By the late sixteenth and more so in the early seventeenth centuries the printing of books about the law had become common place and the titles available were increasing.<sup>20</sup> Legal information derived from the printed page was becoming common. At the same time, research carried out by Brooks<sup>21</sup> demonstrates that over the sixteenth and seventeenth centuries there was an increase in litigation and a rise in the number of lawyers or those seeking a legal education. These lawyers and students were in the market for printed legal works which were no longer a novelty and were coming to be accepted.<sup>22</sup> As the seventeenth century opened William Fulbecke wrote a guide-book for those who would study law<sup>23</sup> indicating not only a need for guidance for those newcomers to the profession but which contained a list of recommended texts, all of which were in print. In addition an increased number of treatises on specific topics were printed.

Although London was becoming the legal centre of England, there were local and regional jurisdictions where barristers appeared such as the Councils in the North and in Wales, along with palatine courts, county quarter sessions, a large number of municipal courts<sup>24</sup> and various special jurisdictions.<sup>25</sup> In many cases, the amount at issue in litigation before these tribunals did not justify briefing counsel in addition to retaining an attorney, but whilst some barristers made only occasional appearances before these courts, for others they were a principal source of work.<sup>26</sup> By the 1640s most provincial practitioners had connections with London lawyers and the use of attorneys and solicitors was increasing. At the same time provincial landholders employed legally trained men, who may have attended at one of the

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<sup>19</sup> J.H. Baker "The English Legal Profession 1450 – 1550" in W. Prest (ed) *Lawyers in Early Modern Europe and America* (Croom Helm, London, 1981) p. 21 et seq; Brooks "The Common Lawyers in England" above n. 7 at p. 44 et seq. Stuart E Prall "Chancery Reform and the Puritan Revolution" (1962) 6 *American Jnl Legal Hist* 28 at p. 32 et seq. W.S. Holdsworth 6 *HEL* p. 615 et seq.

<sup>20</sup> For a detailed discussion see Chapters 5 and 6.

<sup>21</sup> C. Brooks *Lawyers, Litigation and English Society since 1450*, (Hambeldon Press, London, 1998) p. 9 –25, p. 85 et seq.

<sup>22</sup> See Chapters 6 and 7 for the growth of titles and development of law printing.

<sup>23</sup> William Fulbecke *A Direction or Preparative to the Study of the Law* (Thomas Wight, London, 1600) STC 11410. Fulbecke's work was addressed to both common and civil lawyers – see for example, *A Direction* Ch 3.

<sup>24</sup> Cities like Bristol and Norwich supported a complex of law courts with their own staff.

<sup>25</sup> Prest *The Rise of the Barristers* above n. 3 p.50, 54.

<sup>26</sup> *Ibid.* p.50, 51 – 53.

Court or Chancery Inns, as managers and keepers of manorial courts, thus challenging any exclusivity of legal knowledge possessed by local lawyers.<sup>27</sup>

Local administrators benefitted from the publication of law books that addressed their particular jurisdictions. The publication of such standard texts had the potential to introduce standard and consistent practices. This unanticipated aspect of Eisenstein's quality of standardisation was a matter which concerned Michael Dalton, the author of *The Countrey Justice*<sup>28</sup> and *Officium Vicecomitum*.<sup>29</sup> These two books were written specifically for local administrators. As a printed book, *The Countrey Justice* was a valuable educational work for English Justices of the Peace for the next 128 years<sup>30</sup> and was part of a genre of legal writing that started with Fitzherbert's *L'office et auctoritee de justices de peace*.<sup>31</sup> Dalton's aim was to produce a text that would assist as a weapon against intimidation and false information and provide for a standard, consistent practice by Justices.<sup>32</sup> He puts it in this way

I obserued that Iustices of Peace in their places, grew in neglect, and many times were ouerfwayed by superior sollicitations, yea, and fometimes disdgraced, in such sort, as I could haue been content rather to haue fit down in priuate quiet, then with care, studie, and paines to incurre such hazards and difcontentments<sup>33</sup>

As well as the aid afforded by Dalton's work, the Justices may well have had some acquaintance with legal education. As has been suggested above, the law was a sought-after profession by members of the gentry, yeomen and merchant classes as was some form of legal training. Down the scale were those who sought positions as underclerks in a court office. Most of them undertook some form of legal training either at the four great inns or the Inns of Chancery. It is to the education and training of the lawyers to which the focus now shifts.

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<sup>27</sup> Brooks *Pettyfoggers and Vipers* above n. 2 p. 115.

<sup>28</sup> Michael Dalton *The Countrey Justice* (Adam Islip for the Stationers, London, 1618) STC 6205.

<sup>29</sup> Michael Dalton *Officium Vicecomitum* (Adam Islip for the Stationers, London, 1623) STC 6212.

<sup>30</sup> A second edition was issued in 1619, a third in 1630 and a fourth, posthumously, in 1655. It remained in circulation until the eighteenth century and was reprinted in 1666, 1682, 1690 and 1742.

<sup>31</sup> 1514, English translation 1538. Other works dealing with local administration in addition to Fitzherbert were William Lambarde *Eirenarcha* (Newberry and Bynneman, London, 1581) STC 15163; Richard Crompton *L'authoritie et jurisdiction des courts* (Charles Yetswiert, London, 1594) STC 6050; John Kitchin *The authoritie of al iustices of peace* (Richard Tottell, London, 1580) STC 14887; John Kitchin *Le court leete, et court baron* (Richard Tottelli, London, 1580) STC 15017.

<sup>32</sup> J.R. McVicker "The Seventeenth Century Justice of the Peace in England" (1936) 24 Kentucky LJ 387; L.R. McInnis. "Michael Dalton: The Training of the Early Modern Justice of the Peace and the Cromwellian Reforms" in Jonathan A. Bush, and Alain Wijfels (eds), *Learning the Law: Teaching and the Transmission of Law in England 1150–1900* (Hambledon Press, London, 1999) p.256, 257.

<sup>33</sup> Dalton *The Countrey Justice* above n. 28 p. 1.

## Legal Education in the Inns

The Inns of Court began to develop as communal residences and education facilities in about the early to mid-fourteenth century and the Inns of Chancery developed at approximately the same time. The Inns of Chancery served an educative function parallel with the great inns. The statutes of Clement's Inn from the early 1500s mention learning exercises involving writs, including readings from the *Natura Brevium*.<sup>34</sup> The earliest printed edition of the *Old Natura Brevium* with the *Old Tenures* was produced by Pynson in 1494, "at the instaunce of my maisters of the company of stronde Inne."<sup>35</sup> Clearly Pynson's "maisters" considered that having his printed textbook available would be beneficial for students and members of the Inn.<sup>36</sup>

A school education and literacy were a necessity for acceptance at an Inn along with competence in French and Latin. Most entrants would have attended a grammar school although some were educated by private tuition.<sup>37</sup> In the latter part of the sixteenth and into the seventeenth century many entrants to the Inns of Court had attended at or obtained degrees from Oxford or Cambridge,<sup>38</sup> a practice that had been observed in 1531, rather than sending boys of fourteen or fifteen straight to the Inns to commence their legal training.<sup>39</sup>

An advantage of a University education was that it offered the student the opportunity to become used to academic discipline. The Inns lacked the tutorial system that was present at

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<sup>34</sup> S.E. Thorne and J.H. Baker (eds) *Readings and Moots at the Inns of Court in the Fifteenth Century* (Selden Society, London, 1990) p. xxxii.

<sup>35</sup> *Ibid.* citing STC 18385; STC(2)23877.7 J.H. Beale *A Bibliography of Early English Lawbooks*, (Harvard University Press Cambridge 1926) T69 p. 118-119.

<sup>36</sup> As will be seen below in Ch. 5, p.108 et seq. Tottel had an association with a number of lawyers who seem to have provided him with some assistance in his undertakings. It may be more than coincidence that two prominent sixteenth century law printers had close connection with lawyers and may suggest some form of co-operation between the profession and those who printed legal texts.

<sup>37</sup> Prest *The Rise of the Barristers* above n. 3 p. 109 Law-French was also a requirement although that would more likely be picked up as part of the legal educative process. Simonds d'Ewes, who attended Middle Temple between 1611 and 1623 when he was called takes pride in recounting that he conducted moots in law-French; see Simonds D'Ewes *The Autobiography and Correspondence of Sir Simonds D'Ewes, Bart during the Reigns of James I and Charles I* (Halliwell, James Orchard (ed) Richard Bentley, London, 1845 (2 Vols) reprinted in facsimile Elibron Classics, New York, 2005) . In the fifteenth century there was a relatively fixed pattern of readings on set statutes S.E. Thorne and J.H. Baker above n. 34 pp. xxv – xxxiii. However a wider range of statutes were introduced in the sixteenth and early seventeenth centuries. See J.H. Baker *Introduction to English Legal History* (3<sup>rd</sup> ed) (Butterworths, London 1990) p 184-5.

<sup>38</sup> This was a relatively new innovation. In the 1470's when Fortescue was writing, the Inns were seen as self-contained "academies" of the common law, as alternatives to the Universities, with the Inns of Chancery as preparative for entry to one of the four great Inns.

<sup>39</sup> Thomas Elyot, *The Boke named the Governour* (Berthelet, London, 1531) STC 7635 136-7. John Doderidge, *The English Lawyer Describing A Method for the managing of the Lawes of this Land.*, (The Assigns of I More Esq., London, 1631). STC 6981 pp.27 -39; Fulbecke above n. 23 p.31.

the Universities and a student was expected to supervise his own course of studies aided, if he were fortunate, by friends, chamber fellows or family. Often students read on their own, although the Inns offered an opportunity for students to discuss their reading with their fellows. As an alternative to time at a University in 1631 Thomas Powell suggested that the prospective barrister be first placed in an Inn of Chancery and act as a clerk to one of the Common Pleas bureaucrats.<sup>40</sup>

The structure of the Inns was hierarchical. At the head of the hierarchy sat the Benchers, the senior members of the Inn responsible for its running and operation. Beneath the Benchers were the barristers who were by far the greatest number of professional members. Beneath the barristers were the inner barristers or students.<sup>41</sup>

The period of training in the Inns typically lasted ten years and a student's progress was measured by the name or rank given to him. The student started as an "Inner Barrister" until he was qualified to argue in moots. After three or four years, and having demonstrated an ability to recite forms of pleading in law-French, he may be chosen as an "Utter Barrister" and was able to participate in moots or other disputations. This advancement was not recorded but was an essential step on the way to readership and from there to Serjeant, yet it was not a qualification for practice. Its relevance was to the Inn hierarchy only and in reality the Utter Barrister remained a student continuing his education.<sup>42</sup>

The educational year was divided into Learning Vacations, Term Time and Mean Vacations. The four legal terms were when the Westminster courts were open<sup>43</sup> and averaged three weeks each in length. It was during the vacations when the Courts were not in session that students attended readings and did most of their exercises.<sup>44</sup>

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<sup>40</sup> Prest *The Rise of the Barristers* see above n. 3 p. 113.

<sup>41</sup> According to Coke, each Inn had at least 20 benchers, 60 barristers and some 160 – 180 members "below the bar". By end of the 1630's there were 48 full benchers at Lincolns Inn. Middle Temple had 37 benchers and 189 barristers but Prest suggests that this may have included men who were not in residence. Prest *The Inns of Court* see above n. 3 p. 47.

<sup>42</sup> J.H. Baker, (ed) *The Reports of Sir John Spelman* (Selden Society, London, 1978) Vol II p.129. This was the case for the early part of the sixteenth century. Later utter barristers were able to engage in legal practice and made appearance even before they had delivered a reading. The status of utter barrister as a qualification for practice came in 1547. J.H. Baker *Introduction to English Legal History* Above n. 37 p.185 – 6.

<sup>43</sup> Hilary, Easter, Trinity and Michaelmas.

<sup>44</sup> Richardson see above n. 3 p. 27.

The four inns had broadly similar training programmes and qualifications for call to the bar. The main academic aspects involved attendance at either four or six learning vacations immediately before call and participation in a given number of moots both “abroad”, at the Inns of Chancery, and at the “home” Inn. Benchers, as senior members of the Inns, were free to determine the length of these pre-call “exercises” but there were efforts made to standardise the length of membership for those who were to qualify for call. There was, however, some flexibility as the records show<sup>45</sup> and sons of Benchers could expect indulgent treatment.

The learning exercises of which we know from the fifteenth century and which took place in the Inns were part of a dynamic process which had developed from the teaching of an earlier period.<sup>46</sup> The formal lectures or reading of a text was the basic method of instruction and would involve a presentation by the lecturer followed by discussion, questions and debate. Books in manuscript such as *Hengham Magna* appear to have been based upon lectures. Early law teaching may also have been based on examples provided by cases. *Brevia Placitata* and *Casus Placitorum* may well have been used in this form of instruction.<sup>47</sup>

By the mid-sixteenth century the Inns were well established as educational institutions and their style and manner of teaching had become settled. Training at the Inns was less formal than at the Universities and introduced a wider range of cultural and intellectual pursuits. Their educational function was not the principal reason why they were founded nor was it an integral part of their original constitution. However, I contend that changes to legal education methods, which are discussed below, meant that printed material could have become more widely used by prospective lawyers as a source for their learning, notwithstanding that the environment within which their training took place also encouraged and perpetuated the co-existence of print and manuscript along with the continuation of the aural-oral learning tradition. The availability of printed law texts would have enabled students to turn to them in addition to their manuscript materials

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<sup>45</sup> Prest *The Inns of Court* above n. 3 pp. 55-57.

<sup>46</sup> For a discussion of the possible shape of early legal education see P Brand “Courtroom and School Room: The Education of Lawyers in England Prior to 1400” (1987) 60 BIHR 147 – 165.

<sup>47</sup> Ibid. Of these manuscript texts the *summes* of Sir Ralph Hengham were printed with Fortescue’s *De Laudibus* – see *De Laudibus Legum Angliae written by Sir John Fortescue Hereto are ioined the two Summes of Sir Ralph de Hengham* (The Companie of Stationers, London, 1616) STC 11197. The *casus placitorum* were included in John Rastell *Tabula libri assisarum et placitorum corone* (John Rastell, London, 1514). See also John Rastell *Le liuer des assises & ples del corone* (Richardi Tottelli, London, 1561) STC 9600.

In addition to the lecture-style Readings, which will be discussed below, there were exercises in the form of case arguments or moots within a structured format, participation in which was compulsory and in which senior members of the Inn were involved.<sup>48</sup> The principal educational characteristic and advantage of the moots were that they were multi-participatory. There was audience participation after the formal argument along with what we today would probably recognize as “performance critique.” The formality and compulsory nature of these exercises at the Inner Temple in 1560 required

“euery sngle Reader should be at three Mootes in euery Term, and in Michaelmas Term at four Mootes. And euery Bencher not a Reader, to be at fiue Mootes in euery Term, and in Michaelmas Term at six, vpon payn of fiue shillings euery Moote.”<sup>49</sup>

The cases were argued in law-French and a Middle Temple moot took place

“before three of the Elders or Benchers at the lefte, is pleayd and declared in homely Law-french, by such as are young Lerner, some doubtfull matter, or question in the Law; which afterwards an Vtter-Barrister doth rehearse, and doth argue and reason to it in the Law-frenche: and after him another Vtter-Barrister doth reason in the contrary part in Law-frenche also; and then do the three Benchers declare their myndes in English; and this is that they call motyng”<sup>50</sup>

The mixture of languages is interesting. The formal argument was conducted in law-French as might be expected, but the commentary by the Benchers was in English. Fitzherbert’s comment in 1536 during the course of argument in Court was recorded in law-French<sup>51</sup> and one would have expected the use of the same language at the moot to replicate the Court experience. Perhaps the use of English in a commentary exemplified, at least in the educational context, the developing use of the vernacular.

The moots were also experiential as were many aspects of legal education of the time. Students had to immerse themselves in the legal culture that the Inns made available, gathering their knowledge from observation, discussion and private reading, together with

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<sup>48</sup> Mooting in the Inns involved two major activities. One was the formulation and debate of a hypothetical problem involving one or more controversial questions of law. The other was a form of case putting where students sought to justify an interpretation of law by citing maxims, precedents or principles. The essential elements common to both were the formulation and elucidation of cases and the participation of senior members of the Inn who would explain and comment upon the case with the junior members who engaged in the argument.

<sup>49</sup> W. Dugdale *Origines iudiciales* (Printed by F. and T. Warren for the author, London, 1666) Wing D2488 fo. 198. For a general account of legal education in the Inns see Baker, *The Reports of Sir John Spelman* above n. 42 pp 131 et seq.

<sup>50</sup> Ibid. Dugdale fo. 65.

<sup>51</sup> Year Books 27 Hen 8 23 (Tottell, London, 1556) fo 11 STC 9963.

any practical knowledge they might derive from apprenticeship or clerkship.<sup>52</sup> Much study was performed personally – by reading, transcribing or attending court and observing the way in which cases were argued and by compiling case notes or reports.

The lectures, or Readings as they were properly known, were the second formalised element of the aural-oral experiential Inn-based legal education programme. Readings were sophisticated exercises carried out by recognisable individuals. Presenting a Reading was an obligation of senior members of an Inn and reflected the communal nature of legal education. Senior members of the profession were expected to assist in the educational process and share their experience. Readings were major events in the educational cycle and were attended by many practitioners including serjeants and sometimes Judges who had earlier been members of the Inn. They were generally carried out twice yearly in vacations.<sup>53</sup>

The objects of the readings were to expound statutory texts in an organised structure and to illustrate the law with cases which provided a spectrum of situations for discussion. The basic content was the same for the fifteenth and early sixteenth centuries. The debate that followed the Reading provided opportunities for the development of advocacy skills for all present “the Judges and Benchers argue according to their antiquity, the puisne Bencher beginning first; and so everyone after another, till the antientest Judge or Bencher have argued the Case.”<sup>54</sup> There are many readings that were recorded in manuscript in the form of student notes, along with original drafts, but there are only a few in print. The first reading to be printed was Francis Bacon’s reading on the Statute of Uses and that was published posthumously.<sup>55</sup> The absence of printed readings throughout the period is curious, given that the readings may have been delivered in English.<sup>56</sup> Printers had printed reports and texts exemplified by Littleton’s *Tenures*, Glanvil, Bracton, *Fleta* and the lecture-based *Hengham Magna* and the old *Natura*

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<sup>52</sup> Characterised as *nos* or *notre erudition* See J.H. Baker *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford University Press, Oxford 2001) especially ch 3. For further discussion see below Ch 5 p.149 et seq.

<sup>53</sup> Baker *The Reports of Sir John Spelman*, above n. 42 p. 133. See also Edith G. Henderson “Legal Literature and the Impact of Printing on the English Legal Profession” (1975) 68 *Law Libr J* 288 at p. 290. For a discussion of the legal education year, which encompassed Term Time and Vacations see above p.85 and nn. 42,43.

<sup>54</sup> Dugdale *Origines Juridicales* see above n. 49.

<sup>55</sup> Francis Bacon *The Learned reading of Sir Francis Bacon, one of Her Majesties learned counsell at law, upon the statute of uses being his double reading to the honourable society of Grayes Inne* (Printed for Mathew Walbanke and Laurence Chapman, London, 1642) Wing/ B301.

<sup>56</sup> The question may not have arisen had readings been delivered in law-French. Baker suggests that readings were delivered in English although most of the surviving notes are in French. J.H. Baker *Readers and Readings in the Inns of Court and Chancery* (Selden Society, London 2000) p.235 n. 83 although he also suggests at p. 230 n. 41 that during a reading a case may be put in French but the ‘points’ or ‘questions’ in English.

*Brevium*. Why then did they ignore the lectures on the Statutes that formed such an important component of legal education?

One must look at the context within which Readings were delivered – that of the Inns of Court. The Readings were delivered to the members of the Inn by members of that Inn. The Inns conducted their own syllabus of readings. This inward focus of the Readings and the element of exclusivity that accompanied them suggests that a wider and more public dissemination was not contemplated. The group or “coterie” nature of circulation of a particular type of subject matter in manuscript mitigated against it being more widely available.<sup>57</sup> The same could be said for the collegial approach to the use of manuscripts<sup>58</sup> and the circulation of manuscript reports.<sup>59</sup> The types of “treatise” or “text” publications that characterised law printing in the seventeenth century catered for a wider audience than Readings which were more narrowly focussed and were dynamic in nature involving exposition followed by discussion.<sup>60</sup> The value of the Reading as an exercise lay in the totality of the experience. Furthermore, Readings were not authoritative common law sources and although may have been cited by counsel were not used by judges.<sup>61</sup> Thus I suggest that there simply wasn’t the market for printed Readings and when they did see print after 1642, Bacon’s well known reading on the Statute of Uses, which had been available in manuscript since 1600, was the first.

From the mid-sixteenth century the nature of the Readings changed in that they were no longer a series of texts recited at regular intervals. In fact some of the sixteenth and early seventeenth century readings began to acquire authoritative status. They were circulated widely in manuscript and very occasionally some were printed but none before 1640.<sup>62</sup> Readers were free to choose their own topics rather than adhering to the traditional forms,

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<sup>57</sup> For a discussion of “coterie” circulation and the influence of the Inns in maintaining this method of publication, see below Ch 5 p.152 et seq. Such form of publication is an aspect of *nos erudition*.

<sup>58</sup> For discussion see below Ch 5 p. 138 – 139; 152 – 154.

<sup>59</sup> For example see the reports by Paynell and the Grays Inn reporters below Ch 6 p.179 et seq.

<sup>60</sup> Baker *Readers and Readings in the Inns of Court and Chancery* above n.56 p. 231 – 234.

<sup>61</sup> *Ibid.* pp 236-239 esp. p. 239.

<sup>62</sup> For example, John Denshall’s reading on 4 Hen VII c.24 which was delivered in 1524 appears in a notebook of Eusebius Andrews which contained summaries of Kings Bench cases from the early years of James I. Andrews entered Lincolns Inn in 1600 and died in 1629. Denshall’s reading finally saw print in 1662. A reading by Robert Callis on Henry VIII’s Statute of Sewers which was delivered at Grays Inn in 1622 was published as the authoritative work on the subject in 1647. There had been a number of manuscript copies authenticated by the author in circulation. Prest *Inns of Court* see above n. 3 p. 120. The author’s authentication of the manuscript copies suggests first, that they were approved, secondly that they were “authoritative” and thirdly that manuscript circulation sat comfortably alongside printed material. For discussion of print and manuscript co-existence see below p. 137 et seq.

although legislation of the current reign was usually avoided. The topics generally dealt with land law, spiritual jurisdictions and persons, penal statutes but, with the exception of Magna Carta, no readings addressed the sixteenth century “constitutional” legislation accompanying the break with Rome.<sup>63</sup>

Although the Readings were an important part of the educational process there was a shift in this type of exercise towards the end of the sixteenth and into the early seventeenth century.<sup>64</sup> The formal academic acts and exercises were being performed in a perfunctory manner and requirements for attendance at exercises were not enforced. As a result, the aural-oral style of teaching began to suffer and the growth of legal literature became a substitute for the formal and traditional methods of legal education.<sup>65</sup> The style of Readings changed and although attendance was compulsory there were ways by which it could be avoided. At the same time the barristers who were supposed to provide the Readings after call failed to do so. The practice began to develop where lump sum payments were accepted in lieu of the payment of fines for non-performance or non-compliance with post-call exercise requirements.<sup>66</sup> If these were made in advance they could be seen as commuting academic obligations, although there were occasions where missed exercises attracted fines and the required quota of work had to be made up. A process which depended upon the active participation of senior members of the profession began to experience difficulties as such participation declined.

Yet, despite this, lawyers still continued to learn, to be admitted and to swell the increasing ranks of the “upper” and “lower” branches. It is my suggestion that as Inn-based educational practices changed after the towards the end of the sixteenth and into the seventeenth century, at the same time there was a rise in the production and availability of legal texts and treatises

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<sup>63</sup> Such as the Act of Supremacy of 1534. Magna Carta was the subject of readings most notably that of Robert Brooke. See Robert Brooke *The Reading of M. Robert Brooke Serjeant of the Law and Recorder of London Upon the Stat. of Magna Charta Chap 16* (Flescher and Young, London, 1641) Wing B4896. Disputes about land and land tenure were the main concern of the common lawyers and there was an understandable reluctance to get involved in the grave and weighty matters of the Act of Supremacy and the Act of Uniformity. However, see the reading of Richard Gynes referred to in J.H. Baker *Readers and Readings in the Inns of Court* above n. 56 p. 86, 273, 350 which was on Tithes (2 Edw VI c.13) in which he addressed not only tithes but other matters concerning the jurisdiction of the ecclesiastical courts. Gynes was a Reader for the Lent Vacation 1567 at the Inner Temple see F.E. Inderwick *Calendar of Inner Temple Records* (Stephens & Sons, London 1896) Vol 1. p. 243.

<sup>64</sup> Whether there was a “decline” or that the changes were reflective of the dynamic nature of legal education has been a matter of debate. See 6 *HEL* pp. 481- 499; Prest *The Inns of Court* above n. 3 p. 124; Kenneth Charlton *Education in Renaissance England* (Routledge and K. Paul, London, 1965) pp 177 – 186.

<sup>65</sup> 6 *HEL* pp. 481- 499.

<sup>66</sup> This was often the case with men who were leaving London to practice in the provinces or in Ireland. Prest *Inns of Court* above n. 3 p. 135.

dealing with particular topics as well as providing information of a general nature such as Fulbecke's *Direction*<sup>67</sup> or Doderidge's *The English Lawyer*<sup>68</sup> which enabled students to acquire at least some of their learning from such texts. As will be seen in the following discussion, however, the vital learning available from Readings did not see print.

Contemporaneously, however, the pervasiveness of the manuscript culture and the availability of manuscript copies of vital educational resources, such as Readings, clearly acted as a form of competition for printing. Readings recorded in manuscript were very much "lawyer's law" and were not for the local administrators, attorneys or the country justices. Since the Readings did not see print, much of the information conveyed in them is lost to us or is available only in rare manuscript.<sup>69</sup> This illustrates that within the legal community of the Inns the manuscript culture flourished. Any perceived need for lawyers themselves to see the material in print was not present although some of the sixteenth century lawyers encouraged or were involved with printing. The acquisition by Tottel of the common law patent provides an example.<sup>70</sup> However, if there was a "print revolution" it was not apparent for the recording of the essential learning exercise of Readings.

The changes to the exercises, mainly arising from the decline in participation by senior members, shifted the focus towards more self-education and private learning aided by the availability of printed law books. Private study had always been a feature of legal education. In the seventeenth century it became more focussed and occupied a greater part of the student's time. Court-room observation was a well-recognised form of self-education and took place not only in the Royal Courts but the prerogative and conciliar courts. Simonds d'Ewes, for example, attended Star Chamber before his call to the Bar but following that only attended Common Pleas to listen to and take note of cases, thereby broadening his studies.<sup>71</sup>

Case notes taken by students in Court, although referred to by d'Ewes as "reports", were for personal reference and would be written up in a case book or common place book and

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<sup>67</sup> Above n. 23.

<sup>68</sup> John Doderidge *The English Lawyer* (The Assigns of I. More Esq, London, 1631).

<sup>69</sup> For a list of extent readings in print and manuscript see 5 *HEL* 497. See also Thorne and Baker above n. 35 and J.H. Baker *Readers and Readings in the Inns of Court and Chancery* above n. 56.

<sup>70</sup> See below Chapter 5 p. 109 et seq.

<sup>71</sup> D'Ewes above n. 37 p.220, 260.

gathered together with other material from private study and from other learning exercises.<sup>72</sup> William Fulbecke suggested the personal noting and compiling of case materials rather than trusting to the abridgements and work of others, some of which were in print, was a superior resource which aided memory.<sup>73</sup>

Fulbecke's suggestion was not new. Reading and common-placing were well established means of learning the law. Over the fourteenth and fifteenth centuries a considerable body of collections of writs, pleadings, statutes, abridgements and Year Books had circulated in manuscript. For example, Lincolns Inn had a library of manuscripts by 1474, six years before the printing of the first law book by Lettou and Machlinia, thus making these expensive and rare resources available for copying.<sup>74</sup> However, "**great booke skil, or mucche beating of their braine by any close studie, or secret musyng in their chamber**" had to be balanced by "**familiar talking and moutyng together.**"<sup>75</sup> This mid-sixteenth century comment suggests that the shift towards book learning and private study was already taking place using transcribed manuscript and printed materials, although recognising the importance of the exercises and communal discussion.<sup>76</sup>

In the pre-print era, with the exception of the major works such as Glanvil, Bracton, *Fleta* and Littleton, there were no general treatises in use although the printers gave older books a wider circulation.<sup>77</sup> It was when Fitzherbert's *Abridgement*,<sup>78</sup> St German's *Doctor and*

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<sup>72</sup> A book in which 'commonplaces' or passages important for reference were collected, usually under general heads; hence, a book in which one records passages or matters to be especially remembered or referred to, with or without arrangement. "Commonplace-book n." *The Oxford English Dictionary* 2<sup>nd</sup> ed. (Oxford University Press, Oxford 1989). In the context of the Early Modern lawyer it was a collection of case references or legal principles ordered by the compiler. Fulbecke referred to the practice as digesting and making a collection. Fulbecke *A Direction* above n. 23 p. 44.

<sup>73</sup> *Ibid.* Fulbecke above n. 23.

<sup>74</sup> Prest *The Inns of Court* above n.3 p. 132.

<sup>75</sup> Thomas Wilson *The Arte of Rhetorique*, (Richard Grafton, London, 1553) STC 25799 f.21.

<sup>76</sup> Some manuscript material was shared between colleagues. Other material was produced in the scriptorium. Collegial sharing allowed retention of control and therefore limited publication. Scriptoria publication has a more "public" element to it although production of copies was limited. See below Ch. 5 p. 140 et seq.

<sup>77</sup> Bracton was available only in manuscript until its printing in 1569 - *Henrici de Bracton de legibus & consuetudinibus Angliae*. (Apud Richardum Tottellum, Londini, 1569) STC 3475. Yale notes that for upwards of two centuries there was little interest in Bracton until the early Tudor period, although the relevance of Bracton was contested by Fitzherbert. David Yale "'Of No Mean Authority': Some Later Uses of Bracton" Arnold et al (eds) *On the Laws and Customs of England*. (Chapel Hill, University of North Carolina Press 1981) p.383 at 383 – 4. Nevertheless Bracton was often referred to in the Tudor period. See Yale p. 384. See also Cromartie above n.4 p. 100. Glanvil was not printed until 1554 - *Tractatus de legibus et consuetudinibus regni Anglie* (In aedibus Richardi Totteli, Londini 1554) STC 11905. Notwithstanding the references to Bracton, it is likely that the attitude of the Judges, first stated by Fitzherbert in his *Great Abridgement* and echoed by later judges that Bracton was an ornament to discourse and useful only when the text agreed with better authorities, meant that there was not an immediate market for what were largely antiquarian texts.

<sup>78</sup> Anthony Fitzherbert *La Graunde Abridgement* (John Rastell and Wynken de Worde, London, 1516) STC 10954.

*Student*<sup>79</sup> and Perkins' *Profitable Book*<sup>80</sup> appeared that the range of legal literature began to expand. Printing therefore allowed a greater variety of texts than had been available in manuscript and a consequential increase in material to be absorbed.

I do not contend that printing law books was determinative or causative of the changes that were taking place in the legal education process. Rather, the availability of printed material was a fortuitous solution that was present and unrelated to the particular dynamic of the problem. Thus it is incorrect to assume or conclude that the advent of the printing press was the reason why the aural-oral system changed as it did over the later sixteenth and early seventeenth century. I suggest that there was a combination of factors of which the printing press was an important one but it must be considered in context.<sup>81</sup> Increases in numbers coming in to learn the law and participate in the educative system that the Inns offered, a greater amount of litigation placing greater pressures on the senior members of the Inns who might be expected to lead the educative process, an accelerated process by which lawyers “qualified” to practice all contributed to the changes in the aural-oral system.

At the same time as the traditional education system was undergoing this change, the publications available by means of the printing press enabled students to obtain study materials which they could use to “self-educate” while at the same time they could participate in what exercises were offered at the Inns. These were certainly still available – Simonds d'Ewes participated in moots and readings during his time of study in the 1620s.<sup>82</sup>

### **Lawbooks and Study Methods**

How then did law students approach study beyond the moots and readings provided by the Inns and what assistance was provided to them by printed law books? Usual study methods

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<sup>79</sup> The first edition was in 1528. Christopher St German *Dialogus de fundamentis legum Anglie et de conscientia* (John Rastell, London, 1528) STC 21559. The English printing is Christopher St German *Hereafter foloweth a dyaloge in Englysshe, bytwyxt a Doctour of Dyuynyte, and a student in the lawes of Englande of the groundes of the sayd lawes and of conscyence* (Robert Wyer, London, 1530) STC 21561.

<sup>80</sup> John Perkins *Incipit perutilis tractatus magistri Johannis Parkins* (Robert Redman, London, 1528) STC 19629. Despite the Latin title the work was known as “The Profitable Book” and was posthumously published in English under that title in 1555. John Perkins *Here beginneth a verie profitable booke of Master John Perkins* (Totell, London, 1555) STC 19633.

<sup>81</sup> Eisenstein (Elizabeth Eisenstein *The Printing Revolution in Early Modern Europe* (Cambridge University Press (Canto), Cambridge, 1993) p. xiii) herself does not suggest that print was determinative, and this suggests that other factors cannot be ignored. The co-existence of print and manuscript use by lawyers, and the vexed issue of whether lawyers were reluctant to put material into print or the reluctance of printers to print such material are other matters that can be taken into account and will be discussed in Chapter 5.

<sup>82</sup> d'Ewes above n. 37 p.218 - 242.

involved the reading, summarising and common-placing of cases from Year Book reports. Given that the Year Book was used as a study aid for reading and common-placing, unless a student had access to a Year Book manuscript in the library of an Inn, he was faced either with transcribing or digesting a borrowed copy.<sup>83</sup> The availability of printed Year Books enabled more common placing rather than transcription, although this is not to say that printed books were not transcribed. Given the practices of the time and the expense involved in purchasing a book, transcribing a printed book would have been a continuation of a practice that underpinned the whole manuscript culture. In addition, there were no inhibitions about copying the work of another – the concept of the “copy-right” did not exist and could not fit within the manuscript culture.

The printing press and the work of Fitzherbert and St German introduced new forms of law book to the market. Fitzherbert’s Abridgement meant that the student need not engage in personal digesting – the work had been done for him and, in addition, Fitzherbert presented the material in a more organised and structured form than had previously been available.<sup>84</sup> Graham suggests that no longer need the student wade through large numbers of cases trying to impose some form of order upon a disordered corpus of material.<sup>85</sup> However, as has already been noted, Fulbecke suggested that there was no substitute for compiling one’s own case book.<sup>86</sup>

The greater amount of material available in print meant that there was a wider corpus available to the student who could expand his studies as more material became available, although much of the early printed material was of older works available in manuscript or were reprints. As law printing developed a wider range of material became available. Perhaps one of the most useful types of printed work were the aids, abridgements and similar works such as Rastell’s work on the Statutes as well as “standard” books, such as Littleton – the classic work on land law. It was the work of the abridgers such as Nicholas Statham, Sir Anthony Fitzherbert and Sir Robert Brooke and their abstractions of the “cases of the yeres”

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<sup>83</sup> Ibid. Also p. 307.

<sup>84</sup> The degree of organisation is perhaps less than might be expected by today’s standards. The “structure and organisation” was to catalogue cases under alphabetical headings. These headings reflected those commonly used in manuscript records.

<sup>85</sup> H.J. Graham “The Book That “Made” the Common Law: The First Printing of Fitzherbert’s “La Graunde Abridgement, 1514 – 1516” (1958) 51 Law Libr J 100 at 115. For further discussion of the “copying culture” see below Ch.5 p.137– 155 in the discussion about print and manuscript co-existence and the economic advantages of print and manuscript.

<sup>86</sup> Fulbecke above n. 23 p. 44.

in which they ordered by subjects that introduced the concept of procedural guides with principles. These works were more than mere indices but provided an ordering of legal information and summaries of cases.<sup>87</sup> From this beginning English lawyers would begin to search their books and texts for “rules” and begin to think more in terms of a rule that had gone before – a form of proto-precedent – rather than in terms of a judicially consistent approach to writs, causes and forms of action.<sup>88</sup>

Making some sense or order out of the disorganised mass of the Common Law exercised the law book writers of the early seventeenth century, primarily for the assistance of students. The difficulties encountered by students coming fresh to the law were recognised by Coke. His desire was to “institute and instruct the studious, and guide him in a readie way to the knowledge of the nationall lawes of England” and “have the difficulties and darknesse both of the matter and termes and wordes of the art in the beginning of his studie facilitated and explained unto him, to the end he may proceed in his studie cheerfully and with delight.”<sup>89</sup> Sir Henry Finch’s *Nomotechnia*, first published in law-French in 1613<sup>90</sup> and in English in 1627 under the title *Law or a Discourse Thereof in Four Books*<sup>91</sup> was an attempt to systemise the law and was presented as a learning tool for students.<sup>92</sup> It was not complete in that there was no discussion of equity or the recent developments that were taking place in trespass or in commercial law.

Books that tried to provide an overall view of the law were not the only ones available for students. Abraham Fraunce wrote and published in 1588 *The Lawiers Logicke exemplifying the praecepts of Logicke by the practice of the Common Law*.<sup>93</sup> This book was designed to assist the student and his learning. Fraunce was critical of the method of instruction at the Inns, which in his view made the common law hard, unsavoury and barbarous. The use of

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<sup>87</sup> See discussion below Ch. 6 p.165 et seq.

<sup>88</sup> Graham above n. 85 at p.100 The use of the word “rules” does not reflect the concept as we understand it but could embrace a maxim or a holding.

<sup>89</sup> Edward Coke *The first part of the Institutes of the lawes of England*. (Adam Islip for the Stationers, London, 1628) STC 15784.

<sup>90</sup> H. Finch *Nomotechnia* (Adam Islip for the Stationers, London, 1613) STC 10870. For the genesis of Finch’s work see Wilfrid Prest, *The Dialectical Origins of Finch’s Law* (1977) 36 Cambridge Law Jnl 326, at p 341 et seq. The first manuscript was in English and was subsequently printed in the first instance in law French. It is worth noting that all of Finch’s references were to printed material only.

<sup>91</sup> H. Finch *Law or a Discourse Thereof in foure bookes. Written in French by Sir Henrie Finch Knight, his Maiesties Serieant at Law. And done into English by the same author* (Societe of Stationers, London, 1627) . STC 10871 The English version was printed posthumously although the content was different from the law French *Nomotechnia*.

<sup>92</sup> Ibid. A4

<sup>93</sup> Abraham Fraunce *The Lawiers Logicke* (Printed by William How for Thomas Gubbin and T. Newman, London, 1588) STC 11134.

logic would avoid these problems and he himself had found that legal practice “to bee the vfe of logicke, and the method of logicke to lighten the law.” The book is a complicated and an abstract one, appealing more to the philosopher than the practical learning lawyer. Perhaps Fraunce was seen as going too far, too fast in his approach.<sup>94</sup> Although the learning exercises were in the process of undergoing change, Fraunce’s approach was perhaps a little too dramatic a shift away from the practice of the common law.

William Fulbecke’s *Direction or Preparative for the Study of Law*<sup>95</sup> was designed as a practical guide for students coming to the study of both the common and civil law.<sup>96</sup> In it he frankly set out the difficulties that a student may expect to encounter in legal study and suggested means by which some of those problems might be overcome. It is in the area of reading and the use of books that Fulbecke provides us with an insight into the changes in legal study that were taking place during the late sixteenth and early seventeenth century. It is important to note that he sounded a warning about some of the qualities of law books:

**“Feyther ought it to trouble us, that the Law bookes are so huge, & large, and that there is such an ocean of reportes, and such a perplexed confusion of opinions, because the science istelfe is short and easie to one that is diligent.....”**<sup>97</sup>

Fulbecke set out the sources or books where the common law may be found. He began, as may be expected, with the Year Books or, as he called them, the Annals of the Law “**all of which are to be read, if the student will attaine to any depth in the law.**”<sup>98</sup> The reports of Plowden and Dyer were mentioned – Plowden for the fullness of argument and the “**plaine kind of prooffe**” and Dyer for his strictness and brevity. As may be expected, Bracton, Britton and Glanvil were noted along with Fortescue and the inevitable Littleton. Fitzherbert was praised for making some order out of the confusion of the Year Books, along with Brooke and “Parkins”(sic). Stamford was described as having “**force and weight**”, Rastall for his

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<sup>94</sup> Which, like Finch, was based upon the approach of the philosopher Peter Ramus.

<sup>95</sup> Fulbecke above n. 23.

<sup>96</sup> Fulbecke makes reference to civil law in Chapter 3, distinguishing methodology from that of the common law (Fulbecke above n. 23 p.24 et seq and Chapter 8 where he deals with words and terms shared by the common and civil law - in the interpretation whereof, the Common lawe of this Realme and the Ciuill lawe do feeme to agree.).

<sup>97</sup> Ibid. p.5. Fulbecke uses the word “science” which in this context probably means knowledge rather than in the traditional scholastic/medieval sense. For a definition of the terms see Paul F. Grendler *The Universities of the Italian Renaissance* (Johns Hopkins University Press, Baltimore, 2002) p. 317-318.

<sup>98</sup> Ibid. Fulbecke p. 27.

“long and laborious travaile in collecting matters of weight and moment”, Theloaill in his Digest of Writs and Lambarde’s “paines, learning and Law appeare by his bookes”. Finally there was Crompton whose “bookes are in every mans handes, which prooveth their general allowance, his cases are verie profitable, and apt for the title to which they are applied.”<sup>99</sup> Regrettably Fulbecke did not suggest an order in which these books should be read, nor did he suggest that the list is to be treated as exhaustive. Certainly the texts are the best-known of the period and are probably the most general in nature. Significantly all of the texts recommended by Fulbecke were available in print.<sup>100</sup>

Clearly book learning was to be supplemented by practical work but the important matter that Fulbecke emphasised was that book learning preceded all else and clearly supposed an environment where self-motivated study sat alongside the aural-oral system available at the Inns. Indeed, it is probably significant that there is little mention of an Inn-based educational system. Certainly it is implicit in the discussion of exercises that these had to take place within a supervised environment, and the Inns were the only place where this could have been accomplished. Yet the focus was upon the acquisition of knowledge from books, and, given that the reading list suggested by Fulbecke contained titles that all had been printed it can be concluded that printed law books were becoming important study tools.<sup>101</sup>

Fulbecke’s work evidences that by 1600 extensive book study had become accepted because he not only recommended the way in which book study should be embarked upon and the books that should be used but he also analysed the various ways and methods of book study. If there is one thing that Fulbecke emphasised throughout his entire book, it is the importance of method. Unless he was very forward-thinking, it would seem that Fulbecke’s methods had been in place for some time and had become an accepted practice – at least those good methods which he recommended. He was also able to identify what he considered to be bad methods or bad study habits and, quite clearly, again this came from experience. Indeed, the whole tone of the book is experiential, rather than theoretical, quite clearly based upon observation and study in an endeavour to suggest to the student a best practice method.

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<sup>99</sup> Ibid. p. 29.

<sup>100</sup> Baker makes a similar observation. J.H. Baker “*English Law Books and Legal Publishing*” in J. Barnard and D.F. McKenzie (eds) *Cambridge History of the Book in Britain* (Cambridge University Press, Cambridge 2002) p.474 at 502. For observations on the impact of the printing press on the law in the earlier part of our period see Baker “The Books of the Common Law” above n. 11 p. 430 – 432.

<sup>101</sup> The same point is made by J.H. Baker “*English Law Books and Legal Publishing*” *ibid.* pp.476-7, 497-8.

Another factor not mentioned by Fulbecke was that there was developing an expectation of textual learning. Those who had received an education at Oxford or Cambridge and were entering upon legal study would have been used to sourcing information from texts.

John Cooke considered Fulbecke as “the most iudicious that euer was concerning this subiect”<sup>102</sup> and *The Direction* is certainly of more practical worth than Fraunce or Doderidge. However, even Fulbecke was unable to put any sort of order into the apparent chaos of the common law. It was still a complex of detailed instances which defied any scheme of arrangement apart possibly from an alphabetical one. Roger North (1651 – 1734) stated that “of all professions in the world that pretend to book learning none is so devoid of institution as that of the common law.”<sup>103</sup>

Sir John Doderidge’s *The English Lawyer*<sup>104</sup> was another rather more sophisticated form of guidebook and was stated to be a work for students. In fact it operated at a higher philosophical or theoretical level than Fulbecke and sits in the middle ground between Fraunce and Fulbecke. To a reader from a distance, Doderidge’s work is tantalizing. Whilst it is not, nor does it pretend to be, a text about legal principles, in his discussion of the application of the way in which logic can be used in the law, he offered interesting examples from the law, cross referencing to Littleton, Bracton, Glanvil, Lambert<sup>105</sup> and statutory information. He also had a section at the end of the work where he dealt with propositions and principles with examples from the Common Law, although these are by way of summary and as a part of the overall theme of legal logic. Some of the matters clearly served as an introduction for the student and provide a foundation upon which further study may take place.

There can be no doubt that by 1642 the Inns of Court were having difficulties providing a consistent standard of legal education, difficulties which increased with the onset of the Civil War. Learning the law was a complex business, made no easier by the complex nature of the subject itself. Although there were no steps taken to systemize the training of the

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<sup>102</sup> J. Cooke *The Vindication of the Law*, (Mathew Walbancke, London, 1652) p. 70 Wing / C6028.

<sup>103</sup> North, Roger. *A discourse on the study of the laws : now first printed from the original ms. in the Hargrave collection, with notes and illustrations by a member of the Inner Temple*. (Printed for Charles Baldwyn London, 1824) Reprinted Reprinted 2005 by The Lawbook Exchange, Ltd.

<sup>104</sup> Doderidge above n. 68.

<sup>105</sup> William Lambarde’s work on the Justices of the Peace *Eirenarcha* (Newbery and Bynneman, London, 1581) STC 15163.

professionals nor were courses developed for the amateur, the text book writers and the availability of legal information, together with guides on how to study the law clearly indicated that printed books were the new way to study law. The consequences of this were that the law was becoming text based and the emphasis began to move towards the law as incorporated in this medium with attendant aspects of interpretation that became necessary for fixed information.

## **Conclusion**

The lawyers of the Early Modern period were an intellectual group who used and imparted information. The advent of the printing press added a new dimension to information availability and information exchange. There were advantages and opportunities to exploit the new technology, especially in the field of legal education, and as difficulties became apparent within the educational system offered by the Inns there was a greater reliance upon the use printed law texts. There were some areas, such as Readings, into which print did not intrude, despite the fact that standard information on statutory material could be seen to be essential for student. However, the delivery of the Reading was only a part of the process of exchange which largely reflected the aural\oral nature of the education offered.<sup>106</sup>

What print did do for students was to make more material available and in quantities that no longer required time spent transcribing. The qualities of standardisation and dissemination identified by Eisenstein clearly meant that printed material emphasised a difference to that which was available in manuscript and this challenged the manuscript culture.

Print and printed legal information presented new opportunities for law students and lawyers to impart and receive legal information, and also made the law available to a wider audience – perhaps not destined for the legal profession but users of legal information nevertheless – who had contact with the law in the Inns of Court.

Yet the type of printed material that was available and the manner by which it was made available depended upon a number of factors – the marketplace, the economics of printing, the law printers themselves and the influence of their patrons, together with the regulatory

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<sup>106</sup> Moots were entirely oral\aural and not amenable to printing.

structures outlined in Chapter 3. In addition there were certain elements that encouraged the continued use of manuscript.

In the next chapter I shall examine in detail some of these factors and the part that the printing business, lawyers and other elements played in encouraging the printing of law texts. At the same time I shall also consider some of the factors that explain why it was that there were a number of law texts that did not get into print which had an impact upon the way in which legal knowledge developed.<sup>107</sup>

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<sup>107</sup> See J H Baker “The books of the common law” above n.11 at p. 432.

## Chapter 5 - Putting the Law into Print

### Introduction

There were three factors that had an impact upon sixteenth and seventeenth century law printing. The first was the impact of the printers themselves. Printers saw a market among the lawyers for printed legal information. Texts such as Littleton's *Tenures* and the "reports" that we know as the Year Books had circulated in manuscript and could now be printed. As law printing developed so did the number of titles available. But the initial audience for printed law books was limited – what we would refer to as a "niche market." However, market demand was one side of the equation. The influence that the printers had, the involvement of the Stationers Company and the impact of the common law patent giving exclusive printing rights to a single printer cannot be overlooked. The second factor was the influence and involvement of humanism upon law publishing. The third factor was the impact of the social and political context of the sixteenth century, the Tudor Revolution and the use of law as a tool for societal and constitutional change. In this respect printing the law and the reasons for it contained elements of propaganda for the new Tudor system underpinned by the humanist vision of "the common weal". These two latter factors had the effect of expanding the "niche" market.

Against these three factors were aspects of the legal culture that favoured the use of manuscript materials as a means of recording and exchanging information, thus enabling print and manuscript systems to co-exist. It is suggested that this co-existence and the reasons for it may explain why it was that much legal information was not recorded in print.

This chapter will first examine the business of law printing and the contests and conflicts that arose between early law printers against a background of a quest for quality in law printing. This landscape changed with the advent of the law printer Richard Tottel and the grant to him of the exclusive right to print common law texts.

The examination will then turn to the influence that humanism played in the printing of the law, associated with the ideal of the civic society and the importance of known and communicated law to its members. The role of print in the furtherance of the aim and duty of the State to make the subject aware of the law will also be considered in this context.

Finally, possible explanations for the continued co-existence of print and manuscript information resources will be examined. The advantages and disadvantages of the respective media will be considered along with some of the cultural drivers that may have impelled lawyers to continue with the use of their manuscript resources.

In its broadest sense, the chapter considers the various reasons for differing responses of potential users to the new technology

### **The Business of Law Printing**

Law printing in England commenced in 1481 when William de Machlinia and John Lettou printed Littleton's *Tenures*<sup>1</sup> and an *Abbreuiamentum statutorum*.<sup>2</sup> For the next five years they published Year Books and volumes of Statutes<sup>3</sup> but for the five years following there are no records of any law book printing. Machlinia's unexplained departure from the trade left a gap in law printing, especially in law-French.

Law printing resumed in 1490 when Richard Pynson set up his printing shop. Indeed for a while he may have been the only active printer in England.<sup>4</sup> Caxton, who had introduced the printing press into England in 1475 printed some statutes but was not active in legal printing, primarily because he lacked the requisite type nor did he have the expertise to meet the special requirements of printing in law-French. Law printing was a specialised field. Despite John Rastell's desire to print the law in English, the volumes of the common law, and especially the Year Books, required an editorial knowledge of law-French, the terms of art of the law and the specialised founds<sup>5</sup> that were required for legal printing.<sup>6</sup> Furthermore, printers printed a variety of works of which law books and books in general were only a small part of their output.<sup>7</sup>

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<sup>1</sup> J.H Beale *A Bibliography of Early English Law Books* (Harvard University Press, Cambridge Mass, 1926) p. 182.

<sup>2</sup> STC 9513.

<sup>3</sup> STC 9264, 9347, 9742, 9749, 9731, 9737 and 9347.

<sup>4</sup> Richard Beadle, and Lotte Hellinga, *William Paston II and Pynson's "Statutes of War" (1492)* (2001) 2 The Library 7<sup>th</sup> Ser 107 – 119 esp at p. 116.

<sup>5</sup> The pieces of metal type that were cast in a foundry.

<sup>6</sup> Albert J Geritz and Amos Lee Laine *John Rastell* (Twayne Publishers, Boston, 1983) p. 6.

<sup>7</sup> Roger Chartier "The Printing Revolution" in Sabrina Alcorn Baron, Eric N. Lindquist and Eleanor P. Shevlin, (eds) *Agent of Change: Print Culture Studies after Elizabeth L Eisenstein* (University of Massachusetts Press, Boston, 2007) p.397.

The legal printing market was nonetheless important and was associated with its primary audience from an early stage. For example, after he moved from the premises in Dowgate Ward that he shared with Lettou to a new shop near Fleet Bridge, Machlinia moved to premises in Holborn, close to the Inns of Court.<sup>8</sup> This physical proximity to the Inns was the start of what was to develop into a relationship between lawyers and law printers.<sup>9</sup> English law books were locally produced and were not imported. No foreign printing shop saw any benefit in providing books for the English legal market.<sup>10</sup> English was seen as a unique language and not a language of scholarship. The common law system was fundamentally different from that of the Continent, and the financial return after production and transportation was seen as uneconomic.<sup>11</sup> It is suggested that even for local printers the market was too small<sup>12</sup> and although Machlinia's premises in Holborn were in an area frequented by lawyers, he did not print law books exclusively and had to expand his range of titles to make a profit.

Richard Pynson was one of the most notable of the early English law printers and has been seen as the first specialist law publisher.<sup>13</sup> As the King's Printer he benefited from that office and had a monopoly on much of the legal printing whilst he held it. Pynson was the first systematic publisher of the Year Books, printing some 92 separate works out of a total output of legal books of 139.<sup>14</sup> Law books of one sort or another comprised one third of Pynson's total printing output and it was not until Richard Tottel began printing that any single printer was responsible for such a significant number of law books.<sup>15</sup>

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<sup>8</sup> E. Gordon Duff *A Century of the English Book Trade* (The Bibliographical Society, London, 1948) p.97.

<sup>9</sup> For discussion see below p.108 et seq.

<sup>10</sup> Lettou and Machlinia printed Littleton's Tenures in London in 1482 and Machlinia followed with another printing in 1483. Pynson had a printing of the Tenures done in Rouen in 1490 (STC 15721) and also printed the Tenures in London in 1496 (STC 15722).

<sup>11</sup> See L. Hellinga, "Printing" in L. Hellinga and J.B. Trapp (eds) *The Cambridge History of the Book in Britain Volume III 1400 – 1557* (Cambridge University Press, Cambridge, 1999) p. 138.

<sup>12</sup> *Ibid.*

<sup>13</sup> W.W.Greg *Some Aspects and Problems of London Publishing between 1550 and 1650*, (Clarendon Press, Oxford, 1956) p.98. It should be noted that Pynson was not born in England but in Normandy. He may have become a naturalized English citizen in 1493. See Pamela Neville-Sington, 'Pynson, Richard (c. 1449–1529/30)', *Oxford Dictionary of National Biography*, (Oxford University Press, Oxford 2004).

<sup>14</sup> J. H. Baker *Oxford History of the Laws of England* (Oxford University Press, Oxford, 2003) Volume 6. p. 495.

<sup>15</sup> 3 Bennett p.118; Joseph F. Francis "The Fifteenth Century: The Dark Age in Legal History" (1929) 27 Michigan LR 650 at p. 665; R. H. Winfield "Abridgments of the Year Books" (1923) 37 Harv L.R. 214 at p. 215, see also pp. 223-225, 236 ; Charles C. Soule "A Year Book Bibliography" (1901) 14 Harvard LR 557 at p. 558, see also pp. 563-5, 567 ; W.Bolland *A Manual of Year Book Studies* (Cambridge University Press, Cambridge, 1925) p. 64-70.

Printing the law was only a part of Pynson's relationship with it. Like many of the early printers he was involved in lawsuits, often arising out of his printing business. Pynson was involved in litigation with John Rastell<sup>16</sup> as well as a lawsuit with the author of *Doctor and Student*, Christopher St. German.<sup>17</sup> This litigation suggests that although it was rare for editors to be acknowledged in early printed law books, it is certain that members of the Inns of Court served as such from time to time and this litigation suggests that St German was one of them<sup>18</sup> and thus an indication that lawyers may have been involved in the production process.

### **The Contest for Quality**

Early law printing was marked by a contest between printers based upon the quality of works published. It was perhaps indicative of the attitude to the product of the new technology that although a standard, identical work was produced, it was not, for those reasons alone, accorded credit. A work in print did not, in and of itself, acquire "authoritative status" and this was clearly recognised. The point that the early printers relied upon was the quality and therefore the reliability of their output. These claims by the printers reflected the concern of the market for accurate and reliable law books.

One of the earliest contests was between Pynson and one Robert Redman. Very little is known of Redman's background before he started printing law books in the 1520s although it has been suggested that he may have been one of Pynson's apprentices. It was not long before fierce competition developed between the two.<sup>19</sup> Although it is not possible to determine how the hostility started, almost as soon as Redman ventured into law publishing, Pynson attacked him as incompetent, and said he ought rather to be called "Rudeman because

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<sup>16</sup> Baker *Oxford History of the Laws of England* above n. 14 p. 495. It seems that Rastell spent as much time in Court as a litigant as he did a lawyer. H. J. Graham "The Rastells and the Printed English Law Book of the Renaissance" (1954) 47 *Law Libr J* 6 at 7-11; Katherine Topulos, "A Common Lawyers Bookshelf Recreated: An Annotated Bibliography of a Collection of Sixteenth Century Law Books" (1992) 84 *Law Libr Jnl* 641 at p. 652 n.44.

<sup>17</sup> John D. Cowley, "The Abridgements of the Statutes, 1481?-1551" (1931) 12 *Libr* (4th ser). 125, 134-35; J.H. Baker *Oxford History of The Laws of England* see above n. 14 p.500.

<sup>18</sup> Ibid. Cowley where reference is made to Pynson's Chancery proceedings in 1506 against *inter alia* "Christopher Seint Jerman" p. 134. Baker (ibid) states at p. 500 "Plomer's discovery of a dispute with Pynson and three Middle Temple editors concerning the printed abridgement of statutes showed that Christopher St German was one of them." Baker suggests he was possibly an editor in this period after St German quit chambers but before he became successful in the 1520's with *Doctor and Student*.

<sup>19</sup> One of Redman's publications was an edition of the *Magna Carta* (1525; STC 9269) in which Redman states that his shop is at the sign of the George in St. Clement's Parish, just outside Temple Bar. Apparently he was occupying Pynson's old shop and using Pynson's old sign, even though Pynson himself was still using the sign of the George at his new location. J. Christopher Warner *Henry VIII's Divorce: Literature and the Politics of the Printing Press* (The Boydell Press, Woodbridge, 1998) pp. 83 – 85.

among a thousand men it would be hard to find one more unskilled.”<sup>20</sup> The intensity of the competition may be seen from the following example. It is suggested that Pynson “pirated” Redman’s text of the Year Book of 14 Hen VIII<sup>21</sup> a year after its publication. However, when Redman himself reprinted the same Year Book in 1540, the year of his death, he seems to have used Pynson’s text which actually introduced a number of errors not present in Redman’s original publication – a retrograde step rather than an improvement. Pynson, as Kings Printer, viewed his appointment not just as a business but involved the representation of the King and the Government. In his “Greeting to the Reader” criticising the work of Redman, Pynson says:<sup>22</sup>

**the buffoon has dared to promise by his own pains to imprint all the reuerend and sacred laws of England skillfully and correctly. Whether this is truthful speaking or iust hot air, you may perceiue instantly by reading the Littleton printed with his bzand of attention and diligence**

There is clearly a sense of proprietorship not only of the books printed but the whole category of law books but the use of the words “reverend and sacred laws of England” takes the matter further. The information that was being communicated was special and went beyond a ballad or a pamphlet. Thus the role of the printer of official material was to represent the material and its source properly and this role of proper representation in the new medium would become more critical as the printer became responsible for publishing an increasing amount of royal propaganda. Neither the King nor the printer would want the majestic spirit behind such material to be diluted by the crude reprints of, as Pynson may have put it, rude men.<sup>23</sup> The King’s Printer was responsible for the accuracy of the materials printed for the Crown.

Even although Pynson ceased printing in 1528, Redman carried on the feud. In 1534 he stated in a preface to a Year Book addressed to “**To the studentes of the Lawe**”<sup>24</sup> that the work had not been truly printed by Richard Pynson or any other printer and “**I therefore by the help of my frende haue caused this boke (thus as ye see) to shewe hym selfe to the light.**”<sup>25</sup>

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<sup>20</sup> J.H. Baker *Introduction – Year Books 12 – 14 Henry VIII* (Selden Society, London, 2002) p. xix ; See also in this regard W. Bolland *Manual of Year Book Studies* see above n. 15 pp. 65 – 66.

<sup>21</sup> Ibid. Baker.

<sup>22</sup> “Greeting to his reader from Richard Pynson, Printer of the King” Thomas Littleton *Lyttlton tenures newly and moost truly correctyd et amendyd* (Richard Pynson, London, 1525) STC 15726.

<sup>23</sup> Warner above n. 19 p. 85.

<sup>24</sup> The preface suggests that a student market was present as early as 1534 for printed law books which further underscores the view that the Year Books actually fulfilled an educative function.

<sup>25</sup> Bolland *Manual of Yearbook Studies* see above n. 15 p.64.

There were others involved in the law printing business such as John Rastell, his son William who later became a Judge, and one William Myddleton. During the time that Redman and Myddleton were in business Thomas Berthelet had become involved in law printing. It has been suggested that he may have been one of Pynson's assistants.<sup>26</sup> In 1528 he was in business on his own account although in 1526 the ecclesiastical authorities summoned him for printing three harmless works, one of them Fisher's sermon preached at a recent demonstration. His offence was that he had not exhibited the books to the bishop before printing them.<sup>27</sup> This difficulty had little effect on Berthelet's future, for on 15 February 1530, immediately after the death of Pynson, Berthelet was appointed printer to the King with an annuity of four pounds.<sup>28</sup> His work after this was to a great extent official, though he issued many books of general interest.

Berthelet had been involved in the publication of Year Books but this came to an end in 1532. He had, as King's Printer, a monopoly for the printing of statutes but after 1532 Kings' Printers did not concern themselves with printing reports or the more advanced law books.<sup>29</sup> When Berthelet stopped publishing the Year Books, Redman was to enjoy a de facto monopoly of their production until his death in 1540. His edition of 40 Edw. III in 1532 showed distinct signs of careful attention by a legally trained editor – again suggesting the involvement of lawyers in the printing process - with comments, cross-references, and even some collation of manuscripts. In the preface Redman boasted of its superiority to anything produced by Pynson, and expressed a hope that the legal profession would encourage him **“to do some further enterprise.”**<sup>30</sup>

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<sup>26</sup> Duff above n. 8 p.11.

<sup>27</sup> F.S. Siebert *Freedom of the Press in England 1476 - 1776* (University of Illinois Press, Urbana, 1963). Ch. 2. See also Ch 2 p. 37 .

<sup>28</sup> The significant portions of Berthelet's Patent are as follows: 'Henry the Eighth. . . to all printers of books within our realm and to all other. . . greeting. We let you wit that we of our grace especial have given privilege unto . . . Thomas Berthelet that no manner person. . . shall print any manner of books whatsoever our said servant shall print first . . . within the space of six years. Wherefore we will and command you that. . . none of you presume to print any of the said books. . . as ye intend to eschew our displeasure.' Greg above n. 13 p. 65.

<sup>29</sup> J.H. Baker "The Books of the Common Law" in Hellinga L. and Trapp, J.B. (eds) *The Cambridge History of the Book in Britain Volume III 1400 – 1557* (Cambridge, Cambridge University Press, 1999) p. 411 at p. 426.

<sup>30</sup> Baker *Introduction – Year Books 12 – 14 Henry VIII* above n. 20 p. xviii. Reprinting of law texts and the printing of subsequent editions (for example St German's *Doctor and Student* and William Rastell's *Collection of Statutes* raises the issue of the extent to which successive or subsequent editions and printings affected the perception of users as to the fixity and authority of the works, how texts were verified and whether this was an advantage and may merit further study The issue of revised printings is referred to in I.S Williams "He Creditted More the Printed Booke" (2010) 28 Law and History Rev 38 at p.44 and p. 57-58.

## The Role of Richard Tottel

Statutes and Proclamations were the only “official” printed legal publications. Apart from the record of proceedings that was kept by the Court, the only case law “reports” that were circulated widely were the Year Books, although manuscript notebooks of cases would have circulated among groups of lawyers.<sup>31</sup> The printing of the Year Books, and later other reports, was left to individual printers although by 1553 law printing was virtually the exclusive domain of one person – Richard Tottel. Baker suggests that the reason was largely economic.

“Law printing was a specialized craft, requiring a facility with abbreviated French and some Latin, and it could not easily be carried on as a sideline. The bulk of the work lay not in printing new texts for immediate sale, but in maintaining permanent stocks of the traditional books of the law. Lawyers collected, and probably bought, their year books in miscellaneous bundles of year pamphlets; it is not uncommon to find volumes made up of a few Pynsons, a few Redmans, and perhaps the odd Berthelet or Middleton. If a bookseller had a good stock of Pynson remainders, he would not have needed to order more copies of the same year from Redman. The printer therefore came to make his living by continuous reprinting of years already in circulation. This was the state of the business to which Tottel succeeded in 1553, and he did not greatly change it in nearly forty years of law printing.”<sup>32</sup>

How Tottel came to this pass seems to have arisen from a number of fortuitous circumstances. In 1553 one Thomas Powell, a printer of law books who had married William Myddleton’s widow, was involved in a lawsuit which gives us an insight into the business of a mid-sixteenth century London printer, especially one who had law books in his catalogue. The matter at issue in the Powell litigation does not appear from the record, but an inventory of the contents of his house was provided, including his entire stock. It included seventy copies of the Year Book 14 Henry VIII, presumably Redman's remainders, though no mention is made of Powell's own reprint of the Year Book 12-13 Hen. VIII. A comparison of Powell's text of the latter with that of Redman shows that he (Powell) took considerably more care than Pynson had done to improve the text. Besides minor corrections and emendations throughout there are numerous instances in which English words were translated into French.<sup>33</sup> As a result of litigation and possibly as a result of financial problems, Powell ceased publishing common-law books and, when he succeeded to the printing business of

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<sup>31</sup> For an example of commercial manuscript law reporting see the example of Payness, Widdrington, Allpress and Mackworth see below Ch. 6 p.179 et seq.

<sup>32</sup> Baker “The Books of the Common Law” above n. 29 at pp.427-8. The passage suggests that lawyers may have been responsible for binding their own volumes.

<sup>33</sup> Baker *Introduction YB 12-14 Hen VIII* above n 20 p.xx.

Henry Smith in 1550,<sup>34</sup> Richard Tottel became the sole law printer, and the printing of common-law books thus became virtually a defacto monopoly.<sup>35</sup>

Tottel's position was secured not only by a process of economic attrition but also by the grant of the common law patent.<sup>36</sup> For the rest of the period under study the common law patent dominated the printing of case law and after Tottel's death in 1593 became the subject of dispute and litigation for many years thereafter, indicating the value that the printing of common law works attracted. In 1605 the Stationers took over the patent. The law printing monopoly became a part of the "English Stock" and the Stationers were able to nominate printers to carry out the actual printing of common law books.<sup>37</sup> Some Yearbooks were reprinted in this time, along with further parts of Cokes *Reports* and an index of Year Books known as *Promptuarie* by Thomas Ashe<sup>38</sup> as well as Coke's *Book of Entries*. In 1628 under the imprint of the Stationers was printed the first edition of what was to become a standard law text for generations of lawyers – *Coke on Littleton*.

### **Lawyers and Printers**

The printing of law texts was not something that was done simply at the behest of printers who printed what they thought the market may require. I suggest that there were interactions between the lawyers and the printers which had an impact upon the texts that were put into print and, in the mid-16<sup>th</sup> century, who was responsible for printing them. The location of printing shops, the involvement of lawyers in the editorial process and Pynson's printing of *Natura Brevium*<sup>39</sup> demonstrate an early level of interaction between lawyers and printers.

Although there is no direct evidence of similar relationships between lawyers and law printers such as Redman, Myddleton, Berthelet and Thomas Powell, it seems unlikely that

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<sup>34</sup> Smith was a printer of law books. Dating the succession is disputed. Baker above n. 20 dates it as 1553 when Tottel was awarded the Common Law patent. Byrom (see n. 35 below) dates it as 1550.

<sup>35</sup> H.J. Byrom "Richard Tottel – His Life and Work" (1927) 8 *The Library* 4th Series p. 199. The variations in the spelling of Tottel's name are considerable – even on the title pages of books he printed. In the text I have used the spelling adopted by Baker and Byrom, although in the references to works printed by Tottel I spelled his name as it appears on the title page.

<sup>36</sup> For further discussion of the patent system see above Ch. 3 p. 50 et seq. Note that the common law patent, which created a monopoly to print all the books of the common law including case law, must be distinguished from that of the Royal Printer who did not print case law (unless he held the common law patent as well) but who printed official legal publications, especially statutes. For further discussion see above Ch. 3 p. 49 et seq.

<sup>37</sup> For further discussion of the "English Stock" see above Ch. 3 p. 22, 53, 72.

<sup>38</sup> Thomas Ashe *Le Premier Volume Del Promptuarie or Repertory Generall de les Annales*, (John Beale, London, 1614) STC 840.5.

<sup>39</sup> See above Ch. 4 p. 84.

law printers would have printed their texts without some input from the market for whom they were printing. John Rastell was a special case. As a lawyer himself he was well aware of the type of texts that lawyers required although his law printing work was of a rather specialist and novel nature.<sup>40</sup>

I have observed that Richard Tottel became the sole law printer by what appears to have been a process of attrition when he succeeded to the printing house of Henry Smith.<sup>41</sup> However, there were other important relationships that had an impact upon Tottel's future. Smith had a connection with leading members of a circle of eminent lawyers of Lincolns Inn and Tottel became associated with this group.<sup>42</sup> When Tottel set up business on his own account he continued the connection with those who were closely interested in the law printing market and it was on the 12<sup>th</sup> April 1553, shortly after he set up in business, that he was granted the common law patent for a period of seven years.<sup>43</sup>

Tottel must have been a survivor because he managed to continue printing after the death of Edward VI and through the English counter-reformation during the reign of Mary. It appears he did not endure some of the difficulties experienced by Protestant stationers who had been active in printing and circulating English bibles and protestant theological literature.<sup>44</sup> Byrom suggests that Tottel was possibly not unfriendly to the old faith and obtained a renewal of his law monopoly in Mary's reign for a further term of seven years.<sup>45</sup> Certainly Tottel was closely associated with William Rastell who had gone into voluntary exile during the reign of Edward VI and published some of Rastell's law books whilst the author was in exile.<sup>46</sup>

There is still doubt as to precisely how it was that Tottel obtained his monopoly. There is some suggestion that he had influence with the Judges<sup>47</sup> but certainly he had connections with earlier law printers and the circle of lawyers who were members of Lincolns Inn. No doubt his association with the legal fraternity through William Rastell enhanced these connections.

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<sup>40</sup> Rastell did not restrict his printing to law books and printed over fifty titles. Cecil H. Clough, 'Rastell, John (c.1475–1536)', *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004).

<sup>41</sup> Byrom above n. 35 p.200.

<sup>42</sup> Ibid p.202.

<sup>43</sup> Ibid p. 203. This was the first grant of a patent to print common law texts. Although Pynson was Kings Printer he also printed common law texts as a part of his ordinary business and not as a grantee of any monopoly.

<sup>44</sup> Ibid p. 204.

<sup>45</sup> Ibid.

<sup>46</sup> When Mary assumed the throne William Rastell returned to England and took up a judicial position.

<sup>47</sup> Byrom above n.35 p.220.

Certainly those who were senior practitioners may have been concerned at the quality of books available for students,<sup>48</sup> and because senior lawyers became serjeants and ultimately Judges, printers had an interest in maintaining goodwill with members of the profession. Pynson had standing at Lincolns Inn as well as Strand Inn.<sup>49</sup> Redman, Myddleton and Smith as successors of Pynson's printing could well have benefitted from the goodwill that he had established. Byrom suggests that the lawyers at Lincolns Inn seem to have largely controlled the printing of law books from 1542 and that the devolution of law printing to one person would put an end to somewhat undisciplined conditions which had prevailed prior to Tottel being granted the patent.<sup>50</sup>

Tottel also understood his market and was quick to take advantage of the scarcity of law books due to the haphazard methods of recent law printers, although by 1577 he attracted unwelcome attention with allegations of overpriced texts which was not beneficial to poor students.<sup>51</sup> Part of the problem that earlier law printers had experienced was that there was little incentive to print law texts because they sold slowly. Nevertheless the printing of one or two law books each year could provide a gradual income because the market, although not great, was a continuing one.<sup>52</sup>

A disadvantage, however, was that Tottel effectively controlled all legal printing and there is nothing that required him to print any common law text if he chose not to do so. The author could not go elsewhere for should any other printer print the work as it would be an infringement of Tottel's patent.<sup>53</sup>

When Elizabeth came to the throne, Tottel's law patent was renewed for life.<sup>54</sup> This allows for a number of conclusions. Tottel's support for law printing from his law practitioner patrons may have still been in place. He did not seem to have suffered as a result of his association with Mary and those of the "old faith" and it is fair to conclude that the law

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<sup>48</sup> Ibid. p. 221.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid. p. 222.

<sup>51</sup> Ibid. p.209-10. Tottel got into further difficulties in 1578 with Christopher Barker. Barker was the Queen's Printer. As such he had a monopoly on printing statutes. He alleged that Tottel was wrongfully printing abridgments of the statutes. The argument was whether the abridgments fell within the Queen's Printer's patent or could be printed by any printer.

<sup>52</sup> Ibid. p.210.

<sup>53</sup> Ibid. p. 210- 11.

<sup>54</sup> Ibid. p. 213.

printing work that he had done during his enjoyment of the patent was of a sufficiently high quality to justify its continuation indefinitely.<sup>55</sup>

Thus to say that printers and the print medium of themselves dictated the course of law printing in the 16<sup>th</sup> century is to overlook the interactions that took place between the market and the printers themselves. This seems to lend weight to Adrian Johns' suggestion that the rise and importance of print within intellectual elites was not solely as a result of the printed word but as a result of complex interactions that took place between authors, printers and their market.<sup>56</sup>

### **Tottel's Contribution**

The accuracy and therefore the reliability of printed texts was still an issue when Tottel was awarded the common law patent. There had been some improvements in quality as may be demonstrated by the Powell imprinting of the Year Book for 12-13 Henry VIII.<sup>57</sup> The integrity of the original was maintained by the use of French rather than some of the English translations. This indicates a departure from the move towards "Englysshing".<sup>58</sup> A choice had to be made by the printer between the integrity of the text or the wider comprehensibility of the content and he chose the former.

Tottel himself claimed to have improved the production and printing of law books, a reflection of the desire for improvement, accuracy and therefore acceptance and creditworthiness of printed law texts. He suggested that before his time

**"the books of law were imperfect, the most part maruellously mangled, and no small part nowhere to be gotten" and that shortage had raised the prices. Since his entry to the market ; "there be enough.. .that. . . can truly witness . . . sithence I took in hand to serue your uses, that imperfections haue been supplied, the price so eased as the scarcenesse no moze hindereth but that ye haue them as cheap (notwithstanding the common dearth of the times) as when they were most plentiful, the print much pleasanter to the eye in the books of years than any that ye haue been yet serued with, paper and margin as good and as fair as the best, but much better and fairer than the most, no small number by me set forth newly in print that befoze were scant to be found in wyting, I need not my self to report it."**<sup>59</sup>

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<sup>55</sup> Ibid. p. 213.

<sup>56</sup> Adrian Johns *The Nature of the Book* (University of Chicago Press, Chicago, 1998).

<sup>57</sup> Baker "Introduction" *Year Books 12-14 Hen VIII* above n. 20 p. xx.

<sup>58</sup> For discussion see below p. 127 et seq.

<sup>59</sup> *Magna Charta cum statutis quae antiqua vocantur* (Richardi Tottelli, London, 1556) Preface STC 9277.5.

Although this self-praise must be recognised as such, Tottel's contribution to legal printing was significant. There are about 225 known editions of separate Years or groups of Years which bear his imprint or can be clearly attributed to his press. He not only reprinted all the Years already published, but he also printed for the first time many other Years which had not seen print.<sup>60</sup> The uniform appearance of the Year Books may be attributed to other printers but it was continued and developed by Tottel, giving the impression of a regularly produced series, and it was he who imposed regular divisions into terms, grouped reports into reigns, made proper citation possible by standard foliation and added copious references.<sup>61</sup> Tottel ceased printing in 1591 following the printing of the Year Books of 12- 27 Henry VIII.<sup>62</sup> Notwithstanding Tottel's contribution by his printing activities, and as an example of co-existence of media throughout the century, lawyers themselves had been producing their own notebooks similar in style to the Year Books, but these were not printed, and remained in manuscript.

The history of sixteenth century common law printing can be divided into two phases. The first phase terminates with grant of the common law patent to Tottel and in this first period law printing is dominated by a number of individual printers who were responsible for the shape and form of the works, especially the Year Books, that they printed. They were selective in the material that they made available but at the same time utilised innovations allowed by the advent of the new technology. The printing of the Year Books occupied most of the common law printing of this phase, although this is not to suggest that other printing was less common or occupied a lesser status. The first phase can be seen as a period first of development and secondly of stability in the printing of common law texts. In the second phase and up until the death of Tottel the development of new reporting styles saw their way into print with the printing of Plowden's *Commentaries* and the reports of individual reporters.<sup>63</sup> In addition, there were some disputes over this period, especially in the later stages regarding the extent of Tottel's monopoly.

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<sup>60</sup> Soule above n. 15 p. 564. There were periods for which no Yearbooks were printed until the work of the Ames Foundation or the Selden Society, The Yearbooks of Richard II are an example.

<sup>61</sup> E.W. Ives "Purpose and Making of the Later Year Books" (1973) 89 LQR 64 at p. 76.

<sup>62</sup> Soule see above n. 15 p. 586. A search of the Short Title Catalogue indicates no other books were printed by Tottel after 1591.

<sup>63</sup> James Dyer *Cy ensuont ascuns nouel cases* (Richard Tottell, London, 1585) STC 7388; Richard Bellew *Les ans du Roy Richard le Second* (Robert Robertson, London, 1585) STC 1848; Robert Brooke *Ascun nouell cases de les ans et temps le Roy, H.8. Ed.6.*(Richard Tottell, London, 1578) STC 3821. Plowden's style was a novel one and not immediately adopted by other contemporary reporters.

At the same time Tottel had enhanced the quality of the law in print. Although errors and typographical faults are present, his objectives were to improve the product and increase the sales of printed law texts. By the time of his death law printing had moved from a debateable business that it was in 1553 to something that was worth undertaking. Common law printing was a monopoly and Tottel had made it a monopoly worth having. The contest for the common law patent following his death was considerable and forms what could be described as a third phase of common law printing which primarily occupies the seventeenth century and is characterised by a change in the nature of the words printed as discussed in Chapter 7.

This does not mean that there were no difficulties about the accuracy or reliability of printed material after Tottel. For example, the second edition of Thomas Ashe's *Fasciculus Florum*, a collection of maxims from Coke's works, makes reference to the vitiating and false printing of this Booke, through the negligence and oversight of the Printer and his Corrector...wherefore having now reified the fame, I have not onely corrected the faultes therein committed, but also increased it with sentences drawn from the Epistles of the Books, in the former edition omitted, and withall translated the whole worke into our vulgar tongue. Ashe also addresses a special preface to **THE CAPTIOUS AND MALICIOUS Detractors** which arose from ridicule that had been directed towards the book by a member of the North family.<sup>64</sup>

It seems that by 1614 what may be described as the "intergenerational" nature of print was beginning to have an effect. It was becoming standard practice to refer specifically to works in print, recognising the fixity of the record that a printed work contains.<sup>65</sup> For example in Ashe's *Promptuarie*<sup>66</sup> all references are to works in print. This would not have been possible in the first half of the sixteenth century, primarily because of the lesser volume of printed material. By 1614 such material had become plentiful, diverse and common. The referencing to printed works, the provision of indices and the cross referencing of material reflects a movement toward specific citation not only of a particular case as an example, but also where it may be located in the volumes of printed material that may be available. This in turn allowed a Judge or a lawyer to consider the text of the case, yet at the same time make allowance for the fact, as would be well known by both classes of reader, that the cited case may not be the *verbatim* words used by the Judge.

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<sup>64</sup> Thomas Ashe *Fasciculus Florum or A Handfull of Flowers* (G. Eld, London, 1618) STC 5529.

<sup>65</sup> For a discussion of "self-validation" and cross-referencing see below Ch. 7 p.198 et seq.

<sup>66</sup> Above n. 38.

## Tottel's Heirs

In Tottel's hands the common law patent flourished but he had no family to succeed him as printer. The patent was a form of property, Tottel had enhanced its value and in anticipation of his death as far back as 1577 the reversion in the patent had been granted to Nicasius Yetswiert, a Clerk of the Signet and Secretary for the French Tongue to Elizabeth I, a clear example of the use of patents to reward those who had rendered service. However, when Tottel died in 1593, Yetswiert had predeceased him in 1586.<sup>67</sup> A number of squabbles regarding the patent followed. Yetswiert's son Charles claimed that the reversion passed to him as his father's personal representative.<sup>68</sup> Charles Yetswiert also claimed that Christopher Barker, who was the Royal Printer, had infringed the patent by printing Ferdinando Pulton's *Abstract of All the Penal Statutes* and Rastell's *Collection of the Statutes*. Barker's office<sup>69</sup> entitled him to a monopoly on printing statutes and he claimed his action in printing the works did not fall within the scope of the Tottel patent which granted a monopoly "to imprint all manner of books concerning the common laws of this realm."<sup>70</sup>

The potential problem was avoided by the grant of a fresh patent to Charles Yetswiert, although the dispute was the first of many that would surround the common law printing patent for many years thereafter.<sup>71</sup> The patent recited the disputes and gave Yetswiert a monopoly of printing books of the common law and the two statutory collections the subject of the dispute for 30 years from 1594, the date of the patent.<sup>72</sup> The Stationers Company opposed the grant and offered to purchase it in 1595,<sup>73</sup> but some printers took matters into their own hands and began to publish common law books anyway, thus infringing the patent. Yetswiert commenced proceedings in Chancery to protect his rights and it is claimed that the

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<sup>67</sup> This section, unless otherwise noted, draws on J.H. Baker "English Lawbooks and Legal Publishing" in John Barnard and D.F. McKenzie (eds) *The Cambridge History of the Book in Britain Volume IV* (Cambridge University Press, Cambridge, 2002) p. 481 et seq.

<sup>68</sup> The Yetswiert patent was granted to Nicasius, his executors administrators and assigns. Ibid. Baker p. 481 n. 45.

<sup>69</sup> The Office of Royal Printer was held by Christopher Barker and his family from 1577 – 1680. This is a variant of the dispute between Tottel and Barker – see above n. 51.

<sup>70</sup> 2 Arber 15; Baker in "English Lawbooks and Legal Publishing" above n. 67 p. 481 has the wording of the patent as books that "touche or concerne the common laws of this...realme."

<sup>71</sup> For an entertaining account (although some of the historical material about the early history of law printing may be questionable or indeed absent altogether) see Johns above n. 56 especially the chapter entitled "John Streater and the Knights of the Galaxy."

<sup>72</sup> Baker in "English Lawbooks and Legal Publishing" above n. 67 p.481.

<sup>73</sup> Cyprian Blagden *The Stationers Company: A History 1403 – 1959* (George Allen & Unwin, London, 1960) p. 93.

Master of the Rolls granted him an injunction, thus providing recognition of Yetswiert's right to issue the books – a form of “proto-copyright.”<sup>74</sup>

During the course of the dispute Charles Yetswiert died and was survived by his wife Jane. She attempted to settle the dispute, but although the matter was not resolved she printed several law books between 1595 and 1597. When she married Sir Philip Boteler she ceased trade, moved to the country and in 1598 she surrendered her patent in Chancery. The patent was taken up by Thomas Wight and Bonham Norton who commenced printing as the assigns of the Botelers until they received their own patent on 30 March 1599.<sup>75</sup>

The partnership came to an end within the year. Norton left to become a successful publisher on his own account. Wight continued to publish law books, most significantly the first four parts of Cokes *Reports* (1600 – 4) and *Relationes ex libris Roberti Keilwey* which were in fact reports compiled by John Caryll and edited by Serjeant John Croke from a manuscript that had originally belonged to Keilwey.<sup>76</sup> Wight sold his patent, which had twenty years to run, to the Company of Stationers in 1605 who incorporated it as part of the English Stock.<sup>77</sup>

These contests demonstrate the value that the printers saw in the common law patent. That value would not have existed had there not been a market for printing common law books. Monopoly it might have been, but it would have been worthless if the lawyers had not been prepared to purchase the books. That the patent had improved in value also demonstrates a growing acceptance by lawyers of printed law books and arising from that a greater confidence in them.<sup>78</sup>

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<sup>74</sup> Baker “English Lawbooks and Legal Publishing” above n. 67 p. 482; Baker states that the grant of the injunction “thereby arguably lay[ed] the foundation of later copyright protection. The term “proto-copyright” is used in a similar context by Peter K. Yu “Of Monks, Medieval Scribes, and Middlemen” (2006) Mich. St L. Rev 1 at p. 15.

<sup>75</sup> Ibid. Baker at p.482.

<sup>76</sup> Ibid.

<sup>77</sup> For discussion about the English Stock see above Ch. 2 p.22, 53 and 72.

<sup>78</sup> It seems unlikely that lawyers would have purchased books simply to have them on the shelf. There would be no need for such books if the material contained in them was demonstrably inaccurate. If that were the case lawyers would have eschewed print and remained with an alternative - their manuscript books. I suggest that demand and confidence go hand in hand. On the other hand it could be argued that effective exploitation of the monopoly depended upon having a product of sufficient quality that worthwhile print runs could be sold. This is a part of wider discussion about the economics of law printing and scribal publication and which merits further consideration. See p. 80 fn. 11

Clearly during Tottel's monopoly all the Year Books that were going to find their way into print were printed and the second phase, from 1593 to 1642 evinced a focus upon treatises and, importantly for subsequent students and for posterity, the printing of the works of Sir Edward Coke. There can be no doubt that, notwithstanding differing attitudes towards the desirability of having material in print,<sup>79</sup> Coke saw the enormous advantage in terms of dissemination and audience reach in having his works printed. That was the case despite Coke himself having a significant collection of manuscripts in his own library.

Certainly there was a decline in the number of titles printed in the second phase, although a large amount of new material was beginning to become available and was finding its way into print. At the same time, there were problems within the common law printing trade itself as contests about entitlements developed and the exclusive monopoly changed hands a number of times. Law printing would go through a difficult period in the Interregnum, and the seeds that were sown in the second phase that I have described would continue to have an effect on the trade after the Restoration.

However, perhaps the most important event in the latter part of Tottel's monopoly and which developed into the early seventeenth century was the shift from the Year Books towards the printing of what could be termed "private reports". In addition, the comment by Thorne - "What was wanted was something more informative than the argument between judge and counsel leading to the formation of an issue, . . . the future lay with reports in another form."<sup>80</sup> - was becoming a reality.

Thus far I have considered the way in which the business of law printing provided its own incentives, opportunities and, at times, obstructions to the proliferation of legal works in print. I shall now turn to the other factors that I identified at the beginning of this chapter – the impact of humanism and its associated elements of the harmonious society, the "Englysshing" of the law and the attitudes towards ignorance of the law and the way in which these elements encouraged law printing.

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<sup>79</sup> See discussion about the co-existence of print and manuscript see below p. 137 et seq.

<sup>80</sup> Ives above n. 61 p.85.

## Humanism and the Law<sup>81</sup>

“Humanism was an intellectual movement that sprang from a longing for the revival of classical antiquity. The humanists advocated a rational and largely secular education based on the study of the Greek and Roman classics, and from it they expected great benefits to the individual and society.”<sup>82</sup> Using a foundation of the classical republic advanced by Plato, English humanists such as Thomas More, Sir Thomas Elyot and Thomas Starkey championed an ideal commonwealth of the public interest of the whole community rather than private interests. A sound education and virtuous behaviour were seen as essential attributes of the good governor.<sup>83</sup> Humanist values and thought, however, were not simply “a good idea.” The elements of humanism were to be applied and practiced and “common law humanism”, like humanism generally, denied a distinction between theory and practice.<sup>84</sup>

Elements of humanism were present in legal writing from the early sixteenth century in More’s *Utopia* through the prefaces of Rastell, the writings of St German and the expression of humanist values in later sixteenth century legal writing and into the seventeenth century in the writings of Doderidge, Fulbecke, Fraunce, Finch and Bacon. The values and precepts of humanism underwent little change despite the violent political and social upheaval associated with the Henrician Reformation, the Marian counter-Reformation and the establishment of the Elizabethan order. Many of the fundamental and continuing precepts of humanism such as a proper education for proper governance and the importance of law as the underpinning of the common weal - together with the associated advantages provided by print technology for the dissemination of those values - remained constant.

The best-known of the English humanists was Thomas More. His book *Utopia* posits many aspects of the ideal humanist society. More’s large extended family lived in his house, which was a practical demonstration of the application of Utopian educational principles and methods and which attracted a number of friends and acquaintances. The circle which gathered there went beyond his family and included educationalists such as John Colet and

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<sup>81</sup> For a brief overview of humanism, the law and in particular legal education see Richard J. Terrill “Humanism and Rhetoric in Legal Education: The Contribution of Sir John Dodderidge (1552 – 1628)” (1981) 2 *The Journal of Legal History* 30 esp at pp 30 – 36.

<sup>82</sup> Fritz Caspari *Humanism and the Social Order in Tudor England* (Teachers College Press, New York, 1968) p.1.

<sup>83</sup> Richard Ross “The Commoning of the Common Law: The Renaissance Debate Over Printing English Law 1520 – 1640” (1998)146 *U Pa LR* 323 at p. 329.

<sup>84</sup> Mark D. Walters “Legal Humanism and Law-As-Integrity” (2008) 67 *CLJ* 352 at p.361.

writers such as Sir Thomas Elyot. It constituted the most civilized group in Henry VIII's England and a number of its members rose to legal or parliamentary office or were active as writers. Erasmus compared More's house to a Platonic Academy.<sup>85</sup>

Elements of humanist thought underpinned important objectives for printing the law. One was the educational objective of making the law more easily accessible by printing it in English. Within Thomas More's circle of humanist adherents was John Rastell, a multi-talented lawyer-printer, explorer and entrepreneur who printed the law among other works in what was referred to as the vulgar tongue.<sup>86</sup> The print properties of standardisation and dissemination were both recognised and perceived as assisting in the fulfilment of humanist educational goals. The other element was the deeper societal issue of the concept of the "common weal" or the common good. This theme is one that pervades the discussion about access to law and was one of the main societal imperatives of the time. The "common weal" was a concept that operated on a number of different levels having primarily political but also social implications. In all its various manifestations the "common weal" was perhaps the most significant underpinning for access to law, developing from humanist precepts until it took on a life of its own.<sup>87</sup>

Associated with the concept of the "common weal" in the political sense was the State's interest in the dissemination of legal information, not only as a means of informing the public of the law, but also as a propaganda tool for State policy. One of the early actions of Henry VII was to appoint a Royal stationer for this purpose and it was quickly recognised that printed legal information could combat claims of ignorance of the law.<sup>88</sup> The printing press helped to fuel another debate that arose out of the legislative programmes of the Tudors and the Stuarts and addressed the issue of supremacy of the common law or of statute.

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<sup>85</sup> Caspari above n.82, p. 51.

<sup>86</sup> H. J. Graham, "Our Tong Maternall Marvellously Amendyd and Augmentyd": The First Englishing and Printing of the Medieval Statutes at Large", 1530-1533, (1965) 12 UCLA L. Bull. 58 at pp.72,87,97-98; Ross above n.83, p. 347.

<sup>87</sup> Although "Englysshing" was not universally supported by the humanists. Thomas Starkey, Thomas Elyot and Richard Morison suggested the use of Latin. See L.W. Abbot *Law Reporting in England 1485 – 1585* (Athlone Press, London, 1973) p. 88.

<sup>88</sup> Colin Clair *A History of Printing in Britain* (Cassel, London, 1965) pp. 96-98, 105; Siebert above n. 27 pp. 32-35; Pamela Neville-Sington "Press, Politics and Religion" in Lotte Hellinga and J.B. Trapp (eds) *The Cambridge History of the Book in Britain Volume 3 1400 – 1557* (Cambridge University Press, Cambridge 1999) p. 576 at p. 578 For further discussion on ignorance of the law see below p. 129-133.

Humanists saw the law as vital to an ordered society of individuals empowered to order their own affairs. Good citizens were expected to learn the virtues of honesty, public spiritedness and Godliness. Proper behaviour flowed from sound knowledge and this in turn flowed from a proper education.<sup>89</sup> The behaviour of the Renaissance man within society required good manners, a peaceful life in the community and a respect for God. Proper and effective law could only do its good work if properly taught to the subjects of the State. In this way, the subject would know he had to obey and at the same time had before him exemplars to follow in building his character.<sup>90</sup> But the education that was advanced by the humanists was primarily directed towards the education of men of the nobility and gentry for their role in governance either at a local level, in the administration or bureaucracy or as a Royal adviser.<sup>91</sup>

The law was the basis for a functioning society for the good of all rather than for the wealth, power or honours associated with the Church, feudal ties or established power elites although even the humanists did not see this as a universal concept, in that generally the law favoured the propertied classes rather than the entire community. The importance of the law and the legal process as a part of the ordered State, promoting the values of harmony and unity was recognised and thus the study of the law was part and parcel of the humanist curriculum. The publication of law was a part of the wider educational process and another aspect of the informed order advocated by the humanists.<sup>92</sup> Printed law books were less dangerous than the printed Bibles and religious tracts that were present on the Continent and were being imported into England. Ross points out that there was little threat arising from dissident translations of the statutes or “non-conformist” Year Books or treatises. Yet printed law books made dissent more formidable. They made legal resources available to those who wished to mount legal challenges to the establishment.<sup>93</sup>

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<sup>89</sup> Ross above n. 83 p. 332 fn. 20. For further discussion of the “common weal” and the “common wealth” see below. See also Caspari above n. 82 pp.1-8, 16-18, 160 – 174, generally Chapter 6 pp. 251-294; Arthur B. Ferguson *The Articulate Citizen and the English Renaissance*. (Duke University Press, Durham N.C, 1965) p.1; Quentin Skinner *The Foundations of Modern Political Thought* (Cambridge University Press, Cambridge, New York, 1978) pp.101-12, 193-243.

<sup>90</sup> Ibid. Ross pp. 330-331. The writings of Christopher St. German provide an example of the way in which the law serves the “common weale” and are discussed below.

<sup>91</sup> Caspari see above n. 82 especially pp. 145 – 194 and 210 – 241.

<sup>92</sup> John Rastell *Tabula Libri Assisarum et Placitorum Coronae* above n. 84; Fulbecke, above n. 64; Finch, *Law or a Discourse Thereof* above n 111.

<sup>93</sup> Ross above n. 83 p 338-9; See also On Henry VIII's conflicts with the church and "overmighty subjects," see Baker *The Reports of Sir John Spelman* (Selden Society, London, 1978) at p.64-68; G.R. Elton, *England under the Tudors* (Folio Society, London, 1974) p.82, pp. 102-07. By the same token there were concerns about the effect of misinterpretation and error. This was noted by Pulton in the preface to *De Pace Regis* where he said

Print became a facilitator in the educational process. The humanists wished to extend their audiences and their influence. The English followers of Italian and Northern European humanists had a respect for the power of the press to spread standardised classical texts which were the basis for the study of philosophy and rhetoric. Henry VIII, whose Court included a number of prominent humanists, used print propaganda to generate support for the “Kings Great Matter” and the break with Rome, although the humanist message remained the same. Rastell was advocating printed legal information in English in the 1520s before the onset of the Tudor Revolution.<sup>94</sup>

Humanists saw advantages in the disseminatory powers of print as part and parcel of the desire to widen their audience and the appeal of their ideas. Support for a law press and a preference for English or Latin over the arcane law-French as a means of expression of the law were elements of what we would describe as “access to law.”<sup>95</sup> In this way the audience who could read and clearly understand the law as well would be extended – if legal works were printed in English - in addition to a general desire to widen the audience for books in general. As the interest in a law press grew so did the call, in print, for a broader diffusion of legal knowledge among lay people. Rastell claimed that law **“kept secretly in the knowledge of a few persons and from the knowledge of the great multitude may rather be called a trap and a net to bring the people to vexation and trouble than a good order to bring them to peace and quietnesse.”**<sup>96</sup>

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that awareness of the law might be subject to “*depraving, misconstruing or wresting of the laws of God, or man, out of their true meaning & proper sense*”. Concerns about misconstruction and misunderstanding were expressed by others in the seventeenth century – see generally p 203 – 209 and especially p.208-9. Misinterpretation would run counter to the educational goals of the humanists.

<sup>94</sup> 1527 – 1535. See generally Kevin Sharpe *Selling the Tudor Monarchy: Authority and Image in sixteenth century England* (Yale University Press, London, 2009); G.R. Elton *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge University Press, Cambridge, 1972).

<sup>95</sup> Law-French was the language of lawyers and Latin the language of an educated elite. Thus printing in Latin would extend the audience but in a very limited way. Knowledge of law-French was required. The Year Books were in law-French as were many of the early texts. Participation in mootings, for example, would have been impossible without law-French (see above p. 87) and it was considered relatively easy to learn – see John Davies *Le Primer Report Des Cases at Matters En Ley resolved & adjudged en les Court del Roy en Ireland* (John Frankton, Dublin, 1615) STC 6205 in “A Preface Dedicatorie” at ¶¶ 2. See also William Fulbecke *A Direction or Preparative to the Study of Law* (Thomas Wight, London, 1600) STC 11410 pp. 21-22. For a discussion of law-French as an aspect of *nos erudition* see below p. 151

<sup>96</sup> John Rastell, “Prologus Johannis Rastell”, in *Exposiciones terminorum legum anglorum. Et natura breuium* (Johannes Rastell, London, 1525) STC 20702 Rastell was something of a unique figure and had a number of interests but there is some support for his views. See also generally Graham, “Our Tong Maternall Marvellously Amendyd and Augmentyd” above n. 86 at pp87, 97-98. Similar sentiments were expressed in John Hales, Oration in Commendation of Laws (MS, c.1540), Free Library of Philadelphia, Carson Collection, MS LC 14:32.1, fol. 14r. Cited in Ross above n. 83 at pp.331-333, 344 fn 52; Christopher St. German, *Doctor and*

Rastell's position was expressed by others. The force or quality of statute law may have depended upon whether or not it was printed and therefore public, or not printed and therefore private. Dyer stated that if the latter "a man shall not be compelled to take consuance of this so easily as if it was in print."<sup>97</sup>

This reflects Thomist legal thought which held that to obtain full status law had to be promulgated. In England promulgation was carried out by the sheriffs or by direct communication with the judges. Some legislation provided for its own promulgation.<sup>98</sup> However, did failure to promulgate invalidate law? Doe is of the view that such a proposition is doubtful although it was clearly preferable.<sup>99</sup> However, the press, although embraced for its various qualities, was also viewed with some suspicion particularly by religious elites who were contending with the dissemination of printed disputative literature which challenged long-held tenets of the faith. In answer the humanist law book publishers advanced three main reasons for the printing of the law.<sup>100</sup>

The first two reasons involve what today would be referred to as "access to law" issues. First, being able to read and understand the law had a benefit in making the subject aware of the requirements for peaceful, responsible and virtuous living. The subject received a benefit and, in addition, such an understanding was in the interests of the "common weal."

Secondly was the suggestion that greater availability of legal information would serve to loosen the stranglehold upon the law held by the legal profession. Law books would not

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*Student* T.F.T. Plucknett & J.L. Barton (eds), (91 Selden Society, London, 1974) (1530 p.3, pp.176-77); Thomas Phaer, *A New Book of Presidents* (Ricard Tottyll, London, 1559) STC 3332, quoted in 2 Bennett pp.162-63; Richard Taverner, Peroration, in *Institutions in the Laws of England* (J Bydell, London, 1538) STC 9290 and preface to the 1542 edition of the work under the title, *The Principal Laws and Statutes of England Newly Recognized and Augmented* (Richard Grafton, London 1542) STC 9291 at iib. Taverner has been identified as author of this work by Sir John Baker. Baker *The Reports of Sir John Spelman* above n. 93 p. 3.

<sup>97</sup> Wood v Dallison cited in I. S. Williams "He credited more the printed booke" (2010) 28 LHR 38 at p. 67 – 68 fn 39.

<sup>98</sup> N.. Doe *Fundamental Authority in Late Medieval English Law* (Cambridge University Press, Cambridge 1990) p.38.

<sup>99</sup> Ibid. p. 39 Doe refers to the author of *Mirror of Justices*, a text of questionable provenance which emphasised the importance of the textualisation and publication of "the laws and usages of the realm". For a discussion of textualisation and the law see Peter Tiersma *Parchment Paper Pixels: Law and the Technologies of Communication* (University of Chicago Press, Chicago, 2010) p. 28, 31 – 32 and the discussion below in Ch. 7 p.214 et seq.

<sup>100</sup> These three reasons or justifications that follow are based in large part upon Ross above n. 123 pp. 339-41, although I have developed the ideas and extricated from them some of the sociological underpinning attributed by Ross.

replace lawyers but would allow the citizen to inform himself of the law as it affected his daily life, but when there was doubt or litigation the good subject should

**“resort to some man, that is learned in the laws of this realm, to have his counsel in such points, which he thinks doubtful concerning these said statutes, by the knowledge whereof, and by the diligent observing of the same, he may the better do his duty to his prince and sovereign, and also live in tranquillity and peace with his neighbour, according to the pleasure and commandment of almighty God.”<sup>101</sup>**

Law books were also of benefit to the legal profession in that they served an educative function. Thus, both lawyer and citizen would benefit by increased availability of printed legal information, and for the citizen the press uncovered that which had previously been unknown.

The third reason was that law preserved order and was the antithesis of chaos. This was a message that resonated in an England for whom the memory of the Wars of the Roses was still fresh. Chaos could be kept at bay by law. Promulgation and dissemination which were part and parcel of the operation of law could be reinforced by law publishing thus strengthening and enhancing order.

There can be no doubt that the early involvement of humanists in law book publishing had a profound effect not only upon the way in which law books were presented but also upon the way in which law books were viewed by the community. It was probably fortuitous that the Rastells were early pioneers of law publishing and although their output was not great their influence extended over a fifty year period.<sup>102</sup> They not only set the benchmark for the publication of useful law books but provided an example for others, as well as having a continuing influence even from exile. John Rastell’s son, William, a lawyer like his father and later a Judge, continued the family involvement in law printing although after the reign of Mary he did so from a distance. As a Catholic he left England after the accession of Elizabeth but his law publications continued to be printed by Richard Tottel.

But the humanist law publishers did not publish for the lawyers alone. Their audience was a wider one and the move towards the vernacular publication of law clearly anticipated this. The law was for everyone, and thus everyone should have a means by which they might obtain that information. Over the sixteenth century and into the seventeenth century there was

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<sup>101</sup> John Rastell, above n. 96.

<sup>102</sup> Other law printing pioneers were Wynkyn de Worde, William de Machlinia, William Lettou, Richard Pynson and Robert Redman. See above p. 102-103 for discussion of their role.

a move towards providing information on matters of law for an audience that was wider than lawyers and law students.<sup>103</sup> Books such as Fulbecke's *Direction* and Doderidge's *The English Lawyer* were essentially seventeenth century introductions to legal studies for intending lawyers or for those who wished to inform themselves about the basis for legal study.<sup>104</sup>

An unintended consequence of the printing of the law, which the humanists saw as a means of furthering education for good government, was that by the time of Charles I self represented litigants capable of arguing sophisticated points of law, as exemplified by John (Free-Born John) Lilburne, became a thorn in the side of the authorities. Yet in spite of the annoyance that was posed by self-informing litigants, the authorities did nothing to stop, prevent or inhibit the publication of legal material.<sup>105</sup>

### **The “Common Weal”**

Ferdinando Pulton illustrated the second important element underlying humanist law printing when, in his *Abstract of All Penal Statutes Which be General, in Force and Use*<sup>106</sup> he said that the law in print furthered the “profit and quiet of the common-wealth.” The interrelationship of the “common weale” and the law, underlies much of the humanist support for law printing in the sixteenth and seventeenth centuries.

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<sup>103</sup> See below Ch.7 p. 237 et seq.

<sup>104</sup> *The English Lawyer* was printed in 1631 after Doderidge's death in 1628. It was earlier printed from an imperfect copy under the title *The Lawyers Light* (Bernard Alsop and Thomas Fawcet, London 1629) STC 6983. The original manuscripts were discovered by his nephew who published them. For a consideration of the influence of humanist thought underpinning *The English Lawyer* see Terrill above n.81 p. 36 – 42.

<sup>105</sup> One Tudor humanist writer, Thomas Starkey, felt that only the nobility or at least the wealthy should practice law and receive a legal education. It was “a great ruin of all good order and civility” if only “popular men which are born in poverty” practice law” Caspari above n.82 p. 237; L Levy *The Origins of the Fifth Amendment* (2<sup>nd</sup> Ed), (Macmillan, New York, 1986) pp 266 -300 and Mr. Justice K.K. Marks *Thinking Up About the Right to Silence and Unsworn Statements* (1984) LIJ 360. For reports of Lilburne's cases including the legal dialogues that he had with the Court see Thomas Bayley Howell *A complete collection of state trials* (Printed by T.C. Hansard for Longman, Hurst, Rees, Orme and Brown, London, 1816-1828). It should be noted that print was not essential for self-informing litigants. Robert Cotton, although not a lawyer, used his manuscript collection in his role as a form of legal consultant. See Stuart Handley *Sir Robert Cotton Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004); Harold Love *Scribal Publication in Seventeenth Century England* (Clarendon Press, Oxford, 1993) p.76; K. Sharpe, *Sir Robert Cotton, 1586–1631: history and politics in early modern England* (Oxford University Press, Oxford 1979). However, as a result of its disseminatory quality, print was more accessible than manuscript. The function of the two media was the same but the effectiveness and spread as a means of conveying information was significantly different.

<sup>106</sup> Ferdinando Pulton *An abstract of all the penal statutes* (Richard Tottell, London, 1577) STC 9526.7 (1579 ed.) which was reprinted on eight separate occasions between the first edition of 1560 and the last of 1600.

The term “common weal” is a convenient shorthand that encapsulates the ultimate benefits that were seen as the goal of the humanist movement. Furthermore, the concept of the “common weal” was tied up with the focus that developed upon the way in which the English social order was constituted, based upon the native origins of English customs and institutions that followed the severing of ties to Rome. The position that the Catholic hierarchy had occupied in the affairs of England had to be replaced with an entity that was recognisable both constitutionally and socially within the English experience. One aspect of this lay in the concept of parliamentary authority. When St German wrote of the good ordering of all people, temporal and spiritual in *Doctor and Student*, he was referring to Parliament and did so with the intent of broadening the base of parliamentary authority.<sup>107</sup>

It may be observed in the writings of the time that many involved with reform in the 1520s and 30s, most notably Thomas Starkey,<sup>108</sup> professed adherence to a “common good” in language that suggested a public concept that went beyond “good government” and that was wider than a central authority and instruments of enforcement. It had a spiritual dimension as well as that of the physical and temporal well-being of the community.

St. German proposed that the “common weale” was served by legislation and by the common law. Where the common law was silent, legislative power could operate. In many respects he was attempting to validate the use of legislation to advance the “Tudor Revolution.” St. German’s *Dialogues* and *Addycyons*<sup>109</sup> not only give us an insight into legal and jurisprudential thinking of the time but also an understanding of the legal humanists’ approach to the way in which the law and the common weal were intertwined. Publication in print and wide dissemination could be seen only to further and foster social order and harmony, fundamentals of the common weal and essential goals of humanist thought.<sup>110</sup>

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<sup>107</sup> St German’s sentiments were expressed in the first, third, eighth, tenth and eleventh chapters of the *Newe Addycyons*. William Rockett “Temporal and Spiritual: Prolegomenon to the More-St German Controversy” (2000) 37 *Moreana* 5 at p. 24.

<sup>108</sup> See for example Thomas Starkey, *A preface to the Kynges Hyghnes*, (Thomas Berthelet, London, 1536) STC 23236. Starkey in *A Dialogue Between Cardinal Pole and Thomas Lupset* referred to the “commynweale” as a “gud and lust policy, and wherein it principally stonidith and chefely is grondyd.” Cited by Caspari see above n.82 p. 214. Commonwealth” had a political meaning and the concept as used in the sixteenth and early seventeenth centuries would have been influenced by classical writings such as Cicero’s *De Re Publica*. It was not until the deposition of Charles I that the word would be descriptive of the political State.

<sup>109</sup> The first words of the titles St German used for *Doctor and Student*.

<sup>110</sup> Rockett above n.107 p. 143-144.

The concept of the “common weale” as developed by St German was not static and by the seventeenth century it embraced a number of elements. The most obvious was that a properly ordered society required knowledge of the law so that subjects could behave in accordance with it. The challenge of ignorance of the law and the use of printed material to overcome this challenge had been an aspect of law printing from the time it was first articulated in print in *The Ordenaunces of Warre* in 1492.<sup>111</sup>

Like Rastell, Ferdinando Pulton also concentrated upon statutory material, although his works gathered together and classified statutes under headings.<sup>112</sup> The importance of printing the law was recognised as a fulfilment of the duty of the sovereign “to the intent that eueryone which defireth to know may read and thereby perceiue the caufe and contents of the fame.” The availability of the statutes in print fulfilled a societal interest that was in keeping with humanist values, the concept of the “common weale” recognising an ordering of society with the ruler at the head, and the support of the concept itself.<sup>113</sup> The humanists overlaid the importance of educated class of rulers instilling the values of education and the thinking of classical antiquity on the sixteenth century belief in a social hierarchy which the ruler and aristocracy had to maintain and where every man had his place.<sup>114</sup>

Pulton anticipated a wide audience for his work – not only lawyers and students but “*very many discreet men*” and “*was of the common benefit of all men*”, as well as to satisfy “*the request of some of my friends*.”<sup>115</sup> He embarked upon the work and saw the law as necessary to an ordered society which he refers to as the “Weale Publique.”<sup>116</sup> Within this construct the position of

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<sup>111</sup> *The Ordenaunces of Warre* (Richard Pynson, London, 1492) STC 9332. For a discussion about ignorance of the law, see below p.129-133.

<sup>112</sup> Pulton *An Abstract of All the Penal Statutes* above n.106; *A kalender, or table, comprehending the effect of all the statutes that haue bene made and put in print, beginning with Magna Charta* (Company of Stationers, London, 1606) STC 9547 ; Ferdinando Pulton *De pace Regis et regni*. (Adam Islip for the Company of Stationers, London, 1609) STC 20495 and Ferdinando Pulton *A collection of sundrie statutes*. (Societie of Stationers, London, 1618) STC 9328.

<sup>113</sup> *Ibid. A Kalendar* .

<sup>114</sup> Caspari see above n. 82 p. 9.

<sup>115</sup> Pulton *The Collection* above n. 42 These comments made by Pulton are similar to those of Plowden and Coke.

<sup>116</sup> For a discussion of the importance of the common weale in the context of the King’s peace, see Pulton’s preface to *De Pace Regis* above n. 42. In Thomas Elyot *The boke named the Governour* (Berthelet, London 1531) STC 7635 Elyot “introduces the term “publicke weale” instead of the customary “commune weale” for “state” or “commonwealth” and gives as his reason for the use of that word – which despite his efforts was not taken into the English language – his desire to reproduce the meaning of the Latin *res publica*. *Res Publica* – “publicke weale” – to him denotes not a democratic republic but an aristocratic polity, whereas “commune weale” sounds suspiciously like communism. That term might give the impression “that every thinge shulde be to all men in commune without discrepance of an astate or condition...” Such a state of affairs, Elyot thinks,

the Sovereign and the concept of the King's Peace underpinned the criminal law. The King's Peace marches alongside the safety and security of the individual, bringing together concepts of harmony that underpinned the "common weale." In this respect the State as an element of the "common weale" also had an interest in "printed law".

The "common weale" not only reflected the essential relationship between and the interactions of sovereign power with the people. It included other aspects of the way in which the law operated. The "common weale" encompassed the proper making and administration of the law.<sup>117</sup> In his *Archion or a Commentary Upon the High Courts of Justice in England*<sup>118</sup> William Lambarde stated that humanist precept for the educated member of the nobility or the gentry, with service to the Commonwealth a significant aspect of the good life. Lambarde uses the term with political resonances but good government was seen to have the goal of benefit for the common good,<sup>119</sup> otherwise expressed as the "Common Weale." It is in this respect that often the two terms become inter-related. The association of the law with the "common weale" in both the political and social sense is one of mutual benefit. The law was seen as essential to both.<sup>120</sup> Just law was the means by which the Commonwealth governed; in the same way, it was seen as an essential part of the provision of the common good – the foundation for good and peaceful relationships between citizens and social groupings.<sup>121</sup> The concept of service to the law and thereby to the Commonwealth was also

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would call for the Latin term *res plebeian* rather than *res publica* and that would represent the principle opposed to divine order, pure chaos" Caspari see above n. 82 p. 186.

<sup>117</sup> See William Lambarde *Eirenarcha* (Newbery and Byneman, London, 1581) STC 15163; Pulton *A Collection* above n.112; Richard Cary *Le Necessarie use & Fruit de les Pleadings*, (Thomas Wight, London, 1601) STC 4719 p. 2; Powell *The Attourneys Academy* (Alsop and Fawcet, London, 1627) STC 20165; Anon *Institutions of Principall groundes of the Lawes and Statutes of England* (Thomas Wight, London, 1604) STC 9296; Michael Dalton *Officium Vicecomitum* (Adam Islip for the Stationers, London, 1623) STC 6212.

<sup>118</sup> William Lambarde *Archion or a Commentary Upon the High Courts of Justice in England* (Daniel Frere, London, 1635) STC 15143 "To the Ingenious Reader" f. A3.

<sup>119</sup> The use of the term "common good" in this context must be related to the concept of the "common weale" which, as has been noted, had its basis in virtuous policy and good governance derived from Classical and mainly Platonic principles. See also Daniel Wakelin *Humanism, Reading and English Literature 1430 – 1530* (Oxford, Oxford University Press, Oxford 2007) p. 155 and at p. 152 where Wakelin refers to "the 'comyn' rather than the 'singular wele'. See also index entries p. 245 as examples of different means of expression and context.

<sup>120</sup> John Wilkinson in his preface to *A Treatise Collected out of the Statutes of this Kingdom, and according to common experience of the Lawes, concerning the Office and Authoritie of Coroners and Sherifes: Together With an easie and plaine methode for the keeping of a Court Leet, Court Baron and Hundred Court &c* (Adam Islip for the Stationers, London, 1618) STC 25648 dedicated to Sir Henry Montague, Lord Chief Justice of the Kings Bench refers to Sir Henry's position from whence "your...whole mind studies the Common-wealths good thus linking the administration of the law with the "political" commonwealth. The book was reprinted in 1620 – see STC 25648 and STC 24649.

<sup>121</sup> This was apparent from as early as John Rastell's *Exposiciones terminorum legum anglorum* see above n. 96

made clear by both Coke and Fulbecke.<sup>122</sup> Coke understood the importance of publication of the law and the way in which the Commonwealth would be enhanced by making the law available in print and commended the Crown for enabling this to happen.<sup>123</sup>

Coke did not endorse all law printing and was critical of the publication of abridgements considering that they led to some confusion, but applauded the reduction of the penal laws into “some method” as “honourable, profitable and commendable work for the whole Commonwealth”. It was in the context of making legal information for the “common wealth” available that Coke considered that he had a duty to publish his reports in print.<sup>124</sup>

Thus it can be seen that the legal writers of the later sixteenth and earlier seventeenth centuries used the terms “common weale”, “common wealth” and “common good” in interchangeable ways. Whether the social or political meaning was intended depends very much upon the context within which the word was used. One thing is clear - the publication of legal texts was seen to have a greater good beyond merely providing information for law practitioners and students. It is also clear that there was merit in informing subjects of their legal rights and obligations and the metes and bounds of behaviour allowed by law. This availability of information was grounded upon the social aspect of the common wealth - the peaceful and harmonious society - and the political aspect of the common-wealth - the legal structures that reinforced the exercise of power by administrators, officials, judges and, ultimately, the King.

### **Print, Dissemination and “Englysshing” the Law**

Humanists favoured dissemination, thus supporting legal publishing in print rather than in manuscript. Whilst print was being used as a weapon in the unrest of religious change, it was seen by the law printers as a means of bringing harmony - a constant theme of humanist thought and an essential element in the concept of the humanist state.<sup>125</sup> Their approach to

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<sup>122</sup> 4 Cokes Reports “To the Reader” fo B3 page unnumbered; William Fulbecke *A Parallele or Conference of the Civil Law, the Canon Law and the Common Law of this Realme of England* (Wight, London, 1602) STC 11415a “Epistle to the Reader” Folio 3 et seq.

<sup>123</sup> 4 Cokes Reports above n. 122 ; See also 8 Cokes Reports which reinforces the importance of the common law within the common wealth and the duty to publish.

<sup>124</sup> Ibid. 4 Coke’s Reports.

<sup>125</sup> In this respect the humanist ideal transcended the political upheavals of the Tudor Reformations. The message remained the same despite the regime of the time.

dissemination went beyond mere promulgation. Their purpose was not merely to notify the nature of the rules but to provide for a better understanding of the law as an element of the wider society. Taverner's *Institutions* would encourage skilled writers to instruct the "whole community of this land" in the law.<sup>126</sup> St. German's *Doctor and Student* provided a starting point "not merely for instruction, but still more to incite others to collect and put into writing additional cases in English law."<sup>127</sup>

Associated with the desire for dissemination was that of making the law more widely available by printing it in English rather than in Latin or law-French. John Rastell not only articulated the humanist rationale for law printing<sup>128</sup> but he was also a leader, along with Robert Redman,<sup>129</sup> in the move towards "Englysshing" the law. Many law books published by Redman were in English, and his *Great Boke* was the first "Englising" of the statutes. It appeared at a "politic" time with the shift from attempts to resolve the "King's great matter" from the diplomatic to the parliamentary-domestic offensive. Following *The Great Boke* and *Magna Carta* Redman, within a year, had published English translations of Lyndwood's *Constitutions Prouincialles* – a work on canon law – that expressly stated that "they not be put forth to bind any of our kings of England's subjects" but for information only.<sup>130</sup>

Rastell's focus was upon the statutes which were in Latin.<sup>131</sup> The state was increasing legislative activity, with the new statutes along with those already confirmed and in force governing the day to day lives of subjects. As society began to be more ordered, where order under the law or the "common weale"<sup>132</sup> was assuming more and more importance, and where the law was seen as prescribing the rules to which citizens may have reference for the resolution of disputes, the need for accessible law became apparent.

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<sup>126</sup> Taverner, Peroration, in *Institution in the Laws of England* above n. 96.

<sup>127</sup> St. German, above n. 96, p. 3.

<sup>128</sup> John Rastell, *The Statutes Prohemium Johannis Rastell* (John Rastell, London, 1519) STC 9515.5 also known as *The Abridgment of Statutes in English*.

<sup>129</sup> See the bibliography for Redman's law printing in English.

<sup>130</sup> William Lyndwood *Constitutions prouincialles*, (Robert Redman, London, 1534) STC 17113. The inaccessibility of the law, especially canon law, had been an expressed matter of concern since 1514 and was repeated in 1531. H. J. Graham "Our Tong Maternall" above n. 86 especially at p.70-72.

<sup>131</sup> Law French was the language of the Courts and the Year Books and was spoken only by lawyers in the context of pleading.

<sup>132</sup> The modern term for this concept would be Rule of Law, but the term was unknown in the sixteenth and seventeenth centuries.

Rastell understood the disseminatory power of print as a challenge to ignorance. Multiple copies of identical information printed rapidly and in as many copies as the printer or publisher desired could be made available to a wider audience in a shorter time than could be achieved with manuscript publication. He also saw secret law or law concealed by obstacles to accessibility as an impediment to good order.<sup>133</sup>

Rastell and those others who were printing legal works in English exemplified the principal values that underlay the humanist approach to the propagation of the law. There was a recognition of the benefits of print, although that was not directly articulated; there was a preference for Latin or English over law-French thus making the law available to those who were literate and learned; there was a desire to provide books for a wider audience rather than a limited readership. The availability of legal information in print as an unarticulated humanist premise arises as a part of the wider commitment to an accessible law. The stated purposes of wider understanding, broad diffusion and for the law to be “Englished” - all of which were stated in print - do not quite elevate print to a *sine qua non* of those objectives, but certainly it was implicit that the qualities of print lent themselves to the humanist goal.

The law printing humanists understood legal publication as a disclosing of law rather than a form of promulgation thereof. Promulgation takes place when the law is announced for the first time. Rastell and the law printing humanists saw print as a means of revealing law which had previously been hidden. Printed law was educative. It did not threaten but rather enhanced the power of the State. Printed law might educate those subjects and compel or persuade better behaviour. Education in this context was directed towards maintaining good order during a period of significant social reform.

Making the law available in the vernacular was not peculiarly a sixteenth century phenomenon. However, the approach of those who would have seen the law printed in English differed as the sixteenth century moved to the seventeenth. Print, for those of the early part of the sixteenth century, provided an opportunity for making the law available in the vernacular as part of the overall educative goal of humanism. Although it cannot be said

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<sup>133</sup> Rastell *Exposiciones* Prohemium above n. 96. The translation of law into the vulgar tongue does not seem to have been an issue in Europe. In Italy for example the Civil Law prevailed – a different system from the mix of common law and the developing influence of statute, although medieval Italian and Latin were similar. Despite the fact that the move towards “Englysshing” commenced before 1528, it became tied up with the Tudor Reformation as symbolic of a move away from the language of a Church governed by an alien prince – the Pope.

that the humanist ideal had died out, the type of texts and the approach of the writers to the “Englishing” of the law had subtly altered. The importance of the vernacular was realised and appreciated but there were those who considered that the concepts that lay within the language of the law – which was law-French – were not properly rendered in the vernacular and compromised the meaning of legal principles. This shift will be examined in Chapter 7.

### **Ignorance of the Law**

It appears from the legal texts of the time that one of the purposes for printing the law was to reduce ignorance of the law. The *Ordernaunces of War*<sup>134</sup> seem to suggest that such a claim of ignorance of the law might have been made and that the printing of the Ordinances and their regular promulgation would provide an answer to such a claim although Fortescue suggested that ignorance of the law did not excuse and therefore could not be advanced as a justification.<sup>135</sup>

The Ordinances relied both upon print and promulgation. The disseminative and preservative properties of print assisted a self-informing populace to ascertain the law although promulgation was still as significant an element as it had been in the pre-print days. Promulgation went to the binding nature of law and although it may not have gone to the validity of the law itself, it was a feature of law in practice.<sup>136</sup> However Fortescue was of the view that even custom, once promulgated, had the force of statute.<sup>137</sup>

John Rastell addressed ignorance of the law as a reason for publishing his law dictionary. Ignorance could not offer an excuse except where the Sovereign wilfully frustrated the subject’s acquisition of such knowledge.<sup>138</sup> Thus, promulgation was a pre-print discharge of the sovereign’s duty to inform subjects of the law and, after the arrival of the printing press, the appointment of the Kings printer was a pro-active step in ensuring the Sovereign’s duty that law was both communicated and made available by using the new technology.

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<sup>134</sup> Anon *The Ordernaunces of Warre* above n. 111.

<sup>135</sup> John Fortescue *De Natura* Vol 1 c.46; Doe above n.98 p. 38 - 39.

<sup>136</sup> Ibid. Doe p.38 Footnote 30. Manderson observed that the promulgation of law and its proclamation by reading was meant to overcome the problem of ignorance of the law; Desmond Manderson “Statuta v Acts” Interpretation, Music and Early English Legislation” (1995) 7 Yale Jnl Law & Humanities 317 at p. 343. It was the Thomist position that for a law to be effective it had to be promulgated but this was never applied in practice. See Williams above n. 97 at p. 67. Promulgation was certainly an expectation and would have provided an answer to a claim of ignorance.

<sup>137</sup> Ibid. Footnote 135; John Fortescue *De Laudibus Legem Angliae* c.15.

<sup>138</sup> Geritz and Laine above n.6 p. 103.

Pulton in *De Pace Regis* considered how promulgation and publication alleviated ignorance of the law and restated Fortescue's point of view:

*“That the ignorance of the law does excuse none of offence; and also that the law doth help the watchfull, and not the slothfull man; therefore it behoueth each person, first to seeke the knowledge of those laws under which he doth liue, and whereby he is to receiue benefit, or to sustaine peril and next, with all industry to frame his obedience unto them or humbly to submit himself to the censure of them”*.<sup>139</sup>

A similar sentiment was expressed in the *Auld Laws and Constitutions of Scotland*<sup>140</sup> which stated that the purpose in bringing together all of the laws and constitutions of Scotland in one place was for the purpose of avoiding ignorance of the law. The preface discusses how it was that ignorance of the law developed and expressed the importance of gathering all the laws together into one book. To lessen any further ignorance the laws were published in English rather than Latin.<sup>141</sup>

The issue of ignorance of the law as being no excuse was also referred to by Richard Carey in *The Necessary use and Fruit of Pleadings*.<sup>142</sup> Carey considered that ignorance of the law in and of itself was no small enemy.<sup>143</sup> William Hughes, the translator of the *Mirror of Justices* in 1646, considered publication of fundamental laws in the vernacular would strengthen the maxim that ignorance of the law was no excuse.<sup>144</sup>

Powell in his treatise on Courts Leet referred to Crompton's work on Justices of the Peace as well as the works of Anthony Fitzherbert who both considered it necessary to inform people of punishments as well as the offence. Powell presumed to adopt the same course of action so that *“offenders may know the proportion of their paine, as well as the quality of their crime”*.<sup>145</sup>

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<sup>139</sup> Pulton *De Pace Regnis* above n. 112 Preface to the Reader p. Aiii.

<sup>140</sup> *Regiam Majestatem. The Auld Lawes and Constitutions of Scotland* (Thomas Finlason, Edinburgh 1609) STC 22626. The book was compiled and printed at the behest of King James I.

<sup>141</sup> It may be suggested that publication in any language would not benefit an illiterate population. See above Ch .2 p.16 fn. 22 for a reference to sixteenth and seventeenth century literacy.

<sup>142</sup> Richard Cary *Le Necessarie Use & Fruit de les Pleadfings* (Thomas Wight, London 1601) STC 4719.

<sup>143</sup> *Ibid.* Dedication p. A3.

<sup>144</sup> Andrew Horne *The Booke Called The Mirror of Justices* William Hughes(trans) (Mathew Walbanke, London, 1646) Wing H2789 p. A4.

<sup>145</sup> Robert Powell *A Treatise of the Antiquity, Authority, Uses and Jurisdiction of the Ancient Courts of Leet* (R.B. London 1641) Wing P0366 Epistle Dedicatory p.(22).

Although ignorance of the law could be no excuse it is clear that Powell considered that knowledge of the penalty for breaches of the law should be made available.

Coke on Littleton stated: “I cannot coniecture that the general communicating of these lawes in the English tongue can work any inconvenience, but introduce great profit, seeing that *ignorantia juris non excusat*, Ignorance of the law excuseth not. And herein I am iustified by the Wisdom of a Parliament the words whereof be, *That the Lawes and Customes of this realm the rather should be reasonably perceiued and known, and better understood by the tongue vsed in this Realme, the rather should bee reasonably perceiued and known and by so much euery man might, that better gouerne himself without offending of the Law and better keepe, saue and defend his heritage and possessions.*”<sup>146</sup>

Ross considered that there were two popular justifications for printing the law particularly that it allowed men and woman to avoid penalties since ignorance of the law was no excuse.<sup>147</sup> Ross also stated that the Elizabeth and the early Stuarts used printing as a means of combating non-enforcement or under enforcement at a local level and that compilation of statutes would reduce ignorance of the law.<sup>148</sup>

Bailey, whilst acknowledging that men should know the law and its meaning, emphasised that ignorance of the law was an insufficient excuse for its violation because God was the only law giver and therefore law was unchangeable.<sup>149</sup>

Thus there is a common theme that recognised the disadvantages of ignorance of the law and the opportunities that print offered to address the problem. There were three important concepts that lay behind the reduction of ignorance of the law and are intertwined with the discussion that has gone before.

The first was the duty of the sovereign to promulgate or announce the law. This was an essential part of medieval thinking and underpinned early-modern developments. The fact that Fortescue suggested that promulgation could give the common law the force of statute

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<sup>146</sup> Edward Coke *The First Part of the Institutes of the Lawes of England* (Adam Islip for the Stationers, London 1628) STC 15784 Preface p.A.

<sup>147</sup> Ross “The Commoning of the Common Law” above n. 83 at p. 341 – and in support he cites the preface in *Manwoods Forest Laws*, Coke on Littleton and Hughes in the *Mirror of Justices*.

<sup>148</sup> *Ibid.*

<sup>149</sup> Gilbert Bailey “The Promulgation of Law” (1941) 35 *The American Political Science Review* 1059 at p.1075. This view also appears in *The Mirror of Justices* above n. 144 To the Reader unpaginated.

demonstrates the importance and significance of this element. The recognition and status – although perhaps not the validity – of law rested upon the prevention of ignorance by a form of publication. The advent of the printing press added an entirely new dimension to the sovereign’s ability to promulgate and prevent ignorance of the law.

The second concept that underpinned the lessening of ignorance of the law was the humanist concept of the good citizen, well informed of his rights, duties and obligations. Essential to the fulfilment of these elements was an understanding, if not a knowledge, of the law. The disseminative quality of print allowed for greater opportunities for the “good citizen” to become even more cognisant of law. It could be argued that providing the law in print or indeed in writing was not a uniquely humanist concern but had been extant for some time. In *The Mirror of Justices* it was stated “**it is an abuse that the law and vsages of the realm are not put in writing, fo that they might be published and known to all**”<sup>150</sup> and this must be acknowledged. However, I suggest that the rise of humanism and its contemporaneity with the development of the printing press allowed the humanists to focus upon the press as a means of fulfilling a longer outstanding concern about the promulgation of law and countering ignorance of it.

Print provided such an opportunity. Some of the rhetoric employed by the law text writers may have an air of hyperbole to it, but print enabled the dissemination of legal information widely, in quantity, and was so different from what had gone before that the medium was seized upon as the means of facilitating knowledge of the law and giving real meaning to the *ignorantia legem maxim*.

The third concept that the reduction of ignorance of the law addressed was that of the “common weale” or common good. The humanist well informed citizen or citizenry fulfilled a social aspect of the good of the community. A community, aware of its responsibilities at law, was expected to fulfil the duties and obligations that the law cast upon them for the common good. An ignorant society (or one ignorant of the law) was the antithesis of the common weal.

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<sup>150</sup> Above n. 144.

Thus we can see that underlying the stated purpose of preventing ignorance of the law are some essential concepts – essentially beneficial societal purposes - that are intertwined with the drive to put the law into print.

### **Print, Legislation and Dissemination of the Law**

The State as lawmaker had a significant interest in seeing the law in print. For the Tudor State the printing press presented a two-edged sword. On the one side was the fact that print allowed the publication of dissent – a matter that has been discussed in Chapter 3. On the other side were the not inconsiderable benefits that the printing press provided in making mass produced written State and administrative materials such as statutes and proclamations available in large quantities, which could in turn be distributed throughout the kingdom. The wide distribution of identical material in a form more permanent than the memory of the spoken word was one means for the development of standardised rules that could be applied across the kingdom, thus centralising State power in London to an extent greater than had been previously experienced.<sup>151</sup> The motivating factor was primarily to ensure the even application of the King’s Peace and the fulfilment of Royal policy.

The concept of the “right to know the law” did not exist in that form in Early Modern England.<sup>152</sup> Rather the emphasis was upon the fact that the subject should know the law so that he or she could comply with it. The availability of printed material meant that ignorance of the law could not be advanced as an excuse for breaching a rule, if indeed it ever was, but the value of a knowledge of the law which thereby compelled compliance was an important aspect of Royal policy.

The dissemination of the law in mass-produced textual form benefitted from the inherent qualities of print, thus providing advantages for the State that were not present in the aural-oral culture. Printed law provided some significant benefits for lawmakers. Mass produced, widely disseminated texts provided some real advantages for communicating the law as the following observations, based on the properties of print, demonstrate:

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<sup>151</sup> Other methods of standardizing practice arose from private endeavours such as Lambarde’s *Eiernarcha*, above n.117 Fitzherbert’s *Boke of the Justices of the Pees* (Robert Redman, London, 1530) STC 14870 and Dalton’s *The Countrey Justice* (Adam Islip for the Stationers, London, 1618) STC 6205.

<sup>152</sup> Although the validity of law was tied into promulgation and was associated with the prevention of ignorance thereof. See above p. 132 et seq.

- a) texts ensured that communication of the precise wording of the law was not restricted to oral means.
- b) texts ensured that a record of the precise wording of the law was available although such wording was available on the Parliamentary Roll. Print allowed this to be disseminated.
- c) printed texts ensured that for the purposes of dissemination the same textual foundation for the law would be distributed throughout the kingdom.
- d) a text ensured that a printed copy of the law could be posted in a town square or market place for continued reference.
- e) texts ensured that any matters of ambiguity that might arise from oral communication would no longer be present given the “fixed” nature of printed material.
- f) texts enabled the crafting of more precise and complex legislation in the future given that legislation could be disseminated in a mass-produced identical format.<sup>153</sup>

The business of printing statute law centred upon one appointed person: the Royal Printer.<sup>154</sup> This monopolistic appointment ensured a central agency not only for the printing of legal material but for the not insignificant amount of state propaganda that was a characteristic of the Tudor and Stuart period.<sup>155</sup>

Legislation could address specific issues – then as now. It could craft a set of set of rules to address a particular problem. It could provide boundaries for future behaviour. It expressed the will of the King in Parliament – of the monarch speaking with his own voice and with that of the people. It also prescribed a course of conduct not for a county but for a country. Parliamentary legislation had a national, unifying and centralising effect. It placed the sovereign’s rule clearly over the whole country and not just the environ where he or she was present.

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<sup>153</sup> This may have been an advantage for the legislators but a disadvantage for those who came to use and interpret it. For further discussion see below Ch. 7 p. 214 et seq.

<sup>154</sup> For a detailed discussion of the rights and duties of the Kings Printer see 11 *HEL* p. 310 et seq. By 1513 the monopoly for printing statutes and other Royal legislative and official instruments had become firmly vested in the Kings Printer. In a later edition of the Statutes of Henry VIII’s first year there appears a privilege granting to the King’s “**trufty & well-belouyd seruaunte**” the exclusive right to print the statutes for two years – STC 9358.

<sup>155</sup> Neville-Sington above n. 88 p. 581, 589; See also Elton *Policy and Police* above n. 94 esp Ch. 4; 1 Hughes and Larkin p.xxv. See also above Ch. 3 p. 50 et seq.

Print of itself was not determinative of the shift towards legislative activity and its increase over the sixteenth and seventeenth centuries. However, its rise as a means of dissemination of legislative enactments and proclamations increased its unifying effect in that the written word, multiplied by print, brought the word of the law to every part of the realm. Furthermore, in textual form it should be clear and unambiguous.<sup>156</sup> No longer was a rule a memory, affected by all the problems that accompany memory and its ability to subtly modify, but it was now in fixed and immutable form, made that way by the power of print.

Yet if print was an indirect agent in the development of legislation, it was more directly determinative of the move towards the matter of re-organisation of the law. The concept of re-organisation and simplification was dependent upon a technology that would render a new system of laws in a stable format capable of dissemination and promulgation. Underlying the re-organisation movement in England was a move to restate common law principles together with a recasting of statutory information, and vital for this was the ability to render it in printed form.<sup>157</sup>

The complexity of the common law and its often arcane nature had driven the development of abridgements and other aids for students and the wider community which saw print in the sixteenth and early seventeenth centuries. Law reform was a matter which interested the Tudor monarchs but it was others, Francis Bacon among them, who considered a purging of the statute books to ensure clarity, comprehension, simplicity of form, substance and consistency.<sup>158</sup>

The interest in re-organisation of the law continued with the accession of James I who stated:

“I desire not the Abolishing of the Laws, but only the Clearing and Sweeping of the Rust of them; and that by Parliament our Laws might be cleared, and made known to all the Subjects. Rather, it were less Hurt, that all the approved Cases were set down, and allowed by Parliament, for standing Laws in all Times to come. . . better it is to have a certain Law with some Spots in it, nor live under such an uncertain and

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<sup>156</sup> Although in some cases it was not. The Statute of Wills required subsequent enactment to clarify some of its provisions and Coke criticized the statute for causing uncertainty. 2 Cokes Reports.

<sup>157</sup> Barbara Shapiro, “Codification of the Laws in Seventeenth Century England” (1974) Wisconsin LR 428, 431-2.

<sup>158</sup> Ibid.; J Spedding, , R Ellis, and D Heath. (eds) *The Works of Francis Bacon*, (Longman, London, 1857-1874) Vol 5 pge 100.

arbitrary Law; since, as the Proverb is, it is less Harm to suffer an Inconvenience, than a Mischief.<sup>159</sup>

The reorganisation and restatement of the law was part of an overall concern to simplify and, at the same time, enhance accessibility to the law, which would have been aided by the printing press. The qualities of print together with the ability to properly paginate, create indices and contents pages, cross-referencing and the like meant that a project such as Bacon's required the printing technology not only for making the law available but for that most vital element – promulgation. All the characteristics of print that were so attractive to legislators would still apply to the restated or reorganised law. The ideal outcome was the distillation of a number of principles into a few central enactments that would provide the foundation stone for the future regulation of behaviour.<sup>160</sup> Such an ambitious project could not be accomplished without an efficient and accurate means of distribution of the finished product and print provided the answer. However, Bacon's project never came to pass.

Thus, the printing of the law was fostered and encouraged in part as a result of the efforts of the Renaissance humanist lawyers espousing not only the values of enlightenment and education, the deeper values of the good citizen, and the ordered society underlying the "common weale". The State too had an interest in utilising the printing press as a means of dissemination of the official message as well as ensuring that citizens were aware of their obligations and duties under law, again with the goal of an ordered society but, in addition to the values espoused by the humanists, a subservient one. Given these two significant forces that espoused the printing of the law, there is nevertheless a sense that printing the law did not catch on quite as quickly as it might have. Was this because there was some form of organised resistance to legal printing or was it as a result of other cultural imperatives or influences?

## **The Co-Existence of Print and Manuscript**

### **Introduction**

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<sup>159</sup> "King's Speech Concerning the Union" House of Commons Journal Volume 1: 31 March 1607, *Journal of the House of Commons: volume 1: 1547-1629* (Printed by Order of the House of Commons, London 1802), pp. 357-363.

<sup>160</sup> Shapiro see above n. 157 at p 435; for Bacon's philosophical underpinning to simplification of the law see Walters above n. 84 at p 364.

Why was it that manuscript materials continued to be used by the lawyers? What were some of the elements that underpinned the co-existence of manuscript and printed materials for recording legal information?

First, although there were certain factors that made print attractive to lawyers as a means of recording legal information, at the same time there were certain disadvantages inherent with the new medium that may have caused some hesitation in its adoption. Secondly, the way in which lawyers used manuscript materials and the general attitudes that they may have had towards printed and manuscript materials should be considered. Thirdly, there was the way in which lawyers considered the availability of information and whether this could be viewed as an anti-print or anti-publicist view, or whether it was illustrative of a more generalised approach to specialist knowledge. Finally, as an element of print/manuscript co-existence, the nature of information sharing and “coterie publication” which reflected practices adopted by intellectual elites, could have met the legal culture in the melting pot of the Inns of Court. This section will consider these propositions.

### **General Attitudes**

Even although the printing press was present in the sixteenth and seventeenth centuries, the manuscript culture remained, for it was by means of manuscripts that people corresponded and communicated at long distance or conducted public business and administration. In the private sphere manuscript documents recorded agreements, property transactions, wills and bequests.<sup>161</sup>

The printing press presented certain advantages for those involved in the preservation or transmission of information, yet even the benefits of multiple copies and wider dissemination along with economic benefits did not mean that print was universally accepted nor enthusiastically received.

“The older scholars still preferred the manuscript form for their books, and found it difficult to divest themselves of the impression that the less costly printed volumes were suited for the requirements of the vulgar herd. There are even.....instances of scribes preparing their manuscripts from printed “copy” and there are examples of

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<sup>161</sup> Peter Beal *In Praise of Scribes: Manuscripts and Their Makers in the Seventeenth Century* (Clarendon Press, Oxford, 1998) p.3.

these manuscript copies of printed books being made with such literalness as to include the imprint of the printer.”<sup>162</sup>

Aesthetic preferences, concerns that manuscript collections may be devalued by printed copy and a certain cultural elitism saw printed works as being marketable and therefore for the uncultivated and unappreciative mass, all affected the uptake of print. Manuscripts had an intrinsic value that went beyond the information contained in the medium.<sup>163</sup> Trithemius, Abbot of Sponheim, wrote to Gerlach Abbott of Deutz:<sup>164</sup>

“A work written on parchment could be preserved for a thousand years, while it is probably that no volume printed on paper will last for more than two centuries. Many important works have not been printed, and the copies required of these must be prepared by scribes. The scribe who ceases his work because of the invention of the printing press can be no true lover of books, in that, regarding only the present, he gives no due thought to the intellectual cultivation of his successors. The printer has no care for the beauty and artistic form of books, while with the scribe this is a labour of love.”<sup>165</sup>

### **The Contest Between Print and Manuscript**

Economic factors had an impact upon text availability and meant that printers were slow to print a great volume of law books. There were not many texts available to start with. Littleton’s *Tenures* was an obvious first choice for print publication, but apart from the circulating copies of manuscript works such as Statham<sup>166</sup> and similar manuscript abridgements there were no text books as we understand them. Those that became available in the early sixteenth century were written in law-French, such as Perkins’ *Profitable Book*.<sup>167</sup> St German’s *Doctor and Student* was first published in Latin but the second edition was in

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<sup>162</sup> G.P Putnam *Books and Their Makers During the Middle Ages* (2<sup>nd</sup> ed.), (Putnams, New York, 1896) (2 Vols) p. 243.

<sup>163</sup> Ibid. pp. 365 – 6.

<sup>164</sup> It is an irony that these remarks were themselves included in a book printed in 1492 under the title *De Laude Scriptorum Manualium*. It is to be noted that Trithemius was referred to by Elizabeth Eisenstein *The Printing Press as an Agent of Change* (Cambridge University Press, Cambridge, 1980) pp.94-99 but his comment was made relatively early in the history of print. In his later writings he paid tribute to the wonderful art of printing – see Eisenstein above p. 95 It does exemplify the disdain for print that was carried through into the “stigma of print” discussed by J.W. Saunders. “The Stigma of Print – A Note on the Social Bases of Tudor Poetry” (1951) 1 *Essays in Criticism* p. 139. See also Diederick Raven “Elizabeth Eisenstein and the Impact of Printing” (1999) 6 *European Review of History* 223 at p.232.

<sup>165</sup> Putnam above n. 162 pp. 366-7.

<sup>166</sup> Later printed as *Abridgment des livres annales* (Guillaume Le Talleur for R. Pynson, Rouen, 1490) STC 23238. It is of a type that was popular around the 1450’s and contains no material later than 1461. It was never reprinted having been later overtaken by the abridgements of Fitzherbert and Brooke.

<sup>167</sup> John Perkins *Here begineth a verie profitable booke* (Totell, London, 1555) STC 19633 although the title and “Prohemium” were in Latin.

English<sup>168</sup> which is a reflection not only of the humanist desire to “English” legal information<sup>169</sup> but also of the popularity of the work which remained in print for many years and was referred to with respect by Coke.<sup>170</sup> Richard Taverner’s *Institutes of the Laws of England*<sup>171</sup> was an early example of an attempt to offer a textbook approach to the law in English, but it was a rather poor reflection of Littleton’s *Tenures* from which much of it was derived. The Preface reflected the humanist approach that clearly motivated Taverner.<sup>172</sup>

The nature of this “niche” market, whilst providing an incentive to law printers, also provided a disincentive.<sup>173</sup> Law-French was the language of pleading and of the lawyer in Court and therefore focussed texts using this specialised language would have a limited market. Printers made such specialised material available for lawyers, but at the same time lawyers were content to create and circulate specialist works in manuscript, even if they were only in the nature of a note book or common place collection.<sup>174</sup> However, the publication in English of handbooks such as *The Countrey Justice* or *The Attournies Almanacke* would have had a much wider audience – not only of lawyers but also administrators and the gentry which may account for the shift away from the law French Year Books of the sixteenth century towards the printed law treatises in the seventeenth.

### **The Economics and Advantages of Manuscript Publication**

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<sup>168</sup> Above n. 96.

<sup>169</sup> For discussion see above p.127 et seq.

<sup>170</sup> 10 Cokes Reports “To the Reader” page unnumbered. “the authors name was S. Germin, a discreet manm & wel read, I assure you, both in the common law and in the ciuill and canon laws also.” See also 3 Cokes Reports “To the Reader” “E”.

<sup>171</sup> Richard Taverner *The principal lawes customes and estatutes of England which be at this present day in use compendiously gathered together for ye weale and benefit of the Kinges Maiesties most louing subiects.* (Richard Banks (Printer), London, 1540) STC 9290.5.

<sup>172</sup> *Ibid.* p 1.

<sup>173</sup> Print runs were not large for law books, unlike “bestsellers” such as primers or Bibles. Tottel collated sheets from separate printings and made his stock available over a period of time – an example of warehousing stock – see Baker “The Books of the Common Law” above n. 29 p. 427. As an aspect of the economics of law publishing, the legal market was not a poor one and was being refreshed as new members joined. In addition, the profession was increasing numerically. See C. Brooks *Lawyers, Litigation and English Society Since 1450* (Hambleton, London, 1998) generally Ch. 2; *Pettyfoggers and Vipers of the Commonwealth* (Cambridge University Press, Cambridge, 1986) p. 20-29 and generally Ch. 4.

<sup>174</sup> It is difficult to assess from this distance whether the availability of copy of legal works for print was because of a reluctance on the part of lawyer-authors to put their works in print or caution on the part of printers to risk printing such books if they were made available. The printing of works by “recognized” members of the legal profession such as Dyer (albeit posthumously) suggests that this was a selling point for printers. If printers were in fact the arbiters of what should and should not be printed, then they exercised considerable control over the dissemination of legal information. It should not be forgotten, on the other hand, that there was an expressed hesitancy on the part of some authors to put their work into print.

There were occasions when manuscript production had economic advantages over print, especially a short text copied in limited numbers for immediate use such as documents required during law terms or Parliamentary sessions or the large, retrospective, regularly updated collections written to order for a wealthy client.<sup>175</sup> Scribes could mobilise manpower very rapidly for the copying of texts of such urgent or limited interest. Generally it was a text occupying a single sheet, or less, that allowed them superiority over their rivals.<sup>176</sup>

Those into whose hands a manuscript book passed could make their own copy. A popular text could be passed from hand-to-hand and copied. In this way, the original “edition”, which may have been limited to 10 or 20 copies, developed a life of its own as it was handed from copier to copier. Aspects of what we understand as intellectual property, of course, never arose within the manuscript culture, because the only way in which manuscript could circulate beyond the original “production” was by copying. Whereas printed material could, if sales were slow, be retained in a warehouse for later sale, manuscript copies were generally produced when demand required them.<sup>177</sup>

Scribal mass production was available for law book production. Bolland has suggested, not without controversy, that manuscript production of the Year Books was organised through the Serjeants and apprentices at the Inns and transcription took place at a *scriptorium*.<sup>178</sup> Baker suggests that the Year Books were developed primarily for educational purposes, although they were written in regular scribal hands. This supports production in *scriptoria*, which in turn suggests a form of organisation behind their publication and a commercial element to their production. They were made for immediate circulation, were far more likely

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<sup>175</sup> Often this sort of work would include prohibited works. These sensitive, controversial or prohibited texts could be handled by a scribe much more easily than a printer, who was more vulnerable to detection and who thus may have been reluctant to touch controversial material.

<sup>176</sup> Love above n.105 p. 126.

<sup>177</sup> Printing was not the only trade involved in printed book publication. There were additional functions such as editing, typesetting, binding, warehousing and marketing. Such an enterprise required a significant capital base, particularly for the production stage. A seventeenth century print publisher printed and published books as a subsidiary to the selling and binding of books. See Love above n. 105 generally on aspects of the scribal culture especially at Chapters 1 and 2 – on the use of manuscripts by Sir Robert Cotton p.83 – 89 and as to the involvement of legal clerks in scribal publication p. 94 – 95.

<sup>178</sup> Bolland, above n. 15 p. 59. This view is supported by T.F.T Plucknett *Early English Legal Literature* (Cambridge University Press, Cambridge, 1958) p. 109. Year Book production was not restricted to London. There is evidence, for example, of Year Book production at Lincoln – D.W Sutherland *The Eyre of Northamptonshire* (97 Selden Society, London, 1981) p. lxx.

to be retained than personal manuscript notes which were rarely published and were primarily for personal reference.<sup>179</sup>

Thus it is clear that lawyers were used to commercial publication in manuscript form but manuscript publication, by its nature, only ever produced a limited number of copies, usually for a limited audience. Publication for a limited audience was also a characteristic of literary elites.<sup>180</sup>

### **The Development of Law Texts**

The publication of works by Rastell and Fitzherbert reflected the state of the law as it stood at the time rather than an attempt to put it into any coherent form. However, these works provided lawyers with additional tools beyond their own reference works, notes and common-place books, made the use of related or referenced texts much easier and improved the consistency of law and the treatment of “authority.” In this respect print not only made available material that lawyers already had but made new or arcane material available as well. Some of the Year Books were less readily available in manuscript than others, and their printing made this material available and accessible. This supports Eisenstein’s contention that the print medium made new or difficult to access material available. Brooke, Dyer and Bendlowes contributed to current reports in alphabetical, chronological,<sup>181</sup> abridged or topical form.<sup>182</sup>

But it was not until the close of the sixteenth century and the early part of the seventeenth century that the development of a subject based text book began.<sup>183</sup> Up until that shift in focus, the emphasis in law publication throughout the greater part of the sixteenth century had been upon the Year Books, cases and statutory abridgements. These were the tools that

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<sup>179</sup> J.H. Baker “Records, Reports and Origins of Case Law in England” in J.H. Baker (ed) *Judicial Records, Law Reports and the Growth of Case Law* (Duncker & Humblot, Berlin, 1989) p 31 - 34. ; J.H Baker *The Oxford History of the Laws of England* above n. 14 p. 485.

<sup>180</sup> Saunders above n. 164 p.139 states that poets such as Wyatt, Surrey, Bryan, John Harrington and Vaux in the early part of the sixteenth century and Sidney, Dyer, Fulke Greville, Raleigh and Oxford in the later sixteenth and early seventeenth centuries, were not writing for the audience to which a printed book would be directed. For a discussion of “coterie” publication see below p.152 et seq.

<sup>181</sup> In the case of Dyer. There was no other organizational structure.

<sup>182</sup> Bendlowes was not printed in full until 1661 although he was partially printed in 1633 with cases attributed to Dalison in the appendix to Ashe’s *Promptuarie* L.W. Abbot *Law Reporting in England, 1485-1585* (Athlone Press, London, 1973) p. 83; J. H. Baker, ‘Bendlowes, William (1516–1584)’, *Oxford Dictionary of National Biography*, Oxford University Press, Sept 2004. A selection of Dyer’s reports was printed posthumously in 1585, he having died in 1582.

<sup>183</sup> Although there were earlier examples such as Staunford’s *Prerogative* and *Pless del Coron*. For discussion of seventeenth century law printing see Ch. 7.

lawyers used and were most likely to be the books that they purchased. The availability of publishable material, such as the Year Books, and what the market desired were the economic factors that drove law publishers in the early period, in addition to the humanist interests which have been discussed above.<sup>184</sup>

The common law remained a complex and largely incoherent mass that defied organisation or reduction to a simple set of principles. Although there were changes in the action on the case, along with developments in Chancery and the utilisation of the conciliar or prerogative courts, much of the common law focussed more upon practice, pleading and procedure than a defined set of legal principles as we understand them.<sup>185</sup> Thus the lawyer of the sixteenth century learned his craft in the Inns of Court and the immersive atmosphere of the Courts at Westminster, making his own notes and compiling his own common-place book of references, transcribing perhaps the notes of others or a manuscript copy of Littleton. This aspect of educational behaviour, particularly reliance upon one's own resources, continued into the print era and was a cultural practice of lawyers which had developed over the centuries.

### **Libraries and Law Books**

On the eve of the advent of the printing press in England most of the law libraries were practitioners' personal manuscript collections or libraries of the Inns which had developed from donations of books. Studies of private libraries demonstrate a mixture of manuscript and printed works, although none had a full collection of the Year Books or Statutes other than those of a few selected years.<sup>186</sup>

Given that some of the libraries contained bound personal notebooks, it may be concluded that lawyers treated their own notebooks on a par with other manuscript sources. The importance attached by Coke to one of his books is reflected by the fact that he referred to it as his "Vade Mecum", Arderne to his "Best Registre of Lawe" and "My own grete compiled

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<sup>184</sup> See above p. 116 et seq. For some of the books that were printed in the sixteenth century see below Ch. 6.

<sup>185</sup> For example the development of the procedural devices of the Bill of Middlesex and *latitat*.

<sup>186</sup> J.H. Baker "The Books of the Common Law" above n. 29 pp.413-417.; J.H. Baker "Records, Reports and Origins of Case Law" in England" above n. 179 p. 20 at pp. 29 – 30; E.W. Ives, *A Lawyers Library in 1500* (1969) 89 LQR 104 at pp.108 – 110, 115; C.E Moreton "The Library of a late Fifteenth Century Lawyer" (1991) 13 Library 6<sup>th</sup> Ser. pp. 338 – 46 at pp. 341-346 ; W.O Hassall *A Catalogue of the Library of Sir Edward Coke* (Yale University Press, London, 1950) at pp. v-vii .

booke of lawe covered with reed leddir and a horn upon itt”.<sup>187</sup> It could be inferred from this that reference may have been made to personal notebooks from time to time. This may also be confirmed by Fitzherbert J’s well-known comment “Put that case out of your books for it is not the law without doubt.”<sup>188</sup>

The lack of a full collection of works such as Year Books or manuscript texts suggests a culture of sharing or borrowing of books between practitioners, although the practice of specific citation to specific texts was not a feature of legal argument in the fifteenth century. The other suggestion that arises from the small number of books that comprised a lawyer’s library was the existence of a largely oral-memorial culture within the legal profession.

Law was conveyed by three means – orally, in manuscript and in print. From 1540 to 1640 print became more important and became intertwined with the manuscript and oral tradition but manuscript actually remained the preferred medium. In the last years of Elizabeth’s reign, 1590 to 1603, over 200 extant volumes of case reports were generated, copied from about 20 distinct reporters.<sup>189</sup> Manuscript circulation reinforced collective guild or professional control over information and limited production and dissemination. Manuscript circulation depended upon who was willing to loan them, and to whom. Outsiders did not have access to manuscripts – limited circulation was within the Inns and the profession.<sup>190</sup> Conventions guided textual amendments, but of significance was the lack of fixity in manuscripts.<sup>191</sup>

### **Print – Advantages and Drawbacks**

Although manuscript publication continued, there were certain advantages that print had over the old medium. It was a characteristic of law publishing particularly that usually there was no one single edition of a particularly useful text. New editions were released as the law changed, and earlier editions were updated.<sup>192</sup> This, according to Eisenstein, was one of the great advantages print had over manuscript in that the print qualities of mass-production

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<sup>187</sup> J.H. Baker “The Books of the Common Law” above n. 209, p.416.

<sup>188</sup> Year Books 27 Hen 8 23 (Tottell, London, 1556) fo 11 STC 9963 **Teo puis mirer a vo aunciet livres, ¶ teo ne doute.... il sera troube no ley.**

<sup>189</sup> David Ibbetson “Law Reporting in the 1590’s” in Chantall Stebbings (ed) *Law Reporting in Britain* (Hambledon Press, London 1995) 73 at pp. 74-5.

<sup>190</sup> These factors allowed for some measure of or potential for authorial control. See also the discussion of the Grays Inn reporters of the seventeenth century below Ch. 6 p.179.

<sup>191</sup> J.H. Baker “The Dark Age of Legal History, 1500 – 1700” in J.H. Baker (ed) *The Legal Profession and the Common Law – Historical Essays*. (Hambledon, London, 1986) p.435 et seq.

<sup>192</sup> An example may be found in John Rastell’s *Terms de la Ley* which was updated by his son William Rastell

meant that new copies could be circulated to existing markets.<sup>193</sup> Thus, information could be kept current. The manuscript culture relied upon an informal network of updating by copyists. Thus, the standardisation that was apparent in print allowed for a formalised amendment and updating process to take place.

As a part of the editing and updating function, printers made textual amendments and additions to what was available in manuscript with the result that the printed texts contained enhancements not present in the manuscript exemplar. Cross referencing and citation were present in manuscript abridgements and in some manuscript reports<sup>194</sup> but as print developed the referencing was to other printed works and thus to standard exemplars which meant that print sources became favoured and reliance upon them developed.<sup>195</sup>

A factor which may have had an impact upon the continued utilisation of manuscript works was that although, as Eisenstein has claimed, the fixity and multiplicity of copy gave print a certain authority, that authority was none-the-less lacking because of problems with production.<sup>196</sup> Material in print was not relied upon without question. Errors occurred, particularly in the course of production. The omission of the word “not” from the Seventh Commandment in the so-called “wicked Bible” commanded adultery, if one wanted to treat that printed Bible as an ultimate authority.<sup>197</sup> Legal publication suffered no less. Problems occurred where material was printed by uncritical printers, who knew little of the law and

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<sup>193</sup> Eisenstein *The Printing Press* above n. 164 p.71 et seq; Eisenstein *The Printing Revolution in Early Modern Europe* (Cambridge University Press, Cambridge 1993) p. 43 et seq.

<sup>194</sup> Turnour had a full scheme of cross referencing in his manuscript report but it could only be used in the original. See J.H. Baker *English legal manuscripts in the United States of America : a descriptive list* (Selden Society, London 1985 – 90) p.102, item 501 referring to Tournor’s Repertory with an index of titles at the end. See also W.H. Bryson (ed) *Cases Concerning Equity* (Selden Society, London, 2001) Vol 1 p. xvi for a brief biography of Turnour.

<sup>195</sup> The examples become more prevalent as time goes by. Thus more evidence is available from books printed in the early seventeenth century than the sixteenth. Examples may be found in Ashe’s *Epiekeia*. In the second page of the Address to the Reader he cross-references to West’s *Symboleography*. References in works to any Statutes from 1483 refer to works in print. Fulbecke in his *Direction* sets out a list of texts that he recommends (p. 27 – 29). For discussion see below Ch. 7 p.200. At p.44 Fulbecke references Dyer and there are subsequent references to cases in the year Books. Similar cross references appear in Cokes Reports.

<sup>196</sup> I suggest that the “authority” arises from the fact that later printed works validated the earlier by virtue of cross referencing and recommendation. For an example of the latter see Fulbecke’s list of texts in the preceding note.

<sup>197</sup> Eisenstein, “An Unacknowledged Revolution Revisited” (2002) *American Historical Review* 87 at p. 95; Elizabeth Eisenstein “Some Conjectures about the Impact of Printing on Western Society and Thought: A Preliminary Report” (1968) 40 *Jnl Modern History* p. 11 at pp.11-12; S.H. Steinberg *500 Years of Printing* (British Library and Oak Knoll Press, London, 1996) p. 98.

whose editorial abilities were wanting.<sup>198</sup> Subtleties of language, a lack of knowledge of the arcane law-French, a lack of understanding of the utilisation of Latin, particularly in the form of maxims, resulted in inaccuracies.

It has been suggested that many of the issues surrounding the credibility that may attach to printed material were inherent within the medium itself. Although print technology possessed the novel characteristics that differentiated it from manuscript, other factors eroded those characteristics.<sup>199</sup>

One reason for approaching print content with a degree of scepticism was the frequent appearance of *apologia* in early printed material and associated difficulties in obtaining a reliable copy which was encountered by printers across the board. Notwithstanding the availability of *errata* for subsequent editions, or indeed the publication of an *errata* list in the new edition, these were frequently incomplete in themselves. The presence of *errata* lists did not guarantee their use.<sup>200</sup> On the other hand David Hume considered the presence of *errata* one of the considerable advantages of print, in enabling errors to be corrected in subsequent editions.<sup>201</sup> Some *errata* lists were not lengthy, but McKitterick<sup>202</sup> suggests the shortness of an *errata* list was not necessarily a guarantee of high standards in the setting of type. By its brevity, it might seek to conceal a great number of inaccuracies.

Eisenstein, on the other hand, suggests that *errata* were a way of reducing inaccuracies in subsequent editions that was not present in the manuscript culture. There must be some substance to this assertion. As has been seen, the transmission of manuscript works meant that each new copy was effectively a new edition. When a book was published in print the number of copies was limited to the print run. When these copies ran out, and if there was demand, a new edition would be published, often incorporating the corrections which were the subject of *errata* in the earlier edition. Furthermore, according to Eisenstein, feedback

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<sup>198</sup> An example may be found in the 1617 printing of Ashe's *Fasciculus Florum*. In the subsequent printing in 1618, Ashe was critical of the "false printing of this Booke, through the negligence of the Printer and his Corrector" Thomas Ashe *Fasciculus Florum* (GE, London 1618) STC 5529 at p.A4.

<sup>199</sup> McKitterick, *Print Manuscript and the Search for Order 1450 – 1830* (Cambridge University Press, Cambridge, 2003) pp. 99 et seq. See also Ch. 5.

<sup>200</sup> See for example the manual amendment by Lambarde to the 1569 printing of *Bracton* Sheffield University Library RBR Q 347(B) Folio 115V. The *errata* addressed the very mistake that Lambarde noted in hand, suggesting that he had read the text without noting the *errata*.

<sup>201</sup> McKitterick . above n. 199 p. 139.

<sup>202</sup> *Ibid.* p. 132.

from readers could result in further alterations to the subsequent edition. In this way more credibility would attach to a second edition than to the first, and this credibility would not arise from outside the technology, but from the new features that accompanied the publication of works that were inherent within it.<sup>203</sup>

Printers frequently worked from a mixture of sources and this was especially the case in the printing of the early reports and Year Books.<sup>204</sup> Printers had an interest in getting their books into the hands of the booksellers and the accompanying haste meant that inaccuracies would often occur, which would make the work unreliable and untrustworthy. If the new medium were to have any credibility as an authority, inaccuracy would not help in the pursuit of that goal. In addition, material could be derived from a mixture of sources, sometimes conflicting or lacking in authority. There was a scepticism that surrounded material in print that gave cause for pause in accepting, in an unqualified way, material that emanated from the new medium.<sup>205</sup>

Even the printers could advance examples of poor quality material. In 1556, Tottel suggested that his readers reflect back to the days of de Worde, Pynson and Redman when books of law were imperfect “the most part mervelously mangled, and no smale part no wher to be gotten.”<sup>206</sup> In addition, printers could innocently be misled into printing material which was subsequently made available for sale but was clearly wrong or unauthorised. For example, Robert Waldegrave was duped into printing an incorrect version of a statute while he was Royal Printer to James VI of Scotland.<sup>207</sup> However, although criticisms may be made of errors in the printing process it is well known that “manuscript decay” arising from errors of transcription, from manual slips, misreading, inattention or deliberate alteration also took place.<sup>208</sup>

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<sup>203</sup> Eisenstein “Conjectures” above n. 197 pp. 11 et seq; Eisenstein “An Unacknowledged Revolution Revisited” above n 197 p. 93; Eisenstein *The Printing Press* above n.164 p. 80.

<sup>204</sup> F.W Maitland, (ed) *The Year Books of Edward II: Vol 1 1 & 2 Edw II*, (Selden Society, London, 1905), p. xxi; J. H. Baker, *Oxford History of the Laws of England* above n.14 p.477-8.

<sup>205</sup> For a discussion of the contest for quality see above p.104 et seq. See also the discussion that follows.

<sup>206</sup> Baker “Introduction” *Year Books 12 – 14, Henry VIII* above n.20 p.xxi ; J.H. Baker *Oxford History of the Laws of England*, above n 14 p.49.

<sup>207</sup> Katherine S Van Eerde “Robert Waldegrave: The Printer as Agent and Link Between Sixteenth- Century England and Scotland” (1981) 34 *Renaissance Quarterly* 40 at pp. 73-75.

<sup>208</sup> David Diringer *The Book Before Printing: Ancient, Medieval, Oriental* (Dover Publications, New York , 1982) p. 214.

Thus errors in printed works meant that lawyers would rely on trusted manuscripts and the oral traditions and culture with which they had been imbued in the Inns. Despite this, printed law books were convenient, cheap, easy to acquire and more numerous but of uneven distribution and were particularly useful for the lawyer outside London. Whilst debate could be resolved by references to a text, in the sixteenth century the example of the comparison of manuscript and printed versions of statutes<sup>209</sup> suggests that print was not superior and the advantages of print - a fixed and referable text which, with those qualities that might suggest reliance - had not yet become apparent.<sup>210</sup>

Although the content of law texts and reports was in the hands of writers such as Coke, Finch, Plowden, Manwood, Pulton and Sheppard, and print challenged the legitimacy of manuscripts and the oral tradition as standard repositories of law, scribal materials still remained and had authority. Well into the eighteenth century lawyers referred to manuscripts or to their memories to amend or challenge printed law books and particularly reporters.<sup>211</sup> But over time, printed material eroded the primary reliance upon manuscripts and oral tradition as valid repositories of law. Their importance continues to the present day in practice but they are difficult to legitimate when they are in conflict with print.<sup>212</sup> This process of continuing education and reliance upon one's own resources continued into the print era and was a cultural practice of lawyers which had developed over the centuries. Added to this, once print had been introduced were two other features.

One was the easy co-existence that print had with manuscript in legal and other intellectual circles. The introduction of print was a slow process and it took some time before sufficient printed material was available to have a significant impact upon intellectual activity such as note taking and informational recording practices. A lawyer's own notes or records, or the transcribed copies of notes made by another were of as much value and may have had an

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<sup>209</sup> See J.H. Baker *The Lost Notebooks of Sir James Dyer* (Selden Society, 1994, London) p. lxi FN 25.

<sup>210</sup> For further discussion see below Ch. 7 p. 214 et seq in the context of legal hermeneutics.

<sup>211</sup> Richard Ross "The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter and Identity 1560 – 1640" (1998) 10 *Yale Jnl Law and Humanities* 229, p. 278. It is difficult to determine when it became usual to rely on printed material over manuscript. Co-existence of the two media was the norm in the period under study and it is beyond the scope of this work to determine when the change took place. It appears that by the time of Lord Mansfield, printed work was preferred over manuscript although Mansfield himself resorted to manuscript material when it suited him. James Oldham *English common law in the age of Mansfield* (University of North Carolina Press, Chapel Hill 2004) see for examples pgs 6 and 30. See also James Oldham *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (University of North Carolina Press, Chapel Hill 1992) (2 Vols) Vol 1. p. 102 – 105.

<sup>212</sup> Ross "*The Commoning of the Common Law*" above n. 83 fn 363.

informational precision that was simply not available in printed material. This was bound to change as more printed material became available and was more focussed in its nature and content. But the position then occupied by printed material gave little incentive for there to be a change in intellectual practices, along with issues of quality which have been considered.<sup>213</sup>

The second feature was the apparent disdain of print that was present in some intellectual and artistic circles. Although the recording of legal information or the compiling of a notebook could not rank with an artistic form such as a courtly poem, it must be remembered that the Inns of Court were educational melting pots not only for those who wished to pursue the profession of law, but also for other elites in society who were preparing themselves for a career at Court or in the administration of estates or even within the State. They would have brought their values and attitudes with them to the Inns. Print was seen as “common”, vulgar, lacking in the personal touch, associated with commerce or commercial publication and these values would have spread among those students who were training for the law and could well have been an aspect of the culture of the Inns of Court.<sup>214</sup>

### **Legal Information and *Nos Erudition***<sup>215</sup>

It is my contention that the aforementioned reasons are essentially why there was a gradual utilisation of print on the part of lawyers and the legal profession along with early concerns, later allayed, about reliability.<sup>216</sup> Yet there is also a view that print was perceived as a way of “commoning” the common law, and that print was making the law available to an audience that extended well beyond the “legal elite.” Legal information, it is suggested, was the property of the professional elite of the lawyers, and only they should be privy to its secrets and mysteries. This view has been developed by Richard Ross,<sup>217</sup> and suggests other cultural imperatives – the hermetic approach to legal information by the profession and the culture of memory – which led to a reluctance to see the law in print.

Ross is able to point to one William Hudson who looked back with reverence on the common law and praised those who abstained from “publishing their meditations and arguments –

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<sup>213</sup> See above p. 104 et seq.

<sup>214</sup> This attitude may have arisen out of a combination of the disdain for print effected by intellectual elites such as poets – see generally Saunders above n. 14 - and the lawyer’s common learning or *nos erudition* – for further discussion of this element see the next section.

<sup>215</sup> *Nos erudition* or *nostrae erudition* are used interchangeably. The concepts underlying the term are discussed in this section.

<sup>216</sup> See Chapter 4.

<sup>217</sup> Ross “The Commoning of the Common Law” above n. 83.

holding it as a flag of their vain hype and glory, unworthy of their gravity.” Hudson is the only real example that Ross advances for the anti-publicist movement.<sup>218</sup> Although Ross does not specifically mention it, there certainly was a hesitancy about putting work into print expressed on the part of Plowden, Pulton and surrounding the printing of Dyer’s Reports. Whilst it may be suggested that such expressions of hesitancy may suggest a defensiveness against disapproval of putting works into print, there may be other explanations including the cultural attitudes attaching to the stigma of print, perhaps the best exponent of which was Donne in regard to his poetic works.<sup>219</sup>

Whether Ross’ anti-publicists were focussed against the publication of law or against lay people obtaining legal information can only be surmised. Ross suggests that there were four matters that raised concerns about the “commoning” of the law. The first was that of the hermetic nature of the law as a “mystery” and the province of an educated elite.<sup>220</sup> The second issue was that by making legal knowledge available, it would be misused and that the depth of knowledge that underpinned legal information meant that a legal work would not be comprehended at first reading.<sup>221</sup> A third reason was that a wide availability of legal information would encourage litigiousness. Spurious or baseless litigation was seen an antithetical to the concept of law as part of the ordering that underpinned the “common

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<sup>218</sup> William Hudson, *A Treatise on The Court of Star Chamber* in Francis Hargrave (ed) *Collectanea juridica. Consisting of tracts relative to the law and constitution of England. ... . Sparsa Colligimus*.U (E & R Brook London 1791). Volume 2. Reprinted The Lawbook Exchange, Clark NJ 2008. See Ross “The Commoning of the Common Law” above n. 83 at 324. The Hudson publication in Hargrave is available in Eighteenth Century Collections Online. [http://find.galegroup.com.ezproxy.auckland.ac.nz/ecco/infomark.do?&contentSet=ECCOArticles&type=multiage&tabID=T001&prodId=ECCO&docId=CW123911411&source=gale&userGroupName=auckland\\_ecco&version=1.0&docLevel=FASCIMILE](http://find.galegroup.com.ezproxy.auckland.ac.nz/ecco/infomark.do?&contentSet=ECCOArticles&type=multiage&tabID=T001&prodId=ECCO&docId=CW123911411&source=gale&userGroupName=auckland_ecco&version=1.0&docLevel=FASCIMILE) . (Last Accessed 22 July 2010).

<sup>219</sup> Donne trained as a lawyer and was a member of Lincoln’s Inn. Although Donne wrote in the seventeenth century, I suggest that his views were as a result of a developing attitude that is supported by the *apologia* that appear in some of the printed legal works. It is also noted that Donne’s attitude extended to his poetry but his expressions, I suggest, are representative of an attitude. *Biathanatos* was a work controversial in itself, hence Donne’s concerns about seeing it in print. John Donne *Biathanatos a declaration of that paradoxe or thesis, that selfe-homicide is not so naturally sinne, that it may never be otherwise* (John Dawson, London, 1644) Wing/D1858 . See also Richard B Wollman “The “Press and the Fire”: Print and Manuscript Culture in Donne’s Circle” (1993) 33 *Studies in English Literature, 1500-1900*, 85. Donne’s comment when sending the manuscript to Robert Ker was “if I die I only forbid it the press and the fire; publish it not, but yet burn it not, and between those do what you will with it.” Wollman “The Press and the Fire” p. 88.

<sup>220</sup> Brooks *Pettyfoggers and Vipers* see above n. 173 pp. 132-136; E.W. Ives, *The Common Lawyers of Pre-Reformation England: Thomas Kebell – A Case Study* (Cambridge University Press, Cambridge, 1983) pp 190-94; G.R. Owst, *Literature and Pulpit in Medieval England: A Neglected Chapter in the History of English Letters & of the English People* (Basil Blackwell, Oxford, 1961) pp 338-49; E.F.J. Tucker *Intruder into Eden: Representations of the Common Lawyer in English Literature, 1350-1750* (Camden House, Columbia S.C., 1984) generally chapters 1 and 3 also pp. 99 - 114; E.W. Ives, “The Reputation of the Common Lawyers in English Society, 1450-1550”, (1959) 7 *U. Birmingham Hist. J.* 130.

<sup>221</sup> “Alas our books of law seem to them to be dark and obscure; but no wise man will impute it to the laws but to their ignorance, whereby their soul and superficial reading of them cannot understand the depth of them.” 10 *Cokes Reports* Preface.

weale”. On the other hand, those who published the law saw this activity as enhancing the common weal.<sup>222</sup> Finally Ross develops the concept of “political unity” as a force against printing the law. There are certain difficulties with this head, and, as has already been demonstrated, there was a significant “State Interest” in printing the law and making it available.

The first two reasons advanced by Ross can be viewed against the context of legal education and the culture that had developed in the “Third University”. This context underpinned an understanding of the law and how it worked and was applied. Cromartie refers to this as “the common lawyers’ way of doing things”<sup>223</sup> but it was more than that. It is best described by Baker in the following way

“[M]uch of the learned tradition of the English legal profession, at least from the mid-fourteenth century, was generated and nurtured out of court rather than in the hall of Westminster Palace, where it was given practical effect.

The conceptual framework which was handed on by tradition, whether or not it was reflected in the reported cases in the year books, is best described by the lawyers’ own phrase, common erudition, common learning.....”<sup>224</sup>

Erudition had a specific meaning in this context as something learned or acquired as a student.<sup>225</sup> Fifteenth and sixteenth century legal education was immersive and involved more than “book learning”. Common learning or erudition in the context of the law was specific to lawyers. Reading the law from a book gave only part of the story. Perhaps it is for this reason that William Noye,<sup>226</sup> Sir John Davies<sup>227</sup> and Sir Edward Coke (in his earlier writings)<sup>228</sup> expressed a concern that understanding may be lost if maxims and statements of law were translated into English. Davies stated it in this way:

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<sup>222</sup> There is a suggestion that the increase in litigation that took place over the sixteenth and seventeenth centuries was the responsibility of the increasing numbers of lawyers especially in the “lower branch”. It may be that printing the law meant that educational and self-informing resources were available to law students that enabled them to achieve their qualifications or achieve a sufficient level of knowledge to set up in practice. However, Ross does not suggest that. For a discussion of the rise in litigation see Brooks *Lawyers Litigation and English Society* above n. 173 p. 12 et seq.

<sup>223</sup> Alan Cromartie *The Constitutionalist Revolution - : An Essay on the History of England, 1450 – 1642* (Cambridge University Press, Cambridge, 2006) p. 99.

<sup>224</sup> J.H. Baker *The Law’s Two Bodies* (Oxford University Press, Oxford 2001) p.67.

<sup>225</sup> *Ibid.* p.68.

<sup>226</sup> William Noye *A Treatise of the Princpall Grounds and Maximes of Law of the Kingdome* (R.H. by permission of the assigns of John Moore, London, 1641) Wing N.1451.

<sup>227</sup> John Davies *Le Primer Repoprt des Cases et Matters en Ley resolved and adiudges en les Court del Roy en Ireland* (John Franckton, Dublin, 1615) STC 6361.

<sup>228</sup> 3 Cokes Reports “To the Reader” folio E pages unnumbered.

And I may truly say withall that if the bookes of our law were all translated into *English*, they would not bee better, nay, they would not be so well vnderstood by the Students thereof as in this proper and peculiar language wherein they are now written.<sup>229</sup>

It may be concluded, therefore, that the language of the law was a part of “common erudition” – learning known and available to a select few. However, the development of law books did make inroads into the extent of common erudition<sup>230</sup> and Cromartie considered that there was a shift – a transformation of *nostrae erudition* into a less flexible body of determinate principles, created by judicial precedent.<sup>231</sup> Cromartie suggested that printing played a part in this development and there was a sense that the common law could be considered as a system – set out in printed publications. There had been complaints about common lawyers’ lack of method in the 1530s and the achievement of Anthony Fitzherbert in his *Abridgement* may have encouraged the new attitude and given it some impetus.<sup>232</sup> Nevertheless some of the practices employed by lawyers to record their information and develop and use it – aspects of common knowledge and part of the context for its acquisition – continued. This continued into the middle of the seventeenth century when what appears to be an organised system of manuscript law reporting was undertaken, which demonstrates both the continued co-existence of print and manuscript material and manuscript circulation within coteries.<sup>233</sup>

Perhaps a matter underlying the complaint perceived by Ross was not so much about the publication of law and the disharmony it would cause as an economic one of a perceived inroad into a significant and important monopoly. Certainly there was no unified or organised opposition to the publication of legal information and indeed over the seventeenth century books were published both about the law and how to study the law. If there was an anti-publicist movement or tendency in this period it was unsuccessful. Although some of the factors identified by Ross may have been indicative of disquiet on the part of some lawyers towards print, there was a co-existence of means by which the law was communicated.

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<sup>229</sup> John Davies *Le Primer Report* above n. 227.

<sup>230</sup> J.H. Baker *The Law’s Two Bodies* above n. 224 p. 81.

<sup>231</sup> Alan Cromartie above n.223 p.99 – 100. It could also be suggested that the reference to books by Davies could well have meant *printed* books which in turn may suggest that print could have a role in a lawyers perception of the nature of *nos erudition*.

<sup>232</sup> *Ibid.* Cromartie describes print as an “agent” in this shift although Eisenstein is neither cited nor appears in his bibliography.

<sup>233</sup> See below Ch. 6 p. 177 et seq.

I suggest that thus there was a cultural imperative that went beyond Ross's "hermetic" approach and professional concerns along with a continuing market need<sup>234</sup> and is more properly reflected in the concept of *nos erudition* and the fact that print could not convey concepts that were developed from the immersive nature of legal experiential education and developed within the groups and coteries of the Inns. But at the same time, and as importantly, there was also a justified concern acknowledged by contemporaries and historians, that the quality of printed material presented cause for concern.

### **Coterie Publication – Sharing Information Within Groups or Communities.**

The lawyer John Selden made the comment "'tis ridiculous for a Lord to print verses, 'tis well enough to make 'em to please himself, but to make them public is foolish,"<sup>235</sup> and in so saying epitomized the Court poets' approach to publication which was of a limited nature within a select group.

The commonest formula for excusing the appearance of poetry in print was that of a reluctant surrender to the insistence of friends. This attitude was present in legal publishing, demonstrating a common attitude shared by intellectual elites. The pressure of friends desiring copies of Plowden's manuscript of his commentaries led to it becoming so popular that the author thereof saw its transformation to print a strong possibility. Plowden, in many respects, reflects the attitude of the time towards placing one's work in the highly visible arena of print. The existence of his manuscript reports got around the legal profession. He was asked by some of the Judges and other professional colleagues to publish them but was unwilling to do so. Plowden's attitude reflects that of genteel society of the time and its attitude to having a work put into print

**"I thought it my duty to decline making public my own disjudication of the arguments of men more learned than myself, and to keep the work for my own private advantage, and therefore avoid the censure of affecting a more acute and discerning judgment than I really had. But by and by an accident happened, which inclined me and (as I may say) forcibly compelled to me to make this work public. For having lent my said book to a very few of my intimate friends, at their especial instance and request, and but for a short time, their clerks and others knowing thereof, got the book into their hands, and made such expedition by writing day and night, and in a short time they had transcribed a great number of the cases, and especially of the first, contrary to my own knowledge and intent, or of those to whom I had lent the books; which copies at last came to the hands of some of the printers, who intended (as I was informed) to make a profit of them by**

<sup>234</sup> Generally Saunders above n. 164; Love above n. 176 pp. 14, 21, 73 – 77.

<sup>235</sup> Samuel Harvey Reynolds, (ed) *The Table Talk of John Selden* (Oxford University Press, Oxford, 1892), p. 135.

publishing them. But the cases being transcribed by clerks and other ignorant persons who did not perfectly understand the matter, the copies were very corrupt, for in some places a whole line was omitted, and in others one word was put for another, which entirely changed the sense, and again in other places spaces were left where the writers did not understand the words, and diuers other errors and defects there were, which, if the copy so taken had been printed, would haue greatly defaced the work, and haue been a discredit to me. And besides this, they had omitted to transcribe the pleadings according to the records, and had only transcribed the cases and arguments vpon them, so that the benefit, which the reader would haue reaped from the records of the pleadings in this book (which is also a Book of Entries of all others most sifted and tried) would haue been totally lost. Wherefore, in order to prevent and auoid these defects, I considered with myself whether it was not better for me to put this work in print. During which consideration letters were sent to me by all the iustices of both benches and by the Barons of the Exchequer, requesting and encouraging me to make it public and at last, vpon these and other motiues, and hoping that it might be of some benefit to the students of law, I resolued (as you see I haue done) to put it in print".<sup>236</sup>

It was the possibility of having a publisher print the work without the control of the author that led Plowden, finally, to have his work printed. Again, in this respect, Plowden's attitude towards the concept of authorship is unusual. There can be no doubt that had the work been printed without his supervision or authority, his name would have been associated with it. Plowden was most careful to ensure that the quality and integrity of his work would be maintained and, for that purpose, it would be necessary for him to supervise its publication. Plowden was one of the rare examples where the name of the author was at least as important for the sale of the work as the quality of the content and, certainly, any printed publication with the name of Plowden associated with it would find a ready market within the legal profession.

If a Tudor poet did see his work to print in some form or another, it was expected that a preface or introduction would be characterised by effusive modesty on the part of the author. This not only applied to poetry but also to many other forms of work, including legal publications. One has only to recall Plowden's comments in his preface that he had avoided printing his work to "avoid the censure of affecting a more acute and discerning judgment than I really had". A form of humility seems to accompany the publication of printed literary works, which extended into other spheres.<sup>237</sup>

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<sup>236</sup> Edmund Plowden *Les Commentaries ou les reports de Edmund Plowden* (Richard Totell, London, 1571) STC 20040.

<sup>237</sup> See also the prefaces by Fulbecke and Pulton as examples.

These attitudes towards print and the preference for utilisation of manuscripts has principally been discussed within the context of the Tudor court. The Inns of Court themselves comprised a distinct and select audience – a form of coterie that had its own special culture and erudition. Instead of sharing poetical works, as the Court poets did, members of the Inns shared manuscript legal materials among themselves.<sup>238</sup> The form of publication and information exchange is probably more apt for a closed or select community than embarking upon putting material in print if, in fact, a printer saw a benefit in so doing.

It could be argued, therefore, that the community or coterie of users influenced, if not dictated, the way in which materials were disseminated both in the community of the Court, where the attitude was one of the poets' disdain for print, and in the Inns where more practical considerations may have had an influence such as the number of users or size of the groups sharing material. In addition, as I have speculated in chapter 3, the unwelcome attention that may be attracted by putting material in print, especially if it was controversial, may have encouraged the continued use of manuscript and its circulation within a smaller audience or coterie.

## **Conclusion**

The Inn-based educational system for lawyers, courtiers and administrators was struggling to keep up with the increasing numbers of those seeking the advantages of the “third university.” The growth of litigation meant that those traditionally involved in presenting readings and participating in the oral/aural educative process were unable to do so. Students had devised means by which they could avoid compulsory exercises. And yet lawyers were increasing in numbers in all branches.<sup>239</sup> Within this dynamic sat the printers who were printing not only the standard works such as the Year Books and Littleton's *Tenures* but as the sixteenth century progressed into the seventeenth were printing texts on discrete topics, including guide books for local administrators, attorneys and for students themselves. Printed texts were becoming a part of the lawyer's armoury and, in my view, were being used to assist the student in learning the law in areas where the Inns were failing.

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<sup>238</sup> The sharing of manuscript material is responsible for the survival of contemporary material. For example, the lost notebooks of Sir James Dyer were located by way of extracts taken from the originals by Sir Henry Powle in about 1690, although the originals have been lost. However, there were seven other manuscripts that enabled the reconstruction of many of Dyer's unprinted cases exemplifying the copying and sharing culture of the lawyers of the time. See Baker *The Lost Notebooks of Sir James Dyer* above n. 209 “Preface” p.ix.

<sup>239</sup> See above Chapter 4.

But law printing was not just for the benefit of the students. If law was essential for the orderly functioning of society, knowledge of the law and education in it was necessary for the diligent and loyal subject. In its various contexts, the good of society and its good order – the “common weale” – required legal information to be freed from its hermetic and linguistic bonds and made available. Printed law in the vernacular was a means of circulating this information to the wider audience. If the Bible in the vernacular was seen as necessary for the spiritual good of the Protestant community, law in the vernacular was necessary for its secular ordering.

It may be seen from this chapter that there were a number of elements that encouraged the growth and development of law printing. At the same time there were cultural behaviours, practices and responses to print itself which allowed the continuation the manuscript based information sharing system that had been employed in the past.

The business of law printing was one that grew but was not unrestrained. Technical issues, a small market and a slowly growing industry were replaced by vigorous contests between printers and attempts to enhance quality and reliability and thus marketability of law texts. The utilisation of the Royal patent and the involvement of lawyers behind the scenes up until the reign of Elizabeth demonstrate the dynamic nature of law printing at this time.

A larger and more principled motivation for law printing lay with the rise of humanism, the way in which printing could foster humanistic goals as well as the benefits to the “common weale” and the State’s interest and obligation to avoid ignorance of the law. Printing the law as a means of promulgation and presenting the law in the vernacular underpinned elements of the fundamental authority of law in Early modern England.

Yet lawyers continued to use manuscript resources. There were understood advantages and disadvantages to both print and manuscript media. Such was the dynamic that manuscript resources may have been preferred to print – at least in the sixteenth century – and it seems that matters of media preference in court were at the discretion of the Judge. In addition there were aspects of the “deep meaning” of the law – *nos erudition* – along with coterie based information sharing practices and the limited availability of texts in print that encouraged continued manuscript use.

One would have expected, given these drivers to put the law in print, that there would have been radical changes in the way that lawyers gathered and preserved their information. Print provided such a means. But the personally compiled “reports” and notes remained in manuscript, to be circulated among smaller groups. There were a few exceptions to this as exemplified by Plowden and Coke who published in their own lifetimes. But the reports of others were printed only posthumously. The brake on what might have been the wider development of legal printing had its source in the melting pot of the Inns of Court bringing together the values of the Court and those of other intellectual elites. The lawyers, like courtiers, had their own specialized knowledge and coterie publication coupled with the disdain for print as being irrelevant to lawyers’ needs, allowed for a co-existence of a specialized media available to lawyers for preserving and accessing legal information.

Having considered the factors that drove printing the law, along with those that lay behind the continued use of manuscript, the discussion will shift to consider the types of printed texts that became available for the lawyers of the late fifteenth and sixteenth centuries.



## Chapter 6 - Printing the Law – The Sixteenth Century Phase

### Introduction

This chapter considers the nature of the legal works that were printed in the latter part of the Fifteenth Century and during the sixteenth century, and addresses the issue of why it was that certain texts seem to have provided a focus for printers.

In Chapter 5 I suggested that sixteenth century law printing went through two distinct phases delineated by the grant of the common law patent. This chapter will consider the texts that were printed and suggest that one of the elements that concerned printers was the quality of their output. The quality of law texts reflected their reliability and this involved an interaction between printers and lawyers that went beyond the mechanics of what took place in the printing shop. Printed works, particularly about the law, had to be reliable.<sup>1</sup> The material printed had to be accurate. Once lawyers could be satisfied that printed works accurately stated the law, then the texts could be used as part of the lawyer's armoury of information.

Two preliminary observations need to be made. The first is that although the publication of law books followed the introduction of the printing press into England within a few years, manuscript and printed works co-existed. Initially this was part of the normal tentative transition that takes place from one form of information or communications technology to another, especially one as capital intensive as printing, although some of the reasons for co-existence changed, as has been discussed in Chapter 5.

Another reason lies in the cultural milieu within which lawyers were educated and practiced and which has been discussed in Chapter 4. In addition, in an age where a doctrine of precedent had not developed, counsel were more likely to compile their own case notes in notebooks rather than encourage a fully-fledged law report publishing industry which later developed gradually. A spectrum of manuscript use ranging from commercial publication to private record-keeping existed as lawyers worked in an environment of co-existence between printed legal material and manuscript notebooks. Further aspects of the “contest” between

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<sup>1</sup> For a critique of Eisenstein and a discussion of the quest for credibility or reliability see Adrian Johns *The Nature of the Book* (University of Chicago Press, Chicago, 1998) p.36 and Chapters 6 and 7. Johns' critique focussed particularly upon the unreliability of printed texts and the awareness of this by contemporary readers.

print and manuscript will be considered in the context of sixteenth century law printing. It is suggested that this contest, along with elements of print/manuscript co-existence may have had an impact upon the types of works that were printed.

Fifteenth and sixteenth century legal publications may be divided into five categories. The first category comprises the Year Books. It is to be remembered that the Year Books were not published as annual series in the way that law report publication is understood in the twenty-first century. Frequently collections of cases would be produced as folios. On occasion it would be for the purchaser to collect a number of folios for a particular period together and have them sewn and bound as a volume. Thus in a number of examples, folios or quires of a “Yearbook” may differ in layout and print style because they were printed at different times or perhaps even by different printers.<sup>2</sup>

The second category of publications was what I have called “other” law reports.<sup>3</sup> In 1571 of the seven law titles published, one was the first edition of Plowden’s *Commentaries*<sup>4</sup> published by Richard Tottel.<sup>5</sup> Other reports published were the reports by Dyer and Bellewe although Dyer’s reports were printed posthumously.<sup>6</sup>

The third category of publications was what are referred to as the Session Laws or statutes. In this category I have included collections of statutes but have excluded the abridgements of statutes or collections of statutes on a specific topic.<sup>7</sup> This division is based on the difference between an abridgement, which is a form of summary or compilation, and the actual text of the statute, even although individual statutes may be a part of a printed collection or

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<sup>2</sup>See J.H. Baker “The Books of the Common Law” in L. Hellinga and J.B. Trapp (eds) *The Cambridge History of the Book in Britain Volume III 1400 – 1557* (Cambridge University Press, Cambridge, 1999) p. 427-428; J.H. Baker *Introduction to English Legal History* 4th Ed (Butterworths, London 2002) p. 179 – 182. See also J.H. Baker “English Law Books and Legal Publishing” in J. Barnard and D.F. McKenzie (eds) *The Cambridge History of the Book in Britain Volume IV* (Cambridge University Press, Cambridge 2002) p.495 et seq. Tottel’s practice of combining different printings is similar. See above Ch. 5 p. 107, 112.

<sup>3</sup>It should be noted that there are few stylistic similarities between the three collections noted. Dyer is closer to the Year Book model whereas Plowden’s style was new. Some of the later Year Books from Henry VIII seem to be moving towards Plowden’s style. Bellewe collected material out of the abridgements and this was not novel material.

<sup>4</sup> STC 20040.

<sup>5</sup>Plowden’s *Commentaries* were reprinted in 1579, 1584, 1588, 1591, 1594, 1596 and 1599. Although Plowden entitled the work *Commentaries* they are law reports containing details of the argument as well as the decision amounting to a reasoned exposition of the law with a learned gloss. J.H. Baker *Introduction to English Legal History* above n. 2 p.183.

<sup>6</sup>Bellewe’s reports were published in 1585 and those of Dyer in 1585 and 1588 by Richard Tottel and in 1600 by Thomas Wight.

<sup>7</sup> Such as those of Ferdinando Pulton.

compilation.<sup>8</sup> Printed editions of collections of the statutes followed swiftly upon the introduction of printing. It would not be too much to suggest that printing made the publication of accurate copies of the statutes possible, although, as has been observed in Chapter 5, there were occasions of contest between the printed and manuscript versions of statutes. When the office of King's Printer was established, statutes were published as soon as they were passed.<sup>9</sup> However, the King's Printer did not print private acts, nor even all public acts in these sessional publications, and no complete series of the sessional publications has been collected.<sup>10</sup>

The fourth category of publications was the abridgements. Although there were isolated examples of abridgements in the manuscript period, the advent of the printing press and its associated advantages of contents pages and indices gave greater impetus to the development of abridgements and their publication. A collection of cases by Sir Robert Brooke referred to as *Ascuns nouvel cases de les ans & temps le Roy, H.8. Edw.6. & la Roygne Mary* is properly classified as an abridgement and is described as *la graund abridgement* in the title but is not to be confused with Fitzherbert's *Graunde Abridgement*.<sup>11</sup> Other abridgements that were printed are Statham's *Abridgment des libres annales*<sup>12</sup> and Arthur Gregory's *De legibus Angliae municipalibus liber, ordine locorum communium dispositus*.<sup>13</sup>

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<sup>8</sup> The nature of the difference resulted in a dispute between Christopher Barker (then the Royal Printer) and Richard Tottel. Barker claimed that abridgements of the statutes fell within the ambit of his patent. For discussion see above Ch. 5 p.113 – 115.

<sup>9</sup> The office of Kings Printer commenced on 5 December 1485 when Henry VII appointed Peter Faques as Stationer to the King. The Office was renamed Printer to the King and the first to occupy it under that name was Richard William Faques in 1503. For further discussion of the Kings Printer see above Ch. 3 p.30 and p. 49 et seq.

<sup>10</sup> For the duties and activities of the Kings Printer see 11 *HEL* p 301 – 10. See also Graham Rees and Maria Wakely *Publishing, Politics and Culture: The Kings Printers in the Reign of James I and VI* (Oxford University Press, Oxford 2010). Some of the individuals who appear in that history such as Robert Barker and John and Bonham Norton also were leading figures in the later Elizabethan period. By the second half of the sixteenth century if an act was printed it was public and if not it was private. The printing of the statute determined its status. G.F. Elton "The Sessional Printing of Statutes, 1484 – 1547" in Ives, E.W., Knecht, R.J. and Scarisbrick, J.J. (eds) *Wealth and Power in Tudor England: Essays Presented to S.T. Bindoff* (Athlone Press, London, 1978) p. 81-82. As to the issue of statute printing as an element of promulgation see above Ch. 5 p. 130 et seq. and N. Doe *Fundamental Authority in Late Medieval Law* (Cambridge University Press, Cambridge 1990) p. 38- 39.

<sup>11</sup> Brooke's collections were published in 1573, 1576, 1578, 1586 and 1587 by Richard Tottel STC 3827, 3838, 3821, 3821.5, 3823 and in 1597 by Jane Yetswiert STC 3824.

<sup>12</sup> Guillaume Le Talleur for R. Pynson, Rouen 1490 STC 23238. Only one printing appears in the Early English Books Online database.

<sup>13</sup> (Richard Totill, London 1583) STC 12357.3. Gregory's work was reprinted under the title *L'abridgment des cases concernants les titres plus materiall pur les estudients & practiciones des leyes du royaume digesteses certain aptes diuisions des oubsmesmes les titres. Ouesquedeux tables ore primerment addes, l'une des titres mesmes: l'autre des diuisions du chescun titres.* (Thomas Wight and Bonham Norton, London, 1599) STC 12357.7.

The fifth and final category was the Treatises or law texts which also grew in number as the printing of the Year Books declined. During the seventeenth century to 1642, treatises comprised the largest sector of legal printing with a wide variety of titles being printed.<sup>14</sup>

### **Year Book Printing**

For the first 50 years of legal printing the Year Books dominated law publishing. Law printing was intermittent over the period 1480 to 1500, with gaps where there were no law books printed at all.<sup>15</sup> Following the tentative start of Machlinia and Lettou, by the 1560s most of the Year Books had been printed, although there were reprints through to the end of the sixteenth century and the early seventeenth century when Year Book publication had tapered off to a few isolated printings.

The number of Year Books published varied from year to year.<sup>16</sup> In some years large numbers were published and in others none at all. As may be expected, this was the case with all the different types of publication.<sup>17</sup> The varying numbers of Year Book volumes produced over the period does not attract any particular analysis other than that all Year Books printed are those for cases decided after the time of Edward II.<sup>18</sup> The demand for the various “Years” seemed to vary, and there appears to be no real order in the way in which the Year Books were printed.<sup>19</sup> With a few exceptions the greatest number of printings were of relatively recent “Years” – from Edward IV to Henry VIII.

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<sup>14</sup> For a detailed discussion of such law texts see below Ch .7. It should be noted that in addition to the categories referred to there were incidents of printing medieval texts such as Glanville (1554) and Bracton (1569). Britton had been printed before 1540 by Redman although the precise date is unknown. On the printing of Bracton see I.S. Williams “A Medieval Book and Early-Modern Law: Bracton’s Authority and Application in the Common Law c. 1550 – 1640” (2011) 79 *The Legal History Review* 47. Other legal literature was being written but was retained in manuscript and was not printed until much later (for example see M.J. Prichard(ed) *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Society, London 1992) which includes an unpublished treatise by Serjeant William Fleetwood (d. 1594)) Fleetwood’s treatise on Forest Law has never been printed.

<sup>15</sup> Between 1486 and 1490, 1493 – 1494 and 1497 – 1498. For a broad sketch of Year Book printing see W.S. Holdsworth “The Year Books” (1906) 22 *LQR* 266, p.268-270.

<sup>16</sup> The statistical information which informs this discussion has been developed by the author from tabulated information in J.H. Beale *A Bibliography of Early English Law Books* (Harvard University Press, Cambridge Mass, 1926), an examination of the Early English Books On-Line Database (Chadwyck-Healey, Cambridge Information Group New York). <http://eebo.chadwyck.com.ezproxy.auckland.ac.nz/home> (last accessed 3 August 2011) and A. W. Pollard & G. R. Redgrave *A short-title catalogue of books printed in England, Scotland & Ireland, and of English books printed abroad, 1475-1640* (2nd ed. / rev. & enlarged, begun by W. A. Jackson & F. S. Ferguson, completed by Katharine F. Pantzer Bibliographical Society, London, 1976).

<sup>17</sup> High levels of Year Book printing occurred in 1530, 1556, 1568 and 1572.

<sup>18</sup> The Year Books commenced in the reign of Henry III. There are earlier reports or case notes which have been recovered from manuscript sources – see Paul Brand *Earliest English Law Reports* (Selden Society, London, 2006) – but printed Year Books commence with 1-19 Edward II first printed by Tottel in 1562 STC 9551.

<sup>19</sup> Tottel printed Year Books for 1 – 10 Edward III as well as Year Books for the reign of Henry V in 1562 and 1563, yet de Worde printed Year Books of 17 and 18 Edward III in 1516 and 1517. Between 1511 and 1527

Given that printing was a business driven by demand it is quite clear that the Year Books of the more recent times were subject to numerous printings because that was what the lawyers wanted and needed. Recent material was more relevant and up-to-date.<sup>20</sup>

Year Book printing declined towards the end of the Sixteenth century, the largest number being published by Richard Tottel between 1556 and 1572. Although some Year Books were published in the early 1600s there was little activity in this area of legal publishing until 1672 with the publication of the so-called “Vulgate” Year Books. The reason for the decline in Year Book publishing can be attributed to the fact that first there was no great market either for publication of those Years in addition to those that had been published and, secondly, demand for reprints of existing editions was low. One would have thought, with a growing legal profession, reduced costs and greater availability occasioned by the new technology, that the opposite would have been the case.<sup>21</sup>

There were a number of possible reasons for the decline in Year Book printing.<sup>22</sup> First, the Year Books addressed only cases heard in Common Pleas. There was a limited bar practising in this Court and many of the students and practitioners before other Courts had little use for the Year Books. Secondly, the Year Books were dated. More recent reports by Plowden and, in the seventeenth century, Coke were more relevant. Coke often re-interpreted the Year Books to make them more relevant to contemporary practice. Thirdly, the re-printings of the Year Books made them available as “hand-me-downs” and there was no need to embark upon the considerable cost of a further print run.<sup>23</sup> Fourthly, abridgements had made the material in

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Pynson printed Year Books for fourteen years of the reign of Edward III (Years 7, 21, 38 and 40 – 50) Between 1528 and 1538 Redman printed Year Books for six different Years of Edward III (Years 24, 29, 30, 39, 40 and 41) and Berthelet printed 21 Edward III in 1527 and 22-28 Edward III in a single volume in 1538. For Year Book printing see Baker “The Books of the Common Law” above n. 2 p. 430-2; W.C. Bolland *A Manual of Year Book Studies* (Cambridge University Press, Cambridge, 1925) - generally Ch III.

<sup>20</sup> With the exception of 1 Henry VI and 3 Henry VI which were printed 7 times and 9 Henry VI which had 8 reprints, most of the reprints numbering 7 and more are from the period after 1455. If we extend the scope of the examination to include those Year Books which were reprinted 6 times or more we find that with the exception of 4 and 10 Henry VI all the Year Books date from 1444. The volumes of the Year Books were identified by the Regnal Year of the monarch. The cases within each volume were identified by the term within which the case was heard. I have used the regnal year as the identifying feature for the Year Books rather than the chronological year in which the case was decided.

<sup>21</sup> For the reprinting of the Year Books in the latter seventeenth century see Baker “English Law Books and Legal Publishing” above n. 2 p. 497 – 501. See also Charles C. Soule “Year-Book Bibliography” (1901) 14 Harvard LR 557 et seq; Bolland above n.19 p. 76 et seq. Holdsworth above n.15 p. 270.

<sup>22</sup> Ibid. Bolland p. 72 et seq.

<sup>23</sup> This does not overlook the fact that there were occasional reprinting of the Year Books even in the seventeenth century by Wight, Islip and Flescher. For the cost of second hand volumes of the Year Books see

the Year Books more accessible than the Year Books themselves, especially in the way in which the material was ordered.

Legal historians have stated that the printed Year Books are doubtful authority, and the criticism of the printed Year Books by legal historians such as Maitland, Bolland, Baker and others are well known.<sup>24</sup> even although their importance as a part of the essential studies for law students was recognised even as late in the seventeenth century as 1679.<sup>25</sup> Legal historians have preferred to seek out the manuscript sources in the hope that such sources will provide a true record of the cases in question and thereby assist in understanding, as far as one can, the substantive principles, and their critique must be viewed in that light.<sup>26</sup> Yet the lawyers of the time might as easily have resorted to an available print copy as they might have one in manuscript<sup>27</sup> and the printed Year Books provided source material and educational information for lawyers and law students.<sup>28</sup>

Certainly there were difficulties initially experienced by printers and publishers in obtaining acceptance for the printed word. Legal culture was, as has been discussed in Chapter 4, largely oral and based upon memory. Statutory information was available but the large

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J.H. Baker “English Law Books and Legal Publishing” above n. 2. p. 495 et seq. For a brief but helpful account of the history of the Year Books see also J.H. Baker *An Introduction to English Legal History* above n.2 p. 179 – 183.

<sup>24</sup> F.W. Maitland *Why the History of the English Law is not Written in Collected Papers* (Cambridge, Cambridge, 1911) (2 vols) Vol 1 p. 484) F.W. Maitland *The Materials of English Legal History* (1889) 4 *Political Science Quarterly* 496 at 501, p. 642 and p.644) F.W. Maitland “Introduction” to *Year Books of 1 & 2 Edward II* (17 Selden Society, London, 1903) p. xxi. W.C. Bolland *The Year Books* (Cambridge, Cambridge, 1921) p.46 and p. 500; Bolland *A Manual of year Book Studies* above n. 19 p. 75. R.V. Rogers *The Editing and Publication of the Years Books of the reign of Edward III* (1951) 44 *Law Library Journal* 71 at 72. Holdsworth *The Year Books* above n. 15 p. 271; J.H. Baker *Unprinted Sources of English Legal History* (1971) 64 *Law Library Jnl* 302 and *The Law’s Two Bodies: Some Evidential Problems in English Legal History* (Oxford, Oxford, 2001). It must be noted that these are recent criticisms. There do not appear to be similar critiques from contemporary sources such as Coke or Plowden.

<sup>25</sup> The question of doubtful authority derives from the opinions of latter day legal historians. The view of the lawyers of the time suggests that they were a valuable resource for lawyers and law students. The publication of the *Vulgate* was approved by the Judges who observed the scarceness of copies of the Yearbooks “which hath been to no small detriment to the study of law” and they were recommended as “principal and essential part” of legal studies. See *Le premier part de les reports del' cases en ley que furent argues en le temps de le tres haut & puissant prince roy Edward le Tierce. ... Brook & Fitzherbert.* , (George Sawbridge, William Rawlins, and Samuel Roycroft, assigns of Richard and Edward Atkins Esquires, London, 1679) Wing (2<sup>nd</sup> Ed) P3213B. A complete catalogue of the Year Books, their printers and dates may be found at David Siepp *Old Printed Editions of the Year Books (Edward II - Edward III, 1307-1377)* <http://www.bu.edu/law/seipp/stc/oldprinteditions-1.html> (Last accessed 3 August 2011).

<sup>26</sup> Even although the Year Books did contain some substantive rules in what were largely pleading guides – see E.W. Ives “The Purpose and Making of the Later Year Books” (1973) 89 *LQR* 64 at 65 – 67.

<sup>27</sup> Thus, ironically, the quality of the printed product may have reflected the manuscript exemplar.

<sup>28</sup> This is a further example of the way in which lawyers may have moved easily between print and manuscript sources and the co-existence of the two.

disorganised mass of the common law posed an entirely different challenge. The source of a rule may have been debateable<sup>29</sup> and where there were debates about the precise nature of a rule judges would often confer with senior members of the Inns to obtain consensus about the law. In a culture where binding precedent was unknown and where there was no satisfactory or reliable way of recording precedents, such a “consultative” approach was seen as quite acceptable.<sup>30</sup> If memory-based “authority” was to be replaced by a print-based certainty, the printed work would have to be perceived and known to be accurate, reliable and unambiguous. Only when there was more professional confidence in the printed work over other sources would the real impact of the properties of print be realised. This reflected a contest between sources. Material in print was not reliable simply because it was in print. It could be more reliable than a source used by one’s opponent in certain circumstances. Only with the passage of time and other elements such as authorship and the accuracy of the material in print itself would printed material automatically overtake other sources.

In an environment of co-existence the way in which printed material was viewed depended not upon the mere fact that it was printed, but upon a number of other factors including its manner of use by lawyers or the Judge. Print in and of itself did not attribute a greater reliability to the information but that rather depended upon the way it was used, thus demonstrating the importance of the interrelationships and interactions between interested users. The technology itself did not automatically provide an answer to the issue of reliability.

It must be remembered that in this transitional period as printed works became more and more available, practitioners could still rely on their own notes and their memories as repositories for legal information. In the event of a conflict between the printed word and that which was recorded in a personal common place book, the private note would assume more reliability than some printed work by a virtual stranger. Until practitioners could rely upon printed works they would not use them and the uptake of such works would be slow. However, the presence of a name like Dyer, Brooke or Plowden may lend added weight to a printed text. The printers themselves recognised this and used the names of their authors and the accuracy of their texts (and the questionable nature of those of their competitors) as

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<sup>29</sup> It may have been a matter of what modern legal historians refer to as “immemorial custom”.

<sup>30</sup> 3 Cokes Reports “To the Reader” Folio Ei pages unnumbered.

marketing points.<sup>31</sup> Thus, elements other than the technology of print itself were relevant in considering the quality or reliability of information.

Another explanation may lie in the co-existence of the developing print-based culture and that of the existing manuscript culture.<sup>32</sup> The last major printing of the Year Books within the period under study was between 1596 and 1619 by Jane Yetswiert, Adam Islip (on behalf of the Stationers) and Thomas Wight.<sup>33</sup> There was no significant major reprinting until Maynard's edition in 1672. How then did law students and lawyers obtain copies of the information that they sought contained within the Year Book pages? Absent a stock of copies held by the printer (as Tottel did), the copying or transcribing ethos of the manuscript culture provides one explanation. There were extant printed copies of Year Books and there can be no doubt that there were privately copied copies as well. The student or lawyer need only obtain an existing copy and use it as an exemplar, transcribing it himself or having a commercial scribe do the work for him. The availability of existing copies in print and manuscript provided the resources for transcription in a culture that had no hesitation about copying the information required and which valued a manuscript copy as much as it did a printed one. By 1672 there was a perceived need for a reprinting, given that there were more men coming into the legal profession requiring the texts and there were a limited number of sources available as a result of the effluxion of time and intervening catastrophic events.<sup>34</sup> In addition, of course, there was the printing and re-printing of Coke's *Reports* which recast Year Book cases to address matters of contemporary concern along with the abridgements which provided a wealth of Year Book information.

The explanation for the absence of printed law reports other than the Year Books is very clear. There were not many collections that made it to the printing shop. Indeed throughout the entire period the only nominate reports printed are those of Plowden, Dyer and Bellewe.<sup>35</sup> This emerging medium of legal information took time to develop. Furthermore printing

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<sup>31</sup> Although unscrupulous printers might wrongly attribute the names of authors to works to gain a market advantage. Examples may be seen in *The Compleat Copyholder* (attributed to Coke) and *The Use of the Law* (attributed to Bacon).

<sup>32</sup> For a discussion of the co-existence culture see Ch. 5 p.137 et seq.

<sup>33</sup> There was a printing of the years of Edward IV in 1640 by Flescher and Young.

<sup>34</sup> Baker suggests that the passage of time and damage by fire during the Great Fire of London 1666 resulted in a lack of sufficient books to serve the profession, thus prompting the Year Book reprinting project. J.H. Baker "English Law Books and Legal Publishing" above n. 2 p.495.

<sup>35</sup> Along with Brooke's Abridgement which cannot properly qualify as Reports. However, nominate manuscript law reports were available and circulated - J.H. Baker *An Introduction to English Legal History* above n. 2 p. 180 et seq.

involved a considerable outlay in cost both for a first printing and for reprints.<sup>36</sup> Similar explanations may be advanced for abridgements.<sup>37</sup> There was not a large volume of material available for printing in abridgements, and most of the later abridgement printing was by way of reprints of earlier works. But there may be other explanations which as yet are not clear. If the lawyers kept their works away from the printers, this must have been a conscious decision which may have reflected cultural inhibitions arising from the “stigma of print.” Even Plowden printed his *Commentaries* with reluctance and only so that he could supervise the printing to ensure accuracy. On the other hand there may have been reluctance on the part of Tottel, who held the common law printing patent, to print the reports of other lawyers who perhaps were less well-known than Plowden. If this was the case, the role of the printer (Tottel) as a facilitator - and possibly inhibitor of the spread of legal information - assumes a very important role. As the sole conduit for printing the common law, Tottel potentially could control the flow of common law information. As has been shown<sup>38</sup> he was conservative and this too may have influenced his unwillingness to print less well-known material. It may be assumed that his lawyer patrons may have had an input into what was printed, emphasising the interplay of interests and influences that lay behind law printing.

### **Year Book Abridgements**

The printing of the Year Books was followed by the printing of cross-referencing or indexing systems. Collections of material in summary and arranged by headings, providing an abbreviated summary of what the case was about, known as abridgements, had been available in manuscript but the advent of print provided new opportunities, especially with the standardisation of pages and references that print allowed.<sup>39</sup> The Year Books themselves had neither indices nor contents pages, even when in print. The growth in volume of the manuscript Year Books and the material contained therein demanded an attempt at organisation, for otherwise the Year Books themselves would become unusable. There were many manuscript Year Books and they differed in detail and lacked the standardised form and appearance that would be provided in print. Without abridgements, the particular information sought by the lawyer would lie submerged under a mass of disorganised material.

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<sup>36</sup> Although there may have been a reduction in reprints in that the printer knew how the content should be arranged.

<sup>37</sup> There was considerable time and expense involved in printing large works such as abridgements.

<sup>38</sup> For Tottel's conservatism see above Ch. 5 p.107, p. 110 - 113.

<sup>39</sup> Occasionally these side notes and catchwords appeared in the same manuscript. Winfield refers to a manuscript possibly from the 1430's which has titles arranged in a rough alphabetical order dealing with cases from the reigns of Edward III, Henry IV and Henry V. P.H. Winfield *Abridgments of the Year Books* (1923) 37 Harvard LR 214 at p. 215.

The Abridgements provided both an indexing system and a quick reference to cases under a particular heading. In some Year Books there were marginal references or side notes which appeared in print but the abridgements were not merely indices. Furthermore the organisation of information under headings was a system familiar to lawyer-common placers who had devised their own reference systems. The fact that Year Book abridgements were printed suggests both that there was a market for such texts and that some form of standard organisational system was beginning to develop.<sup>40</sup>

There were four main abridgements of the Year Books.<sup>41</sup> These were an Abridgement of the Book of Assizes, Statham, Fitzherbert and Brooke. Most of the material in the abridgements of Statham, Fitzherbert and Brooke was drawn from the Year Books, but also contained material that appeared in other sources that are no longer extant

The Abridgement of the Book of Assizes was first printed by Pynson in 1510.<sup>42</sup> An edition printed by Tottel was published in 1555 under the title *Abridgement of the Book of Assises*.<sup>43</sup> Several observations need to be made. The first is that notwithstanding the title, the abridgement is not the same as the Year Book *Liber Assisarum*.<sup>44</sup> It comprised seventy-six headings beginning with *Attachment* and referred to approximately one thousand cases or points argued. A large number of cases were taken from the Year Book *Liber Assisarum* and all the other cases came from the period between the reigns of Edward I and Edward IV. It has been suggested that much of the material in this Abridgement came from Statham and in addition contained many comments and notes on a number of statutes.<sup>45</sup>

Statham's Abridgement provided the model for many of the printed abridgements that later followed. It was not the first abridgement of the Year Books that was created, but it was the

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<sup>40</sup> For the utility of indexing and organization see Winfield *ibid.* p. 217 et seq.

<sup>41</sup> Numerous abridgments succeeded Statham, Fitzherbert and Brooke but these works contained a large volume of material both judicial and statutory that was developed after the Year Book period. These works represent efforts to classify and order the disorganised mass of the common law. Winfield *ibid.* p. 215 -216.

<sup>42</sup> There is no printing information and the edition does not have a title page or a detailed colophon other than Pynson's device on the final page although we do know that Pynson had printing premises in London at this time. The edition is catalogued under STC 9603.

<sup>43</sup> Richard Tottell, London, 1555 STC 9604 and 9605. Authorship is attributed to William Callow.

<sup>44</sup> 1-50 Edward III.

<sup>45</sup> Winfield *Abridgements of the Year Books* above n. 39 at p. 215.

first to be printed although it was untitled. There is no reference to Statham as the author and indeed there is no direct proof that Statham compiled it.<sup>46</sup>

The version of Statham printed by Pynson in 1490 certainly was in pre-existing manuscript form and, given the nature of the material contained in the printed version, was extant in 1460.<sup>47</sup> However, apart from Pynson's printing, no other copy of any other edition has been able to be traced.<sup>48</sup> It was the printed prototype for later abridgements that followed but was not as extensive. It contained two hundred and fifty-eight headings commencing with *accomppte* and the titles are centred on the writs that were used in the cases that were cited. There were some 3,700 references and cases under these titles. Many of the references were just those – a note or a line from the case. This demonstrates the way in which the new titles added to legal information availability per medium of print

Sir Anthony Fitzherbert, although writing on a broad range of subjects, is best known in legal circles for his works *The New Natura Brevium* and *The Graund Abridgement*. The first edition of *The Abridgement* appeared in 1516 and was printed by John Rastell.<sup>49</sup> The concept of Fitzherbert's work was not new but it was far more extensive than that of Statham. There are only two more titles in Fitzherbert than there were in Statham but 29 of Fitzherbert's titles differed from those of Statham and a number of Statham's headings were dropped. Fitzherbert's methods of organisation differed from that of Statham and many of the references that appeared under the dropped headings from Statham were redistributed under other titles. It is in the references that the full dimension of his work may be observed. There are 14,039 references, or almost four times those that appeared in Statham.<sup>50</sup> References to cases were to the term and regnal year in which the case arose or was settled. In the 1516 edition, there are no references to the folio in the Year Book.<sup>51</sup>

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<sup>46</sup> The person who authored "Statham's Abridgment" is unclear. Winfield identifies two potential candidates but the evidence for one or the other is not conclusive. Winfield *Abridgments of the Year Books* Ibid. p. 221-223. The publication itself does not have a title page. The copy referred to in the Short Title Catalogue and that appears in Early English Books On-Line and that may be found in the British Library is tentatively entitled *Abridgment des livres annales* (Guillaume Le Talleur for Pynson, Rouen, 1490) STC 23238.

<sup>47</sup> Winfield places it as 39 Henry VI. Winfield *Abridgments of the Year Books* above n.39 at p. 226.

<sup>48</sup> Ibid. p. 227.

<sup>49</sup> Winfield above n.39 p.232 et seq. For a discussion of Rastell's printing activities and contribution to the printing of the law see Chapter 5 and his involvement with Fitzherbert's abridgment see Winfield above n. 39 p.234 et seq.

<sup>50</sup> These figures are taken from the 1565 edition.

<sup>51</sup> Foliation had not become standard practice until its regular use by Tottel. See below n. 57.

The value of Fitzherbert's work became apparent. Whereas there was only one edition of Statham, Fitzherbert's book was regularly re-printed.<sup>52</sup>

Winfield suggests that Fitzherbert had access to Statham's work and there can be no doubt that he did. Fitzherbert often adopted cases which have never been traced in the printed Year Books and for which he gives no better reference than Statham. He takes them over almost literally, which would suggest that some of the manuscripts that might have been used by Statham may not have been available to Fitzherbert.<sup>53</sup> Thus this seems to suggest that there was a paucity of manuscripts, which may have required Fitzherbert to rely upon the printed source.

It may well be that Fitzherbert worked co-operatively with John Rastell.<sup>54</sup> If this is so, this would be an early example of the extended interaction that is a part of legal printing. Although Rastell was a lawyer, if he and Fitzherbert worked together the final printed product was not just that of the printer. It is also the case that Rastell himself worked co-operatively with other printers on Fitzherbert's *Abridgement*.<sup>55</sup> When the printing of the abridgement was announced, Rastell stated his intention of publishing tables that would be ordered and numbered to assist in the furthering of the study of law. This was done with the publication of *Tabula Libri Magni Abbreuiamenti Librorum Legum Anglorum*, published in three parts on February 10, 1517. This was compiled by Fitzherbert who drew up short subtitles under each alphabetical title. The *Tabula* was re-published by Tottel on November 10, 1565 and became nearly as important as the abridgement itself.<sup>56</sup> Without the *Tabula*, a lawyer would have to work through the whole of an alphabetical title in order to track down what was wanted. With Rastell's number of the plea and marginal catchword, a searcher had

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<sup>52</sup> In 1565, 1573, 1577 and 1586.

<sup>53</sup> Winfield *Abridgments of the Year Books* above n. 39 p.236.

<sup>54</sup> Rastell and Fitzherbert were friends and were part of a group known as the Coventry lawyers. See H.J. Graham "The Rastells and the Printed English Law Book of the Renaissance" (1954) 47 *Law Libr J* 6 at 7 –see also p. 7 n.4 and p. 16. H. J. Graham "'Our Tong Maternal Maruellously Amedyd and Augmentyed': The First Englishing and Printing of the Medieval Statutes at Large" (1965) 13 *UCLA L Rev* 58 at 73 at n 50; H.J. Graham and J.W. Heckel "The Book that 'Made' the Common Law: The First Printing of Fitzherbert's *La Graunde Abridgment* 1514-1516 (1958) 51 *Law Libr J* 100 at 114 noting Rastell's acknowledgement of Fitzherbert's compilation work in the "Prologus" – note the discussion at p. 114-116.

<sup>55</sup> *Ibid.* Graham "Our Tong Maternal". Another example of the lawyer/author, in addition to providing content, as a part of the printing/production process.

<sup>56</sup> Winfield above n. 39 at p. 236.

a quick guide to the abridgement but was no nearer in getting to the folio in the printed Year Book itself. It was not until the 1565 edition that this defect was remedied.<sup>57</sup>

The absence of folio references from the Year Books in the 1516 edition suggests that Fitzherbert's sources may have been unprinted except, possibly, *Liber Assisarum* and possibly even Statham.<sup>58</sup> There had been printed editions of the Year Books well before 1516 but only some of the years were covered. It is also clear that a work the size of the abridgement would have to have been commenced many years before its actual publication, which means that Fitzherbert would have to have used a number of manuscript sources and much of the material that he incorporated into the abridgement clarified points missed in the books themselves.

The third major abridgement was that of Robert Brooke.<sup>59</sup> Whereas Fitzherbert had 260 titles and slightly over 14,000 cases, Brooke had 404 titles and 20,717 cases. The use of the word "case" should be clarified and, perhaps, the word "reference" would be more satisfactory because both Brooke and Fitzherbert selected points from cases themselves as well as brief opinions and some notes which may have come from other sources such as the Inns of Court. The increase of references in Brooke's work arises from his inclusion of cases from the reign of Henry VIII. He also split up some of Fitzherbert's longer cases and in addition to abridging the Year Books, he occasionally cited old *Natura Brevium*, Fitzherbert's *Natura Brevium*, *Old Tenures*, *Doctor and Student* and some Statutes.

The work of the early printed digesters and abridgers continued the common placing method of ordering categories of law under headings. The disseminative quality of print provided the potential for a wider distribution of the abridgements, which had formerly been available only in manuscript and subject to the limitations imposed by manuscript publishing.<sup>60</sup> The

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<sup>57</sup> One of Tottel's contributions to Year Book printing was the introduction of standard foliation this making proper referencing and citation possible. Ives, above n. 30 p. 76.

<sup>58</sup> Alternatively the standard mode of citation may have been imprecise or that folio references were not yet a form of reference.

<sup>59</sup> *La graunde abridgement, collecte & escrie per le iudg et tresreuerend Syr Robert Brooke chiuallier*, (Tottell, London, 1568) STC 3827 His abridgement was published posthumously in 1568. and re-appeared in 1570, 1573, 1576 and 1586. By the time Brooke had died, nearly all the Year Books had been printed but they had not been printed in any order and were published more as convenience dictated. See Winfield above n. 39 p. 240 et seq.

<sup>60</sup> It is not suggested that manuscript common place books were "published" in that form by means of scribes working in a scriptorium. It is highly likely that they were informally shared among colleagues – another form

previously disordered mass of the common law was assisted by distribution of the abridgements in print, for the indices that were developed by the abridgers gave reader access to material, together with organising it in a coherent and readily understandable manner.<sup>61</sup>

There were two possible consequences that might have flowed from this. The first is that by publishing in print and by virtue of an acceptance by the legal community of a certain value in the printed books, the methods of ordering adopted by the abridgers gradually became a recognised standard and set a bench mark for future ordering and classification. Individual common placers had their own ordering methods but the printed works offered a standard that could act as a guideline for students in the future.

The second possible consequence is that English lawyers started to search their books for rules, thinking more in terms of the standard rule and the utilisation of cases as a basis for the rule than in the terms of judicial consistency, writs, causes and forms of action.<sup>62</sup>

There can be no doubt that both Brooke and Fitzherbert were well known and recognised valuable publications and of considerable utility for students. William Fulbecke in his *Direction* recommended Fitzherbert and Brooke but had nothing to say about Statham.<sup>63</sup>

***M. Fitzherbert must needes be commended for great paines, and for well contriuing that which was confusedly mingles together in many peere Bookes:but he was moze beholden to nature, then to art, and whilest he laboured to be iudiciall, he had no precise care of methodicall pointes: but as hee was in conceit stowe, so he was in confusion sure; and in the treatyses which he of his own penning hee sheweth great iudgment, sound reason, much reading, perfect experience, and in the whole conueyance of his discourses giueth sufficient prooffe that he sought rather to decide then to devise doubtful questions***

***Maft Brocke is polite, and by popular and familiar reasons hath gained singuler credite, and in the facilitie and compendious forme and abridginge Cases hee carrieth away the***

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of publication in the manuscript culture. See Peter Beal *In Praise of Scribes: Manuscripts and Their Makers in the Seventeenth Century* (Clarendon Press, Oxford, 1998) p. 12 – 16, p. 25.

<sup>61</sup> Graham *The Book That “Made” the Common Law* above n. 54.

<sup>62</sup> Ethan Katsch “*Communications Revolutions and Legal Revolutions: The New Media and the Future of Law*” (1984) 8 Nova L.J. 631 at p. 645. There were already changes to the way in which legal questions were raised in the sixteenth century and legal argument after trial (at the enforcement phase) was becoming as important if not more so than at the pleading stage. Post trial arguments allowed the debate to be grounded upon an existing factual situation thus focusing the argument. J.H. Baker “*English Law in the Renaissance*” (1985) CLJ 60. These procedural changes were unrelated to the printing press, but lawyers would have had access to printed texts to aid in their arguments.

<sup>63</sup> William Fulbecke *A Direction or Preparative to the Study of the Law* (Thomas Wight, London, 1600) p. 27-28 STC 11410.

garland. But where *Ma Fitzberbert* is better understood, he profiteth more, and his Abridgement hath more sinewes, though the other hath more vaines, but I am loath to make them countermates, and therefore leaue the iudgement thereof to others.

## Statutes and Abridgements

The publication of collections of statutes also commenced intermittently between 1480 and 1534 and then proceeded on a regular basis. Most years saw publications in the single figures although there were some years in which a large number of collections were published.<sup>64</sup> Statute publishing continued on a steady basis until the end of the Sixteenth century.

The Royal Printer was responsible for printing the Public Acts as they were enacted by Parliament.<sup>65</sup> There were certain exceptions, particularly in the early days of printing. Machlinia printed the statutes of the first year of the reign of Richard III<sup>66</sup> and Caxton printed the statutes for the first four years of the reign of Henry VII in 1491.<sup>67</sup> Even after the appointment of William Faques as the Kings Printer, other printers were issuing Statutes.<sup>68</sup> In the main specific statutes were printed by the Royal Printer and extensive regular printings by the Royal Printer commenced in 1513 when Pynson held the office. Private printers moved to printing compilations or collections of earlier statutes as contemporary statutory material became the province of the Royal Printer although there were frequent retrospective publications especially of the statutes of Henry VIII.<sup>69</sup>

Robert Redman was the first to print the pre-Tudor *Nova Statuta* between 1530 and 1533 and this was expanded to cover Tudor Parliaments. The text was entitled *The Great Boke of*

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<sup>64</sup> 17 in 1543, 19 in 1552, 11 in 1560, 17 in 1562, 11 in 1572 and 18 in 1573.

<sup>65</sup> The monopoly that the Kings Printer's patent granted included statutes although there were often disputes about the nature and extent of the statutory material to which the patent applied. For a discussion of the Royal Printer see above Ch . 3 p. 49 et seq.

<sup>66</sup> *Statuta apud westmonasteriu edita anno primo Regis Ricardi tercii*(William de Machlinia, London, 1484) STC 9347. There is neither title page nor index. The "statutes" are identifiable by a Chapter reference and the language is law-French.

<sup>67</sup> *The kynge our souernynlorde henry the seuenth after the conquest by the grace of god kyng of Englonde of Fraunce and lorde of Irlonde at his parlyamet holden at Westmynster the seuenth daye of Nouembre in the first yere of his reigne* (William Caxton, London, 1491) STC 9348. There is no title page nor index. The language is English.

<sup>68</sup> In 1508 Notary published 19 Henry VII (STC 9351) and in the same year de Worde published 1-19 Henry VII (STC 9351a).

<sup>69</sup> In 1575 16 separate volumes of the Statutes of the Parliaments of Henry VIII were printed.

*Statutes*. He followed this in 1534 with the publication of *The Boke of Magna Carta*, Ferrers translation of the Old Statutes.<sup>70</sup>

The characteristics of printed statutes varied between printers. Some editions were entitled with the regnal year in which the statutes were enacted and proceeded to set out the text thereof. Other printings, such as 7 Henry VII by de Worde have a decorative frontispiece and a table of contents for easy reference.<sup>71</sup> Elegant production was also a feature of Berthelet's printing of statutes and succeeding printers such as Powell, Jugge and Barker.<sup>72</sup> The volumes of printed statutes rarely had a preface to the reader but occasionally the collections or compilations contained such a message. In some cases the work of previous compilers was being issued in a new and updated edition. An example may be seen in Christopher Barker's printing of *A collection in English, of the statutes now in force, continued from the beginning of MAGNA CHARTA, made in the 9. yeere of the reigne of King H. 3. vntill the ende of the session of Parliament holden in the 31. yeere of the reigne of our gratious Queene Elizabeth* which contains indices of the an alphabetical list of the statutes as "**fet forth by Maſter Iuſtice Raſtal**" and another setting out the regnal years of the kings, the times of their Parliaments, the subject matter of the statute so that "**the Reader eaſily finde vnder what title, and in what leafe of this Booke anie of theſe Statutes be placed.**" The work contains a preface written by William Rastell, clearly indicating the debt owed to the original compiler.<sup>73</sup>

A further development in the printing of legal material came in 1579 with the printing of Ferdinando Pulton's abstract of penal statutes.<sup>74</sup> Like Staunford's earlier work, Pulton's deals with statutes covering a specific area of law rather than an abridgement of all statutes over a set period. It contains a detailed preface and table of contents and the text is ordered alphabetically under subject headings. The particular rule is stated with a statutory reference

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<sup>70</sup> Graham points out that these statutes at large were all published in English a full decade earlier than credited by Holdsworth, Winfield, Read and Bennett and during, not after, the Reformation Parliament. Graham, *Our Tong Maternall* above n. 54 p. 61.

<sup>71</sup> *Statuta .vii. Perlamento Henrici .vii* (Wynken de Worde, London, 1508) STC 9351a.

<sup>72</sup> See *Anno secundo et tertio Edouardi Sexti* (Thomas Berthelet, London, 1549) STC 9422.5; *Anno primo Henrici Octavi* (Thomas Powell, London, 1563) STC 9360.5; *Anno octauo reginae Elizabethae*. (Richard Jugge, London, 1563 STC 9469.5); *Anno xxiii. Reginae Elizabethae* (Christopher Barker, London, 1585) STC 9485.7. This edition has a particular interest for the table of contents contains a schedule of the statutes that were printed together with a list of those enacted which were not.

<sup>73</sup> Christopher Barker, London, 1591 STC 9318. The title does not refer to what we would understand as the "short title" or "long title" of the statute but to the heading or subject matter to which a statute might be relevant.

<sup>74</sup> *An abstract of all the penal statutes which be general, .... Collected by Fardinando Pulton of Lincolnes Inne Gentelman, and by him newly corrected and augmented* (Christopher Barker, London, 1579) STC 9528. This work addressed the same subject matter as Staunford in *Plees of the Crown*.

and marginal notes summarise or explain the content. Pulton's work exemplifies a growing confidence that writers had in the availability of existing material (in this case statutory) and their willingness to address specific areas of the law in a helpful and simple way, at the same time cross referencing their work to existing printed material. This confidence, together with an obvious desire to explain and elucidate the law helped develop the large output of law texts or treatises which took place in the seventeenth century.<sup>75</sup>

### **Some Observations**

One might have expected that after the advent of the printing press, and with a ready market present, there would be a gradual and sustained growth in the variety of printed of legal information, but this was not the case. Although there was regular printing of Year Books until 1587, and of Statutes and Treatises, the books printed were fairly standard and with the exception of a few titles such as Plowden's *Commentaries* were not innovative. As has been pointed out in Chapter 5, regulatory structures and factors within the business of law printing may provide an explanation. What development there was seems to be fitful with isolated high peaks of production rather than a steady growth curve.

Factors other than market forces intruded. The period under study was one of considerable turmoil. During the reign of Mary, for example, many of the Protestant printers, fearing persecution, left England for the Low Countries yet 1556 saw the greatest number of Year Books printed. However by 1558 overall law publishing was on the decline. During the time of Elizabeth law publishing increased but did not show a consistent and sustained growth pattern.

The role of the printers and the regulatory structures within which they worked cannot be overlooked. Before Tottel was granted the common law patent in 1553 there was competition between printers as exemplified in the Pynson\Redman contest.<sup>76</sup> This was not necessarily disadvantageous but it did mean that there were competing editions of similar works on the market. Tottel appeared to have the backing of the judges<sup>77</sup> and also had the advantage of patronage from eminent lawyers leading to the renewal of the patent in 1556. There was a

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<sup>75</sup> See below Ch .7.

<sup>76</sup> For discussion see above Ch. 5 p. 104 et seq.

<sup>77</sup> 2 Arber 775. For discussion see above Ch. 5 p. 108 – 110.

concern, however, that Tottel had allowed the patent to atrophy<sup>78</sup> notwithstanding that he had improved certain educational texts such as an annotated Magna Carta. His practice, as has been noted, was to store material in warehouses so that he could release it as required, but despite this he printed over 100 common law items and seemed to consider that there was worth in the patent by registering some 50 or so titles in the Stationers' Register on 18 February 1583. But, as has also been noted, the titles he printed were fairly standard. It has been suggested that Tottel increased the value of the patent, notwithstanding Barker's report, and was less willing to risk capital on other types of publishing.<sup>79</sup> From this it can be concluded that Tottel was not entirely a slave of the market but rather was able to manage it through the utilisation of his monopoly.

Thus in the second half of the sixteenth century law publishing had elements of a managed industry. Although the market for the law books published in the sixteenth century was predominantly that of the legal profession that market and the type of law texts published was in the process of changing.

### **Plowden's Commentaries**

Why, then, did the printing of the Year Books fall off so dramatically after 1572? The following explanations are offered. One is that there were changes in the approach to reporting the processes of the Courts. In 1571, just before the last peak in Year Book production, Plowden's *Commentaries* were printed. These reports introduced an entirely new style of law reporting. No longer were only the pleadings and arguments recorded. The progress of the case through to disposition was reported, combining what could previously only be acquired by bringing two sets of records together. The reports attributed to Sir James Dyer were printed some fourteen years later, although their style is similar to that of earlier reports.<sup>80</sup> New "nominate" manuscript reports, were filling the vacuum left by the Year Books, although Plowden's innovative style was not immediately emulated.<sup>81</sup>

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<sup>78</sup> See Barker's report to Lord Burghley – "the patent of the Common Lawe hath ben very beneficiall....but nowe it is of less value than before" 1 Arber 116.

<sup>79</sup> C.A. Knott "Richard Tottell" in J.K Bracken and J Silver (eds) *The British Literary Book Trade 1475 – 1700* (Gale, Detroit 1996) p.311.

<sup>80</sup> *Cy ensuont ascuns nouel cases, collectes per le iades tresreuerend iudge, Mounsieur Iasques Dyer* (Tottel, London, 1585) STC 7388. They were printed posthumously.

<sup>81</sup> J.H. Baker *Introduction to English Legal History* above n. 2 p. 180.

Plowden's *Commentaries* were radical in their approach. He himself recognised this. He commented that they excelled any former books of reports in point of credit and authority and observed that earlier reports consisted of the responses of the Judges to motions put by counsel. Plowden's reports dealt with points of law which had been argued and, unlike the Year Books, recorded cases in a variety of courts. The decisions reported were given after deliberation and so "**these reports carry with them the greatest credit and assurance**"<sup>82</sup> clearly indicating that credit and reliability were a selling point and differentiated Plowden's work from that of others.

Earlier reports were little more than summaries of special points in the argument and more often than not completely omitted the decision and the reasons for it, sometimes because, in many medieval cases where there was doubt, there was in fact no decision and the case dropped out of the court process over time. The Year Books especially were seen as pleading guides rather than providing an accurate report on the substantive issue before the Court.<sup>83</sup> The decision in the matter was not important to the reporters. The changes in pleading practice, including the shift to written pleadings resulted in a corresponding shift in the way in which cases were presented and argued in Court. The issue became the effect of the pleadings rather than the nature of the issues and form that they should take. Whereas the cases reported in the Year Books comprised the dialogue between counsel and the Bench that had as its objective the formulation of the issue before the Court, the written pleadings defined the issue. What became of interest to the reporter was the argument on that issue and the outcome on that issue that was settled by the Court. Thus written pleadings became a necessary part of the report. The dialogue on the pleadings became insignificant and the decision of the Court assumed more significance.<sup>84</sup>

Plowden's reports were limited to those cases where a point of law needed to be decided. Unlike the Year Books each case was identifiable by name. At the beginning there was a full heading including the name of the parties, the date of the argument, the Court concerned and the term in which the proceedings were commenced. The body of the report contained the official record of the pleadings, a full note of the arguments of counsel and the Judges and the

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<sup>82</sup> Edmund Plowden *Les comentaries, ou les reportes de Edmunde Plowden vn apprentice de le comen ley* (Richard Tottell, London, 1571) p. vi (preface) STC 20040.

<sup>83</sup> J.H. Baker (ed) *The Reports of Sir John Spelman* (Selden Society, London, 1978) p. 177; J.H. Baker *Introduction to English Legal History* 3<sup>rd</sup> ed. above n. 2 p.179 – 180.

<sup>84</sup> *Ibid.* Baker *Introduction to English Legal History* above n.2 p. 182 - 184.

substance of the final judgments. In this way all the necessary information regarding the decision was contained in one place. This method was a significant and influential innovation and set a new benchmark for printed reports presented in a similar style.<sup>85</sup>

So successful were Plowden's reports that they were the subject of a number of re-printings and were themselves the subject of an abridgement by Thomas Ashe in 1597 and 1607 which was later translated into English by Fabian Hicks and published in 1650.<sup>86</sup> Plowden's style influenced those who followed including Coke who praised the *Commentaries* as "exquisite and elaborate."<sup>87</sup> Fulbecke makes the following observation<sup>88</sup>

**The two late reporters are Ma Plowden and Sir James Dyer, who by a severall and distinct kind of discourse, haue both laboured to profit posteritie. Some humours doe more fancie Plowden for his fulnesse of argument and plaine kinde of profe: others doe more like Dyer for his strictnesse and breuity.**

The praise accorded to Plowden by Coke and Fulbecke is not merely an example of post publication validation of a text.<sup>89</sup> It demonstrates the complex interactions that surrounded the acceptance of printed works. The new medium presented a challenge to Plowden in terms of the potential that it presented for loss of control of the content and a possible damage to his reputation. It does not seem from the available evidence that Plowden had any other reason to print apart from the urging of friends and to preserve the work from an opportunistic printer.<sup>90</sup> Once the work was printed under his supervision, Plowden's objective was complete. Yet his *name* associated with the printed work was almost as important as the fact of printing.<sup>91</sup> And the way in which others recommended his text demonstrates that printing *of itself* did nothing special other than make the work more readily available. It is the interaction with and by others involved in some way with the work that enhanced its presence in print. Although it

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<sup>85</sup> Although there can be no doubt that manuscript reports may have helped fill the vacuum. These reports were privately compiled and circulated. It should also be stated as noted above that Plowden's style, although innovative, was not immediately emulated. See below for discussion about manuscript reports.

<sup>86</sup> *Abridgment des tous les cases reportez alarge per Monsieur Plowden* (Jane Yetswiert, London, 1597) STC 20037; The 1607 printing was by Adam Islip for the Stationers – STC 20038. Fabian Hicks *An exact abridgment in English, of The commentaries, or reports of the learned and famous lawyer, Edmond Plowden* ((Printed by R. White, and T. Roycroft, for Matthew Walbanke, and Henry Twyford, London, 1650) Wing (2nd ed.) / P2609.

<sup>87</sup> 2 Cokes Reports p.viii (preface).

<sup>88</sup> Fulbecke above n. 63 p. 27.

<sup>89</sup> For a discussion of the self-validation of printed works see below Ch. 7 p.198 et seq.

<sup>90</sup> For a discussion of Plowden's attitude to seeing his work in print see above Ch. 5 p.153 – 154. For a discussion of opportunistic printing see below Ch. 7 p.226 et seq.

<sup>91</sup> The association of a report with a named reporter had been developing in importance in manuscript law reports. See Baker *Introduction to English Legal History* above n.2, p. 180.

could be argued that a similar sort of interaction could take place with manuscript,<sup>92</sup> the properties of the new technology meant that interactions with others relied upon as well as enhanced those properties. Print fixed Plowden's work – his copy was standardised and, importantly, it was available. The interactions of others ensured that advantage was taken of those qualities.

### **Print and Manuscript**

Despite the new material that was becoming available, manuscripts continued to circulate and were used by choice. The new technology was making material available but was not replacing manuscript publication. The reasons for this are associated with the culture that underpinned the co-existence of print and manuscript.<sup>93</sup> First, it is suggested that the practice of circulating printed books continued in the same way that had taken place with manuscripts. In any case where a new technology has an impact upon a culture, change is not immediate and for a period of time aspects of the new culture co-exist with the changes that follow upon the introduction of the new technology and its consequent longer term cultural changes. It is fair to conclude that law practitioners shared their copies of the printed Year Books, and the borrowers would copy those matters that they considered relevant into their own manuscript commonplace books. It could be suggested that the printed Year Books provided a form of exemplar particularly for students who were unable to afford either manuscript or printed versions of these volumes.

Secondly, printed copies of cases were not the only resource available for legal information. The printing shop did not drive out the *scriptorium* and, as will be discussed below within the context of the Grays Inn reporters,<sup>94</sup> law reports and case notes were produced in manuscript form, circulated among and were used by the legal profession. For example “nominate” reporters such as John Bryt and Roger Townshend were reporting on the eve of the advent of the press in England.<sup>95</sup> Reports by John Spelman, John Port, John Caryll, Roger Yorke, Richard Pollard, Edmund Anderson and Francis Morse were available in manuscript but were not printed during our period.<sup>96</sup> Reporters such as William Dalison and William Bendlowes

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<sup>92</sup> And did although the behaviours were more related to disseminating something that was in short supply rather than recommending something that was readily available.

<sup>93</sup> This is discussed in more detail in Ch.5.

<sup>94</sup> See discussion at p. 179 about Paynell and associates who compiled and published manuscript versions of reports in the early years of Charles I.

<sup>95</sup> J.H. Baker *An Introduction to English Legal History* above n. 2 p. 180.

<sup>96</sup> *Ibid.* Some of Caryll's material appeared as Keilwey's Reports in 1602.

were well known even before they were printed.<sup>97</sup> Lawyers saw the noting and gathering of cases as a matter for their own benefit and information. Theirs was a specialised profession with its own practices, rituals, hierarchy and indeed language.<sup>98</sup> There was little commercial gain to be had from printing large numbers of varying case reports of some antiquity and which may not find a market, especially if lawyers preferred to compile their own notes and share them with their colleagues. It may be argued that this was a clear example of the way in which two sets of cultural practices sat alongside one another and could support the suggestion that lawyers looked to themselves for their legal information, and those in the commercial world, sensing that there was not a market, discontinued large scale printing of the manuscript Year Books. This was a challenge to the new technology and indicates that putting legal material in print, and particularly contemporary legal material, was not a universal objective. Not only did the printers make a choice about the materials that they would print, but the lawyers themselves made a choice about whether their materials would be widely disseminated or restricted to the coterie.<sup>99</sup> The dissemination of written legal information was not the exclusive province of print.

Thirdly, it has been suggested by every legal historian from Maitland through to Baker that the black letter Year Books of this period were unsatisfactory as reliable records of that which they purported to report and that they had a large number of errors. Maitland suggests that the Cokes, Bacons and Maynards of the seventeenth century were able to put up with “slipshod texts.” They knew what the book ought to say and must be taken to have said<sup>100</sup>, presumably arising from aspects of *nos erudition*.. It may be, as has been noted, that the market declined as a result of the lawyers preferring to rely upon their own commonplace books, the emerging reports of Dyer and commercially available manuscripts. The printers realised that there would be no market if they could not publish accurate and reliable texts, and by the end of the sixteenth century there was a growing strength in legal printing,

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<sup>97</sup> Ibid. Material by Bendlowes and Dalison appeared in an appendix to Thomas Ashe’s *Epekeia* and in a 1633 edition of Keilway’s Reports. See the entries for Bendlowes and Dalison by J.H. Baker *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004).

<sup>98</sup> Summed up in the term “notre erudition” – see J.H. Baker *Laws Two Bodies – Some Evidential Problems in English Legal History* (Oxford University Press, Oxford 2001) esp. Ch 3.

<sup>99</sup> Possibly an aspect of “notre erudition” especially as far as case notes or reports were concerned. The *oeuvre* of printed treatises suggests that they were intended for a wider audience (or more extensive dissemination). It is perhaps relevant to note that the cross referencing to other legal works was to those that were in print rather than manuscript sources. The cross referencing to printed material pointed the reader in that direction. Any relevant manuscript material would have come to the attention of the reader from another source or would be derived from the coterie or “notre erudition” if indeed the reader was privy to it.

<sup>100</sup> Maitland *Year Books of Edward II – Volume I* above n. 25.

indicating that there was growing professional and public confidence in the quality of law books that were being printed. Despite the monopoly afforded by the patents, lawyers did have an alternative information source in manuscript if there were continued quality issues with the printed product.

The new information technology did not eliminate the manuscript system of publishing, even into the seventeenth century. In the field of legal information, manuscript publishing was remarkably resilient in the face of print and in circumstances where it might be assumed that the obvious way of publishing legal information, particularly as a commercial venture, would be to use print with its advantages of consistency of copy, fixity and volume ensuring wide distribution with costs that decreased with volume. This in fact was not the case.

An example of commercial manuscript law reporting arose in the early years of Charles I. Robert Paynell, Thomas Widdrington, William (or George) Allestree and Humphrey Mackworth entered into a joint venture to report the proceedings of the Courts. Paynell covered the Exchequer, Widdrington reported Kings Bench and Allestree and Mackworth, the Court of Common Pleas.<sup>101</sup>

Given the number of extant manuscripts and their incorporation into other work it is reasonable to conclude that this was a commercial law reporting venture. It can be no coincidence that all four were members of the same Inn of Court.<sup>102</sup> The notes that they kept were clearly not just for their own use and nor can it be assumed that their work was loaned and copied as part of the ethos of earlier times. The evidence suggests that they collated their various collections and there is no overlapping of cases.

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<sup>101</sup> W. H. Bryson *Cases Concerning Equity and the Courts of Equity 1550 – 1660* (Selden Society, London, 2001) p. xvii. Bryson suggests that the production of the reports by this group of Grays Inn reporters went beyond their personal use given the volume produced.

<sup>102</sup> Widdrington was a student of Cambridge and was admitted to Grays Inn on 14 February 1619. Allestree was admitted to Grays Inn on 16 November 1618 and Allestree to the same Inn on 7 August 1623. Allestree was also a graduate of St Johns College, Cambridge. Mackworth was admitted to Grays Inn on 24 October 1621 having matriculated to Queens College Cambridge in 1619. There are numerous manuscript copies of their reports and they have served as a basis for other works. Those commonly attributed to Winch are an abbreviation of Allestree's reports and Baker suggests that Hetley's Reports are part of Mackworth's work J.H. Baker "The Dark Age of English Legal History, 1500 – 1700" in J.H. Baker (ed) *The Legal Profession and the Common Law* (Hambledon, London, 1986.) p. 453 – 455. Littleton's (not to be confused with the author of *Tenures*) Reports include cases taken from Mackworth and some of Paynell's work also appears in those Reports.

A commercial law reporting venture in the first half of the seventeenth century is interesting in itself, but should not be unexpected.<sup>103</sup> The Year Books had been out of production for approximately a century although, as has been observed, a number had been printed. Private reporters such as Dyer and Plowden had been printed in the late sixteenth century and clearly there was a demand for up-to-date information concerning the cases that were being decided by the Courts.<sup>104</sup> Perhaps the most surprising feature of the venture is that it was distributed in manuscript rather than in the by now well-established technology of print. It demonstrates that the manuscript culture was, if anything, a thriving one, and which continued to be a viable and accepted means of recording and communicating legal information. It also shows that even into the seventeenth century print was not necessarily a “first port of call” for the publication of legal information. It clearly demonstrates the co-existence of the two media.

This suggests a number of possible conclusions. First, the reporters were preparing their reports for a small but guaranteed market of lawyers, possibly all fellow members of Grays Inn and the limited circulation did not justify the expense of putting the work in print.<sup>105</sup>

Secondly, the manuscript system of circulation of information was still thriving and was still valid and meaningful competition for print. The competition was more than merely a matter between two information systems. The distribution of common law materials in manuscript was in a way a challenge to the common law patent.<sup>106</sup> The common law patent created a monopoly only for *printed* works. Thus, under the apparent exclusivity that Tottel and the heirs to the common law patent enjoyed to print common law material, there existed an alternative system for the distribution of legal material and as such presented a challenge to the ascendancy of print.

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<sup>103</sup> Francis Bacon proposed a venture to King James I that there be a continuing series of reports overseen by experienced lawyers. Ibid. Baker p. 453. See Roderick Munday “Bentham, Bacon and the Movement for the Reform of English Law Reporting” (1992) 4 *Utilitas* 299 at p.313-4.

<sup>104</sup> The early volumes of Coke’s *Reports* reported recent cases. The first volume, for example, covers cases decided between 1582 and 1598. Dyer’s Reports were only a selection of the total corpus of his work and were printed posthumously in 1585-6. See J.H. Baker *Reports from the Lost Notebooks of Sir James Dyer* (Selden Society, London, 1994) and Chapter 5 fn.238 for the preservation of original material by copying.

<sup>105</sup> Although expense did not stop the printing of Coke’s *Reports* or Plowden’s *Commentaries*. Factors such as reputation of the authors would have allayed concerns about a possible market.

<sup>106</sup> At the time of Paynell et al the patent was in the hands of the Stationers, but, given the co-existence of print and manuscript, unprinted manuscript material was a feature of the legal culture throughout the period, including the time when Tottel held the common law patent.

As has been observed, Tottel was a conservative printer and although he printed what the market required, no doubt with the assistance and guidance of his lawyer patrons, there was a body of legal information that he chose not to or was prevented from printing. In the case of the latter possibility because, as was seen in the example of Plowden, an author may have an interest in seeing a work in print but may also be unwilling so to do. Given Tottel's conservatism and business acumen, it is more likely that the decision not to print specialist, small circulation works was driven by commercial and economic imperatives. Thus, the combination of the printer's choice and the existence of an alternative manuscript system could have acted as inhibitors to placing a wider range of legal materials in print.

If one accepts Maitland's supposition that the lawyers of the seventeenth century were aware of the errors and faults in the printed copies of the Year Books (for example) and adjusted their arguments based on their own experiential learning and knowledge, it is fair to assume that there would still be a wariness about relying on printed material as providing an authoritative source. Hence, the manuscript market still had a place.

Thirdly, and associated with the first conclusion, the method of production of manuscripts suggests that this means of information transmission was utilised for what we would call "niche markets" which were of a limited and specialist nature. Finally, the business model itself raises an echo of that suggested by Bolland for the reproduction and distribution of the Year Books – a group of dedicated reporters pooling their resources and compiling their work into one collated volume. If the venture developed by Paynell and his associates was in concept and execution completely novel, then these four lawyers were highly innovative and entrepreneurial. Alternatively, were they following an earlier and proven business model – one which could well have been utilised by those who produced the Year Books thus giving some support in part to the "methodology" suggested by Bolland.<sup>107</sup> Bolland's suggestion was that the Year Books had been made available as part of a commercial enterprise. This view was challenged by Simpson who suggested that the scribal culture itself mitigated against such a proposal. In a culture where manuscripts circulated by copying commercial production was not really feasible.<sup>108</sup> Simpson suggested that "simple economics are fatal to Bolland's theory of commercial production" and rather that some form of patronage or indirect reward

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<sup>107</sup> Bolland, *A Manual of Year Book Studies* above n. 19.

<sup>108</sup> A.W.B. Simpson "The Source and Function of the Later Year Books" [1971] 87 LQR 94.

resulted in continued Year Book publication.<sup>109</sup> Ives was also critical of the “official reporters” suggestion, first advanced by Plowden and the commercial or professional organisation behind Year Book compilation adopted by Bolland, suggesting rather that they developed in an “organic fashion”.<sup>110</sup> However, the critique based on economics did not seem to deter Messrs. Paynell and his associates. The difficulty with Bolland’s suggestion is that, with the exception of some suggestions by Plowden that were repeated by Coke, there is little supporting evidence of an organised commercial manuscript publishing business, a matter referred to by Ives. Certainly commercial *scriptoria* were available to make multiple manuscript copies of any work given to them. In the case of the Grays Inn barristers we know who was responsible for generating the material. It is possible that *scriptoria* were used to make multiple copies of their reports. It is my suggestion, therefore, that of the alternatives offered the answer falls somewhere in between. The venture itself has elements of innovation and entrepreneurialism and utilised existing scribal structure such as *scriptoria* to make the product available, thus giving some commercial viability to the venture. Any economic advantage would come from the first copies that were made and sold. Thereafter, the scribal norm of copying would probably have been on an individual rather than a commercial basis.

### **Other Law Publications**

Because the common law patent covered only printed cases there were other forms of legal publication that were coming onto the market. During the sixteenth century treatises dealing with specific legal issues were printed. Although this in itself was not a novelty, it is notable that before the introduction of the printing press there were a few basic treatises and the only new addition to the *oeuvre* was Littleton’s *Tenures* and the popularity and acceptance of this work is attested not only by the number of times that it came into print, but also by virtue of the fact that it was the first printed law text.<sup>111</sup>

The sixteenth century saw a few tentative steps in the early years with Perkins’ *Profitable Book*,<sup>112</sup> Phaer’s *Presidents*<sup>113</sup> Staunford’s *Pleas of the Crown*<sup>114</sup> and *Exposition of the Kings*

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<sup>109</sup> Ibid. p. 108-9.

<sup>110</sup> Ives above n. 30 p. 82.

<sup>111</sup> Although Sir Thomas Littleton claimed to have written the book for his son Richard, Baker suggests that perhaps Richard turned it to a profit, the inference being that he may have arranged for the printing.. Copies of the manuscript appear to have been in circulation before the author’s death. Baker suggests that the private purpose was expressed out of professional modesty, although I note that such claims appear in subsequent printed law texts. Baker J.H. *Introduction to English Legal History* above n. 2 p. 186 – 7.

<sup>112</sup> John Perkins *A profitable booke of Maister Iohn Perkins* (Richard Tottell, London, 1567) STC 19635. Earlier publications of Perkins work were in 1528 STC 19629, 1555 STC 19633, 1528) STC 19629.

*Prerogative*<sup>113</sup> and Christopher St German's *Doctor and Student*<sup>114</sup> although pre-print works such as *Natura Brevium*, *Carta Foedi* and Lyndwode's *Provincial* were regularly printed. Towards the end of the century works by William West, Lambard, Kitchin, Fraunce and Crompton were regularly in print. The development of specific subject law books also led to the "hybrid" text which rests between the Abridgement and the explanatory treatise which, as will be discussed, was based upon the oral readings delivered at the Inns.<sup>115</sup> The best example is Pulton's *Abstract of Penal Statutes*<sup>116</sup> which dealt with a limited scope of material, ordered into specific headings and with a summarised note of the content. The treatise began to flourish in the seventeenth century whilst at the same time report printing declined. The development of treatise or law text printing will be dealt with in detail in the next chapter.

## Conclusion

The development of sixteenth century law printing was gradual. The titles printed were what might have been expected – printed works of available and, one could say, standard manuscript materials. However, print did allow for innovation in the presentation of information and standardisation of production that would be of importance when later writers wished to cross-reference to earlier texts. Other innovations such as the printing of abridgements and the slow development of the publication of subject-based law texts and early guidebooks such as Perkins' *The Profitable Book* allowed for the continued development of such texts into the seventeenth century together with the continued production of handbooks for local officials.

The decline of the Year Books was in part paralleled with and led to the development and publication of "nominate" case books, commentaries or law reports some of which were printed posthumously but many of which did not see print at all and remained in manuscript throughout our period. The most notable of the printed case books was Plowden's *Commentaries*, not least because of his style which was not immediately imitated.

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<sup>113</sup> Thomas Phaer *A New Book of Presidents* (Ricard Tottyll, London, 1559) STC 3332.

<sup>114</sup> William Staunford *Plees del Coron* (Tottell, London, 1557) STC 23219.

<sup>115</sup> William Staunford *Exposition of the Kings Prerogative* (Rychard Tottell, London 1567) STC 23213.

<sup>116</sup> Christopher St German *Hereafter foloweth a dyaloge in Englysshe, bytwyxt a Doctour of Dyunyte, and a student in the lawes of Englande* (Robert Wyer, London, 1530) STC 21561.

<sup>117</sup> See below Ch. 7 p.188 – 191.

<sup>118</sup> Pulton *An abstract of all the penall statutes* above n. 74.

Sixteenth century law printing introduced the new medium and established it as an alternative to manuscript resources. But as we have seen, print did not supplant manuscript or drive it out. Although printers ignored the body of law that was contained in the Readings and focussed more upon the Year Books, Abridgements and law texts, the sixteenth century saw the consolidation of the new medium.

By the end of the sixteenth century the importance of legal printing was established primarily as a result of the consistency of the work of Richard Tottel enabled by the regulatory structure of the common law patent. In the forty or so years that he held the patent, law printing had moved from a tenuous business to one which was valuable. The various contests between printers to secure the patent up until 1605 demonstrate that printed law books were becoming accepted by the legal profession, that over the years the reliability associated with the quality of legal material in print had improved and thus printed legal information took on a quality of authority. The nature of cross-referencing with other works bears this out in that (with the exception of statutory references) cross-referencing to other works was to works *in print*. The new medium enhanced its authority by self-validation and thereby gradually moved its audience, both extant and potential, towards greater reliance upon printed works.<sup>119</sup>

The exclusive patents suggest a focus upon reliability. Exclusivity was of no value if the product was one which was inaccurate, inferior or unreliable.

Thus the move over the sixteenth century had been to establish the reliability of the output of the new medium. As has been argued, this was not something that was attributable to nor arose directly from the medium. The use and acceptance of printed material depended as much upon its availability and it has been demonstrated that there were alternative manuscript resources which did not feature in the contemporary printing press. All the legal materials that were extant at the time were not available in print and that being the case, the material that was in print was only a part of the total information that was potentially available.

It is not the purpose of this study to determine the proportion of printed material to the extant manuscript material at any fixed time, and such a study would be limited to manuscript

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<sup>119</sup> For a discussion of “self-validation” see below Ch. 7 p.198 et seq.

material that has survived. In addition it is not the purpose of this study to determine the proportions of print and manuscript material that was cited in court.

What is clear from the evidence is that the co-existence of print and manuscript had an impact upon the availability of printed legal material and because of this, although it may not have been intended, that co-existence had an inhibiting effect upon the printing of the law.

There would be continuing problems with errors and with credibility, but the properties of standardization and fixity brought an anchor of certainty to the law and removed it from the realm of “slippery memory”. The focus would now include not only an examination of what the rule was to one of what the words meant – legal hermeneutics or the study of the meaning of the words in print would become a new tool of the lawyers.<sup>120</sup> And for that there had to be an acceptance of what was stated in print. The work of the sixteenth century law printers, especially Tottel, had provided the foundation for the use of the printed law. The evidence of acceptance of printed material and its reliability came when it was cited and approved in Court.<sup>121</sup>

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<sup>120</sup> For a consideration of legal hermeneutics see below Ch. 7 p.214 et seq.

<sup>121</sup> *Sir Edward Dimmocke's Case* (1609) BL MS. Harg 33 f22 cited in I.S. Williams “He Credited More the Printed Booke” (2010) 28 *Law and History Rev* 38 where the remark was made “He credited more the printed booke”, *Holwood v Hopkins* (1600) in Helmholz *Select Cases on Defamation to 1600*, (Selden Society, London, 1985) p. 91 where it was noted in response to the Judges desire to review the record of the Kings Bench “our books are good precedents to guide us”. Williams points to the jurisdictional quarrels that were prevalent in the early seventeenth century and the use of printed material as the only appropriate source for legal argument. See p.52-3, indicating a willingness to accept printed material as authoritative.



## Chapter 7 - Law Printing in the Seventeenth Century – Treatises and Other Texts

### Introduction

Sixteenth century law printing concentrated mainly upon “traditional” texts and the Year Books. As the preceding chapter has shown, only a few of the London printers were engaged in this work, primarily because of monopolistic impact of the common law printing patent and the role of the Royal Printer. In the first four decades of the seventeenth century printers shifted their focus to printing other law texts. Many of these texts were printed by other than the holder of the common law patent because they did not fall within its ambit. Volumes of the Year Books continued to be printed but not as frequently nor in as great a quantity as in the sixteenth century.<sup>1</sup> The most significant law report printing event was the publication of the reports of Sir Edward Coke. These reports demonstrated changes that were taking place in law reporting in that Coke sometimes followed upon the style of Edmund Plowden.<sup>2</sup> Coke’s Reports constitute something of a hybrid law book comprising law reports which were quite novel in their approach, demonstrating a focus upon using cases to demonstrate a principle, as well as containing a lengthy dissertation on matters of law and legal history in the preface.

These other law texts<sup>3</sup> covered a number of different topics and were directed to a number of different audiences. In this chapter I shall examine some of the common themes that were apparent in the treatises that were printed between 1600 and 1642, consider the audiences to whom the works were directed and what appeared to motivate the authors and printers of the time and why the works were put in print.

First, the nature of the treatise – which I shall refer to as the “law text” – will be discussed along with some observations upon the use of those works and the types of law text that were available to the late sixteenth and seventeenth century lawyer.

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<sup>1</sup> Six volumes of collected Years were printed by Thomas Wight and Adam Islip between 1600 and 1619. More printed the Long Quinto in 1638 and Flesher and Young printed 1-21 Edward 4 in 1640.

<sup>2</sup> Coke’s Reports did not always follow Plowden’s style and many of the reports are quite short especially see Volume 5.

<sup>3</sup> Some of them are called treatises by their authors although this nomenclature is challenged by A.W.B. Simpson in *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature* (1981) 48 Univ Chicago LR 632. I retain the use of the term on occasion because it is one used by the authors of the time.

Secondly, the themes that become apparent in the law texts will be discussed, along with some of the developments that took place. One was the way in which earlier printed works became embedded or “validated” by subsequent reference. Another was the way in which concerns were expressed about putting legal information in the vernacular – a retreat from the early sixteenth century interest in “Englishing” the law. A third theme is the way in which print became the “preserved memory” of legal information – a gradual shift from the memory-based culture of the lawyers.

A fourth and important theme is the development of a focus upon the language of a text and the rise of textual interpretation, especially in the field of statute law and its association with print.

Further themes considered will include those of the use of print in an attempt to impose some order upon the common law as well as the problems occasioned by opportunistic or unauthorised printing of texts. The discussion of the themes will conclude with a consideration of how some types of law texts – guidebooks and manuals – extended the scope of the audiences for law texts

The final part of the chapter will examine the printing of the *oeuvre* of Sir Edward Coke and his changing approaches to the use of printing technology.

### **Law Texts – A General Discussion**

Of all of the major works produced in the sixteenth century,<sup>4</sup> only Staunford’s *Plees del Coron*<sup>5</sup> and *Exposition of the Kinges Prerogative*<sup>6</sup> were rudimentary Treatises. The dedication to the *Exposition* makes it clear Staunford was trying to produce a new type of work based upon a case abridgement and the systematisation of principles, suggesting that judicial “acts” and cases be ordered on the basis of **certeine p̄nciples, rules and groundes of the said lawes**<sup>7</sup>

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<sup>4</sup> St Germain, Fitzherbert, Rastell, Dyer, Plowden, Brooke and West.

<sup>5</sup> William Staunford *Plees del Coron* (Tottell, London, 1557) STC 23219.

<sup>6</sup> William Staunford *An exposicion of the kinges prerogatiue collected out of the great abridgement of Iustice Fitzherbert and other olde writers of the lawes of Englande* (Tottell, London, 1567) STC 23213.

<sup>7</sup> *Ibid.* pages unnumbered.

Otherwise, according to Simpson, the legal literature of the period comprised collections of cases and Statutes with abridgements providing a “parasitic” form of systematisation along with indices, formularies and glosses.<sup>8</sup>

The problem arose from the disorderly and unmethodical nature of the development of the common law. It had long been considered that the only way that a true understanding of the common law could be achieved was the result of the immersive experience of the Inn-based education system and years of direct involvement in the practice of law before the courts.<sup>9</sup> The law writers of the Sixteenth and Seventeenth Centuries tried to introduce some order into the apparent chaos of the common law system. Often, their published writing started as personal notes. Many of the abridgements and other attempts to divide the law into topics and sub-topics owed much to the practice of common-placing engaged in by students and practitioners.

Simpson observed that mediaeval common lawyers displayed little interest in analysing the substance of law.<sup>10</sup> Rather, the view was that the common law was based upon maxims or fundamental principles.<sup>11</sup> Twenty five maxims were collected by Bacon and submitted to Elizabeth I as a part of a plan to make the common law more coherent for both lawyers and lay people although there were other examples both before and after Bacon's effort.<sup>12</sup> Although maxims could be seen as one form of methodising the common law, there were

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<sup>8</sup> A.W.B. Simpson above n. 3 p. 636-637.

<sup>9</sup> See discussion above in Ch. 4 p.84 et seq and Ch. 5 p. 149 et seq.

<sup>10</sup> Ibid. p. 642.

<sup>11</sup> John Fortescue *De Laudibus Legum Angliae* 1468 – it was first printed in English in 1567 under the title *A learned commendation of the politique lawes of* (Rychard Tottill, London, 1567). By the time that St German wrote *Doctor and Student* the fundamentals of English law were said to have included “**dyvers principles that be called by those learned in the lawe maxymes.**” Maxims were essentially unarguable propositions that needed no authority or logical demonstration behind them.

<sup>12</sup> See Francis Bacon *The elements of the common lawes of England* (Robert Young for the Assigns of J More, London, 1630) STC 1134 ; *Principia sive Maxima Legum Angliae* (Ricardus Long, London 1546) STC 20394 cited in A.W.B.Simpson *The Rise and Fall of the Legal Treatise* above n. 3 at p.645, Thomas Ashe *Fasciculus Florum* (G. Eld, London, 1617) STC 5528, John Rastell *Exposiciones terminorum legum anglorum...The exposicions of the termys of the law of england* (John Rastell, London, 1523). STC 20701 The text was first printed in English by Richard Tottel in 1563.(Richard Tottell, London, 1563)STC 20703.5 It underwent a title change in 1624 to *Les termes de ley* (Adam Islip for the Stationers Company, London, 1624) STC 20716. See also William Noye *Treatise of the Principall Grounds and Maximes of the Lawes of this Kingdome* (R.H. by permission of the assigns of John Moore, London, 1641) Wing N1451. For a brief description of *Principia*, noted as the earliest collection of English legal maxims see John C. Hogan and Mortimer D. Schwartz “On Bacon’s “Rules and Maximes” of the Common Law” (1983) 76 Law Libr J p. 48, p.55 et seq. For a discussion of Bacon’s attempts to reorganise the law see above Ch. 5 p.136 - 137.

others which attempted to present an exposition of principles such as Finch's *Law or a Discourse Thereof*<sup>13</sup> and Doderidge's *The English Lawyer*.<sup>14</sup>

Although many of the works lacked a substantive quality nevertheless what they do have in common is an attempt to discuss and describe the state of the law in a textual or explanatory format, rather than comprise a record of a court proceeding and a decision, or the wording of a Statute. In this discussion the term “law text” will be used, even although the term “Treatise” was preferred by the authors of the time.

The contents of the treatises and especially the prefaces by the authors are most instructive in analysing the purpose for which the work was printed and the motivations of the author in doing so, although it must be stated that in many cases the language used is self-deprecatory or hyperbolic and the value of the prefaces must take these factors into account. Thus we may determine whether the primary purpose of the work was for education, reference, to provide an authoritative work for standard practice, for professional use or for the wider community under the umbrella of the “common weal”.

Although there were recognised treatises that originated prior to the printing press and which continued to be available both in manuscript and in print, there was a veritable explosion of new treatises in print, primarily towards the end of the Sixteenth and into the early Seventeenth Centuries.

I suggest that there are a number of reasons for the increase in these works, many of which were subject specific. One was an attempt to develop principles from the disorganised mass of the common law, and at the same time to attempt to bring some kind of organisation to that body. Another was to assist students in their studies of the law – the educative objective that was beginning to assume importance as the traditional aural-oral education system provided by the Inns began to falter. A third, perhaps more relevant to works not intended solely for the use of the legal profession in London, was to bring some form of standardised behaviour or practice into the administration of the law because – and this was not limited only to areas of practice – a consistent methodology was more easily attainable from a widely distributed standard guidebook, than from orally transmitted customary practices that varied from

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<sup>13</sup> Henry Finch *Law or a Discourse Thereof* (Societie of Stationers, London, 1627) STC 10871.

<sup>14</sup> John Doderidge *The English Lawyer* (The Assigns of I More Esq., London, 1631). STC 6981.

location to location. A recognised standard of treatment, for example in local courts, was seen as essential for the benefit of the State and the community.<sup>15</sup> Common practice enhanced centralisation of power and also ensured that individuals could expect a recognised standard of treatment under law. In addition, the availability of such texts meant that people could point to instances where Royal officials – from Justices upwards – exceeded their authority and could potentially challenge royal control. These themes will be developed further in this chapter. Underpinning all of them is the growing recognition of the way in which the properties of print enabled, enhanced and further these objectives. In this chapter, perhaps more than in those preceding, I have let many of the authors speak for themselves rather than paraphrasing them. By the seventeenth century legal writers were coming to grips with print and were well aware of the advantages and disadvantages of the medium. Their voices give us an authentic rather than reconstructed account.

### **The Increase in Law Texts**

From 1600 to 1642 between sixty and seventy new law texts were printed.<sup>16</sup> Some addressed subject matter that had been dealt with by other authors.<sup>17</sup> Others dealt with topics that had not been earlier been printed. Some of the topics were quite esoteric.<sup>18</sup> Others dealt with matters that were relevant to everyday life.<sup>19</sup> On the other hand the number of new titles of

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<sup>15</sup> It was for such a purpose that Michael Dalton wrote *The Countrey Justice* (Adam Islip for the Stationers, London, 1618) STC 6205.

<sup>16</sup> Included are Coke's Reports as stated in the introduction to this chapter. This compares with some forty titles that were printed in the entire period from 1481 to 1599. Some of these titles were the subject of a number of printings. For example there were some fourteen printings of Perkins *Profitable Book* (John Perkins *A profitable booke of Maister John Perkins felow of the inner temple treating the lawes of Englande* (Richard Tottell, London, 1567) and two printings of John Manwood *A Breve Collection of the Lawes of the Forest* (Printer Unknown, London, 1592) STC 17290. It was reissued as *A treatise and discourse of the lawes of the Forrest* (Adam Islip for Wight and Norton, London, 1598) STC 17291 and reprinted by Adam Islip, London, 1615 STC 17292. Richard Hooker *Of the Lawes of Ecclesiasticall politie* (John Windet, London, 1593) STC 13712 (Reprinted by Windet in 1597 STC 13712.5 and 1604 STC 13713 and by George Latham in 1639 STC 13720) John Kitchin's *Le Court Leet* (John Kitchin *Le court leete, et court baron, collect per John Kytchin de Greys Inne* (Tottell, London, 1580) STC 15017)) was also reprinted in 1607 STC 15023. *Doctor and Student* by St German was regularly reprinted throughout this time and was probably one of the most successful treatises of the period.

<sup>17</sup> For example Michael Dalton's *Officium Vicecomitum* (Adam Islip for the Stationers, London, 1623) STC 6212 dealt with the powers of sheriffs and local officials. This had been the subject of the publication of Sir Anthony Fitzherbert's *[T]he offices of sheryffes, bailliffes of liberties, escheatours constables and coroners*. (Robert Redman, London, 1538) STC 10984.

<sup>18</sup> For example see see John D'Oyly *The Orders, Lawes and Ancient Customes of Swanns* (August Mathews, London, 1632) STC 25930.

<sup>19</sup> See for example the treatise by John Wilkinson dealing with the powers of local officials entitled *A Treatise .... concerning the Office and Authoritie of Coroners and Sherifes* (Adam Islip for the Stationers, London, 1618) STC 25648 Later printings after 1651 substituted the word "Commonwealth" for "Kingdom". The works of Michael Dalton – *The Countrey Justice* above n. 15 and *Officium Vicecomitum* above n. 17 deal with similar subject matter. The role the gentry and those who were involved in the local courts was reality of everyday life

reports diminished. Although there were reprints of Plowden<sup>20</sup> and Dyer<sup>21</sup> the only new reports that saw print, apart from Coke's volumes,<sup>22</sup> were the Irish Reports of John Davies.<sup>23</sup>

The increase in the publication of law texts arose from a recognition of the need to assist students deal with the bulk, diversity and complexity of the common law. These concerns were alive in the sixteenth century and continued into the seventeenth. Common lawyers were likely to claim that the apparent chaos of the common law was illusory, and beneath it lay fundamental principles and maxims as were present in other arts and sciences.<sup>24</sup> Fortescue suggested that the form and content of the common law developed from universal principles (universales) “which those learned in the laws...call maxims, just as rhetoricians speak of paradoxes and civilians of rules of law.”<sup>25</sup> However, later writers such as William Rastell and Anthony Fitzherbert considered that the fundamental rules of the common law could be discerned from a process of sorting and rearranging on the basis of topics and titles.

It was the increase in the number of University educated men coming to the Inns that caused a shift in the approach of text writers. The curriculum for an Arts degree had moved towards an emphasis upon the dialectic – the study of the process of selection and modes of argumentation – along with the influence of the logic school of Peter Ramus.<sup>26</sup> Thus there was an emphasis upon the development of a formal structure which resulted in the growth of three types of legal literature. First there were the maxims or rules of law.<sup>27</sup> Secondly there were textbooks “methodising” the law for students and for lawyers, with the aim of providing ready-made techniques for the analysis of legal material.<sup>28</sup> The third type was a mixture of the

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in early modern England. See Christopher W. Brooks *Law, Politics and Society in Early Modern England* (Cambridge University Press, Cambridge 2008) p. 294-306; p. 399-407; p. 416-420.

<sup>20</sup> 1613. It should be remembered that manuscript law reports were circulating at this time. See above Ch. 6 p.177 et seq.

<sup>21</sup> 1600 and 1638.

<sup>22</sup> 11 were printed before 1642. The twelfth was not printed until 1651. It should be noted that the *Reports* were regularly reprinted and brought up to date some of the matter covered in the Year Books. Although Coke was but one reporter the printing and reprinting of his *Reports* was a significant continuing event over this period.

<sup>23</sup> 1628.

<sup>24</sup> Possibly an aspect of *nos erudition*.

<sup>25</sup> Sir John Fortescue *De Laudibus Legum Angliae* ed. S.B. Chrimes (Cambridge University Press, Cambridge, 1942) pp 20 – 34. For the earlier printing see above n. 11. For further discussion of maxims see above p.189-190 and below p. 192. The seventeenth century concerns about the complexity of the common law and the accuracy of earlier reports were articulated by Coke in 1 *Reports* “Preface to the reader” (unpaginated).

<sup>26</sup> See Lisa Jardine, *The Place of Dialectic Teaching in Sixteenth Century Cambridge* (1974) 21 *Studies in the Renaissance* pp.31-62.

<sup>27</sup> Bacon *Elements of the Common Laws of England* see above n. 12 was available in manuscript from 1597.

<sup>28</sup> Examples may be found in the works of Fraunce, Doderidge, and Fulbecke.

other two where maxims and statements of rules are organised according to a method in an effort to form an overview of the whole body of law.<sup>29</sup>

### Types of Law Texts

Sixteenth and early seventeenth century law texts can be otherwise divided into seven major groups depending upon the type of information contained in them and the manner of their presentation.

Discrete legal topics form a major group. Within this group can be included works such as Pulton's *Kalendar* and *De Pace*,<sup>30</sup> possibly Dalton's *The Countrey Justice*<sup>31</sup> and *Officium Vicecomitum*<sup>32</sup> Monson's work on nuisance,<sup>33</sup> Coke's *Complete Copyholder*,<sup>34</sup> his *First Institutes (Coke on Littleton)*<sup>35</sup> and Edgar's *Lawes Resolutions of Women*.<sup>36</sup> It was in the seventeenth century that some of the Readings delivered in the Inns on particular subjects began to see print. Examples are Brook's *Reading on Magna Carta*<sup>37</sup> and Bacon's famous *Reading of the Statute of Uses*.<sup>38</sup>

Specialist legal publications directed at non-lawyers also began to appear in print such as D'Oyly's *The Orders, Lawes and Ancient Customes of Swanns*,<sup>39</sup> Manwood's *Forest Laws*,<sup>40</sup>

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<sup>29</sup> See Sir Henry Finch, *Nomotechnia* (Adam Islip for the Stationers, London, 1613) STC 10870.

<sup>30</sup> Ferdinando Pulton *A kalender, or table, comprehending the effect of all the statutes that haue beene made and put in print, beginning with Magna Charta*, (Company of Stationers, London, 1606) STC 9547 ; Ferdinando Pulton *De pace Regis et regni viz.* (Adam Islip for the Company of Stationers, London, 1609) STC 20495.

<sup>31</sup> Michael Dalton *The Countrey Justice* above n. 15 This work could also fall within the category of a guidebook for local officials.

<sup>32</sup> Above n. 17.

<sup>33</sup> Robert Monson *A briefe declaration for what manner of speciall nusance concerning priuate dwelling houses* (Printed for William Cooke, London, 1636) STC 6453.5. This narrative work is a very long law report and Baker and Milsom suggest that it may be *Hales Case* see J.H. Baker and S.F.C. Milsom (eds) *Sources of English Legal History* (Butterworths, London, 1986) p. 597.

<sup>34</sup> Edward Coke *The Compleate Copyholder* (T. Coates for W Cooke, London, 1641) Wing C4912. It is not clear that this work is not in fact by Coke – for discussion of opportunistic printing see below p.226.

<sup>35</sup> Edward Coke *The first part of the Institutes of the lawes of England. Or, A commentarie vpon Littleton.*(Adam Islip for the Stationers, London, 1628) STC 15784. It should be noted that this was a “gloss” of an existing book on the entirety of medieval land law and more and was therefore not novel. It is included as a discrete text because it was soon viewed as essential to the study of any law student.

<sup>36</sup> Thomas Edgar *The Lawes Resolution of Womens Rights* (Flescher for the Assigns of More, London, 1632) STC 7437.

<sup>37</sup> Robert Brooke *The Reading of M Robert Brooke Upon the Statute of Magna Charta Chap 16* (Flesher & Young, London, 1641) Wing B4896.

<sup>38</sup> Francis Bacon *The learned reading of Sir Francis Bacon...upon the statute of uses* (Walbancke & Chapman, London, 1642) Wing B301.

<sup>39</sup> D'Oyly above n. 18.

<sup>40</sup> Manwood above n. 16.

Mason's *A Mirror for Merchants*,<sup>41</sup> the *Laws of the Market*<sup>42</sup> applying to the City of London, Malynes *Lex Mercatoria*<sup>43</sup> and Welwood's *Abridgement of Sea Laws*<sup>44</sup>, which were specifically written for swan herds, hunters and foresters, merchants and the last title particularly for fishermen. Another form of specialist legal publication was that of antiquarian law - the collection of older rather than current laws and materials. Thus we have publication of collections of statutes such as *Magna Charta cum Statutis, Tum Antiquis, tum recentibus*<sup>45</sup> in Saltern's *Of the Ancient Laws of Great Britain*,<sup>46</sup> *Regiam Majestatem - Old Laws of Scotland*,<sup>47</sup> Selden's publication of Fortescue<sup>48</sup> and Thomas Powell's guide for searching records in the Tower.<sup>49</sup> In 1631 Arthur Agard's *Repertorie of Records* was posthumously published.<sup>50</sup>

The sixteenth century saw the printing of Perkin's popular *Profitable Book*<sup>51</sup> which was a form of *vade mecum* for lawyers but the first year of the new century saw the publication of Fulbecke's *A Direction or Preparative to the study of the Lawe*,<sup>52</sup> one of the first books printed to assist students in the steps that they should take to study law. In the latter part of the period Doderidge's *The English Lawyer*<sup>53</sup> (earlier the subject of an unauthorised printing

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<sup>41</sup> Robert Mason *A mirrour for merchants* (T Creede, London, 1609) STC 17620. Other works by Mason that addressed the debate on the nature of law include Robert Mason *Reasons Monarchie* (Valentine Sims, London, 1602) STC 17621, Robert Mason *Reasons Academie* (Th. Creede, London, 1605) STC 17619 as well as Edward Hendon, Robert Mason, Will. Noye, and Henry Fleetwood (eds) *The Perfect Conveyancer, or, Several Select and Choice Presidents Collected by Four Sages of the Law* (F.L. and J.G. for Matthew Walbancke, London, 1650) Wing P1478 published posthumously in London in 1650.

<sup>42</sup> Anon *The Lawes of the Market* (W. Iaggard, London, 1620) STC 16727.9. Other issues of *The Lawes of the Market* were printed in 1562 (J Cawoode STC 16704.6) and 1595 (J Windet for John Wolfe STC 16717).

<sup>43</sup> Gerard Malynes *Consuetudo, vel, Lex mercatoria, or, The Ancient Law -Merchant* (Adam Islip, London, 1622) STC 17222. Its credit and authority was so well recognised that parts of it were published separately including by Samuel Hartlib in his book on Commonwealth economics *The Reformed Commonwealth of the Bees* (Giles Calvert, London, 1655) Wing H997.

<sup>44</sup> William Welwood *An Abridgement of all Sea-Lawes Gathered forth of all Writings and Manouments* (Humfrey Lownes, London, 1613) STC 25237.

<sup>45</sup> Anon *Magna Charta cum Statutis, Tum Antiquis, tum recentibus* (Adam Islip, London, 1602) STC 9283

<sup>46</sup> George Saltern *Of the Ancient Lawes of Great Britain* (J. Iaggard, London, 1603) STC 21635.

<sup>47</sup> John Skene *Regiam Majestatem* (Thomas Finlason, Edinburgh, 1609) STC 22626.

<sup>48</sup> John Selden *De laudibus legum Angliae written by Sir Iohn Fortescue L. Ch. Iustice, and after L. Chancellor to K. Henry VI. Hereto are ioind the two Summes of Sir Ralph de Hengham L. Ch. Iustice to K. Edward I. commonly calld Hengham magna, and Hengham parua.* (Adam Islip for the Stationers, London, 1616) STC 11197.

<sup>49</sup> Thomas Powell *Direction for search of records remaining in the chancerie. Tower. Exchequer, with the limnes thereof* (Bernard Alsop for Paul Man, London, 1622) STC 20166.

<sup>50</sup> Arthur Agard *Repertorie of Records* (B. Alsop and T Fawcet, London, 1631) STC 194.

<sup>51</sup> Perkins above n. 16.

<sup>52</sup> William Fulbecke *A Direction or Preparative to the Study of the Law* (Thomas Wight, London, 1600) STC 11410.

<sup>53</sup> Doderidge above n. 14.

under the title of *The Lawyers Light*<sup>54</sup>) was a leading work on the nature of a lawyer's craft. Powell's *Attourney's Academy*<sup>55</sup> and *Attornies Almanacke*<sup>56</sup> were similar guide books for lawyers about legal practice.<sup>57</sup> Some of these "guidebooks" had appeared in the latter part of the sixteenth century<sup>58</sup> but increased in number and scope over the seventeenth century. Dalton's *Coutrey Justice*<sup>59</sup> and *Officium Vicecomitum*<sup>60</sup> and Wilkinson's *Treatise on Coroners and Sherrifs*<sup>61</sup> provide examples although they were written for lay officials. Many of the titles in this category dealing with local courts and practice beyond London were designed to address perceptions of misfeasance in local courts and provide for correct practice according to law.<sup>62</sup>

Books of maxims and general principles of law were of considerable assistance to students and also catered to a wider readership. Falling within this category were general works such as Bacon's *Maxims and Elements*<sup>63</sup> and Noye's *Treatise of Grounds and Maxims of Law*.<sup>64</sup>

A number of books dealing with general legal matters and legal thought were printed during this period. Mason's *Reason's Academie*,<sup>65</sup> the controversial *Interpreter* of John Cowell,<sup>66</sup>

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<sup>54</sup> John Doderidge *The lawyers light: or, A due direction for the study of the law for methode*. (Alsop and Fawcet, London, 1629) STC 6983.

<sup>55</sup> Thomas Powell *The Attourneys Academy* (George Purslowe, London, 1623) STC 20163.

<sup>56</sup> Thomas Powell *The Attornies Almanacke* (Alsop & Fawcet, London, 1627) STC 20165.

<sup>57</sup> *The Attourney's Academy* has been described as the first treatise on common law procedure. J. H. Baker (ed) *The Reports of Sir John Spelman*, (Selden Society, London, 1978) (2 Vols) vol. 2 p. 96.

<sup>58</sup> A leading example is William Lambarde *Eirenarcha: or of the office of the iustices of peace in two bookes: gathered. 1579. and now reuised*, (Newberry and Byneman, London, 1581) STC 15163. Other examples from the sixteenth century include William Lambarde *The dueties of constables* (Wight and Norton, London, 1599) STC 15152 and Richard Crompton *L'authoritie et jurisdiction des courts* (Charles Yetswiert, London, 1594) STC 6050 ; John Kitchin *The aucthoritie of al iustices of peace* (Richard Tottell, London, 1580) STC 14887; *Le Court Leet* above n 16.

<sup>59</sup> See above n. 15.

<sup>60</sup> See above n. 17.

<sup>61</sup> Wilkinson above n. 19.

<sup>62</sup> [The Offices] are dailie exercised by many, yet fewe knowe the true forms that are to be kept in keeping of these Courts."

Wilkinson above n. 15 The Epistle Dedicatorie pages unnumbered. See also the prefaces to Dalton *Officium Vicecomitum* above n. and *The Coutrey Justice* above n. . An indirect and perhaps unforeseen consequence was the the publication of such works might have the effect of providing some common or standard practice on the part of officials in the exercise of their powers and duties. Dalton's work addresses both matters of procedure and form along with substantive rules many of which are contained in statutes to which references are made. There are also references to other printed texts including Plowden, Dyer, Coke, Brooke, Compton, Rastell, Lambard, Pulton and Fitzherbert. One can only speculate upon the impact that these references may have had on the application of local custom.

<sup>63</sup> Bacon above n. 12.

<sup>64</sup> Noye above n. 12.

<sup>65</sup> Robert Mason *Reasons Academie* (Th. Creede, London, 1605) STC 17619.

<sup>66</sup> John Cowell *The interpreter* (John Legate, Cambridge, 1607) STC 5900.

Ashe's *Epieikeia*<sup>67</sup> and *Promptuarie*<sup>68</sup> provide examples. Other works such as Eburne's examination of the derivation of the rules of equity was published as *The Royal Law or Rule of Equity*<sup>69</sup> and Finch's *Law or a Discourse thereof*<sup>70</sup> was first published in English in 1627.

Books on procedure which had appeared in the sixteenth century as guides to pleadings and the forms of action continued to appear. Coke himself published a *Book of Entries*<sup>71</sup> in 1614 and Bacon's *Chancery Ordinances*<sup>72</sup> provides another example. It should be observed that much of the law of the time was still bound up with the forms or pleading that derived from the Year Books.<sup>73</sup> Hence, it is not uncommon for texts on specific topics frequently to contain Year Book references. Similarly the works on Leet Courts and the powers of local justices addressed not only substantive matters but covered matters of procedure as well.

The publication of abridgements of cases continued. Pulton published his various abridgements and commentaries of the statutes.<sup>74</sup> The appearance of the Reports of Sir Edward Coke in 1600 and thereafter and their significance received early recognition from abridgers. In 1606 Thomas Ashe, an admirer of Coke and an early abridger and indexer of his work published his *Un Perfect Table a tous les several livres del Reports de Sir Edward Coke*,<sup>75</sup> his first edition of *Fasciculus Florum* in 1617, and a second edition in 1618 bringing his earlier abridgement of Coke up to date.

In addition to the major groupings suggested there were the various works that appeared to have a legal focus but were in the nature of religious or political tracts that addressed ecclesiastical or political matters. These works identified matters of law which required remedy or which were unjust or incorrect, generally from a religious standpoint. Thus

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<sup>67</sup> Thomas Ashe *Epieikeia et table generall a les annales del ley* (Adam Islip for the Stationers, London, 1609) STC 840.

<sup>68</sup> Thomas Ashe *Le premier volume del promptuarie*, (John Beale, London, 1614) STC 840.5.

<sup>69</sup> Richard Eburne *The royal law or, The rule of equitie prescribed us by our Sauour Christ Math. 7.12.* (W. Stansby, London, 1616) STC 7472.

<sup>70</sup> Finch *Law or a Discourse Thereof* above n. 13.

<sup>71</sup> Edward Coke *A booke of entries* (Adam Islip for the Stationers, London, 1614) STC 5488.

<sup>72</sup> Francis Bacon *Ordinances made by the Right Honourable Sir Francis Bacon ...* (Walbanke & Chapman, London, 1642) Wing B316.

<sup>73</sup> For a discussion of cross-referencing and the self-validation of texts see below p.198 et seq.

<sup>74</sup> Pulton *Kalendar* above n. 30, Pulton *De Pace* above n. 30.

<sup>75</sup> Thomas Ashe *Vn perfect table a tous les seuerall liuers del Reportes de Sir Edwrd Coke* (Adam Islip for the Stationers, London, 1606) STC 5525. Ashe was a member of Grays Inn. Although he wrote a number of books he was not financially successful and was entitled to free commons at the Inn and was granted a pension. When he died he was described as a pauper. David Ibbetson, 'Ashe, Thomas' (c.1556–1618) Oxford Dictionary of National Biography (Oxford University Press, Oxford 2004).

Hooker's *Of the Lawes of Ecclesiasticall politie*<sup>76</sup> addressed what the author considered should be the way in which the Church was governed, utilising both religious and legal tools of analysis. Pendryck's *Application of the Laws of England for the Catholike Priesthood*<sup>77</sup> was a Catholic plea for law reform and for toleration for Catholics and priests, although it was not printed in England. A work that was not directly associated with religion may be found in William Prynne's *Sovereign Power of Parliaments*.<sup>78</sup>

### **Themes in the Law Texts**

A number of themes become apparent upon a study of the treatises of the period. The first indicates a recognition of the existence and availability of law texts in print and the way in which subsequent printed works cross referenced and referred to the earlier works, thus directing the reader to the earlier text and, in a sense validating those texts by increasing reliance upon them.

The second theme is that of the language of the law. By the seventeenth century a number of legal texts were being printed in English, but the “Englisshing” of the law was still a matter of debate and was bound up with issues of accuracy of expression and deeper meaning that was underpinned by the concept of *nos erudition*.

The third theme addresses the way in which print began to intrude upon the aural\oral system of learning and its reliance upon memory and mnemonic devices and began a shift to “preserved memory”. That leads into a discussion of the fourth theme. Once textualisation and its preservation in print freed learning from the constraints imposed by memory, the focus of examination began to shift towards the meaning of the text, particularly in the area of statute. It is suggested that the confluence of increased statutory activity, the printing of the statutes and the development of hermeneutics, whilst not a planned nor orderly progression, are not entirely coincidental.

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<sup>76</sup> Hooker above n. 16.

<sup>77</sup> William Pendryck *Application of the Laws of England for the Catholike Priesthood* (Henry Jaye, Mechlin, 1623) STC 7435. Mechlin is in Flanders.

<sup>78</sup> William Prynne *The soveraigne power of parliaments and kingdomes divided into foure parts* (Michael Sparke, London, 1643) Wing P0847A, P4109, P4088, P4103, P3962 Prynne, a pamphleteer and supporter of Parliamentary sovereignty, was a barrister of Lincoln's Inn and critic of the regime who had been mutilated following the publication of *Histori-mastix* in 1633 which was interpreted as critical of attitudes of the Royal Court. See above Ch. 3 p.37- 38. Ironically Prynne supported Parliament in the Civil War but opposed the execution of Charles I and supported the Restoration in 1660,

The fifth theme addresses the way in which print assisted text writers to order the law and try to develop principles and approach legal issues from a logical perspective. The disorganised state of the common law was clearly a matter of concern and, by the use of existing print materials and the development of logical argument, early seventeenth century law writers saw the need to impose some form of structure upon the law.

The sixth theme addresses one of the darker elements of legal printing – one I have termed opportunistic printing where printers obtained a copy and printed it without the consent of or input from the author, or even went so far as to misrepresent the provenance of a printed work, demonstrating that unscrupulous printers recognised that there was money to be made from legal printing.

The seventh theme discusses the development of guidebooks and manuals for the use of lawyers and public officials. Such texts had appeared in the sixteenth century, but the purpose of handbooks for public officials was notable in that the authors stated that these were directed towards not only standard practice but also the elimination of injustice.

The final theme brings many of the earlier themes together in that it identifies the varying audiences for legal texts. Although many texts were clearly directed towards lawyers or law students, there is a recognition that printed legal information had advantages for those who were outside the legal profession – a perpetuation of the pre-existing concepts of the common weal and that of combating ignorance of the law.

I shall now proceed to address each of these themes in more detail.

### **Self-Validation of texts by Texts**

In his essay “The Books of the Common Law” Baker states:

“Perhaps we should not be too hard on the printers themselves, who doubtless relied on professional advice both in selecting texts for publication and in editing and proof reading. Moreover, the profession seems to have acquiesced in the prevailing balance between print and manuscript. Yet the result was an unintended narrowing of the canon of legal literature. A still more drastic narrowing of the canon resulted from the complete omission of readings. Perhaps it was right to encourage students to attend lectures or copy texts themselves. But the failure to print readings helped to exclude

doctrinal literature completely from the later common law mind. The common law of the future was to be case law, and printed case law at that”.<sup>79</sup>

In so saying Baker emphasises a fundamental issue about the interaction of the new technology and those who were involved in its utilisation both in terms of production and consumption. He points to the fact that there was a wide range of legal literature available in manuscript that did not become available in print. Many of the reasons for this have already been discussed in my analysis of the co-existence of print and manuscript and indeed it must be emphasised that notwithstanding Baker’s comments, that co-existence continued during the period under study.<sup>80</sup> However I suggest that the needs of the market both from the point of view of the printers and the consumers may well have dictated what law books were printed particularly in the later 16<sup>th</sup> and early 17<sup>th</sup> centuries. The following reasons could therefore be advanced for the fact that Readings did not see print.

1. As has already been suggested, printers may not have been interested in printing the readings. They were not seen as a commercial proposition and would have appealed to a limited audience.
2. Although formal in terms of delivery, the reading itself was part of a greater exercise. The Reading was participatory by nature and thus much of the “value” of the exercise would be lost if the formal reading was put in print without the exchange and case-putting that followed. However, it must be acknowledged that manuscript copies of the Readings included these exchanges which could have been included in a printed edition.
3. Readings dealt with statutes and were cyclical in their presentation in the fifteenth century. However, this had broken down by the reign of Elizabeth but availability of Readings in manuscript could well have been a factor which diminished demand.
4. Finally it may have been that the readers themselves were simply not prepared to allow their material to be put in print.

Baker suggests three reasons why there was an absence of citations in or cross-referencing to works prior to the sixteenth century.

- (a) it was unlikely that books were much used in Court;
- (b) there was an absence of Court libraries;

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<sup>79</sup> J H Baker “The books of the common law” in L. Hellinga and J.B. Trapp (eds) *The Cambridge History of the Book in Britain 1400 – 1557* (Cambridge University Press, Cambridge 1999) Vol III p.411 at 432.

<sup>80</sup> For discussion see above Ch. 5 p.137 et seq.

(c) propositions were supported by example rather than by citation.<sup>81</sup>

There are several explanations, however, why print and the narrowing of the legal canon began to supplant manuscript although it must be conceded that co-existence of print and manuscript use among lawyers continued for a considerable period after that under study.

One aspect of the matter lies in the qualities of print that have been identified by Eisenstein.<sup>82</sup> Print allowed for more copies of a particular text to be available and thus texts were more widely disseminated among the audience – in this case the lawyers. This easier availability of texts and the wider use that dissemination occasioned was enhanced by the fact that as more printed works became available at later times cross referencing to earlier texts took place.

The effect of this was that later texts contained references to earlier printed texts thus driving the reader to the earlier text if it was considered necessary to follow up the reference. In this way the reader was directed more towards the print medium than towards material that may have been recorded in manuscript. A very frequent example that occurs in almost all printed texts from approximately 1550 onwards is the reference to statutory material which was available in print. As the 16<sup>th</sup> gave way to the 17<sup>th</sup> century, case references begin to appear along with statutory references thus further impelling the reader towards printed material that was already available. Cross-referencing with other works was cross-referencing to other works *in print*. The new medium enhanced its authority by what could be described as a form of self-validation and thereby gradually moved its audience, both extant and potential, towards greater reliance upon printed works.

In some respects this form of cross referencing could be said to be a way in which the printed medium validated itself and as Baker has observed, simultaneously resulted in a narrowing of the focus whereby students may reference their material. This is not to say that students abandoned common placing or their own note taking for they did not, but it provides an early – one might say embryonic – example of the way in which print was beginning to develop its own internal system of cross referencing and validation of materials. Such cross referencing

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<sup>81</sup> Baker “The books of the common law” Above n.79. I suggest that these may be seen as aspects of *nos erudition* or *communis erudition*. *ibid.* p.413.

<sup>82</sup> See above Ch. 2 p.13.

to works in print makes it arguable that this was new beginning of the dominance to which Baker refers.

Yet it was not only in the marginal cross referencing to earlier printed works that such validation took place. William Fulbecke's *Direction* provides a reading list of books to which students should have reference – all of which were in print.<sup>83</sup> Ashe's *Table of Cokes Reports* and *Fasciculus Florum* cross reference to Coke's reports which were in print. Although Coke's circulation of *Shelley's Case* in manuscript pre-dated the printing of his reports, all of Ashe's work deals with printed material. Ashe also published an abridgement of Plowden's *Commentaries* – again a work which had been in print for almost 30 years.

Coke in his prefaces also makes reference not to manuscript titles but to works that were in print. Thus the validation or approval of print is not only seen in the way in which marginal cross referencing to material took place but also validation can be seen from the way in which existing authors recommended or wrote commentaries or abridgements of existing printed texts.

The development of cross referencing to printed works is instructive. Staunford's *Les Plees de Coron*<sup>84</sup> provides an example from the middle of the sixteenth century. This text contains numerous statutory references along with case references and references to earlier texts. Britton and Glanvil were in print at the time although Bracton was not.<sup>85</sup> The references to printed works contain folio references, although there are none such for Bracton. In addition there are references to Fitzherbert, primarily to title headings rather than page or folio number. Statutory references abound. Of interest is the manner of referencing. Most of the references in Staunford are embedded in the text rather than in the margin.<sup>86</sup>

Fourteen years later saw the publication of the first volume of Plowden's *Commentaries* in 1571.<sup>87</sup> The first edition had neither an index nor a table of contents, although later printings

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<sup>83</sup> Fulbecke's recommendations were to common law and civil law texts. The common law texts included Staunford's *Prerogative* and *Les Plees del Coron* as well as Lambarde's work on Justices of the Peace. Other texts included Plowden, Dyer, Bracton, Britton, Glanville (not yet in print), Fortescue, Littleton, Fitzherbert, Brooke, Parkens (Perkins), Rastell, Theloall and Crompton.

<sup>84</sup> Totell, London 1557 STC 23219.

<sup>85</sup> Glanvill was first printed in 1554 STC 11905 and Britton in 1534 (Robert Redman, London 1534) Beale T334. Bracton was not printed until 1569.

<sup>86</sup> The common sixteenth century equivalent of footnoting.

<sup>87</sup> STC 20040.

did.<sup>88</sup> However, the printed versions are all carefully foliated which provided a means for subsequent referees to identify a particular passage.

References in Plowden are carefully identified and include references to texts such as Fitzherbert – once again the principal references are to titles rather than page or folio numbers. Other works receive different treatment. In the report of *Throckmorton v Tracy and Nicholson*<sup>89</sup> there is a reference to Bracton which contains a page reference and, of course, by this time Bracton had come into print.<sup>90</sup> As one would expect there were frequent references to statutes and cases which appear in the Year Books are referenced by folio – again suggesting reference to a printed version.

In addition to his text references, Fulbecke had the by now common marginal references to statutes and cases. His case references include Bellewe, Dyer and text references include Littleton and Fitzherbert. The Fitzherbert references are to title but other references, such as to Staunford are to folio, indicating reference to a printed work.

Pulton's *De Pace Regis*<sup>91</sup> similarly contains references to printed works such as statutes and also to Fitzherbert – both to the *Abridgement* and the *New Natura Brevium* and, in the case of Coke's Reports, the volume number and the page reference.

By the time of the publication of Doderidge's *The English Lawyer* referencing to printed works was becoming routine. Throughout the text are references to books in print such as the Statutes, Fitzherbert's *Abridgement* and *New Natura Brevium*, as well as to Coke by volume and folio, Brooke and Littleton by page and Plowden and Bracton by folio.

This review demonstrates that there was a willingness on the part of legal writers to reference and, by doing so, endorse printed material. I suggest that is so because the referencing employed is to provide support from other legal materials for an opinion or, more often, a proposition of law. The fact that printed materials are used indicates a familiarity with and

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<sup>88</sup> Devised by the recorder of London, William Fleetwood. The second volume of the *Commentaries* was printed in 1594 (STC 20047) and carried on the foliation numbering from where the first volume left off.

<sup>89</sup> Edmund Plowden *Les Commentaries ou les reports de Edmund Plowden un apprentice de le comen ley*. (Richard Tottell, London, 1571) STC 20040 folio 162.

<sup>90</sup> The *Commentaries* were first printed in 1571. Bracton was first printed in 1569. See above n. 85. It can be inferred from this that Plowden was up-to-date with material that was coming into print.

<sup>91</sup> (Adam Islip for the Stationers, London 1609) STC 20495.

acceptance of these works. Yet Staunford frequently referred to Bracton which had not at the time of writing been printed and was in manuscript. Perhaps a work such as Bracton commanded a respect that other manuscript material may not have, yet it seems unusual that there should be little if any other referencing to manuscript in the texts that were in print. Speculative though it may be there are a number of possible explanations.

One is that the printers themselves encouraged referencing to printed material to maintain the impetus that print had achieved in the marketplace. A second explanation may lie in the limited circulation of manuscript materials which was countered by the disseminative property of print. Perhaps the writers saw little point in referencing uncommon material that was hard to obtain. Such selectivity supports Baker's narrowing suggestion and had the effect of narrowing discussion within the printed *oeuvre*. Cross-referencing and citation, while enhancing issues in print, meant that unprinted legal discussion languished although, thanks to manuscript co-existence would still receive consideration among the "coterie". However those issues would not benefit from the exposure to and continued propagation afforded by print. A third explanation may be that by the time that he wrote *The English Lawyer* Doderidge was beginning to accept the reliability of printed material and preferred material to be in print rather than manuscript. The irony about this suggestion is that Doderidge himself did not see *The English Lawyer* into print and it was published posthumously. Yet there is a double irony, and one that perhaps supports an acceptance of the reliability of print and a preference to refer to it. After referring to learned treatises such as Glanvil, Bracton, Hengham and Fortescue, Doderidge notes and endorses as fit for printing,

A learned Treatise composed by a learned yet vnkknown Author whilst he was a Prifoner in the Fleet, and therefore the said work or tract is called *Fleta*, in the time as it seemeth of King Edward the first and although there doe now remaine but a few Manuscript copies thereof as hauing been neuer imprinted it is worthy to see the light, and for the furtherance of the student of the Lawes to be diuulged.<sup>92</sup>

### **The Language of the Law**

We have seen how the humanists of the sixteenth century sought to unlock the mysteries of the law by dispensing with the use of law-French or Latin and making the law readily available in English.<sup>93</sup> This posed something of a problem, however, for it was remarked upon by several seventeenth century text and report writers that the precision in meaning that

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<sup>92</sup> Doderidge *The English Lawyer* above n. 14 p. 42. The texts to which Doderidge referred were well known to contemporaries in manuscript and in print, perhaps unlike other manuscript works.

<sup>93</sup> See above Ch.5 p.127 et seq.

was present in law-French was lost because the deeper sense of some of the terms could not readily and precisely be expressed in English.

Fulbecke commented on the language of the law referring particularly to some of the special terms of the common law, noting that much of the language of the law was derived from the Normans and other nations but also emphasizes a potential loss of meaning.

**How can it then be, but that the Common Law should haue harsh, obscure, difficult & strange tearmes by the commixtion of the seueral languages of the Saxons, Danes, and Normans, the authors of the same. ....If the receiued wordes of the Law should be altered, it may well be presumed that many auncient bookes of Ciuil law & the old yeare bookes would in short time, be hardly vnderstood: And I am fully perswaded, that if the auncient Tearmes of the Law should be changed for more polite and familiar nouelties, the new tearmes would be nothing so emphaticall and significant as the olde.**<sup>94</sup>

William Noye's *A Treatise of the Principall Grounds and Maximes of Law of the Kingdome*,<sup>95</sup> a collection of maxims and principles of law was written, as the subtitle suggests, for the benefit of students and was published in English, although there is an *apologia* for the use of that language:

**These Grounds, and Maximes of the Law, being Originally written in French, are therefore very elegant, and sententious. But how by their Translation in our Vulgar tongue, lose some of their grace and beauty, a thing incident unto Translations, which if it cannot be avoyded, it is therefore to be tolerated, because they are very profitable for those that do not understand the French tongue.**<sup>96</sup>

This evidences the tension that existed between making the law available, especially to students, and the loss of “grace and beauty” if the work was not in law-French. However, it was recognised that the audience was primarily those who would read English. Certainly Davies expressed a concern about putting his work in English.<sup>97</sup> Primarily this was because

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<sup>94</sup> Fulbecke above n. 52 p. 21 - 22. It should be noted that the concern of Fulbecke about the "language of the law" or what other writers call "Terms of Art" is echoed in other works, especially within the context of translating legal texts from Law French or attempting to put Law French terms into English. It cannot be said that this amounts to a reaction against printing the law, not indeed making legal information available in "the vulgar tongue". If anything the legal writers seem to be articulating a caveat against making the law confusing by using terms or language with which the law is traditionally unfamiliar.

<sup>95</sup> Noye above n. 12.

<sup>96</sup> Ibid fo.A3 pages unnumbered under the heading “The Matters Contained and Handled in this ensuing Treatise are chiefly as followeth.” It is most unlikely that these were Noye’s sentiments. Noye’s work was printed posthumously and thus what may be a printer’s *apologia* may explain a change from the original manuscript.

<sup>97</sup> John Davies *Le Primer Report des Cases et Matters en Ley resolved & adiudges en les Lourt del Roy en Ireland* (John Franckton, Dublin, 1615) STC 6361 “A Preface Dedicatorie” at ¶¶ 2 et seq. pages unnumbered.

much of the sense would be lost, particularly in the utilisation of terms of art which, although were immediately recognisable by a lawyer, could not easily translate into English. Coke wrote his Reports in law-French and entered the pleadings in Latin, although the Prefaces were written in English as well as Latin.<sup>98</sup>

He explains why in the preface to the Third Volume of the Reports:

But forasmuch as the former Reports of the Law and the rest of the Authors of the Law (the Doctor and Student who wrote in the English tongue excepted) are written in French; I have likewise published these in the same language: And the reason that the former Reports were in the French tongue was for that they begun in the reign of King Edward the third, who as the world knowes, had lawfull right in the kingdome of Fraunce, ....; It was not thought fit nor conuenient, to publish either those or any of the Statutes enacted in those dayes in the vulgar tongue, lest the vnlearned by bare reading without right vnderstanding might sucke out errors, and trusting to their own conceipt might endamage themselues & sometimes fall into destruction. .<sup>99</sup>

Yet Coke's approach had changed by the time that he published *The Institutes* although he maintained a caveat about the way in which some law-French terms had become "Vocables of Art".<sup>100</sup> Coke's intended audience was wider than students and for this reason Coke's commentary was published in English as well as enhancing the principle that ignorance of law could not be offered as an excuse.<sup>101</sup> The Preface made clear Coke's desire to make the law available, no longer closeted behind specialised legal language of law-French. Coke observed that Littleton was written in French, continuing the theme of the "Englishing" of the law, yet expressing a caveat especially regarding the way in which terms of art had developed within the law.

... for so many ancient termes and words drawne from that legal French are grown to be *vocabula artis*, Vocables of Art so act and significant to expresse the true sence of the laws and are so wouen into the laws themselues as is in a manner impossible to change them, neither nor legall terms to be changed.<sup>102</sup>

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<sup>98</sup> There is the suggestion that although the *Reports* were printed in law-French it was probable that Coke expected them to be translated into English thus reaching a wider audience and this is supported by the vernacular tone of the *Reports*. Paul Raffield "Contract, Classicism, and the Common-Weal: Coke's Reports and the Foundations of the Modern English Constitution." (2005) 17 Law and Literature 69 at p. 76.

<sup>99</sup> 3 Cokes Reports "To the Reader" folio E pages unnumbered.

<sup>100</sup> Coke on Littleton above n. 35 Preface folio A pages unnumbered. Coke emphasised throughout his writings the sovereign political authority of the common law and his change of approach was conditioned by the perceived challenges to that authority by the Stuart theory of monarchy. Raffield "Contract, Classicism, and the Common-Weal" above n. 98 p. 78 and aslso p, 81 et seq. The use of the term "Vocables of Art" appears in the quotation on the following page.

<sup>101</sup> *Coke on Littleton* contains parallel texts. Littleton's text is in law-French and Coke's commentary or "gloss" is in English. For a discussion of ignorance of the law see above Ch. 5 p. 129-133.

<sup>102</sup> Coke on Littleton above n. 35 Preface folio A pages unnumbered.

Sir John Davies, compiler of the *Irish Reports*,<sup>103</sup> also examined the language that was used in the law. He noted that after the Conquest, it was not thought fit to make any change or alteration in fundamental points or substance of the law but some of the legal forms were changed and pleadings of various actions were made and entered in French. This continued until the reign of Edward III when it was ordained that all pleas should be pleaded, debated and judged in the English tongue but that they would be recorded in Latin. However, he points out that the bills that were introduced (before they became the Statutes or Acts of Parliament) were “exhibited” in French and passed and enrolled in that language even until the time of Henry VII.

Davies observed that those Statutes are printed in Rastell’s first Abridgement of Statutes of 1559. Only after the reign of Henry VII were Acts of Parliament recorded in English. Only the reports of cases, resolutions and Judgments in law, which comprised what Davies described as the Books of Law were in law French.

(They) Haue euer vntill this day bin penned & published in that mixt kind of speech which we call law French, differing indeed not a little from the French tongue, as it is now refined and spoken in France as well as by reason of the words of Art and Forme called the Terms of the Law, as for that we do still retain many other old words and Phrases of speech which were vsed 400 yeares since and are now become obsolete and out of vse among them but are growne by long and continual vse so apt, so natural and so proper for the matter and subiect of these, Reports as no other language is significant enough to expresse the same, but only this Law French wherein they are written.

And this is the true and only cause why our Reports & other books of the law for the most part are not set forth in English, Latine or the modern French, for that the proper and peculiar phrase the Common law cannot be so well exprest, nor any case in law be so succinctly, sensibly and withall so fully reported, as in this speech, which is indeed mixed and compounded of all these 3 languages. Which reason hath not bin well vnderstood by those, who obiect it as a fault to the Professors of our law, that, forfooth, they write their Reports and books of the law in a strange and vnkown tongue which none can vnderstand but themselves, to the end that the people being kept in ignorance of the law, may them more admire their skill and knowledge and esteem and value and at a higher price.<sup>104</sup>

Davies considered the nature of this argument against law-French given that it could be easily learned:

[I]nfomuch that the meanest wit that euer came into the study of Law doth come to vnderstand it almost perfectly within ten dayes without a Reader. So as we do not seale or locke vp the mysteries of our law in *Hieroglyphickes*, or in a darke Language that cannot be vnderstood: But wee expresse the Cases, Arguments and Iudgments of the Law in a forme of speech, so plain, so significant and in a Tongue so soone learned by any man, that can speak English and vnderstand Latine, as I dare say, there is no rationall science in the world hauing so many words and *Termes of art and forme* that is so clearly deliuered in any language. And I may truly say withall that if the bookes of our law were all translated into *English*, they

<sup>103</sup> John Davies above n. 97. A subsequent edition was printed for the Stationers Company in 1628 – STC 6362.

<sup>104</sup> Ibid “A Preface Dedicatorie” at ¶¶ 2 pages unnumbered.

would not be better, nay, they would not be so well understood by the Students thereof as in this proper and peculiar language wherein they are now written.<sup>105</sup>

He considered the objection involving the language of the law arose out of ignorance and, in addition, there were what he described as other vulgar imputations cast upon the law and lawyers such as uncertainty, unnecessary delays in legal proceedings and the pursuit of vexatious cases – described by Davies as “bad and dishonest”. These criticisms were without justification according to Davies, and the use of law-French was yet another “grievance” advanced by those who were more generally critical of the state of the law and of legal practice.

Davies occupies an interesting position. His preface gives a very concise picture of the state of the law and some of the arguments forming the basis of complaints about the law and the “legal system” of the time. He has no hesitation in making legal material available and some of his comments about language, particularly using the terms like ignorance of the law, suggests that he recognises that information regarding the law must be made available. This includes, of course, the common law or law derived from custom. He is prepared, without too much debate, to go this far but clearly is not a supporter of the “Englishing” of the law, given the loss of precision that has developed by the utilisation of law-French and the development of “terms of art”. The perceived inaccessibility of the law being published or made available in a language other than the vulgar tongue, is something that can be easily remedied by a brief period of study.

On the other hand, Thomas Ashe, a seventeenth century abridger and great admirer of the works of Sir Edward Coke, published the second edition of *Fasciculus Florum or A Handfull of Flowers Gathered out of the severall Bookes of the Right Honorable Sir Edward Coke*<sup>106</sup> in both Latin and English;

So that the same being now perfect (for the Latine) need not blush, or be ashamed to appeare before the best learned Scholler in the Vniuersity: So the benefit thereof may redound to the vulgar sort and less learned of the Commonaltie<sup>107</sup>

Sir Henry Finch, rather than printing in English had *Nomotexnia* or *Nomotechnia* printed in law-French<sup>108</sup> although it was posthumously reprinted in English as *Law: Or a Discourse*

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<sup>105</sup> Ibid.

<sup>106</sup> Ashe *Fasciculus Florum* (G.Eld, London, 1618) STC 5529.

<sup>107</sup> Ibid “Againe to the Reader” fo A4 pages unnumbered.

*Thereof in Foure Books* in 1627<sup>109</sup> and again in 1636.<sup>110</sup> Prest observed that Finch's decision to publish in law French "cut off the final form of Finch's work from a large and growing number of his fellow-practitioners, who nevertheless eagerly continued to purchase the numerous English versions and abbreviations which appeared after his death."<sup>111</sup> Yet Finch was writing for students. Although neither of the printed editions contain it, an early manuscript version of *Nomotechnia* is addressed "To the friendly reader, and especially to gentlemen, students of the law."<sup>112</sup>

Do these seventeenth century writers indicate that there was a regression away from Rastell's goal, and that of the law humanists of stating the law in English for the benefit of all? The temptation is to conclude that in some respects these statements favouring the retention of the hermetic nature of law could represent or illustrate the existence of an anti-publicist school or a regression from the humanist goals. This conclusion can be rapidly dismissed. The writers cited are not hesitant about having their work in print, although Coke explained in the first volume of the Reports that he went into print reluctantly. The matter that really concerned all four writers was the question of precision and the avoidance of ambiguity. Sitting behind this concern was the immersive nature of legal education and culture and an understanding of terms of art which, to these experienced lawyers, needed no explanation.<sup>113</sup> The law-French terms and the maxims of law were a form of code, readily understood by the acolytes of the law who had lived and worked with them for years. This code needed no explanation. To "re-encode" the terms of art essentially could require a return to first principles and an unnecessary and often confusing restatement of the principles and theories that underpin the law-French encoding. To attempt this re-encoding increased the potential for error and misunderstanding that could so readily arise.

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<sup>108</sup> Finch *Nomotechnia* above n. 29. It could not be said that it was yet a trend for law texts to be printed in English. Cokes Reports were in law French as were Davies *Irish Cases*. Finch was printed before *Coke on Littleton*, Ashe's *Fasciculus Florum* or Noy's *Treatise*.

<sup>109</sup> Finch above n. 13. It should be noted that the content of the English version contained differences from the law French *Nomotechnia* and was not a translation. See Ch. 4 p. 95 fn. 91.

<sup>110</sup> Miles Flesher for the assigns of John More, London, 1636 STC 10872 It was published after the Restoration in 1661 (Wing F931) and 1678 (Wing F932). Wilfrid Prest, "The Dialectical Origins of Finch's Law" (1977) 36 Cambridge Law Jnl 326, at p 341 et seq points to the fact that *Nomotechnia* in the original manuscript forms was written in English although Finch made a conscious decision to print in law-French.

<sup>111</sup> Wilfrid, Prest, *The Dialectical Origins of Finch's Law* above n. 110 p. 346. Although "gentlemen" suggests qualified lawyers, and assuming that is what Finch meant, the work is addressed to both "qualified" lawyers and students.

<sup>112</sup> *Ibid.*

<sup>113</sup> In that it was part of *nos erudition*.

The other unstated premise that underlies the concern about abandoning law-French terms of art has to do with the distributive nature of print and the recognition of a growing reliance upon printed material. The premise is this – it is recognised as a good and beneficial thing to put the law in print because in this way a large number of identical copies of the legal information are going to come into the hands of a wide and diverse audience. But these distributed and standard copies must be accurate and reliable. The law must be properly stated, lest the reader be led into error. There is a risk, therefore, that the quality of fixity– the immutable quality of the printed word in multiple copies – might, without care, confound the laudable benefits of making the law available to a wider audience. However, the accuracy of the text is only one part of the equation. Error could arise from a lack of understanding – as Coke said “bare reading without right vnderstanding might fücke out errors, and trusting to their own concept might endamage themfelues & fometimes fall into destruction.”<sup>114</sup> Although an accurate text might well aid in the dissemination of knowledge, a potential difficulty arose in the manner in which the text might be interpreted or applied. The concerns about the accuracy of English to express legal principles and the common knowledge that lay behind those precepts provide an example.<sup>115</sup> Dissemination of an accurate text, therefore, is only a part of the spread of the understanding that accompanied knowledge. But by the same token, an accurate text was a necessary first step.

In this sense the concern about precision returns us to the issue of reliability that be-devilled the sixteenth century law printers, although by the seventeenth century law authors recognised that confidence in material was abroad, and that printed law, especially emanating from respected personages such as Coke would be relied upon and achieve an “authoritative” quality. To allow for misrepresentation of the printed word cast a shadow over the creditability that may be ascribed to the printed word. At the same time, the use of law-French terms of art avoided the problem of textual analysis or legal hermeneutics that obviously concerned the writers, again evoking the fear that such analysis could well mean that earlier undisputed propositions could become the subject of dispute – an unnecessary outcome if the meaning was clear in the law-French terminology.<sup>116</sup>

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<sup>114</sup> 3 Cokes Reports “To the reader” folio E pages unnumbered. Similar concerns were expressed by Hooker in the Preface to “*Of the Lawes of Ecclesisatical Politie*” and by Pulton in *De Pace Regis* (London 1609) sig.Av.

<sup>115</sup> For discussion see above Ch. 5 p.149.

<sup>116</sup> For a discussion of legal hermeneutics see below p.214.

## From Mnemonic to “Preserved” Memory

The law treatises gathered together information upon discrete topics and presented it in a logical and structured manner. In many respects this echoed the aural-oral memory-based training of lawyers.<sup>117</sup> What print did more effectively than manuscript, because of the volume of material available, was to provide a greater opportunity for the “memory” to be preserved more accurately than in manuscript because of typographical fixity - and without manuscript’s inevitable textual drift. It is no accident that Coke described memory as “slippery”<sup>118</sup> but of deeper significance was the way in which print impacted upon “customary memory”.

Sir John Doderidge’s<sup>119</sup> *The English Lawyer* was not only a book for students and for whom it was clearly written, but was also an attempt to impose some order upon the labyrinth of the common law.<sup>120</sup> Doderidge, like Finch and Fulbecke, wrote on the methodology of common law study to ease the plight of the student. However the provision of a study guide necessarily required an attempt to place some order upon the disorder of the common law. This was not an academic exercise, embarked upon in the course of writing the text. Doderidge lived and worked in a time when methodisation of the common law was an issue that was being debated and considered. He was a contemporary of Bacon who had compiled a book of maxims as a means to systematise the common law.<sup>121</sup> Thus Doderidge was following a developing trend of a more rigorous structuring of legal reasoning that had developed by the end of the sixteenth century. An example may be seen in the arguments in *Slade’s Case* where a solution to what appeared to be an insoluble problem was sought by resort to general principle and logical analysis.<sup>122</sup>

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<sup>117</sup> A useful discussion of the role of memory for the Early Modern lawyer may be found in Richard Ross “The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter and Identity 1560 – 1640” (1998) 10 *Yale Jnl Law and Humanities* 229.

<sup>118</sup> 1 Cokes Reports “To the Reader” pages unnumbered.

<sup>119</sup> 1555 – 1628.

<sup>120</sup> For additional discussion of “The English Lawyer” in the context of legal education see above Ch.4.

<sup>121</sup> See above p. 189. For discussion of Bacon’s attempts to systemise the law see above Ch..5 p. 136 – 137.

<sup>122</sup> (1602) Trinity Term 44 Eliz Court of Kings Bench; 4 Cokes Reports 92b; see David Ibbetson “Common Lawyers and the Law Before the Civil War” (1988) 8 *Oxford Jnl Legal Studies* 142 at 151. The approach in *Slades Case* did not represent common practice but shows a move in the direction of arguments being based on general principle and logical analysis.

According to Doderidge one of the most important disciplines required in the pursuit of the study of law was that of memory.<sup>123</sup> A whole chapter was devoted to the importance of memory, its nature and the art of remembrance beginning with the following statement:

The next naturall gift to be considered of, is *foundnesse of Memory*, which this the receptade wherein everything is repofed and laid up whatsoever thing the Underftanding hath apprehended and iudged worthy of receipt or entertainment: for what doth it profit with great labour, dexterity, and induftry to get together, when the thing gotten is not carefully kept and preferved, but loofely let gow, or negligently loft?<sup>124</sup>

The development of memory was a requirement for the lawyer of the Sixteenth and Seventeenth Centuries, and before. The common law particularly required this. There was no single text like Scripture or a *Corpus Iuris*. Even Bacon, who advocated significant reforms to the perceived complexity of the law and advocated the summarising of the law under headings and titles, cautioned "But we must take care that while they make men ready in practice they do not make them idlers in the science itself; for their business is to facilitate the recollection of the law, not to teach it."<sup>125</sup>

A deep understanding of the law, acquired over years of training, underpinned criticism of the newcomers to the profession - attorneys and "solicitors" - who were seen as "empiric" practitioners who, although they knew the form of the law, did not understand its underlying principles.<sup>126</sup>

### **Mnemonic Devices**

Mnemonic principles were present in law books and were advocated not only by Doderidge but by Fulbecke and Coke, although Coke also advanced protection against "slippery memory" as a reason for publishing his Reports<sup>127</sup> and saw his cases as a "bringing again to memory cases judicially argued."<sup>128</sup>

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<sup>123</sup> Doderidge above n. 14.

<sup>124</sup> Ibid p. 12.

<sup>125</sup> Bacon *Aphorism 87, De Augmentis* in James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds) *The Works of Francis Bacon* (Longman, London, 1857-1874) (14 Vols) Vol 5 p 106-7.

<sup>126</sup> Bacon *The Advancement of Learning* (1605) in James Spedding, Robert Leslie Ellis and Douglas Denon Heath (eds) *The Works of Francis Bacon* (Longman, London, 1857-1874) (14 Vols) Vol 3:270.

<sup>127</sup> 1 Cokes Reports.

<sup>128</sup> Coke on Littleton 293a. Above n. 30.

The law used words that echoed the “memorial” form of recall. Citations were referred to a "remembrance" and entries in an official record were termed "memorials", harking back to the concept of community remembrance for solemn occasions like land transactions.<sup>129</sup>

The nature of the legal process required resort to memory. In courts where there was no official record kept of what was said, but only of outcomes, judges did not deliver written decisions, nor were they recorded and the notes that were kept by counsel, barristers and students were often sketchy, for it was not until the seventeenth century that shorthand became common.<sup>130</sup> Memory of what was said filled in the gaps. Reporters would often claim that they had cross-checked with the notes of others to vest their work with authority.<sup>131</sup>

In the same way that attorneys and solicitors were criticised for an understanding of form without deep substance, the law books of the Sixteenth and Seventeenth Centuries could be seen to tell only parts of the story. Underlying the information contained on the printed page was a mass of knowledge and experience.<sup>132</sup> The relationship of the law books to deeper knowledge that lay in memory and shared knowledge acted in the same way " as the feveral linkes of a Chaine draw and depend one upon another."<sup>133</sup>

Lawyer authors of the Sixteenth and Seventeenth centuries referred to books as remembrancers or promptuaries and those words were often included in the titles of books.<sup>134</sup> The notes or "reports" that lawyers took of cases were to serve as an *aide memoire*. That concept is reflected in Plowden's prologue where he stated that he called his reports

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<sup>129</sup> See Michael Clanchy *From Memory to Written Record* (Arnold, London, 1979).

<sup>130</sup> Harry M Scharf, *The Court Reporter* (1989) 10 *Journal of Legal History* 191 – 7. Scharf makes it clear that shorthand was in use in the sixteenth century, that Dyer used a form of shorthand and that shorthand systems were being used in the early seventeenth century.

<sup>131</sup> Plowden, above n. 89 410 (Newis v. Lark), 481 (Nichols v. Nichols), 514 (Eare v. Snow); 7 Cokes Reports Preface iii-iv (report of Calvin's Case); See also See L.W. Abbott *Law Reporting in England, 1485-1585* (Athlone Press, London, 1973), 64, 144-46; Percy H. Winfield *The Chief Sources of English Legal History* (Harvard University Press Cambridge, Mass., 1925) 184-85; David Ibbetson “Law Reporting in the 1590s” in *Law Reporting in Britain*, ed. Chantal Stebbings (Hambledon Press, London, 1995), 78-80; J.H. Baker “Records, Reports and the Origins of Case-Law in England” in *Judicial Records, Law Reports, and the Growth of Case Law*, ed. J.H. Baker (Duncker & Humblot, Berlin, 1989), 41.

<sup>132</sup> *Nos erudition* – that mass of acquired and shared knowledge and experience that characterised common law practice and education. See J.H. Baker *The Law's Two Bodies: some evidential problems in English legal history* (Oxford University Press, Oxford 2001) esp at ch 3.

<sup>133</sup> Doderidge above n14. p.16.

<sup>134</sup> Ashe, *Promptuarie* above n. 68 ; Simon Theloall, *Le Digest des Briefes* (Tottell, London, 1579) STC 23934; Dalton, "Epistle to James Lee and Thomas Spencer," in *The Countrey Justice* above n. 15 , the book is described as a brief memorial of the law; William Sheppard, *The touch-stone of common assurances*. (M.F. for W. Lee, M. Walbancke, D. Pakeman, and G. Bedell, London, 1648) - the book was described as a “remembrancer” of land law.

Commentaries because that term "has the sense of a register, or memorial of acts and sayings."<sup>135</sup> However, the printing of legal material made much of the "exclusive" knowledge of lawyers more widely available.

The organisational method of commonplacing was capable of receiving new information into the existing structure and the use of headings assisted in the recollection that was required to construct an argument. The tools of commonplacing - "heads," "grounds," "generals," and "divisions" - also had a mnemonic quality, a form of link in Doderidge's chain of recollection.<sup>136</sup> Bacon observed that headings and other organisational tools did not discover new material so much as "recover or resummon that which we already know. . . . So as, to speak truly, it is no invention, but a remembrance or suggestion, with an application."<sup>137</sup>

Despite the emphasis that Doderidge placed upon the importance of memory and despite the fact that the attempts to "order" the common law in treatises had a mnemonic quality, the old arts of recall and orality were giving way to the new technology which preserved information and fixed it in time and place in standard form. Identical texts would allow the lawyer to be able to locate information within a known and identifiable volume. Indices and contents pages would help locate the topic by page, and an ordered, structured form of presentation, based upon the known art of common-placing, provided a recognisable structure for locating the information in print.

The "memorial culture" of the Early Modern Lawyer was challenged by Coke in the first paragraph of the first volume of the Reports,<sup>138</sup> reflecting perhaps the problems attendant upon the volume of legal information that was being generated by the printing press and by the increased litigation of the late sixteenth and early seventeenth centuries and demonstrating that printed works were becoming the repository of "legal memory".

**Nothing is or can be so fixed in mind or fastened in memorie, but in short time is or may be loosened out of the one, and by little and little quite lost out of the other: It is therefore necessarie that memorable things ould be committed to writing (the witnesse of times, the light and life of trueth) and not wholly**

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<sup>135</sup> Plowden, Preface to *Commentaries* above n .89. E.W. Ives described the Yearbooks as "extensions of the memory of the legal profession" allowing lawyers and judges to "move readily from memory to their reports and back again, without distinction" E.W. Ives, "The Purpose and Making of the Later Year Books" (1973) *Law Quarterly Review* 69-71.

<sup>136</sup> The tools of common placing referred to by Doderidge were sophisticated and were recommended as an ideal method.

<sup>137</sup> Bacon, *Advancement of Learning* (1605) in *Works*, 3:389-90 see above n. 126.

<sup>138</sup> 1 Cokes Reports.

betaken to slippery memorie which feldom yeeldeth a certain reckoning.....Therefore as I allow not of those that make memory their storehouse, for at greatest need they shall want of their store; so I like not of those that stuffe their studies with wandring & masterleffe Reports, for they shall find them too soone to lead them to error.<sup>139</sup>

However, in the same way that there was a co-existence of manuscript and printed texts, of which common place books kept by lawyers are an example of the former, so there was a co-existence of the traditional arts of memory and mnemonic, which had served the professional man in the pre-print era, with the availability of "memory in print".<sup>140</sup> As texts came to be used increasingly by students for study and for the memorisation of principles for moots and the other exercises of the Inns, so arose the critical analysis of the text itself - hermeneutics - where the meaning and import of the words became an aid to considering the information that they conveyed.<sup>141</sup> Thus while print did not eliminate the important arts of memory, and it would be wrong to suggest that it had done so, it provided a known repository of information which could be recalled by perusal rather than recollection, and allowed the development of textual analysis.

### **Textualisation, Print and Hermeneutics**

Print presented a new means of recording legal information which, it will be argued, enhanced the development of legal hermeneutics.<sup>142</sup>

Textualisation of the law, which had been in place in the medieval period had the effect of wrapping memory in the words of the text, yet in the medieval pre-print era textualisation did not automatically lead to the deep scrutiny of textual interpretation or hermeneutics.<sup>143</sup> One reason was a difficulty in making the text of the statute available. The original text was retained but does not appear to have been the subject of widespread copying or dissemination. During much of the 13<sup>th</sup> century, for example, there was no definitive version

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<sup>139</sup> Ibid. "The Preface to the Reader" pages unnumbered.

<sup>140</sup> This did not mean that memory became less important. Lawyers were still required to remember what was in the printed text, especially if they did not have the books in Court.

<sup>141</sup> Hermeneutics in law began in the sixteenth century as printing made the written word more available in an identical format thus giving the words used a common reference point. Paul Raffield *Images and Cultures of Law in Early Modern England: Justice and Political Power 1558 – 1660* (Cambridge University Press, Cambridge, 2004) p. 5-6 and p. 37.

<sup>142</sup> Ibid. p. 5-6. Raffield suggests it initiated the development of legal hermeneutics.

<sup>143</sup> This is not to say that there was an absence of cases of statutory interpretation but that they were less frequent than in the developing sixteenth century which saw a significant increase in the enactment of legislation. For a discussion of textualisation and its various stages see Peter Tiersma *Parchment Paper Pixels: Law and the Technologies of Communication* (University of Chicago Press, Chicago, 2010) p. 28. 31 - 32 For the move from orality to textualisation in the law see M.T. Clanchy "Remembering the Past and the Good Old Law" (1970) 55 *History* 165 p. 170; Clanchy *From Memory to Written Record* above n.129 .

that one could consult to determine the accuracy of one's private copy. The official roll containing statutes was kept in Chancery but it was incomplete. Prior to printing the copying of statutes was laborious and expensive – each copy having to be made individually – no two ever going to be exactly the same. Therefore, it was difficult to establish a canon of authentic statutes.

Judges themselves did not have a current set of statutes available for reference. Because of difficulties accessing an accurate version of the text, statutes were often misquoted and in any event seem to have been consulted only sporadically. Furthermore there was little consistency in citation practices, the statute simply being referred to as such or by its initial or important words.<sup>144</sup> The approach to the interpretation of statutes tended to be fluid and dependent upon factors that were often extraneous to the text.<sup>145</sup> For example in the 14<sup>th</sup> century Judges were often members of the King's council and they would have been present when a law was adopted. The written record of legislation might have mattered less than a Judge's own recollection of what had been decided. The text would be a reminder of what had taken place. This is reflected by the statement made by a Judge to a lawyer in 1305 “do not gloss the statute, for we understand it better than you; we made it.”<sup>146</sup> when a lawyer was arguing why a statute had been enacted.

Statute law was seen as the will of the lawmaker rather than the text itself being authoritative. A broad approach was taken to interpretation with appeals to common knowledge or traditions to ascertain the meaning or purpose of a statute. Alternatively, enquiry could be made of the lawmakers themselves. This was reflected in an incident from 1366 where there is a report of Judges going to Parliament to ask what it meant by recently enacted law.<sup>147</sup> As Tiersma puts it:

“It is not surprising that during this era English Courts did not have a consistent theory of how statutes should be interpreted. Sometimes they were strictly construed, sometimes loosely. But sometimes Judges carved out exceptions to a statute, sometimes they extended its reach. And on occasions they ignored the relevant statute altogether”.<sup>148</sup>

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<sup>144</sup> Tiersma above n. 143 p. 155-6.

<sup>145</sup> S.E. Thorne (ed) *A Discourse on the Exposition & Understanding of Statutes with Sir Thomas Egerton's additions* (Selden Society London 1942) p. 69 et seq.

<sup>146</sup> Tiersma above n. 143 p. 146; J.H. Baker *An Introduction to English Legal History* 3<sup>rd</sup> ed. (Butterworths, London 1990) citing *Aumeye's Case* (1305) YB 33 – 35 Edw I p. 82.

<sup>147</sup> *Ibid.* Tiersma p. 146-7.

<sup>148</sup> *Ibid.* 146 – 7.

The textualisation of law in England was somewhat complex with linguistic issues arising from statutes that were debated in English but recorded in French. Tiersma suggests that legislators most likely did not focus on the exact text of the proposed act, since many of them may not have understood the French in which it was written.<sup>149</sup> However into the sixteenth century statutes were becoming viewed as the clear words of the law maker. Baker states that in the Tudor period there was a “new reverence for the written text ... legislative drafting was now carried on with such skill .... that the Judges were manifestly being discouraged from the creative exegesis that they had bestowed on medieval statutes”.<sup>150</sup>

I suggest that the advent of printing<sup>151</sup> of public statutes, the appointment of a specialist Royal Printer to print them - coupled with the standardisation of text and the ability to effect wide dissemination arising from the volume of production - provided a context within which textual examination and interpretation could develop. The common lawyers were not as theoretically constrained as the civilians by the sanctity of the text espoused by Justinian.<sup>152</sup>

Print enabled access to affordable copies of legislation, much of which had been unavailable for some time prior to the advent of print, including both those that were printed by the Royal Printer as well as collections of statutes, thus allowing for comparison and context as well as careful, critical and comparative reading.<sup>153</sup>

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<sup>149</sup> Ibid. p. 149.

<sup>150</sup> J.H. Baker *Introduction to English Legal History* above n.146 p. 237. For a commentary on the development of legislation and its use during the reign of Henry VIII see J.H. Baker (ed) *The Reports of Sir John Spelman* above n. 57 p. 43 – 46. See also Tiersma above n. 143 p. 151.

<sup>151</sup> And the promulgation that followed as a consequence. Baker states that the royal printer “had come to provide the profession with a more accurate and authentic text; one could no longer so easily dismiss an inconvenient enactment by presuming some textual corruption.” J.H. Baker *Reports from the Lost Notebooks of Sir James Dyer* (Selden Society, London 1993) Vol 1 p lx – lxi. However, note the discussion at p.220 below and the references at footnote 183.

<sup>152</sup> Within the civilian context the attitude of Justinian prevailed in that the work authorised by him was designed to be self sufficient. It consisted largely of the writing of jurists but was produced to prevent such writing proliferating further. From Justinian’s point of view the only power to interpret the code lay with the Emperor and interpretation of the Corpus beyond that which was authorised was forbidden. The reality of the matter was that there was commentary on Justinian and the prohibitions do not appear to have been strictly enforced. See Ian Maclean *Interpretation and Meaning in the Renaissance* (Cambridge University Press, Cambridge, 1992) p. 50-51, p. 54.

<sup>153</sup> Examples of some of the statutes that were printed contemporaneously are *Statuta apud westmonasteriu edita anno primo Regis Ricardi tercii* (William de Machlinia, London, 1484) STC 9347 and *Anno octauo reginae Elizabethae*. (Richard Jugge, London, 1563) STC 9469.5. Examples of collections of “historical statutes” may be seen in *Magna Charta cum statutis quae antique* (Richard Totell, London 1556) STC 9277.5; *Magna Charta cum Statutis, Tum Antiquis, tum recentibus* (Adam Islip, London, 1602) STC 9283; *The great booke of statutes* (Robert Redman, London, 1530-33) STC 9286; George Ferrers (trans) *The booke of Magna Carta with diuers other statutes* (Robert Redman, London, 1534) STC 9272; Ferdinando Pulton *A collection of sundrie statutes*, (Adam Islip for the Company of Stationers, London, 1618) STC 9328; William Rastell *A Collection of the Statutes from the Beginning of Magna Carta until the yere of our Lorde 1557* (Richard Totelli, London, 1559)

The history of statutory interpretation starts in the sixteenth century.<sup>154</sup> An example of this development was that there were no such titles in Fitzherbert's *Abridgement* yet in the late sixteenth century a separate title on the subject may be found in Sir Robert Brooke's *Graunde Abridgement*.<sup>155</sup> Plowden covered interpretation in some detail in the case of *Eiston v Stude*<sup>156</sup> together with a number of passages that addressed problems in the understanding of statutes which had an impact upon students.<sup>157</sup> Knafla observes that it is "not unusual to find in the law books of students at the Inns of Court in the early seventeenth century copious marginal notes on Plowden's interpretation of statute law."<sup>158</sup>

The evidence thus suggests that a search for meaning was taking place in the sixteenth and seventeenth century during which time textualised legislation was becoming available in print and although Plowden observed that equity could enlarge or diminish the words of an Act,<sup>159</sup> that concept had begun to recede. By 1639 an English Judge criticised it as too general a ground for the construction of statute and the courts paid less attention to the equity of the statute as they looked more towards its purpose.<sup>160</sup>

The purpose of a statute could be made clearer by the presence of a preamble and lengthy preambles were customary. Some preambles could set out the policy behind the statute.<sup>161</sup> Coke himself remarked that the preamble of a statute was a good means to find out the meaning of the statute "as it were a key to open the understanding thereof."<sup>162</sup> Dyer

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STC 9307.5; Richard Taverner *The Principal Laws and Statutes of England Newly Recognized and Augmented* (Richard Grafton, London, 1542) STC 9291.

<sup>154</sup> J.H. Baker *Reports from the Lost Notebooks of Sir James Dyer* above n. 151, Vol 1 p. Lix.

<sup>155</sup> S.E. Thorne (ed) *A Discourse on the Exposition & Understanding of Statutes* above n. p. 10.

<sup>156</sup> (1574) 2 Plowden 459 at 465-468. The English doctrine of lequity de lestatut was derived from the Roman law concept that gaps in statutes could be filled by analogy to other parts of the statute or of the code. S.E. Thorne, "The Equity of a Statute and Heydon's Case" (1936) 31 Ill. L. Rev. 202, 206-10.

<sup>157</sup> Louis A Knafla *Law and Politics in Jacobean England – The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, Cambridge 1977) p. 165.

<sup>158</sup> *Ibid.*

<sup>159</sup> *Eyston v Studd* 2 Plowden 459 at 465.

<sup>160</sup> Tiersma above n.143. p. 152-3.

<sup>161</sup> This was particularly the case with legislation during the period of the Henrician Reformation and steered through Parliament by Cromwell G.R. Elton *England Under the Tudors* (Folio Society, London 1997) p. 164-165.

<sup>162</sup> Coke on Littleton above n.35 79A; see also 3 Cokes Reports "To the Reader" "the Statute of 27 Henr 8 cap 10 was made for restoring of the auncient Common Law againe, as is expressly appeareth by the Preamble of that Statute."; Tiersma above n. 143 p. 152-153; "Each of Henry's great reforming statutes is preceded by a preamble which is nothing more or less than an eloquent essay advocating what the statute stands for. The printing press was being used, for perhaps the first time in England, for contemporary political propaganda." See Martin Ess "The Sixteenth Century English Lawyer's Library" A Talk Given at the Association of the Bar of the

considered the preambles were a key to open the minds of the makers of the Act and the mischiefs which they intended to remedy.<sup>163</sup>

Thus, the presence of preambles allowed the identification of the “mischief” or problem that the statute was designed to address.<sup>164</sup> Because Cromwell and the Tudors availed themselves of the opportunities that printing technology presented, it could be said that Cromwell’s use of preambles was probably associated with the recognised disseminative quality of print to ensure that the message reached a wide audience. Rather than print itself being determinative of the development of preambles, its use was opportunistic – it was available and it was advantageous for Cromwell’s purposes. However, an unforeseen consequence of this development was the use by lawyers of preambles, not as a propaganda or policy message, but as a tool for the interpretation of the language of the statute.

It is hard to determine whether or not printing of statutory material by the Royal Printer was determinative of the growth of “policy explanatory” preambles. In the same way that Luther saw print as a “God’s highest and extremest act of grace, whereby the business of the Gospel is drawn forward”<sup>165</sup> in spreading the Lutheran Reformation and its availability was coincidental with Luther’s concerns, it may be suggested that Cromwell took a leaf out of Luther’s book and was able to use the new technology to advance the Henrician Reformation by the utilisation of printed broadsheets, tracts and legislation. The evidence is clear that Cromwell and indeed the Tudors were very aware of the importance of “image” and propaganda and the use of preambles as an articulation of policy is an aspect of this.<sup>166</sup>

To develop the issue, the following tentative suggestions are made. First, it is difficult to conclude that Cromwell’s use of preambles was a direct consequence of print. It would be overly bold and speculative to suggest that without print, the development and use of preambles would not have taken place. Secondly, however, Elton’s comments make it clear

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City of New York 28 November 1978 [http://www.law.harvard.edu/faculty/martin/ess\\_talk.htm](http://www.law.harvard.edu/faculty/martin/ess_talk.htm) (last accessed 28 March 2011).

<sup>163</sup> J.H. Baker *Reports from the Lost Notebooks of Sir James Dyer* above n.151 p. Lx.

<sup>164</sup> See below – an aspect of Ellesmere’s approach to the resolution of ambiguity.

<sup>165</sup> Jennifer Loach “The Marian Establishment and the Printing Press” (1986) 101 *English Historical Review* 135; Elizabeth Eisenstein “The Printing Press as an Agent of Change (Cambridge University Press, Cambridge 1979) p. 303-4.

<sup>166</sup> Kevin Sharpe *Selling the Tudor Monarchy – Authority and Image in Sixteenth-Century England* (Yale University Press London 2009); G.R. Elton *Policy and Police – The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge University Press, Cambridge 1972) esp at Ch. 4.

that Cromwell adopted the new medium as a means of communicating the Royal message. Thirdly, the preambles had a number of purposes, including a propaganda purpose and an explanatory value. Finally, print was used to disseminate those messages. If one accepts those propositions, it can be said that print did have an impact in at least drawing attention to the preamble and strengthened its use as an interpretative tool and possibly accelerated the development of hermeneutics.

That legal hermeneutics was beginning to develop may be observed from the texts that were becoming available on the subject. The best known is Ellesmere's *Discourse Upon the Exposition & Understanding of Statutes*.<sup>167</sup> Ellesmere had long been interested in statutory interpretation.<sup>168</sup> He wrote an introductory essay on the subject as a student and refined his ideas in the preparation of a speech on the *Post-Nati*.<sup>169</sup> His interest in the statutes extended to patronising the publication of a new edition of the statutes and he supported Pulton in his work to see the *Collection of Sundry Statutes* into print.<sup>170</sup>

The *Discourse* was not the only work on statutory interpretation but it was probably the first written some time prior to 1567.<sup>171</sup> Other examples include *A Treatise concerning Statutes, or Acts of Parliament, and the Exposition thereof* by Sir Christopher Hatton<sup>172</sup> and Thomas Ashe's *Epieikeia et table generall a les annals del ley*.<sup>173</sup> Issues of statutory interpretation also concerned Sir James Dyer. Baker suggests that Dyer focused upon the sense and intent of the matters of the statute and that the *mens statuti* should lead the Judge to a proper conclusion in construing the statute.<sup>174</sup>

Dyer's approach was that the Court could not go behind the letter to correct errors in legislation<sup>175</sup> and consequently there was a greater concentration upon the letter of the statute

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<sup>167</sup>Thorne *A Discourse* above n.145. This work remained in manuscript and was not printed until some time later. There is a suggestion that it was printed in 1650 but my researches suggest that the first printing was by Paul and Nutt for Bernard Lintott in 1710.

<sup>168</sup> For an account of Ellesmere's interest in statutory interpretation see Louis A Knafla *Law and Politics in Jacobean England* above n.157 p. 47 et seq.

<sup>169</sup> Ibid. p. 46 – 49; p. 165. For a discussion of the *Post-Nati* speech see Knafla Ch X p. 202 et seq.

<sup>170</sup> Ibid. p.165-6; J.H. Baker "English Books and Legal Publishing" in John Barnard and D.F. McKenzie (eds) *The Cambridge History of the Book in Britain* (Cambridge University Press, Cambridge 2002) Vol IV p.404-5.

<sup>171</sup> Knafla above n 157 p. 11.

<sup>172</sup> This book was not printed until 1677 and Thorne suggests it was written in about 1576. Ibid. p.10

<sup>173</sup> (Adam Islip for the Stationers, London, 1609) STC 840. This text and the others noted are indicative of a wider interest that lawyers in this period had in cases about interpretation. Plowden's *Commentaries* consist in the main of cases about interpretation, be it of statutes, conveyances or contracts.

<sup>174</sup> J.H. Baker *Reports from the Lost Notebooks of Sir James Dyer* above n.151 Vol 1 p. Lx.

<sup>175</sup> Ibid.

than the spirit.<sup>176</sup> Baker suggests this was associated with the changes in the character of the statute, such as the fact that they were more precisely drawn, there being multiple sections, provisos and exclusions together with preambles all of which designed to restrain judicial freedom.<sup>177</sup>

### **Did Print Enhance Hermeneutics?**

The activities of the Royal Printer meant that there was a single, authoritative, carefully printed text. This meant that the previously flexible approach to statutory interpretation was overtaken by a more literal approach to the interpretation of legislation which left little room for textual manipulation. Therefore fixity and standardisation constrained interpretative creativity. The Royal Printers provided an accurate text and Judges could not rely on textual corruption to avoid an inconvenient enactment.<sup>178</sup> Thus it is likely that there was more focus on the wording of the statute to extract any additional meaning that might be present.

Baker attributes the growth of hermeneutics to changes to the nature of statutes themselves suggesting that the growth in the sovereignty of Parliament began to impose constraints upon interpretation as a result of legislative innovation. “The judiciary was firmly embarked on its semantic approach to legislation.”<sup>179</sup> The production of the statutes by the Royal Printer and stability of print provided a clear copy although did not go entirely unchallenged.<sup>180</sup> In addition there was the use of statute as a law-making exercise as well as one in propaganda especially in the form of the preamble.<sup>181</sup> Gradually the pre-sixteenth century approach to interpretation was replaced as new theories about the sovereignty of Parliament began to develop, co-existing in some cases with earlier theories.<sup>182</sup>

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<sup>176</sup> Ibid.

<sup>177</sup> Ibid. Elton emphasised the propaganda value of preambles (Elton *Policy and Police* above n.166 p. 210) and in light of that it may be that preambles of themselves were not as effective as a restraint on judicial freedom as other aspects of new statutory structures. Baker lists a number of innovations which *cumulatively* may have had the effect of confining judges in their application of a statute and restricting the use of such concepts as “the equity of the statute”.

<sup>178</sup> Ibid. However see below for cases where print and manuscript statutes were compared.

<sup>179</sup> Ibid. p. Lxi.

<sup>180</sup> Ibid.

<sup>181</sup> This element has not been noted in G.R. Elton *Policy and Police* above n. 166 or Kevin Sharpe *Selling the Tudor Monarchy* above n.166 although it is clear from Elton – *England under the Tudors* above n.161 at chapter 7 page 163 and H.J. Graham “Our Tong Maternal Marvellously Amendyd and Augmentyd: First Englishing and Printing of the Medieval Statutes” (1965) 12 UCLA L.R Bull 58 page 76. See also Desmond Manderson “Statuta v Acts Interpretation, Music and Early English Legislation” (1995) 7 Yale Journal of Law and Humanities 317 at page 355 and following.

<sup>182</sup> S.E. Thorne *Discourse* above n. 145 p. 11.

Yet curiously, although the advent of print may have had an impact upon the development of legal hermeneutics, when it came to conflicts between the printed version of the statute and that in manuscript, there seemed little hesitation on the part of Judges to compare the two and favour the manuscript version.<sup>183</sup> This exemplifies the ease with which the sixteenth century judges lived with the co-existence of manuscript and print. A printed statute was able to be challenged by a manuscript version. Print was not accorded a superior status to the manuscript version and, importantly for a consideration of Eisenstein's premise that the technology was the agent of change, the way in which print assumed a status superior to manuscript depended very much upon those who were using and who were expected to rely upon printed material. Such attitudes stemming from the fluid approach to information from print and manuscript media, which was an aspect of co-existence, demonstrates that as long as lawyers were going to accord a superior or at least equal status to manuscript material, the superiority (and ultimately authority) of print would remain in question. The printing of a statute had not yet reached Tiersma's third level of textualisation in the sense that a printed statute in and of itself was totally authoritative. That was to come later.

However the greater availability of texts of statutes to lawyers during this period may have largely contributed to the drift away from the earlier approaches to interpretation of legislation and facilitated the development and spread of hermeneutic practices based upon the text. The language of the *Discourse* suggests that there was an availability of statutory texts greater than was the case prior to the introduction of printing.<sup>184</sup> The greater volume of statutory information now available in print which facilitated its spread and availability was in part responsible for a new focus or approach to statutory interpretation. Thus print provided a fresh context within which statutes could be considered.

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<sup>183</sup> See J. H. Baker *The Lost Notebooks of Sir James Dyer* above n.154 p. lxi fn 25 citing the cases of *Stowell v Lord Zouche* (1569) where there was an error in the printed statute of Edward I; *Vernon v Stanley & Manner* (1571) where the printed statute was corrected by sense and by 'librum scriptum domini Catlyn'; *Ligeart v Wisheham* (1573) where the printed statute was at odds with 'lestatute script' and *Taverner v Lord Cromwell* (1572) where French and English versions of the statutes were compared along with Rastell's edition and the manuscript. There were other interpretative principles the were developing in the field of defamation evidencing the general interest in interpretation (above n. 173) and, because many of these cases did not see print it supports the view that print was not such a significant contributor to issue of interpretation – see I.S. Williams "He Creditted More the Printed Booke" (2010) *Law and History Review* 39 at p. 47

<sup>184</sup> S.E Thorne *Discourse* above n.145 p. 27.

## Ordering the Law

One of the common themes that exercised the seventeenth century legal writers was that of putting some order into the law. Doderidge and Fulbecke approached the problem of ordering the law in different ways. The starting point was to utilise logical analysis. Doderidge used his method to develop his particular subject and unlike Fulbecke addressed a considerable scope of legal principles, presented in an ordered and organised way. Doderidge placed the law and legal principles within a logical framework, setting out that framework and then demonstrating how the law fits within it.<sup>185</sup>

Another difference between Doderidge and Fulbecke was that Doderidge delved deeper into his subject with reference to authority. Citations began to be used in the section on definitions, primarily in relation to statutes and to Bracton. Once the reader reached the section entitled *Methodus studendi*, citation became more frequent and it is of note that many citations are of works that are already in print such as Stamford, Dyer and Fitzherbert. Despite this, Doderidge's work was not a text which purported to order the law as a set of substantive rules under clearly defined headings. Rather, substantive rules were used to exemplify general propositions.<sup>186</sup>

Doderidge's work is an example of the wider movement by sixteenth century humanist educators to devise a method or organisational form for knowledge and the disorganised body of the common law presented such an opportunity. This was a developing process exemplified early in the sixteenth century by Rastell and Fitzherbert in their publications, and which formed the basis for Bacon's desire to systemise the law. Doderidge did not originate the method that is apparent in *The English Lawyer* but the work demonstrates the desire to place the law within a recognised structure where legal rules were categorised and arranged within a framework:

Which being no hard thing to accomplish, thereby would appeare that it were neither unpossible neither unprofitable, nor althogether unpleafant, to reduce every title of the Law particularly to a Methode; and so consequently, the whole body thereof into a perfect shape, which now seemeth wholly without Conformitie, and altogether difmembred.<sup>187</sup>

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<sup>185</sup> Doderidge *The English Lawyer* (above n.14 p.191 as to the divisions of the grounds of law and p. 193 as to secondary principles.

<sup>186</sup> Ibid. See Doderidge's use of structures.

<sup>187</sup> Ibid. p. 190.

A way of organising this "dismembered" body of knowledge was to develop a form of analysis where the logical relationships between the various parts of a topic were explored and discussed. Ramist theory provided a structure for this process - a statement of general principle that is developed and which works downwards towards particulars. Fulbecke's discussion of Littleton's definition of fee simple is an example.<sup>188</sup>

Thomas Ashe's interest in organization of legal material is present in all of his books. In his first work, a *Table to Coke's Reports*,<sup>189</sup> Ashe like Plowden suggested that the work was for his own use but that he was prevailed upon by others to put it in print. His *Table to the Reports of James Dyer*<sup>190</sup> was a clear indication of his desire to organise legal information. In about 1597 he published an abridgement of Plowden's *Commentaries*<sup>191</sup> and in 1606 published a table to the first five volumes of Edward Coke's Reports.<sup>192</sup> Ashe took the work of others and organised the material in the form of tables or abridgements. While this was not a novel approach, Ashe used the opportunity to organise a form of authoritative structuring for cross-referencing works that were already in print. His *Table of Coke's Reports* was a work that was well suited for the practicing lawyer and for the student. Coke's Reports assumed a particular authority in a very short time because they were compiled by, as Ashe put it, *perfon of high place or eminent quality, either for honour, or some other respect*.<sup>193</sup> As a guide to the subject matter dealt with in Coke's reports, Ashe's work would have been of considerable assistance, and could well have been used as a study aid by students in their reading of Coke's reports. The 1606 edition was subsequently expanded to cover all the eleven volumes of Coke's Reports that were published during his lifetime.<sup>194</sup>

A similar organisational system was adopted in Ashe's *Table to Dyer's Reports*<sup>195</sup> entitled *La table al lieur des reports del tres reuerend Judge Sir Iames Dyer* and Ashe provided a guide

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<sup>188</sup> Fulbecke *A Direction* above n.52 p. 84 et seq.

<sup>189</sup> Ashe *Vn perfect table* above n. 75.

<sup>190</sup> Thomas Ashe *Le Table al Lieur des Reports del tres reuerend Judge Sir Iames Dyer Chiualer iades chiefe Iustice del common banke* (Richard Tottell, London, 1588) STC 7391 Reprinted in 1600 (STC 7392) and 1622 (STC 7393).

<sup>191</sup> Thomas Ashe *Abridgment des tous les cases reportez alarge per Monsieur Plowden* (Jane Yetswiert, London, 1597) STC 20037.

<sup>192</sup> Ashe *Vn perfect table* above n. 75.

<sup>193</sup> *Ibid.* The Epistle page unnumbered.

<sup>194</sup> 1618 (STC 5526) and later reprinted in 1652 (Wing A3969).

<sup>195</sup> Ashe *Le Table al Lieur* above n. 190.

to the use of the tables in a short preface. The advantage for the student or practitioner in referencing cases to titles was that there was only one volume of Dyer's Reports.

Ashe's work was reprinted in 1600 and again in 1622. Dyer's reports were an essential possession for every law student, and Baker observes that Dyer and Plowden feature more often than any other printed books in legal common place books of the Elizabethan and Jacobean period.<sup>196</sup> Ashe's *Abridgment des touts les cases reportez alarge per Monsieur Plowden*<sup>197</sup> contains a note of the case together with some notes thereafter. Each case has a general title preceding the names of the parties.<sup>198</sup> However, the organisation of material by means of contents, titles and cross referencing is not present in this work.<sup>199</sup>

As I have earlier observed, by the time that Ashe's *Promptuarie* was published in 1614 what may be described as the "intergenerational" nature of print is beginning to have an effect. There are various tables and short referencing lists in the beginning of the work but it is when Ashe reaches *Le Table Generall del Common Ley Dengleter &c* that the vast scope of the work becomes apparent. The Titles are ordered alphabetically commencing with "Abatement" and each title is subdivided into sub-headings. For each sub-heading statutory and case references are provided. As well as references to cases, there are references to Fitzherbert's abridgement and even to some texts. For example under the heading *Fines des Terres* there are frequent references to West's *Symbolography*.<sup>200</sup> It is a massive and ambitious work and perhaps may be seen perhaps not as an abridgement in the strict sense for it did not include substantive material, but as a general legal index.

We cannot leave Ashe without a mention of his *Epiekeia et Table generall a les Annales del Ley*, described by Holdsworth as "a curious book,"<sup>201</sup> which was a collection of cases from the Year Books and other reports in which statutes had been extended by equitable interpretation.<sup>202</sup> Although it was not a treatise, it was nonetheless a form of law text and demonstrates the variety of legal material that was becoming available in print. As was

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<sup>196</sup> J.H Baker, *Reports From the Lost Notebooks of Sir James Dyer* above n.151 pp. xli - xlii.

<sup>197</sup> Ashe above n. 191.

<sup>198</sup> e.g. *Trefpas per Wimbifh vers Talbois*.

<sup>199</sup> A copy of the 1597 edition (STC 20037) contains a handwritten table of contents on the flyleaf obviously compiled by the owner for ease of reference.

<sup>200</sup> William West *Symbolaeography* (Richard Tottle, London, 1592) STC 25267.5 The work was originally published in two parts in 1592 (see STC 25267.7 and STC 25267a).

<sup>201</sup> 4 *HEL* p.313 Ashe *Epiekeia* (Adam Islip for the Stationers, London, 1609) STC 840.

<sup>202</sup> In that respect it was a text exemplifying the development of hermeneutics.

Ashe's practice, the cases were organized and analysed. In the introduction he demonstrated his deep understanding of the nature of equity in English law. The work was organised in a slightly different manner to that used in the Table to Cokes and Dyers Reports. A different sort of subject matter - the relationship between statutory provisions and cases on point which consider the provision - is considered and explains Ashe's different treatment. The table of contents comprises some twenty headings containing a brief description of the matter to be considered. As each matter was considered, Ashe made a brief statement of the principle or issue and then listed the relevant statutes where the issue makes an appearance. Under each statute he listed the references in the reports or Year Books where a case addresses the issue. Thus, in the first matter dealing with the statutes affecting the rights of the King under Magna Carta, chapter 10 and tenures reference is made to two cases appearing in Plowden's *Commentaries* in folio 243 and 244, decided in 1562.<sup>203</sup>

There are 215 pages of similar references. In the edition held by the Library of Congress in Washington DC<sup>204</sup> there is an appendix containing Dalison's and Bendlowes' Reports. Following this appendix are a number of indices to Ashe's analytical work on the 20 subject matter headings. The first index comprises a list of all the statutes referred to, the sections thereof and the pages upon which they appear in the work. The second index is a list of various title and subject matter headings along with references to the pages in the text where these appear. Finally there are some observations on how to use the index. For example:

**Where you find any Statute and no chapter mentioned, the same (for the most part) is a private and not printed.**<sup>205</sup>

This observation itself made it clear that Ashe is dealing with primary legal material - cases and statutes - in print. Thus the way in which print is used to reference printed works, to organise printed information and rely on the consistency of the material which is referenced or indexed, suggests that there is a recognition of the underlying qualities and advantages of print, and that lawyers and law students are accustomed to resort to this material.

I have already made mention of Sir Henry Finch's *Nomotechnia*, composition of which was commenced in manuscript in 1585. It was an attempt to apply Ramist method to the common law.<sup>206</sup> Blackstone held Finch's work in high regard.

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<sup>203</sup> 4 Eliz.

<sup>204</sup> Above n. 201.

<sup>205</sup> Ibid "Observations Added by way of Postscript" p. Lii.

“Sir Henry Finch’s discourse of law is a treatise of a very different character; his method is greatly superior to all that were before extant; his text is weighty, concise and nervous; his illustrations are apposite, clear and authentic”.<sup>207</sup>

However, as a comprehensive examination of English law it is incomplete. It contains no discussion of Equity or the development of the action of trespass or case. There is no discussion of commercial law, although there were other texts written in this area at the time. Unlike Fraunce’s *Lawyers Logicke*<sup>208</sup> or Doderidge’s *English Lawyer*,<sup>209</sup> both of which attempted to facilitate the study of law using methods of logic, Finch tried to rationalise the structure of the law. Although he claimed that the study of law required an understanding of principles which appear in the books, he did not succeed in reducing the subject, especially that of actions. However, what is noteworthy is that, like other text writers of the time, Finch cited statutes, cases and texts, all of which were available in print.<sup>210</sup> This perhaps further demonstrates the way in which later printed works validated or recognised earlier works in print.

These efforts by the early law textbook writers demonstrate both their enthusiasm to attempt to place some order into the law and the difficult challenge that faced them. Yet we see early attempts to link cases with principles and to provide for general propositions with exceptions which had been the style of the Readings. What perhaps is most significant about these early attempts at ordering is not so much whether or not it was successful because largely it was not, but in the way in which the authors had little difficulty or reservation about cross referencing or referring to existing works in print. If there were any objections to “credit” by the time that Ashe was writing they seem to be insignificant. Printed legal material was being accepted and was forming the foundation for an accepted account of the law.<sup>211</sup>

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<sup>206</sup> It also brought it in closer conformity with Mosaic Law although this line of discussion was abandoned when the book went into print.

<sup>207</sup> Sir William Blackstone, *Tracts chiefly relating to the Antiquities and Laws of England* (1771) p. iv – vi cited in Wilfred Prest ‘Finch, Sir Henry (c.1558–1625)’, *Oxford Dictionary of National Biography*, (Oxford University Press, Oxford, 2004).

<sup>208</sup> Abraham Fraunce *The lawiers logike exemplifying the praecepts of logike by the practise of the common lawe* (William How, London, 1588) STC 11344.

<sup>209</sup> Doderidge above n. 14.

<sup>210</sup> Even although he worked primarily in manuscript.

<sup>211</sup> The development of a desire to harmonise and order of the law was not exclusive to the common lawyers. Gerard Malynes’ *Lex Mercatoria* – see above n.43 - recorded custom – thus fixing it in time and place per medium of print and attempted to harmonise disparate practices and provide order for what appear to be a set of complex and disorganised body of rules whilst also discussing economic theory.

## Opportunistic Printing

Yet all was not entirely well within the law printing industry. The fear of a circulated manuscript finding its way into print was a concern expressed by Plowden and was a continuing problem. Unauthorised publishing could do damage to an author's reputation and compromised the "authority" of the work.<sup>212</sup>

One available copy of Noye's work<sup>213</sup> is bound with two other texts. One is entitled *Certain Observations Concerning A Deed Of Feoffment* and is attributed to on "T.H. Gent" The other is entitled *A Treatise Of Particular Estates By Sir John Doddridge* (sic), the author of *The English Lawyer*. One cannot accept this attribution of authorship uncritically. It is considered unlikely that he wrote the Treatise on Estates although it is attributed to him on the title page.<sup>214</sup> The provenance of the work is indicative of a recurring problem. It seems that TH did not authorise the work for publication. Rather it was an opportunistic printing and the publisher states

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<sup>212</sup> See the comments by Plowden in the prologue to *Commentaries* above n.89 unpaginated where he refers to the copying of his cases "contrarie to the knowledge and meaning of me....which at the length came to the hands of some printers who ment.....to sett them forthe for gain." Opportunistic printing addresses both the unauthorized printing of a known work (as was Plowden's concern) and the ascribing of an author's name to a work he had not written (as was the case with *The Compleate Copyholder* above n. 34). There were other texts which printed posthumously such as William Hudson, *A Treatise on The Court of Star Chamber* in Francis Hargrave (ed) *Collectanea juridica. Consisting of tracts relative to the law and constitution of England. ... . Sparsa Colligimus.U* (E & R Brook London 1791). Volume 2. Reprinted The Lawbook Exchange, Clark NJ 2008. and William Lambarde *Archeion or a Commentary upon the High Courts of Justice in England* (Daniel Frere, London, 1635) STC 15143 and volumes 12 and 13 of *Cokes Reports*. This raises issues about the verification of the material, how and why it was that printers of "suspect" material anticipated a market and why such material was retained by their authors in unprinted form when other material had been printed. Matters such as continued manuscript circulation or possible "self-censorship" by authors may provide an explanation and may need further consideration as part of a larger study of the developing "authority" of printed texts. See above p. 139 n. 174. It should also be noted that Lambarde's *Archeion* and John Doderidge's *The English Lawyer* above n. 14 were first printed in "unauthorised editions" (*The English Lawyer* was printed as *The Lawyers Light: or A due direction for the study of the law for method* (Alsop and Fawcet, London 1629) STC 6983) which spurred their "authorised" printing. This contrasts with Plowden's experience where clearly he was aware of the risk of unauthorised printing.

<sup>213</sup> Printed in 1642 and held by the Henry E. Huntington Library and Art Gallery (Wing N1452) comprises 179 pages. The other, held by the Union Theological Seminary (New York N.Y.) Library (Wing N1451) and printed in 1641 contains Noye's work alone.

<sup>214</sup> David Ibbetson, 'Doderidge, Sir John (1555–1628)', *Oxford Dictionary of National Biography*, (Oxford University Press, Oxford 2004). Tradition has associated Doderidge with the *Learning of Common Assurances*, which has William Sheppard as author; William Sheppard *The learning of common assurances.*, (Printed by M.F. for W. Lee, M. Walbancke, D. Pakeman, and G. Bedell, London, 1648.) Wing / S3192A but other legal works possibly attributed to him are *The lawes resolutions of womens rights: or, The lavves prouision for* (Flecscher for the Assigns of More, London, 1632) STC 7437 which has Thomas Edgar noted as author and perhaps *The office and dutie of executors.* (TC for Andrew Crook, Laurence Chapman and William Cooke, London, 1641) Wing 1359A, which is also ascribed to Thomas Wentworth.

Courteous Reader, a *Copy whereof coming to my hands (not having seene anything in this kind extant before) and conceiving it would be gratefully accepted of many, I have adventured to commit it to the Presse, and so Farewell.*<sup>215</sup>

Sir Edward Coke was a “best-seller” and there were those who took advantage of his good name and standing. An edition of *The Compleat Copyholder* printed in 1641 had not been authorised for print under the hand of Coke during his life. The printer makes it clear that the copy came into his hands and was considered worthy of publication. Coke’s reputation by this time was so high that he was described as “an ornament to our Kingdom” and it was obviously well recognised that any book by Coke would have a ready market.<sup>216</sup> William Cooke, the printer and bookseller seems to have been responsible for the printing along with another collection of cases entitled *Speciall And Selected Law-Cases Concerning The Persons And Estates of all men whatsoever*.<sup>217</sup> The cases are stated to have been collected and gathered from the Reports and Year-Books of the Common law and was printed by one MF in 1641.

The provenance of the book is set out in the Preface from the Stationer, William Cooke, to the Reader. A copy had come into his hands, although how he does not say. He considered it to his own satisfaction and then sought the *allowance and confirmation from Superior Judgements* and therefore sent it to some of the Judges for consideration. Sir Richard Hutton, formerly a Judge of Common Pleas considered the manuscript *and vouchsafed not onely to peruse it, but in diuers places to correct and enlarge it, and now digested into a perfect body.*

That having been done, Cooke *could not suffer it to sleep longer by me, but thus publish it for the benefit of the Common-wealth, not doubting but they which intensiueley conuerse with books of this nature will gratefully entertaine it a poore addition to their studies*<sup>218</sup>

Thomas Ashe also experienced difficulties with unauthorised publication. The second edition of *Fasciculus Florum* makes reference to the vitiating and false printing of this Booke, through the negligence and oversight of the Printer and his Corrector...wherefore having now reified the same, I have not

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<sup>215</sup> Noye above n. 12 “The Printer to the Reader” p. L2.

<sup>216</sup> Coke *The Compleate Copyholder* above n. 34. Drinker Bowen suggests that this work was published in 1630 (p. 516) but no records available seem to suggest this and that publication was posthumous in 1641. In her bibliography, Drinker Bowen lists an edition printed in 1650 and none earlier. Catherine Drinker Bowen *The Lion and the Throne: The Life and Times of Sir Edward Coke* (Little Brown, Boston, 1985).

<sup>217</sup> Anon *Speciall and Selected Law-Cases Concerning the Persons and Estates of all men whatsoever* (Printed by MF, London, 1641) Wing S4837.

<sup>218</sup> *Ibid.* p. A3 pages unnumbered.

only corrected the fautes therein committed, but also increased it with sentences drawn from the Epistles of the Books, in the former edition omitted, and withall translated the whole worke into our vulgar tongue.<sup>219</sup> He also addresses a special preface to **THE CAPTIOUS AND MALICIOUS Detractors** which arose from ridicule that had been directed towards the book by a member of the North family. Issues of both credit and unauthorised alterations which attracted the scorn of the North family placed Ashe in an embarrassing position – a consequence feared by many as a result of the threat of opportunistic or unauthorised printing.

The threat was real and recognised and it is a consequence of the lack of control that authors had over their books and demonstrates the lack of control that was exercised by the Stationers Company. Even after the recognition of an author's property in a work there were still difficulties with unauthorised or opportunistic printing. The added difficulty that rogue printers<sup>220</sup> posed to legal publishing, for the sake of picking up an immediate profit upon publication, was that the credit of the law in print was liable to be compromised.

Yet such threats did not discourage lawyers from putting work into print, be it for the purposes of maintaining control like Plowden, for the wider good of society like the sixteenth century humanists, to highlight the work of others as well as make his own contribution to equity such as Thomas Ashe, or to attempt to address practical problems and perceived administrative faults and cure them with guide books like Michael Dalton. This study has demonstrated that there was no lack of enthusiasm on the part of a number of lawyers to put their work into print.

On the other hand there are those whose work did not see print in their lifetime, or those who, for a number of reasons, were reluctant or unwilling to use the new medium or simply preferred the manuscript system. Possible concerns about unauthorised printing may have persuaded them to maintain a limited distribution within the coterie.

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<sup>219</sup> Ashe *Fasciculus Florum* above n.106 Folio A4 pages unnumbered.

<sup>220</sup> Ashe's complaint was directed to bad printing quality rather than rogue printers. It is to be noted that both the 1617 and 1618 editions of *Fasciculus Florum* were printed by G. Eld. However, as has been shown above, rogue printers who defied the Stationers or who printed manuscripts that came into their hands other than from the author challenged the accuracy of printed texts.

## Guidebooks and Manuals

I have already made reference to some of the guidebooks that were available in Chapter 5. Guides or manuals had been a feature of legal writing from the early sixteenth century but with printing, the ability to influence the audience to whom they were directed, and to standardise practice, became a reality.

In 1623 Powell published *The Attourneys Academy*.<sup>221</sup> It was reprinted three times in the next seven years. Subsequently in 1627 Powell published *The Attornies Almanacke*,<sup>222</sup> another procedural guidebook designed to help those who have to move ‘any person, cause, or Record, from an inferior Court to any of the higher Courts at Westminster’.<sup>223</sup>

*The Attourney’s Academy* and *The Attornies Almanacke* are examples of books of practice that had been coming off the presses of legal printers and that reflected the changes in practice that were developing. Older works such as *Diversitie de courts et leur jurisdiction* the *Registrum Omnium Brevium* and *Book of Entries* were by then out of date. When Sir Edward Coke published a *Book of Entries*<sup>224</sup> in 1614 his work covered nearly 1500 pages and the author claimed that none of the entries it contained had previously been published. Many of the works of this nature were designed for a student audience. One of the most useful reference works of the sixteenth century was *The exposicions of the termes of the laws*.<sup>225</sup> When it was reprinted in 1607 it was retitled *The exposicions of certaine difficult and obscure words and termes of the lawes of this realme. Newly amended and augmented, both in French and English for the helpe of such young students as are desirous to attaine knowledge of the same*<sup>226</sup> thereby indicating its intended market.

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<sup>221</sup> Powell *The Attourneys Academy* above n. 55.

<sup>222</sup> Above n. 56.

<sup>223</sup> Ibid. Title page.

<sup>224</sup> Above n. 71.

<sup>225</sup> John Rastell *The exposicions of the termes of the lawes of England* (Tottell, London, 1567) STC 20704 It was published in both French and English. The first version was printed in 1523.(STC 20701).

<sup>226</sup> (Company of Stationers, London 1607) STC 20713. The work was printed nine times in the seventeenth century before 1640. As it was reprinted it was further developed. The edition of 1624 is said to be “newly imprinted and much enlarged and augmented”. The 1636 printing claims to be “newly imprinted and much enlarged and augmented with a new addition of above two hundred and fifty words.”

*The Attourney's Academy* contains a table of the dates of the law terms and lists appearance days and the days for the return of writs and explains the general course of procedure in the major courts. There is another extensive table appended for ease of use containing information on how to start an action, where one went for writs and the fees that were required. But it was essentially a guide book that would have to be supplemented by wider reading of more detailed texts. It did not define terms and gave no guidance to the attorney as to how he could decide whether or not he could offer a remedy.

The work is essentially procedural and had its third printing in 1630. Powell himself suggested that the work was more for the guidance of laymen than professionals<sup>227</sup> Baker suggests that most of Powell's content was derived from late Elizabethan manuscript works<sup>228</sup> and that it was not entirely original is suggested by a number of similar works in manuscript dating from the 1580s.<sup>229</sup>

Common Pleas pleading practice at the time of Powell's work involved the preparation of pleadings in Chambers whereupon they were filed in the office of the Prothonotary. The complexity of pleading not only meant that the form had to be correct but involved settling the pleadings between Counsel and with the Prothonotary's office. Given this level of procedural complexity, Powell's work would have been of little use were a litigant to attempt to represent himself.<sup>230</sup>

But a guidebook such as this was an essential tool for an attorney. Although today we think of the law as a set of abstract rules, in the seventeenth century and indeed earlier, the relief available required bringing the suit in the proper form of action such as debt, assumpsit or one of the growing varieties of trespass. Attorneys – those of the so-called “second branch” – were those who often had first contact with the client and had to discover whether or not there may be a case and which form of action was the proper one.

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<sup>227</sup> *The Attourney's Academy* above n.55 p. i – iv. C.W. Brooks *Pettyfoggers and Vipers of the Commonwealth* (Cambridge University Press, Cambridge, 1986) p.175.

<sup>228</sup> Baker “Introduction” *The Reports of Sir John Spelman* above n. 57 Also note *ibid.* Brooks p. 174.

<sup>229</sup> *Ibid.* Brooks.

<sup>230</sup> Procedure differed depending upon the Court in which one commenced proceedings. It has been suggested that Kings Bench may have been the first Court to regulate paper or written pleadings and by 1523 and possibly earlier there was an official called the Clerk of Papers, a position that was never present in Common Pleas. Baker “Introduction” *The Reports of Sir John Spelman* above n. 57.

As a solid, practical introduction to pleading and practice, Powell wrote a useful work and one that is clearly written and easy to understand. It is a book that cannot stand alone, but demonstrates that the audience and market for law books went beyond the students and lawyers of the Inns and was extending to those of the “second branch”, as well as providing some guidance to those without legal training. The further point that can be made is that a lay reader who was interested enough had, by 1624 and more so by 1630, other texts which could be drawn upon for the detail and doctrinal underpinnings of the pleading matters that are addressed in *The Attourney’s Academy*

*The Attornies Almanacke* has as a subtitle *For the generall ease and daily use of all such as shall have occasion to remoue any Person, Cause or record from an inferiour Court to any of the higher Courts at Westminster*. This subtitle reflects some of the concerns that were held about the quality of the proceedings and hearings in the provincial courts. The proceedings of the local jurisdictions were subject to review by the central courts. In addition there was a lack of uniformity in the remedies that were offered. Cases in local courts were heard before mayors or bailiffs who could be tradesmen with no legal knowledge and who were likely to be partial. The King’s Courts at Westminster were available to any citizen. Transfers to the Westminster Courts could be abusive and were utilised by defendants to delay proceedings, or because a more favourable outcome may be reached, and there were statutes restricting such transfer which recognised this. But legal thinking was towards the subordination of local custom to reason as interpreted by the judges in the interests of the commonwealth. The local courts were seen as unsystematic, ill-served and the standard of Justice there ill-administered.<sup>231</sup>

For some lawyers there was an interest in removing cases from local courts. Local tribunals often imposed strict limits on those who could appear before them. *The Attornies Almanacke* provided lawyers with a handy guide comprising the forms of address for the writs that could be used for the removal of cases.

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<sup>231</sup> Matthew Hale in Brooks *Pettyfogger and Vipers* above n. 227 p. 100. Powell did not address all the Courts in his work. He acknowledges this, and the limitations of the book in “To the Reader” *The Attornies Almanacke* above n.56 A3ii. The book, which is presented in a tabulated form, sets out the manner in which writs may be obtained to remove cases from inferior courts in cities, towns or bodies incorporate or enabled to hold plea to the greater courts at Westminster. See *The Attornies Almanacke* above n. 56 p. 1 et seq.

Unlike the *Attourney's Academy*, there was a more limited audience for the *Almanacke*, although the impact of the work would be more extensive

*I haue little to say to the readers hereof, because I conceiue the number of them to be but small, consistig onely of attornies, sollicitors, clerks, practising in either law, and Stewards of Courts of diuers kindes. But beleue me, the vse of it will bee of great importance to all sorts of people whatsoeuer, for that it may concerne them daily for one vse or another.*<sup>232</sup>

The concept of copyright had not developed beyond its embryonic form as a means of protecting the printing and publication monopoly of the Stationers, but Powell graciously acknowledged the work of others.

*It was not out of pride or scorne to borrow out of other mens corrections but of a meere bashfulnesse to make knowne my wants to those who happilie would turne it to an unhappie sport and derision.*<sup>233</sup>

He then went on to make an interesting comment that reflects the co-existence of print and manuscript, even on the printed page, and that confirms the common-placing practice of lawyers or attorneys, in that each practitioner is assumed to have his own collection of references.

*Let euery one that findes such ommision or imperfection in this little booke, adde or mend as much with his penne as he can better warrant or his correction supplie. So shall it with many hands within few dayes attaine a full perfection, and I arriue at the height of my ambition herein resting.*<sup>234</sup>

There were others who required law texts apart from the students, barristers and members of “the second branch”. Those who used the law such as justices of the peace, administrators or local officials had to be catered for. Some of the works of the sixteenth century such as William Rastell’s collection of the statutes, Lambarde’s *Eirenarcha*<sup>235</sup> and *The Duties of Constables, Borsholders, Tithing-men and such other lowe and lay Ministers of the Peace*<sup>236</sup> provide examples. The system of local customs, franchise and duties attached to land were dealt with in the manor courts. Charles Calthorpe’s book *The relation betweene the Lord of a manor and the Cobby-holder his tenant*<sup>237</sup> addressed these issues.<sup>238</sup>

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<sup>232</sup> Powell *The Attornies Almanacke* above n. 56 “To the Reader” Folio A pages unnumbered. The “all sorts of people whatsoever” clearly refers to the clients who will benefit from the use of the work by their advisers.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Lambarde *Eirenarcha* above n. 58.

<sup>236</sup> STC 15145-62 – There were 10 editions between 1601 and 1631.

<sup>237</sup> Charles Calthorpe *The relation betweene the Lord of a manor and the Cobby-holder his tenant* (William Cooke, London, 1635) STC 4369.

<sup>238</sup> Although Littleton’s *Tenures* was still the most authoritative text, even although over 150 years had elapsed since its first print publication it did not address copyhold as the common law did not have copyhold jurisdiction

Justices of the Peace were usually members of the landowning local gentry and a text for the guidance of JPs also was added to the *oeuvre*, although, as is mentioned below, manuals for JPs began to appear in the sixteenth century. In 1618 Michael Dalton published *The Countrey Justice*,<sup>239</sup> one of the recognised works on the office of Justice of the Peace. *The Countrey Justice* was a compilation of private notes left in London by Dalton when he travelled to Cambridgeshire to resume his duties as a Justice of the Peace.<sup>240</sup> As was the case with other legal writers, the issue of publication had to be considered by Dalton. He, like Plowden and others before him, wrestled with the prospect and decided to publish after speaking with Sir Henry Montague - Lord Chief Justice of Common Pleas - and only put the work into print after he had obtained Montague's favour for allowance and patronage thereof.<sup>241</sup>

An alternative and likely interpretation of the expressed hesitation to put material in print may arise from the fact that seventeenth century authors were in the transition from the manuscript to the print culture. They were well-used to circulating their manuscript works among a small group or coterie and in Dalton's case may have done so and thereafter decided

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in Littleton's day. It had, however, been updated and in 1628 Coke's authoritative *A Commentary Upon Littleton* – above n. 35 – was printed.

<sup>239</sup> Dalton *The Countrey Justice* above n. 15.

<sup>240</sup> The law administered by JPs and the functioning of the manorial courts were not taught specifically at the Inns of Court, although general legal principles were. Thus, works such as *The Countrey Justice* were designed for those who were not conversant with the study of law, although many of the gentry did attend the Inns to round out their education. See W Prest, *The Inns of Court Under Elizabeth and the Early Stuarts: 1590 – 1640* (Longman, London, 1972) p. 152. A dedication to a patron appears in other printed legal works and an example of some concerns about publication of legal material may be exemplified in Pulton's correspondence with Sir Thomas Egerton. See Virgil B Hetzel "Ferdinando Pulton, Elizabethan Legal Editor" (1947) 11 *Huntingdon Library Quarterly* 77. In the first letter noted by Hetzel, Pulton clearly is seeking a licence from the Lord Chancellor for the printing a preliminary version. This correspondence was possibly used to suggest Egerton's patronage thus enabling Pulton to access records in the Tower. Knafla above n.157 165 – 6.

<sup>241</sup> Whereupon, I began to recollect my confused notes and obseruations, willing for my priuate helpe and better readineffe, to digest them into some order and method, such as my vnderstanding could best contriue. Thus prepared, I yet made question with my selfe, whether it were better to aduenture thye publishing of these my labours, or to keep them by me onely for my priuate vse. In this vnsettled consultation, being brought vnto your Lordship by my good friend (who also discovered to your Lordship this my labour) and finding your Lordship fauourably to respect me, and it, I tooke heart and encouragement to put the same into Print, after that I had obtained (according to my humble suit) your Lordships fauour for allowance and patronage thereof. This feature seems to appear in so many printed works that one wonders whether or not it is a form of authorial modesty, rather than a genuine concern for publication. Certainly, Plowden expressed such sentiment. Coke was a great self-promoter but like Plowden he put together his reports and institutes for his own private use, and states he was prevailed upon to put his material into print, although his later notebooks suggest it was his purpose to print the contents. See J.H. Baker "Cokes Notebooks and the Sources of his Reports" (1972) 30 *CLJ* 59.

Dalton makes another reference to his private notes in the Epistle to Sir James Lee, the Kings Attorney of the Court of Wards and Liveries.

*This worke (whatsoever it bee) being written; first as private Notes for my particular helpe in this businesse, wherewith my selfe and many others are daily employed, and set on worke, without yielding any pleasure or profite at all to us, otherwise than for the publique good.* Dalton *The Countrey Justice* above n. 215.

to go beyond the limited audience of the coterie to make their work available to the wider community when sufficient reason arose.

As a printed book, *The Countrey Justice* was a valuable educational work for English Justice of the Peace for the next 128 years<sup>242</sup> and was part of the genre of legal writing that started with Fitzherbert's *L'office et auctoritee de justices de peace*<sup>243</sup> Dalton wrote his work *The Countrey Justice* to guide Justices on the laws that were applicable to actions taken outside general sessions. Dalton had observed that there were occasions when JPs could be unduly influenced by persuasion or powerful influence. In addition, Justices were known to act capriciously or in their own interest. Because there were times when they may be required to act spontaneously and urgently there was always the possibility of an abuse of authority. Dalton's aim was to produce a text that would assist as a weapon against intimidation and false information.<sup>244</sup>

Dalton puts it in this way

I obserued that Iustices of Peace in their places, grew in neglect, and many times were ouerfwayed by superior sollicitations, yea, and sometimes disdgraced, in such fort, as I could haue been content rather to haue fir down in priuate quiet, then with care, studie, and paines to incurre such hazards and difcontentments.<sup>245</sup>

The scope of Dalton's work was limited and it mainly furnished working justices with a clear outline of their authority out of sessions. It was backed with citations from the statutes and from other legal treatises. It filled a gap left by Lambarde's *Eirenarcha* in that it dealt with administrative rather than sessional duties.

Dalton's career flourished and he was appointed a Master in Chancery in 1622. The following year he published *Officium Vicecomitum, or, The Office and Authoritie of Sheriffs*,<sup>246</sup> which occupies a position similar to that of *The Countrey Justice* in providing

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<sup>242</sup> A second edition was issued in 1619, a third in 1630 and a fourth, posthumously, in 1655. It remained in circulation until the eighteenth century and was reprinted in 1666, 1682, 1690 and 1742.

<sup>243</sup> 1514, English translation 1538.

<sup>244</sup> J.R McVicker "The Seventeenth Century Justice of the Peace in England" (1936) 24 Kentucky LJ 387; L.R McInnis. "Michael Dalton: The Training of the Early Modern Justice of the Peace and the Cromwellian Reforms" in Jonathan A Bush, and Alain Wijfels (eds) , *Learning the Law: Teaching and the Transmission of Law in England 1150 –1900* (Hambledon Press, London, 1999) p.256, 257.

<sup>245</sup> Dalton *The Countrey Justice* above n. 15 Folio A3 pages unnumbered.

<sup>246</sup> Dalton *Officium vicecomitum* above n. 17. It is subtitled *The Office and Authoritie of Sheriffs. Written for the better incouragement of the Gentry (upon whom the burthen of this Office lyeth) to keepe their Office and*

guidance for local officials in the exercise of their duties. It was one of a number of books published on the duties of sheriffs and was followed by William Sheppard's *The Office and Duties of Constables*<sup>247</sup> in 1641.

The scope of *Viccomitum* covered three major issues, the first being those matters relating to the peace of the realm – His Maiesties peace, the Execution of Iustice, and the keeping of his Maiesties rights. The second issue within the scope of the work is the good of my Countrie; for it setteth forth the Office, Authoritie, and Duetie of the Sherife, who is his Maiesties deputie in his countie, and hath committed vnto him (*Custodiam Comitatus*) the charge of the whole countie. The third matter is for the gentrie of this land, vpon whom the burthen of this office lyeth, they (by a kind of custome) haue vsed to transferre and turne ouer this their authoritie and charge, to the Vndersherifes and Officers.<sup>248</sup>

It is in this last area that Dalton went on to identify what he considered were some of the difficulties that had arisen in the exercise of the jurisdiction of the sheriff, and thus, the evil that the book attempted to remedy. In referring to the “undersherifes” and their officers, Dalton described them as

Men for the most part of meane estate, who looking onely after their priuate profit, neglect the publicke, regarding little or nothing, either the preseruacion of the Kings rights, or the common good of the Countrie; but contrariwise vse much deceit, to the King in conelung his rights and duties, and much oppresion of his subiects.<sup>249</sup>

Thus he wrote the book because

All these in some measure I haue herein discovered; And a Principall meanes to prevent these things hereafter, I conceiue to be, the plaine setting downe of this Authoritie, and Office of the Sherife, and the discoverie of these abuses; that such as hereafter shall vndergoe the place, may more fully vnderstand themselves, and these things; and so may the better endeavour to execute their said Office, according to their Oathes; whereby they shall the better performe their duties to GOD, their PRINCE, and their countrey.<sup>250</sup>

In this respect the *Officium Viccomitum* serves similar purposes to *The Country Justice* - the standardisation of good local government and the elimination of corrupt practices. The

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*Undersherife in their houses; Thus so by their continuall care of the businesse, and eye over their Officers, they may the better discharge ther dutie to God, their Prince, and the Countrey in the exercise of this their Office.*

<sup>247</sup> William Sheppard *The offices and duties of constables* (Ric. Hodgkinsonne with permission of the assignes of John Moore, London, 1641) Wing S3200. The first part of the title is very similar to Lambardes work. Above n. 53.

<sup>248</sup> Dalton *Officium Viccomitatum* above n. 17 The Epistle Dedicatorie, pages unnumbered.

<sup>249</sup> Ibid.

<sup>250</sup> Ibid. The problems of corruption was not a new one. “[e]veryone knew, and had known for centuries, that the root of most injustice was not imperfect law but corruption and weakness in juries and sheriffs.” J.H.Baker *The Reports of Sir John Spelman* above n. 57 p. 46.

book does not contain a contents page but has a detailed index of all the topics and subheadings that are the subject of discussion. It is suggested that this would be the most well-thumbed part of the text which, when read together with *The Countrey Justice*, would provide a very good outline of the legal and administrative powers available to officials in the Counties. The information is presented with a statement of clear, broad propositions which are then refined and discussed in more detail. The book is replete with cross references and again it is notable that all of these are to material in print.

The reason for embarking upon a detailed discussion of these texts is to demonstrate the following features which are indicative of the way in which printed law texts were extending beyond the sixteenth century *oeuvre* of Year Books and abridgements and the way in which a recognition of the qualities of the new medium were being recognised.

1. Although texts for local officials had earlier been written and printed,<sup>251</sup> the works by Dalton served to bring practices up to date and also addressed perceived problems in local judicial and administrative practices.
2. Both texts recognised the need for improvement in the administrative duties of justices and local officials and their clear purpose was to provide a way in which this could be done.
3. Although it might not be directly stated, a possible sub-text to both books was the desire to establish some form of standard or common practice in local administration and to eliminate suggestions of capricious practices that may vary from county to county. Such standardisation of local judicial and administrative practices could only benefit the State's interest in the law-abiding society and therefore the "common weal." This standardisation could be achieved by a common reference work that was available through the distributive quality of print.
4. Finally, the books demonstrate the continued willingness of authors and printers of law texts to go beyond what may be seen as texts for the profession and address wider aspects and issues surrounding the administration of law.

### **The Audiences for Law Texts**

As I have discussed, most of the printed works dealing with legal topics were primarily designed for lawyers or law students, although a number of the titles were clearly designed

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<sup>251</sup> Fitzherbert above n.17; Kitchin above n.16.

for an audience that went beyond the legal profession and those involved with the administration of the Courts in London. Michael Dalton's works were designed to assist those responsible for the administration of the law in the counties and in the local courts. Works on the Courts Leet<sup>252</sup> were designed to assist those responsible for the operation and administration of the local shire and manorial courts. Works such as Manwood's *Forest Laws*<sup>253</sup> and D'Oyly's *The Orders, Lawes and Ancient Customes of Swanns*<sup>254</sup> were directed to those involved in the administration of the forests and, in the latter case, deputies, commissioners and gamesters<sup>255</sup> who may be interested in and responsible for the enforcement of the rules and customs concerning swans. Mercantile texts such as *Lex Mercatoria*,<sup>256</sup> *Lawes of the Market*<sup>257</sup> and *An Abridgement of all Sea-Lawes*<sup>258</sup> were also written for specialist audiences such as merchants and mariners as well as possibly their legal advisers and those involved in the arbitration of disputes

One has to be cautious in considering the term "law student" because it has a different sense than is understood today and could include a junior practitioner as well as one learning the law for the first time, thus demonstrating a potentially different market for printed law books. As has been observed the process of legal education at the Inns of Court and Chancery was seen as a continuing one where the student went through a number of stages before call, and even after call the term that described a barrister was "apprentice" suggesting that the learning process continued.<sup>259</sup> Only when a barrister made the transition from apprentice to Reader does it seem that the transition from student to "teacher" has taken place.<sup>260</sup> Thus the term "student" refers to the wider audience of those involved in the law than just those who were studying before call. Clearly this segment of the "student" audience is contemplated.

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<sup>252</sup> Kitchin above n. 16 although addressed to students of the law in the Inns of Court and Chancery was directed towards improving and standardising the procedure of these local courts. Robert Powell *A Treatise of the Antiquity, Authority Uses and Jurisdictions of the Ancient Courts of Leet* (R.B., London, 1641) Wing P0366 addressed procedure, jurisdiction and penalties and was addressed to a wider audience so that they might be informed of the nature of the matters dealt with by the Court and the consequences of breaking the law.

<sup>253</sup> Manwood above n. 16.

<sup>254</sup> D'Oyly above n. 18.

<sup>255</sup> Although the common meaning of this word is that of a player, actor or gambler, it also means a keeper of a "game" of swans. See the 6<sup>th</sup> entry under "gamester" *Oxford English Dictionary* (2<sup>nd</sup> ed) (Oxford University Press, Oxford, 2004).

<sup>256</sup> See above n. 43.

<sup>257</sup> See above n.42.

<sup>258</sup> See above n.44.

<sup>259</sup> See above Ch. 4 p. 84 et seq.

<sup>260</sup> Although "utter barristers" could be practice and appear after 1547 even before they had done a reading. J.H. Baker *Introduction to English Legal History* (3<sup>rd</sup> ed) (Butterworths, London 1990) p.185-6.

For a number of legal treatises, however, an audience wider than specialists or lawyers is contemplated. In many of the prefaces in works printed throughout the sixteenth and seventeenth centuries there are references to making the contents of the work available for the public good or the "common weal."<sup>261</sup>

The wider audience to which legal texts or treatises were addressed included all those who may have had an interest in the particular subject matter of the work. A number of works were printed about the duties of local officials. Thus a principal part of the audience would comprise those officials themselves such as Justices or sheriffs. A further part of the audience would be those under such officials who had an administrative task to fulfil associated with the exercise of the office of the particular official. Yet another part of the audience would be those who dealt regularly with those officials - other administrators in the area, the local lords or leading citizens in the community.

One of the elements of the social context of the "common weal" was the obligation upon the upright subject to inform himself of the law. The printing press had made legal information available and available in the "vulgar tongue". A common theme articulated by legal writers was the importance of ensuring that the subject was not kept in ignorance of the law.<sup>262</sup> Once the law was readily available in print, it was incumbent upon the subject to obtain copies of the books that contained information on a particular subject. Thus texts which may appear to have an initial focus upon a specialist audience, such as Michael Dalton's *A Countrey Justice*, would naturally be found upon the shelves of those specialists. These would further fulfil the interests of the political common-wealth in ensuring a proper execution of powers, keeping proper order and adopting a consistent approach to recurring problems. Also the same text might be found in the hands of members of the local community as part of an overall interest in community affairs and the way in which systems operated.

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<sup>261</sup> Already discussed above in Ch. 5 p. 123 et seq. Examples may be found as follows: Thomas Starkey, *A preface to the Kynges Hyghnes*, (Thomas Berthelet, London, 1536) STC 23236; Lambarde *Eirenarcha* above n. 58; Ferdinando Pulton *A collection of sundrie statutes*. (Societe of Stationers, London, 1618) STC 9328; Richard Cary *Le Necessarie use & Fruit de les Pleadings*, (Thomas Wight, London, 1601) STC 4719; Powell *The Attourneys Academy* above n. 55; Anon *Institutions of Principall groundes of the Lawes and Statutes of England* (Thomas Wight, London, 1604) STC 9296; Dalton *Officium Vicecomitum* above n. 17; William Lambarde *Archion or a Commentary Upon the High Courts of Justice in England* (Daniel Frere, London, 1635) STC 15144. Wilkinson above n. 19 especially in the 1620 reprint— see STC 25648 STC 24649;4 Cokes Reports "To the Reader" fo B3 page unnumbered; William Fulbecke *A Parallele or Conference of the Civil Law, the Canon Law and the Common Law of this Realme of England* (Wight, London, 1602) STC 11415a "Epistle to the Reader" Folio 3 et seq.

<sup>262</sup> See above Ch. 5 p.129 et seq.

In addition, access to legal texts enabled those who challenged the authorities to argue legal issues without formal legal training, a prime example being that of John Lilburne who was prosecuted not only in the Royal courts but also in those of the Commonwealth.<sup>263</sup>

### **Concluding the Themes**

The themes that became apparent in the legal treatises of the early seventeenth century continue some of the issues that arose in the sixteenth and introduce some fresh elements.

Print, although not pervasive, was clearly a part of the legal landscape. Cross referencing to printed works demonstrated a willingness on the part of law writers to refer to other printed texts as a reference or to direct readers to them. Printed law texts had the effect of concentrating the focus and attention of readers upon printed material rather than all the materials that may have been available.

Secondly, the debate about legal language continued but the emphasis had changed to one of accuracy of meaning and the fact that the maxims and terms of the law in law-French conveyed a particular meaning that suffered in translation and lacked the sub-contextual encoding that arose from the immersive nature of legal learning. In addition it demonstrates a particular interest in meaning which was an aspect of hermeneutics which also arose during this period.

But before hermeneutics came the retentive nature of print and its spread not only as a means of recording information but as a replacement for the requirement to have a detailed memory of legal information. The requirement for memory remained but a level of detail was made available in legal texts to which reference could be made.

Thus, rather than having an argument about the reliability of “slippery memory”, the focus shifted to the way in which words recorded in print could be interpreted, especially those in statute. The increase in legislative activity over the Tudor period, the use of print as a means of promulgation, the activity of the Royal Printer in making multiple copies of statutes

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<sup>263</sup> For a detailed account see L Levy *The Origins of the Fifth Amendment* (2<sup>nd</sup> Ed), (Macmillan, New York, 1986) pp 266 -300 and Marks K.K. Mr. Justice *Thinking Up About the Right to Silence and Unsworn Statements* (1984) LIJ 360. For reports of Lilburne's cases including the legal dialogues that he had with the Court see Thomas Bayley Howell *A complete collection of state trials* (Printed by T.C. Hansard for Longman, Hurst, Rees, Orme and Brown, London, 1816-1828).

available, the utilisation of preambles all coalesced to allow lawyers to embark upon a search for the meaning of the words used in statutes and to develop ways in which that meaning could be ascertained. Flexibility in the application of the law became constrained as print enhanced textualisation.

At the same time efforts were being made to bring the common law into a form of order and print was used to this end. As hermeneutics began to impose constraints upon the way in which statutory information might be interpreted, so attempts were made to try and put some form or shape to the common law by the identification of principles. The task would be a long one, but it had its beginnings in the seventeenth century, enhanced by print which made the discussion accessible.

However, as was observed, although the printing of law was seen as economically advantageous, it was at times perceived also as an impediment to reliability, and the authority of printed works might be undermined by inaccurate and unauthorised or opportunistic printing. Our examination of the contest between Pynson and Redman and the comments made by Tottel about early legal printing<sup>264</sup> demonstrates that allegation of inaccuracy were not new but the development of law text printing that was outside the scope of the common law patent presented incentives for unscrupulous printers to misattribute or misrepresent the provenance of works.

Books about legal practice, both for those in the legal profession and those involved in the administration of the law, were available in the seventeenth century as they had been in the sixteenth. However, the new texts, particularly for attorneys, had not been available in the sixteenth century and reflected the rise of the “lower branch” as well as the need for such texts. A concern with proper administration and its standardisation also drove the printing of guides for local officials.

The wide variety of texts printed in this period identifies audiences that went beyond those attending the Inns for the purposes of legal education. It was inevitable that law texts in print, enabled by Eisenstein’s identified qualities as opposed to those in manuscript, would lead to broader topics of a legal nature appealing to audiences beyond lawyers. It could not be said

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<sup>264</sup> See above Ch.. 5 p.111.

that print “democratised the law”, for such a concept would be anachronistic, but the law was made available to a wider audience thus combating the problems of ignorance and enhancing the benefits that the law and good government might provide for the common good.

### **Sir Edward Coke**

Thus far the emphasis of this discussion has been upon legal texts and treatises published over the seventeenth century but the publication of Reports and case materials also continued. The printing of the Year Books had largely been accomplished in the sixteenth century and the numerous Year Book titles printed over that period declined in the seventeenth century.<sup>265</sup> At the same time the last twenty years of the sixteenth century saw the publication of “private” reports such as Plowden and Dyer. The printing of these works continued along with others in the seventeenth century but the most dramatic example of law reporting in this time period was that of the Reports of Sir Edward Coke (1552- 1634), which were to become so well-known and recognised that they were simply referred to as The Reports.

This section deals in some detail with what I perceive to be some of the main themes present in Coke’s works. They are all relevant to the central theme of the way in which the law came into print way and in which lawyers and others responded to printed law. Throughout Coke’s work is an emphasis upon learning, understanding and a knowledge of the law together with an argument about the supremacy and significance of the common law. These issues could only be resolved by a wide distribution of information, which print enabled. Furthermore there was a sub-text to Coke’s desire to see the law in print and it has to do with the importance of standardisation of information that was enabled by print. The issue of reliability and the danger of unauthorised or badly printed works was recognised but was countered by the careful publication of works by recognised authors. Coke was a towering figure even in his own time and his erudition was well known. But I suggest that although Coke had significant recognition during his life, his continuing reputation over the following centuries was maintained by the fact that his work was put into print.

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<sup>265</sup> The major printings were by Wight and Adam Islip from 1600 – 1619 and some of the Years of Edward IV by Flesher & Young. All the volumes comprise collections of a number of Years, but the printings were a fraction of those that took place in the sixteenth century.

Clearly he caused many in authority some concern. It is well-known that after his death, Coke's chambers were sealed and a search carried out for subversive materials.<sup>266</sup> Such was his reputation and standing that his words were feared even after death. However, certain sections of *Third Institutes* gave strong support to the Crown. For example, Coke's approach to the Law of High Treason had not changed since his prosecution of Guido Fawkes or Sir Walter Raleigh. The crimes of murder, robbery and rape were uncontroversial although at times Coke was critical of the harshness of the penalties.

Coke's Reports are important not only for the legal principles that may be discerned from them and the style in which they were presented, but also for the prefaces in which Coke provided an essay on matters of legal history or, in the later volumes, a summary of the cases reported. In addition, the prefaces provide us with an insight into Coke's purposes for publication and some of the wider issues about legal matters that he wished to address. Notwithstanding that Coke was one of those who wrote and participated in the environment of the co-existence of print and manuscript, there can be no doubt that he was well aware of the advantages presented by the new technology. It allowed him not only to present his reports of cases, but also his own particular view of the law.<sup>267</sup> He recognised the significance of the way in which the press allowed a large volume of materials to be made available, thus allowing for the mass propagation of his views. In addition to his Reports he published in his lifetime one volume of his *Institutes*<sup>268</sup> together with a *Book of Entries*<sup>269</sup> and his role in the seventeenth century story of the law in print merits special attention.

There are a number of themes present in Coke's printed legal works that also illustrate some of the challenges that printed law brought to the intellectual activity of lawyers. I have already discussed Coke's comments on terms of art, his commitment to making the law available in English and his recognition of the power of print as a means of fixing memory. His attitude to seeing his work in print was initially one of reluctance but from 1600 when the first volume of the Reports was printed through until the end of his life this attitude changed to the point where he became an enthusiastic adherent of printing the law. The changing

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<sup>266</sup> See above Ch. 3 p. 73.

<sup>267</sup> The way in which Coke's view of the law was expressed was evolutionary in nature and reflects his own career as it progressed from a Judge of the Court of Common Pleas and Kings Bench, his dismissal from those posts and his subsequent return to public life as a member of Parliament and a supporter of the Petition of Right. See Bowen above n. 219 for a general biography of Sir Edward Coke. See also Allen D. Boyer "Sir Edward Coke" *Oxford Dictionary of National Biography* (Oxford University Press, Oxford, 2004).

<sup>268</sup> Other volumes were published posthumously.

<sup>269</sup> Coke *A booke of entries* above n. 71.

political climate and Sir Edward's progress from Attorney-General, which was the position that he occupied when the first volume of the Reports were printed, through his position as a Judge, his fall and his subsequent career in politics provides an explanation for this shift in attitude. There can be no doubt that there was limited circulation of manuscript copies of Coke's case notes amongst select members of the legal fraternity and, like Plowden, Coke arranged for the printing of the first volume,<sup>270</sup> fearful that unauthorised versions may find their way into print. He was mindful of his reputation and of the value that would be attached to Reports coming out under his name.

I haue sithence the xxii yeere or her Maiefties Raigne, which is now xx yeeres compleat, obserued the true reasons as neere as I could, of such matters in Law (wherein I was of Councell, & acquainted with the estate of the Question) as haue bin adiudged vpon greate & mature deliberation; And as I neuer meant (as many haue found) to keepe them so secret for mine own priuate vse, as to denie the request of any friend to haue either view or copy of any of them; So til of late I neuer could be perswaded (as many can witnes) to make them so publike, as by intreaty to commit them to print.<sup>271</sup>

Coke revisited the purpose of publication from time to time throughout the Prefaces. In the Preface to the Seventh Volume.

I set downe in writing, out of my short obseruations which I had taken of the effect of euery argument (as my manner is, and euer hath beene) a summarie memorie of the principall authorites and reasons of the resolutions of that case, for mine owne priuat sollace and instruction. I neuer thought to haue published the same, for that it was not like to giue any direction in like cases that might happen (the chiefeft end of publishing Reports) .... Now when I ended it for my priuat, I was by commandment to beginne againe (a matter of no small labour and difficultie) for the publicke. For certainly, that succinct method and collection that will serue for the priuat memorial or repertory, especially of him that knew and heard al, will nothing become a publike Report for the present & al posteritie, or be sufficient to instruct those readers, who of themselves know nothing, but must be instructed by the report onely in the right rule & reason of the case in question.....

I thought good as well for thine instruction and vse (good reader) as for the repose and quiet of many, in resolving of questions and doubts (wherein there hath beene great diuersitie of opinions) concerning their estates and possessions, to publish some others that are common in accident, weightie in consequent, and yet neuer resolved or adiudged before.<sup>272</sup>

At an earlier stage in the preface to his first Reports, Coke expressed his criticism of the quality of some of the reports that had been published, demonstrating that issues surrounding reliability were still alive:

For I haue often obserued, that for want of a true and certain Report the case that hath bin adiudged standing vpon the recke of manie running Reports (especially of such as vnderstood not the State of the

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<sup>270</sup> 1 Cokes Reports.

<sup>271</sup> Ibid. "The Preface to the Reader." Folio C2 et seq A similar comment is made in the Preface to the Third Volume – Your extraordinary allowance of my last Reports, being freshly accompanied with new desires, haue overcome me to publish these few excellent Judgements and Resolutions of the reuerend Iudges and Pages of the Law "To the Reader" Folio C2 pages unnumbered.

<sup>272</sup> 7 Cokes Reports The Preface Folio aiii pages unnumbered.

Question) hath bin so diuersely drawne out, as many times the true parts of the case haue bin disordered and disordered, and most commonly the right reason & rule of the Iudges vtterly mistaken.<sup>273</sup>

It is perhaps noteworthy that in the preface there is no expression of the humility that certainly appears in Plowden's preface. One may be justified in asserting that Coke considered that his Reports avoid these pitfalls and were a true and correct report of the case, albeit with his own interpolations.<sup>274</sup> As we have seen, control by authors over unauthorised printing was a problem in the early seventeenth century. Accuracy and credit were clearly matters which concerned Coke and perhaps it is ironic that despite his concerns, *The Complete Copyholder*, which was never authorised for printing, was nevertheless published.<sup>275</sup>

The ability to ensure control over the presentation of his material in print was not the only matter that motivated Coke. Throughout all the prefaces to his Reports and other writings there was a recognition of the importance of making information available both for the education of students and for the "common good". This did not mean that Coke readily endorsed all legal printing. He was critical of some material on offer and in particular some Abridgements.<sup>276</sup> He noted that these have profited the authors themselves:

but as they are vsed haue brought no small prejudice to others; for the aduised and orderly reading ouer of the Bookes at large in such maner as elfewhere I haue pointed out, I absolutely determine to be the right way to enduring and perfect knowledge; and to vsé abridgements as tables and to trust only to the Books at large. .... and certain it is that the tumulaturie reading of Abridgements, doth caused a confused iudgment and a broken and troubled kind of deliuerie or vtterance. But to reduce the said penal Lawes into some Methode or order is an honourable, profitable and commendable work for the whole Commonwealth<sup>277</sup>

Coke's valuing of education and learning appeared in the second volume of the Reports:

**There is no Jewell in the world comparable to learning, No learning so excellent both for Prince and Subject as knowledge of Lawes; and no knowledge of any Lawes (I speake of humane) so necessarie**

<sup>273</sup> 1 Cokes Reports "The Preface to the Reader" Folio C2 pages unnumbered.

<sup>274</sup> It is not clear on the face of the Reports where Coke's interpolations occur.

<sup>275</sup> Cokes worst fears about "true and certain" reports had come to pass. In the Preface to the Seventh Volume he is highly critical of a pamphlet reporting a speech given at the Norwich Assizes in August 1606. He is critical particularly of the lack of context and the errors of law that it contained. He comments that he would not have let any of his works pass under the name ascribed to the pamphlet, and if he had thought it worthy would have published it himself. The subtext to the complaint is that there was a passing off, much to Coke's anger and embarrassment.

<sup>276</sup> Coke places great store on reading as a method of study. Although he has also referred to discussion and contemplation as essential study skills, the focus more and more shifts to the use of books. Coke was educated in the Elizabethan Inns of Court where the oral-memorial system or moots, exercises and readings was still continuing undiminished. By the seventeenth century it may be fair to conclude that Coke saw that there was a shift in legal education towards a more individually centered form of study which could be best achieved by considering and reading the "right books".

<sup>277</sup> 4 Cokes Reports Folio B3 pages unnumbered.

foꝛ all estates, and foꝛ all causes, concerning goodes, landes, oꝛ lyfe, as the common Lawes of England.<sup>278</sup>

It is not surprising that he saw his Reports and published works as fulfilling an educative function and frequently addressed students of the law in his writings, emphasising the value of accurate source material and frequently giving advice on how to use it and apply it in the course of study.

In troth, reading, hearing, conference, meditation, & recordation, are necessary I confesse to the knowledge of the common Law, because it consisteth vpon so many, & almost infinite particulars: but an orderly obseruation in writing is most requisite of them all; for reading without hearing is darke and irksome, & hearing without reading is slipperie and vncertaine, neither of them truly yeeld seasonable fruit without conference, nor both of them with conference, without mediatation & recordation, nor all of them together without due and orderly obseruation.<sup>279</sup>

In his discussion of the style of his case reporting Coke gave further advice to students.

I haue added the pleadings at large: as well for the warrant, and better vnderstanding of the cafes and matters in Law, as for the better instruction of the studious Reader in good pleading, which Maſt. Littleton faith is one of the most honorable, lawdable, and profitable things in the Law: I with the continuances had bene omitted, and yet some of them also are not without their fruite. To the Reader mine aduise is, that in reading of these or any new Reports, hee neglect not in any case the reading of the old Bookes of yeares reported in former ages, for assuredly out of the old fields must spring and grow the new corne....<sup>280</sup>

Coke continued his educational advice in the Third Volume,<sup>281</sup> setting out a reading list starting with the early common law texts,<sup>282</sup> moving on to more recent publications<sup>283</sup> and then concluded that the most useful and those of the greatest authoritie and excellencie are the Register, Littleton, Fitzherbert and Stanford and reference is made on other occasions to some or all of these texts, especially in the tenth volume of the Reports.<sup>284</sup>

In a more abbreviated form than that offered by Fulbecke, Coke tendered advice about the path of learning that a student might undertake. In the Preface to the Third Volume<sup>285</sup> he discussed in some detail what he referred to the degrees of the Law and traced the path that might be followed by a student through the Inns of Chancery to the Inns of Court, and the

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<sup>278</sup> 2 Cokes Reports “To the Learned Reader” ¶3 pages unnumbered.

<sup>279</sup> 1 Cokes Reports “Preface to the Reader” page unnumbered.

<sup>280</sup> Ibid.

<sup>281</sup> 3 Cokes Reports.

<sup>282</sup> Glanvil, Bracton, Britton, Fleta, Ingham and Nova Narrationes.

<sup>283</sup> The Old Tenures, the Old Natura Brevium, Littleton, *Doctor and Student*, Perkins, Fitzherbert’s *Natura Brevium* and Stanford’s *Plees de la Coron*.

<sup>284</sup> 10 Cokes Reports.

<sup>285</sup> 3 Cokes Reports.

progress that a typical student might undertake. Given that his primary audience was either those studying or already qualified in the law, and given that the Reports themselves were written in the “language of the law”, it seems curious that he considered it necessary to embark upon this discussion. A possible conclusion is that by the time he reached the third volume, Coke was writing for a wider audience and possibly for posterity thus taking the opportunity to expound upon the common lawyer’s course of education and immersion in what was a difficult field to master.<sup>286</sup>

The wider audience was contemplated in the Preface to the Fifth Volume when Coke stated, after denouncing ignorance and holding that truth and an end of ignorance was an end of confusion, and that the laws of England were the birthright of its subjects:

My only end and desire is, that such as are desirous to see & know (as who will not desire to see & know his owne may be instructed: such as haue bene taught amiffe (euery man beleeuing as he hath bene taught) may see & satisfie himselfe with the truth, & such as know and hold the truth (by hauing fo ready and easie a way to the fountaine themfelues) may be comforted and confirmed.<sup>287</sup>

As part of his educative function, Coke used the prefaces to his Reports to discuss and develop certain matters of law, and especially wrote on the history of the common law and of common law principles. In the Sixth Volume of the Reports, he followed up on his assertions of the excellence of the common law made in the Second Volume. In the Sixth Volume he refers again to the educational function that he sees performed by the Reports:

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<sup>286</sup> See Raffield “Contract, Classicism, and the Common-Weal” above n. 98.

<sup>287</sup> 5 Cokes Reports “To the Reader” Folio Aiiii pages unnumbered. 5 Cokes Reports is notable for the printing of *Caudrey’s Case* in English. This printing presents something of a mystery at least from an examination of the copies available on the Early English Books Online Database. The first printing of 5 Cokes Reports was in 1605. It did not contain *Caudrey’s Case*. The second printing in 1607 is identical. The third printing in 1612 contains an additional 41 pages before the preface and the table of contents and is headed “Of the Kings Ecclesiastical Law” and is an account of *Caudrey’s Case* which was about a cleric who was deprived of his living. The title page for the publication is identical to the 1605 and 1607 editions and after the matter of Ecclesiastical Law concludes there is yet another title page (identical to the first) and Cokes preface and table of contents identical to the 1605 and 1607 editions. From this it may be concluded that *Caudrey’s Case* was first printed in 1612 and has been included in subsequent printings and editions. However a Jesuit named Robert Parsons wrote a critique of 5 Cokes Reports ( Robert Parsons *An answer to the fifth part of Reportes lately set forth by Syr Edward Cooke Knight, the Kinges Attorney generall Concerning the ancient & moderne municipall lawes of England, which do apperteyne to spirituall power & iurisdiction.* (F. Bellett, Saint Omer 1606) STC 19352) and most of this work (some 200 pages) addresses *Caudrey’s Case*. Parsons’ account was published in 1606 - 6 years before the 1612 printing of 5 Coke which included the account of *Caudrey*. Parsons makes reference to 5 Cokes reports - indeed his work contains that reference in the title. However his page references to 5 Coke are to folios, whereas the printings of both 1605 and 1607 are paginated. Either Parsons was working from a manuscript version of *Caudrey* in which case there is a demonstration of the co-existence in the use of print and manuscript, or there had been a printed copy of *Caudrey* circulating. Of course the editions held by the database may be incomplete and if that is the case it makes an interesting point about Eisenstein’s quality of standardisation.

The reporting of particular cases or examples is the most perspicuous course of teaching, the right rule and reason of the Law: for so did Almighty God himselfe, when hee deliuered by *Moses* his Iudiciall Lawes.....

And the Glossographers, to illustrate the rule of the Ciuile Law, doe often reduce the rule into a Case, for the more liuely expressing and true application of the same. In reading these and other of my Reports, I desire the Reader that hee would not reade (and as it were swallow) too much at once; for greedie appetites are not of the best digestion: the whole is to be attained to by parts, and Nature (which is the best guide) maketh no leape....

A curfarie and tumultuarie reading doth euer make a confused memorie, a troubled vtterance and an incertaine Iudgement.<sup>288</sup>

It was not only in the Reports that Coke gave advice to students. In the First Institute (*Coke on Littleton*) he states:

My aduice to the student is, that before he reade any part of our Commentaries vpon any Section, that first he reade againe and againe our author himselfe in that section, and doe his best endeauours first of himselfe, and then by conference with others (which is the life of study) to vnderstand it, and then to reade our Commentary thereupon and no more at any one time, than he is able with delight to beare away, and after to meditate thereon, which is the life of reading. But of this argument we haue for the better direction of our student and his studies spoken in our first Booke of Reports.<sup>289</sup>

The educational importance of his work was continued in the *Book of Entries* in which it was stated on the title page that it was “collected and published for the common good and benefit of all the studious and learned professors of the Laws of England”<sup>290</sup> and is therefore obviously designed for a student or professional audience. Precedents of pleadings are gathered together for education and presupposes reading for study, as well as use for practical application.

Sir Edward was well aware of the power of print and he was not backward in promoting his own works. His reference back to his own “first Booke of Reports” provides an example. But apart from the difficulty of an author citing another of his own works as an authority, the significant sub-text to Coke’s comment is that there is no hesitation to refer to printed works. This theme occurs regularly in Coke’s work. So accepted had print become by the time of the printing of *Coke on Littleton* that in the preface Coke set out the printing history of Littleton’s *Tenures* as well as a number of other leading texts in print.

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<sup>288</sup> 6 Cokes Reports “To the Reader” Folio ¶¶iii pages unnumbered.

<sup>289</sup> Coke on Littleton “The Preface” Folio C3 pages unnumbered.

<sup>290</sup> Edward Coke *A Booke of Entries* (Printed for the Societie of Stationers, London, 1614) The “common good” in this context was limited to the audience – the book was for the benefit of all of them. Beyond this social implication this cannot be said to extend to the “common weale” either in the wider social or political senses. The title page may well contain some printer’s hyperbole. Note the way law student had a special meaning in the early modern period. See above Ch. 4 p. 84 et seq.

Indeed the use of printed work was becoming such a norm that Sir Edward gave advice on how to use printed texts. He recognised some of the problems accompanying printed texts, primarily surrounding issues of credit, but at the same time was not hesitant in recommending certain texts, all of which were in print at the time.

In reading of the cases in the Bookes at large, which sometimes are obscure and misprinted, if the Reader after the diligent reading of the case, shall observe how the case is abridged in those two great Abridgements of Justice *Fitzherbert* and *Sir Robert Brooke*, it will both illustrate the case and delight the Reader; And yet neither that of *Statham* nor that of the Booke of *Affises* is to be rejected: And for pleading the great booke of Entries is of singular use and utility. To the former Reports you may add the exquisite and elaborate Commentaries at large of Master *Plowden*, a grave man and singularly well learned, and the summarie and fruitful observations of that famous and most reuerend Iudge and sage of the Law *Sir James Dyer*, Knigh, late chiefe Iustice of the Court of Common pleas, and mine own simple labors: Then haue you 15 Bookes or Treatises, and as many volumes of the Reports, besides the Abridgements of the common Lawes; For I speake not of the Statutes and Actes of parliament, whereof there bee diuers great volumes. And for that it is hard for a man to report any part of branch of any Art or science iustly and truly, which he professeth not, and impossible to make a iust and true relation of any thing that hee vnderstands not: I pray the beware of Chronicle Law reported in our Annales, for that will vndoubtedly lead thee to error.<sup>291</sup>

By the time that the Fourth Volume of the Reports was printed (1604) Coke had shed his reluctance to see his work in print. The themes of education and the benefit of the commonwealth – themes that had been constant justifications for putting work into print and implicitly recognising the properties of print – were made clear and the importance of knowledge of the law – such knowledge being acquired by publication of the law - was emphasised:

To make one plaine and perspicuous law diuided into articles, so as euery subiect may know what acts be in force, what repealed, either by particular or generall words in part or the whole and what branches & parts abridged, what enlarged, what expounded; so as each man may clearly know what and how much is of them in force, and how to obey them, it were a necessary work and worthy of singular commendation; which His Maiefty out of his great wisdom and care to the common wealth hath commanded to be done.<sup>292</sup>

Coke considered for the good of the commonwealth he owed a duty not to keep his reports private but was encouraged to publish and communicate them to all. Thus, the important matter of dissemination by way of publication using the print medium was for the good of the

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<sup>291</sup> 3 Cokes Reports “To the Reader” Folio C2 page unnumbered. *The Book of Entries* to which he refers may well have been his own although it was not printed until 1614. It is in the Preface to the Third Volume of the Reports that Coke repeats the theory advanced by Plowden that authorship of the Year Books rested with four “reporters” appointed by the Crown.

<sup>292</sup> 4 Cokes Reports “To the Reader” Folio B3 pages unnumbered. In this passage Coke is referring to statutory law which had increased in volume since the reign of Henry VIII. It emphasises the general theme of the preface which is about making the law available.

common wealth and was considered a high calling. The public good as a reason for publication was further discussed in the Sixth Volume of the Reports.

I haue (good Reader) brought this fixt worke to a conduction, and published it for thy priuate instruction, for the publike good and quiet of many, and for preuenting of daunger the daughter of Errour.<sup>293</sup>

And the importance of the common law as providing an end to disputes which was for the common good was stated in the Eighth Volume:

the antient & excellent institution of the Comon Law might be recontinued for the good of the commo'wealth (*for it is conuenient for the commonwealth that there be an end to controuersies*).<sup>294</sup>

By the Eighth Volume Coke had refined what he considered his duty to publish Reports:

So ought euery man according to his power, place & capacity to bring somewhat, not onely to the profit and adorning of our deere Countrey (our great Eagles nest) but therein also, as much as such mean intrumts can to expres their inward intention & desire, to honor the peaceable days of his Maiesties happy and blessed gouernment to al posterity. And for that I haue bin called to this place of Iudicature by his Maiesties exceeding grace & fauor, I hold it my duty, hauing obserued many things concerning my profession, to publish amongst other certaine Cafes that haue bin adiudged and resolued since his Maiesties raigne in his highest Courts of ordinary Iustice in this calme and flourishing springtime of his Maiesties iustice, amounting with those of my former edition in al to 84.<sup>295</sup>

The importance of publication was, by the Tenth Volume, becoming associated with some of the higher elements of truth and Justice, for in discussing the nature of the cases appearing in the work he had made them available to with the purpose that *hee which is the foundation of Iustice should not lie hiddeen and vnknowne*.<sup>296</sup>

The concluding words of the Eleventh Volume, the last to be published in his lifetime, aptly summarised Coke's purposes in printing his Reports:

The end of this edition is, that God may be glorified, His Maiestie honoured, the common good encreased, the Learned confirmed, and the Student instructed.<sup>297</sup>

Yet Sir Edward had a "political" side to his philosophy of the law – one that brought him into collision with James I. Coke's career when considered alongside the printing of the various volumes of the Reports reflects his developing political views. Coke was Attorney-General

<sup>293</sup> 6 Cokes Reports "To the Reader" Folio ¶iij pages unnumbered.

<sup>294</sup> 8 Cokes Reports "To the Reader" Folio Aii page unnumbered.

<sup>295</sup> Ibid.

<sup>296</sup> 10 Cokes Reports "To the Reader" pages unnumbered.

<sup>297</sup> 11 Cokes Reports "To the Reader" pages unnumbered. The Twelfth Volume and Thirteenth volumes were printed posthumously in 1656.

when the first four volumes of the Reports were printed.<sup>298</sup> He was appointed Chief Justice of the Court of Common Pleas in 1606 and occupied that position until his appointment as Chief Justice of Kings Bench in 1613. It was during this time that volumes five to nine were printed. Following his appointment to Kings Bench he was prohibited from going on circuit and he was ordered to revise his *Reports* although his views expressed therein had earlier been the subject of a clash with Lord Chancellor Ellesmere.<sup>299</sup> It has been suggested that four “Ps” were responsible for Coke’s fall – “pride, prohibitions, praemunire, and prerogative.”<sup>300</sup> His fall in 1616 was not the end of his troubles. After the adjournment of Parliament (of which he was a member) in December 1621 he was dismissed from the Council and imprisoned in the Tower, his books and papers seized by the King’s agents. He was released in 1622 and the serious charges against him were dropped.<sup>301</sup>

The printing of the first volume of *Institutes* came in 1628 by which time Coke was the Member of Parliament for Buckinghamshire.<sup>302</sup> It was in this Parliament that Coke was involved in the presentation of the Petition of Right but it was also the year that saw the end of Coke’s involvement in public life.<sup>303</sup> The subsequent volumes of the *Institutes* were printed posthumously<sup>304</sup> but such was Coke’s reputation and the level of the Crown’s concern at his challenge to the Stuart view of the position of the Crown vis-à-vis the law that his chambers were sealed and his papers seized upon his death in 1638.

Coke had not been averse to using print to advance his particular views especially of the position of the common law in the constitutional structure.<sup>305</sup> Coke considered knowledge of the common law as essential.<sup>306</sup> He saw the common law as being superior to any other form

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<sup>298</sup> 1600 – 1604.

<sup>299</sup> Boyer above n. 267. See also Stephen D. White *Sir Edward Coke and the Grievances of the Commonwealth* (Manchester University Press, Manchester, 1979) p. 7. See also Louis A. Knafla *Law and Politics in Jacobean England: The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, Cambridge, 1977) p.297 – 318 for the critique of Coke’s *Reports*.

<sup>300</sup> Ibid Boyer citing *The letters of John Chamberlain*, ed. N. E. McClure, 2 vols. (1939) 2.34.

<sup>301</sup> White above n. 299 p. 9. The seizure of his papers in 1621 was repeated again after his death, and the interference with his papers resulted in the confiscation of the Second, Third and Fourth *Institutes* which were not printed until 1644 by order of the Long Parliament. White above n. 299 p. 10.

<sup>302</sup> Coke had been a Member of Parliament whilst he was at the Bar in 1589 and 1593. He returned for four Parliaments in 1621, 1624, 1625 and 1628. Boyer above n.267.

<sup>303</sup> Ibid.

<sup>304</sup> White above n. 299. See also n. 301.

<sup>305</sup> Raffield “Contract, Classicism, and the Common-Weal” see above n.98. See also Alan Cromartie *The Constitutionalist Revolution* (Cambridge University Press, Cambridge, 2006) p. 179 et seq. Cromartie argues that there was a belief that the common law was omniscient – that is that it was capable of finding answers to every social and political question including issues about the church and the monarch. See p. 3.

<sup>306</sup> 2 Cokes Reports.

of law for the benefit of the community. It is clear that the common law was fundamental to good government – the antient & excellent institution of the Comon Law might be recontinued for the good of the commo'wealth (*for it is conuenient for the commo'wealth that there be an end of controuersies*)<sup>307</sup> - and in another preface praised it, comparing it with laws in other jurisdictions where, he claimed, the Judges would rather do injustice **than displease the Kings humour.**<sup>308</sup>

Coke was critical of what he perceived as shortcomings in the legislative process:

**Many times vpon willes intricately absurdly and repugnantly set downe by parsons, scriueners and other such imperites: and often times vpon Actes of Parliament, ouer-laden wyth prouisos, and addicions, and many times on a suddain penned or corrected by men of none or verie little iudgement of law.**<sup>309</sup>

He then proposed the remedy:

**If men would take sound aduice and counsell in making of their conueyances, assurances, instruments and willes: and councellozs would take paines to be rightly and truley informed of the true state of their clyents case, so as their aduice and counsel might be apt & agreeable to their client's estate: and if Acts of Parliament were after the olde fashion penned, and by such onely as perfectly knew what the common law was before the making of any Act of Parliament concerning that matter, as also how farre forth former Statutes had prouided remedie for former mischiefes and defects discovered by experience; then should verie few questions in law arise and the learned should not so often and so much perplexe their heades, to make attonement and peace by construction of law between insensible and disagreeing wordes, sentences and prouisos as they now do.**<sup>310</sup>

The importance of the common law and the way that it should be administered was continued in the Third Volume of the Reports.<sup>311</sup> Coke viewed the significance of Reports as a form of preservation of earlier dicta, so that there would be future consistency of approach. He referred to the vnitie and consent of so many feuerall Iudges and courts and so many successions of ages, and the coherence and concordance of such infinite feueral and diuers cafes<sup>312</sup> He then went on to consider the importance of reasons but on the other hand did not consider giving reasons to be necessary in all cases:

And in troth if Iudges should set downe the reasons and causes of their Iudgments within euery Record, that immense labor should withdraw them from the necessary seruices of the common wealth, and their Records should grow to be like *Elephantini libri* of infinite length and in mine opinion lose somewhat of their present authority and reuerence. .... But mine aduice is that whensoever a man is forced to yeeld a

<sup>307</sup> 8 Cokes Reports "To the Reader" pages unnumbered.

<sup>308</sup> 2 Cokes Reports "To the Learned Reader" pages unnumbered.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid.

<sup>311</sup> 3 Cokes Reports.

<sup>312</sup> Ibid. "To the Reader" Folio Cii pages unnumbered.

reason of his opinion or iudgment, that then he set downe all authorities, presidents, reasons, arguments and inferences whatsoever that may be probably applied to the case in question.<sup>313</sup>

The use of the word “president” is interesting, although within this context it would not be of a binding nature but be an exemplification of a past application of a rule which may or may not be followed. “President” was the sixteenth and seventeenth century manner of spelling “precedent” although the complex meaning that is attributed to that word in twenty-first century common law culture certainly was not present in Coke’s day. “President” as used by Coke refers to the Court record.<sup>314</sup> A meaning that could be attributed to the word in the legal culture of the time was that a “president” provided an example for others to follow.<sup>315</sup> The use of the words “authority” and “reason” carried greater weight in the judicial process.<sup>316</sup> It did not have the binding force that is the essence of a legal precedent today.

Rather, the issue of consistency was enhanced by consensus, and Coke describes a process whereby, in a difficult or obscure case, the Judges may discuss the matter among themselves and with other senior barristers to arrive at a statement of what the law is or should be:

But forasmuch as if a man should spend his whole life in the study of these Lawes, yet he might still adde somewhat to his vnderstanding of them: Therefore the Iudges of the law and matters of difficulty, do vse to conferre with the learned in that art or science, whose resolution is requisite to the true deciding of the case in question.<sup>317</sup>

Coke addressed the issue of consistency at a later stage of the preface in a lengthy passage that also made a call for clarity, which could be achieved by proper law reporting and the wide dissemination of such reports:

First to explaine and expound those Statutes and Actes of Parliament which either haue been enacted since those Reports or were not (no occasion falling out) in reports expounded at all. Secondly, to reconcile doubts in former reports rising either vpon diuersity of opinions or questions moued and left vndecided, for that it cannot be, but in so many Bookes written and so many seueral ages, there must be (as the like all Sciences and Arts both deuine and humane it falleth out) some diuersitie of opinions and many doubts left vnresolved, For which only purposes I haue published the former two, and this last of my Reports, which I trust will be a meane (for so I intended them) to cause the studious to peruse and peruse again with greater diligence, those former excellent and most fruitfull Reports; And in troth these

<sup>313</sup> Ibid. It is to be noted that Coke refers to the “commonwealth” in the governmental sense in this passage.

<sup>314</sup> Coke states “These Records for that they containe great and hidden treasure, are faithfully and safely kept (as they well deserue) in the Kings treasure.” Ibid.

<sup>315</sup> “There is no power in Venice can alter a decree established: twill be recorded for a president.” William Shakespeare *The Merchant of Venice* IV i; *Paston Letters* II. 204 “These preidentes consedred wolde discourage any man to a-bide but a litel amonges hem that so straunged hem self from me.” (1460) John Fitzherbert *A ryght frutefull mater: and hath to name the boke of surueyeng* (Richard Pynson, London, 1523) STC 11005 xi. f. 12, “But y<sup>e</sup> diuersytie of these tenures..can nat be knowen but by the lordes euydence, court rolles, rentayles, and suche other presydenes.”

<sup>316</sup> Coke on Littleton above n. 35 “Preface” pages unnumbered.

<sup>317</sup> 3 Cokes Reports “To the Reader” Folio Ei pages unnumbered.

of mine (if so I may call them, being the Judgments of others) are but in the nature of Commentaries, either for the better apprehending of the true construction of certaine generall Actes of Parliament concerning the whole Realme, in certain principall points neuer expounded before, or for the better vnderstanding of the true sense and reasoning of the Judgments and resolutions formally reported or for resolution of such doubts as therein remain vndecided.<sup>318</sup>

Coke's view of the common law was more bluntly expressed in the first volume of *The Institutes* where he stated: The common law is the best and most common birth-right that the subject hath for the safeguard and defence, not onely of his goods, lands and reuenues, but of his wife and children, his body, fame and life also.<sup>319</sup>

The way in which the common law could be used was developed by Coke in *Coke on Littleton* where he discussed citation, or Littleton's lack of it. Although there was no authoritative doctrine of precedent nor *stare decisis*, there nevertheless was citation of examples used for the guidance of Courts. Issues of certainty were as important to the citizens of the seventeenth century as they are to people today. Coke's comments were as much in praise of Littleton and his clarity and use of reason, so much so that no judge had held against him. Coke used Littleton's approach to describe these two faithful witnesses in matter of Law, Authority and Reason and it is his use of the word "authority" that is critical. The authority, perhaps not of a binding nature but certainly persuasive, of earlier common law cases together with good reasoning, was what gave the common law its strength. Complex and difficult though it may be to order, it provided clear and certain signposts to citizens so they could direct their actions. It was law that had been developed from experience.

The importance of the common law becomes clear in some of Sir Edward's other writings. In *Fourth Institutes* Coke described all the Courts including Star Chamber which although abolished two years before publication, was flourishing at the time of Coke's death. All the Courts of the Realm were to distribute justice which was derived along with the power that the Courts had from their proper roots. The "proper roots", according to Coke, was the common law and the Court of Parliament was the servant and handmaid of the common

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<sup>318</sup>Ibid. page unnumbered. Coke expressed some concern at the way in which Statutes interfered with long-established rules of the Common Law. In the Preface to the Third Volume of his Reports he observes that although some Statutes have changed the common law rule yet in resolution of time, the same (as a most skilful and faithfull supporter of the commonwealth) have been with great applause for avoiding of many inconveniences restored again. His concern is expressed further For any fundamental point of the ancient Common laws and customes of the Realme, it is a Maxime in pollicie, and a triall by experience, that the alteration of any of them is most dangerous; For that which hath bene refined and perfected by all the wisest men in former succession of ages, and prooued approoued by continual experience to be good & profitable for the common wealth, cannot without great hazard and danger to be altered or changed 4 Cokes Reports To the Reader pages unnumbered.

<sup>319</sup> *Coke on Littleton* above n. 35 Preface pages unnumbered.

law.<sup>320</sup> The clear reasoning founded upon law that Coke presents probably explains why the works were not published until well into the Revolution. Throughout “there runs a serene assurance which to royalists must have been more disturbing than the loudest rantings of the House of Commons.”<sup>321</sup>

There can be no doubt that Coke was a highly respected and influential commentator on the law. His background, reputation, scholarship, learning and experience all meant that he was held in the highest regard and his contribution to the law and our understanding of it is immeasurable. It is suggested that his wide influence and impact upon the law, and the reason why it was that the Royal authorities feared, for example, the publication the *Second Institutes*, which in fact was posthumously printed in 1642, is the way in which Coke used the printing press. It may be argued that his statements made in his prefaces demonstrate a reluctance for publication and that may well have been the position in the early years. However, it is quite clear as the political climate changed, Coke saw continued assaults upon his beloved common law. That, however, was not the only motivating factor behind his extensive writings on legal matters.

From what he says about the relationship between the law and the subject, Coke saw himself as one who could use his knowledge, learning and reputation to disseminate an understanding of the law and enhance its place in the minds of the subjects of the realm. The law for Coke was not only a sword that could be used aggressively but a shield and defence. His whole approach to the common law, rightly or wrongly, rested upon these foundations. Coke may have started as a reluctant publicist, although my own view is that his protestations of modesty were typical of the time and are overstated, but there can be no doubt that as he observed the interest generated in his reports and, during his lifetime, the work of Ashe in indexing and cross-referencing them, that he saw and understood the power of publication in print and understood, perhaps in same way that Thomas Cromwell did, the political power of the printed word.

Here he had the perfect medium for disseminating his views on the law. The printing press would enable his message to be carried to all parts of the kingdom and to everyone who may

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<sup>320</sup> In such a case Star Chamber would not qualify because it was a prerogative Court and not a Court of Common Law.

<sup>321</sup> Bowen above n. 216 p. 521.

be interested. The protestations of pressure from friends began to diminish as more and more volumes of the Reports were published, and were entirely absent by the time of publication of the Institutes. Indeed, given the enthusiasm with which Coke approaches his task and the references that he makes to the printing of Littleton's *Tenures*, it can be concluded that he is sharply aware of the importance of putting his work in print. It is with Sir Edward Coke that we see the first planned utilisation of the printing press to propagate the law. And it is also clear that Coke recognised the qualities of the new medium that enhanced the communication of his message:

- \* Wide dissemination, identical copies indexed and paginated so that reference could be readily made; and
- \* Stability of content over which he had control and which would not be circulated within a limited coterie and suffer the effects of manuscript textual drift arising from copying, but which would be available to all who had the shillings to buy the works and the ability to read them, coupled with works like those of Ashe, based upon the identical nature of printed texts and the stability of content, which further enhanced the utility of the works.

Sir Edward Coke would have been an influential figure upon the law in any event. As an advocate and a Judge, notwithstanding the circumstances of his dismissal, his position in history was assured. However, it was the way that he published his material and the way that he used the printing press that enhanced his standing and that had a continuing influential impact upon English law until the time of Blackstone.

### **Printing the Law in the Early Seventeenth Century – Concluding Observations**

The following general observations, in addition to those already stated in the discussion on themes, may be made about the printing of legal texts over the first part of the seventeenth century.

There was a recognition that an understanding of the law by the wider populace had societal or community benefits, these being exemplified by the political and social concepts of the “common weal.” The availability of law books in print in standard form and widely disseminated assisted in bringing the law to the wider community. In this way the power of

the law as the means by which the State ordered society for its own good and its understanding of the elements of that power could be communicated.

The thread and theme that ignorance of the law is no excuse, first stated in print by Henry VII, continued with equal strength and intensity into the Stuart period. In addition the law as something that was for the benefit of the subject occupies the other element of the common wealth. Regardless of whether or not the suggestion that the common law was the subject's shield against tyranny is valid, there is a very clear subtext to the social concept of the law as an element of the common wealth: that although the law may emanate from the King, it was for the people who had a stake in it, together with a sense of proprietorship. The importance of putting the law in print is further emphasised by the office of the Royal Printer, present not only in England but also in Scotland, and underscores the recognition of the beneficial qualities of the communications technology

Coupled with this there was a continued recognition of the importance of making the law available in English as well as using Latin or law-French.<sup>322</sup> It is suggested that the remarks by Sir John Davies cannot be interpreted as a desire to maintain the hermetic nature of the law, kept secret behind a legal language that was not widely understood. Although Davies suggests law-French is easily learned the theme that is present in his remarks along with those of other writers such as Noye is in the nature of a caution or caveat and was directed towards the importance of precision of meaning expressed in "legal language." Thus it is contended that these statements of caution or caveat were not made to act as a brake on the "Englishing" of the law that had begun with Rastell and the Henrician Tudor humanists. In his early Reports Coke would have agreed with Noye and Davies, but later he became a supporter of "Englishing". There were a number of reasons for this attitude. First, although the primary audience for Coke's works may have been the lawyers, as time went on he contemplated a wider audience, unacquainted with the "terms of art" of the law. Secondly, the printing of law worked no inconvenience, but rather profit especially because ignorance of the law was no excuse. Thirdly, it was of advantage that knowledge of the law enabled people to better order their lives. Fourthly, knowledge of the law enabled a proper defence of "heritage and possession" and finally so that good governance might be provided.<sup>323</sup>

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<sup>322</sup> See especially Coke, Ashe, Finch and Malynes.

<sup>323</sup> These reasons were stated in the preface to Coke on Littleton above n. 35 folio A pages unnumbered, although he maintained the law French in which Littleton had originally been written.

The focus for “Englishing” the law in the seventeenth century had shifted. Many of the humanist motivations such as education and societal benefit in having the law available in the vernacular were still present – certainly the educative element both for law students and the wider community is clear from the prefaces and the societal benefit has been encapsulated in the concept of the “Common wealth” but the elements of the “Common wealth” go beyond some of the broader Tudor humanist ideals and suggest, therefore, a shift in focus.

There was a further shift in societal focus that may be understood within the broader context of making essential information available to the wider community. The most obvious example is that of religious information. The Bible provided the essential Word of God for a community whose relationship with God was real in more than just the spiritual sense. The Reformation and the subsequent acceptance of vernacular Bibles<sup>324</sup> gave rise to an expectation that information essential to the living of a “goodly” life should be available. There was a very strong understanding of the relationship between God’s Law and that of man. Thus there was an expectation that the Law should be available in a comprehensible form. To do otherwise would be a lawyer’s equivalent of the Protestant view of the Papists who locked up the Word of God in Latin. In the same way that the printed vernacularised Bible allowed an interpretation of the Word beyond the exclusivity of the Church, so printed statutory material, was available for scrutiny and the development of principles to ascertain their meaning and interpretation.

There was a recognition that printed manuals such as Dalton’s works for Justices and Sheriffs would help to standardise practice in the local courts of the country with consequent benefits for both the administration and the community. Although these works emanated from private sources they reflect another aspect of the political concept of the “Common-wealth” and operated on several different levels. The first and most obvious level is that manuals dealing with local administration would assist in providing guidance for local officials.<sup>325</sup>

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<sup>324</sup> There had been moves for vernacular Bibles before the Reformation – Wyclif and the Lollards provide an example – but it was the rise of Protestantism that drove the vernacularisation of religious information.

<sup>325</sup> Dalton makes his motivations clear in the preface to *The Country Justice*. Although he debated about whether he would publish his notes or not, he received encouragement from Sir Henry Montague, Chief Justice of the Pleas as well as comments made by the King at a speech in Star Chamber in which he prized and valued the Justices, and Dalton’s concerns arose from what he saw as neglect and possible corruption on the part of Justices. Thus publication, albeit from a private source, could assist the boarder interests of the Crown and the “common wealth”.

The second level is that practice in local courts could potentially be standardised. The goal of standardisation was not going to be achieved overnight but the best practices suggested in the various administrative manuals provided a starting point on the process, the ultimate goal being a consistent treatment of process, litigants and outcomes across the country. A further benefit arising from this was that although standard practice would not necessarily eliminate the arbitrary or capricious abuse of power by local officials, it would provide a measure which would make such abuses more obvious and detectable.

The third level arises from the second and that involves the centralisation of power that began with the Tudors and in the pursuit of which a number of mechanisms were utilised, among them the printing press. A standardised administrative system allowed for more effective central monitoring and control, in that a central decree could make alterations to standard practice which would then be applicable across the country.

There was a recognition that the common law was overly complex and difficult to understand. If there were to be the benefits to the “Common wealth” in making the law available, it had to be made available in a form that was comprehensible. Simply making reports of cases available in the manner of the Year Books would provide little assistance and the introduction of written pleadings rendered the Year Books of limited assistance even to lawyers. New methods needed to be devised to report the law and to present legal information. The first challenge was met by innovative early Reporters such as Plowden and Coke.

The development of the legal text or treatise was another means by which information, generally upon specific subjects or topics, could be presented. This in turn had an impact upon how the law was viewed. The amorphous and complex mass of the common law was examined for certain themes which could be isolated and then be the subject of a discrete text.

In addition there was a recognition that the mass of the common law required some form of “ordering” or “method” and in some respects the development of texts on specific subject was a first step towards achieving this. Furthermore, ordering was necessary if the interested lay citizen was to achieve an understanding of the law.

The effect that the qualities of print presented - dissemination, fixity and standardisation although identified by those terms by Eisenstein - were recognised and understood by the law authors and compilers as well as by the agencies of the State. If there was a common goal in making the law more easily accessible by means of print it was the proper and peaceful ordering of society from the perspective of the way in which the individual ought to behave and from the perspective of those who were administering the law. Printed law was beneficial and it was beneficial because of print's unique qualities that were not possessed by manuscript, especially in the areas of volume and distribution. Manuscript could not hope to compete with the wide distribution that print allowed and although there may have been some quality control problems and concerns about unauthorised works – issues that bedevilled manuscript publication as well – authors and those interested in the communication of the law could be sure that if the copy was a good one, a standard message would be sent by the printed work.

The immersive educational processes of the Inns may have been ideal for one who wished to become part of the legal culture and ultimately practice law, but could not be the only way by which legal information of varying levels of sophistication could be made available. Thus a new approach to making legal information available was required. Treatises were not new, but treatises on specific topics, such as forest laws or married women, were novel.

There was a recognition that there was also a large student audience. Most of the authors published over the period make some reference, either directly or obliquely, to the benefit that may accrue to students and Coke certainly was one of these. Indeed it was Coke who recommended reading habits to students and certainly we know that private study formed a large part of the immersive training process undertaken in the Inns of Court. Elsewhere I have referred to the debate about whether there was a decline in the Readings and learning exercises offered by the Inns. It is my contention that the printing of law texts of all sorts suggests that these very books offered a meaningful supplement to an educational system that was beginning to suffer from the strain of increased numbers of students as well as more professional demands on those who would, in earlier times, supervise Readings and the other exercises offered by the Inns. The failure to print Readings also meant that although this valuable source of legal information was available in manuscript it suffered from the lack of a wide dissemination and preservation afforded by print. In addition the growth of the so-

called “lower branch” of attorneys and solicitors, who did not undergo the Inn-based training to the extent that barristers did, if they did at all, meant that there was an additional market for law books.

The rise of the printing press was not determinative of these changes in legal education, but was available and filled a need as the Inns struggled to meet the demands of an increasing number of students, a more complex socio-legal environment, the increase in Parliamentary activity, and demands on the time of the volunteers upon whom the educational system depended. The press was available and printers, authors and publishers quickly recognised that there was a developing need which could be filled by the new technology. It would be within a few years that the learning exercises and the educational system of the Inns would be gone, and the student would only have books to provide the information essential for his studies. Although this could not be foreseen in 1640, the structure and the processes were in place.

But although many of the works of this period had an educational quality, writers like Coke saw education as not merely a matter for law students but for the wider community. The primary audience may have been law students but that audience soon widened, especially for Coke. Law was a matter which affected everyone and as a part of the developing conflict between King and Parliament there was a debate as to the supremacy of the law, especially the common law. Coke swiftly saw the advantages of print for the propagation of his particular stance about the supremacy of the common law. There were clear advantages available in print that enabled Coke to achieve the several educative goals that he wished to achieve both for students and for the wider community. Once again the volume of copy and the associated ability to effect a wide distribution within a short time showed the advantage of the new communications technology in getting an idea into the marketplace. In some respects Coke’s approach to printing his oeuvre enhanced and emphasised some of the more general themes that arose from treatise printing.

Yet Coke’s works, although perhaps the most significant *corpus* of legal work over the early seventeenth century, cannot be viewed as the sole determinant of the impact of print upon legal thought and attitudes. The diversity of law texts and the way in which their publication in print increased over the late sixteenth and early seventeenth centuries reinforces the propositions that not only that there was a market for such texts, but that printed texts were

viewed as an innovative means by which such information could be made available. Furthermore, despite the occasional concerns about “credit”, print was seen as an “authoritative” medium for the dissemination of legal principles. Although there was still a co-existence of print and manuscript, the increasing resort to print suggests that the distributive and standard qualities of print were seen as superior to the limited or coterie based manuscript culture. The advantages of print as a means of disseminating legal information and as a part of a wider desire to simplify the law and make it available were becoming apparent.

## Chapter 8 - Conclusion

### Introduction

The printing press brought a paradigm shift in communications technology. The elements of the printing press identified by Eisenstein and which were not possessed by manuscripts, provided a means by which those using printed material could approach information and the communication thereof in an entirely different way. The importance of this for lawyers was significant, in that the law deals only in information in various forms, and the process and practice of law depends entirely upon its communication. One of the principles that we take for granted is that there should be no secret laws. The other side of that proposition is that for a law to be effective, it must be communicated. The printing press brought a new dimension to the way in which the law was communicated, be it by way of proclamation, statute or in a compilation by an author such as Ferdinando Pulton.

Early modern English lawyers were a literate elite that came to their profession in a number of ways. The Inns of Court and Chancery provided an immersive, experiential aural/oral training for barristers and also for the gentry who needed an understanding of the law for their administrative roles as Justices or local officials. Some attorneys and solicitors – members of the “lower branch” – may have benefited from some time at a Chancery Inn, although much of their training was “on the job” as a clerk to a practitioner. But in addition to the experiential training that was provided, lawyers used books and manuscript texts in the early part of the period under study, and printed texts as they became available. The increasing number of titles printed and the topics with which they dealt provided trainee lawyers with alternative texts to those available in manuscript and new and different resources to those that had been available to the preprint lawyer.

From the manuscript year books, notebooks and the few texts available in the late 15<sup>th</sup> century, a substantial *oeuvre* of printed law texts had become available in print by the 1640s. These texts expanded the scope of materials available to trainee lawyers and administrators and provided a supplement or addition to the more formalised and traditional exercises that comprised elements of the training offered by the Inns.

Such training, which took place over many years, provided not only an understanding of the mechanics of law and pleading but another element of experiential long term training – a deep knowledge or understanding of the discipline termed *nos erudition*. Such learning could not be obtained just from books or texts. Thus books – in print or in manuscript – provided one of the resources required for legal training but not exclusively so. But by the end of our period one thing was certain: print had enabled a larger number and a wider variety of texts dealing with all manner of aspects of law than had been available or could be available in manuscript. From a very tentative beginning law printing had become a recognised speciality of the printing trade, so much so that the greater proportion of the law books printed rested in the hands of either the Royal Printer or the holder of the common law patent.

### **Eisenstein’s Theory – A Validation?**

In some respects this could be said to provide at least the beginning of the validation of Eisenstein’s theory of the printing press as an agent of change in the intellectual activity of literate elites. The qualities of dissemination, standardisation, fixity of text, data collection and verification are all aspects of the new technology that were available to the users of printed materials – be they students, lawyers, judges, administrators, authors or the State and its officials. The temptation is immediately to conclude that this agency was at work but to do so almost suggests either that change was inevitable because of print or that print was determinative of any change that took place.

This thesis suggests otherwise, and that the printing press and its product should be viewed within a wider context. One of the principal aspects of that context was the way in which printing and the product of the press was regulated and managed in our period. The business of law printing itself, the factors that encouraged the development of law printing as part of the wider agenda of humanism and making the law available in the vernacular had an important part to play and influenced the way and the types of law books that were printed. The lawyers themselves played no small part in the development of legal printing and not just as consumers of but also as contributors to the output of the press. In addition to that there were cultural practices of the lawyers and the way in which they were educated and dealt with information within their own community or “coterie” that provided a resistance to new technology. An examination of the texts themselves, especially the range of the titles that were printed in the period dominated by Pynson and Tottel in the sixteenth century, and in

the wider scope and diversity of titles printed in the first part of the seventeenth century demonstrates some of the underlying drivers or factors that encouraged or limited change.

I offer the following possible conclusions that may be drawn from these various elements within the context of the evidence that this thesis has discussed and that test and impact upon Eisenstein's theory of the printing press as an agent of change within an intellectual elite.<sup>1</sup>

### **Regulatory Structures**

The way in which the printing trade was carried out was subject to continual regulation by the State and by the Stationers Company. Although censorship seems to be the predominant focus of much of the historiography of the early printing press, the evidence suggests statutes, litigation, the appointment of a specialist State printer and the grant of monopolistic patents was directed more towards industry regulation and control than towards content control. In addition, and working closely with the State, was the Stationers Company whose predominant goal was the protection of its members and their interests.

I suggest that the regulatory structures that were in place during this period have been underrated in their significance and that they played an important role in the way in which printing, and especially law printing, developed. These regulatory influences were constantly present during the period under study, from Richard III's first exemption of printers from restrictions on foreign participation in English commercial activity to the 1637 Star Chamber Decrees which purported to regulate almost every aspect of the business of the printers.

The evidence suggests that initially there was State encouragement of the printing trade by way of exempting those in the book trade from residency or citizenship requirements, although, as the trade grew, these requirements were re-imposed. At the same time the State was well aware of the benefits to be obtained from the new technology with the earlier appointment by Henry VII of the King's Stationer, who later became the Royal Printer. The appointee was guaranteed a steady work flow of printing for the authorities. By the same token the authorities could ensure that their printing requirements would receive swift attention. The Royal Printer was important and as legislative activity increased his role

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<sup>1</sup> Although it should be acknowledged that Eisenstein was approaching the matter from a European perspective which would make it difficult to generalise about the impact of regulation except, possibly, of the Papal Index of prohibited books.

became even more significant because he had the exclusive right to print statutes and proclamations and his role should not be underestimated in the history of law printing. This use of the new technology by the State enabled not only the promulgation of law so essential to its authority but the use of the technology to advance the “official line”. The use of print by the authorities became important in the advancement and propagandising of the legislation of the Henrician Reformation. The use of preambles – an important aspect of a statute as the principles of statutory interpretation developed – provided, in some cases, the propaganda statement as well as an explanation of purpose. The identification of a mischief was as much a descriptive statement of an unacceptable situation that required the remedy as an introduction to the remedy itself.

The printing press was a contributor to the Henrician Reformation in that the technology was present, available, and it was used. It may well be that its initial use encouraged its further use, but its significance lay in the fact that it made information widely available in larger quantities than might have been the case with manuscript. This meant that the Royal message, be it by legislation or proclamation, had not only an aural audience – who heard promulgation at the assizes or in the market – but a literate audience who could read and, as a result, more closely analyse the text of the statute. In this respect the volume and availability of printed material may have had a more than coincidental connection with the development of hermeneutics which I shall discuss more fully below.

Apart from the Royal Printer there were other regulatory steps that had an influence on the development of printing and in particular legal printing. Some of the regulatory activity took place within the trade itself by means of a Stationer’s Guild and, after 1557, the Stationers Company. The influence of the Guild and the Company was twofold – it regulated the actions of its members and granted licences to members for the exclusive printing of works, and it acted as an interface between the trade and external influences. It had at heart the interests of its members by ensuring work distribution and by using its influence and connections to further the wider interests of the trade in general. The evidence demonstrates an on-going relationship between the State primarily between the Privy Council and the Stationers which resulted in two sets of decrees from Star Chamber. It must be emphasised that these decrees arose within the context of litigation which identified “disorders” in the trade arising in many cases as a result of disputes about the scope of printing patents. The outcome was designed to put an end to the difficulties and provide for the better operation of

the industry, although the patents remained. In addition there were elements of content control imposed as part of an on-going interest in the State to control sedition and heresy. What had started as concerns by the Church about heresy had become the interest of the State as religious doctrine and State policy merged. Yet as has been demonstrated, those who transgressed content control measures found the fruits of publication were used as evidence of more serious crimes.

Although the Stationers had their own processes for determining who could print what – and up until 1553 that included common law texts – the most influential form of regulatory activity as far as law printing was concerned was the common law patent. This became an important regulatory device, putting the responsibility for common law printing in the hands of a monopoly printer, mirroring the exclusive rights of the Royal Printer to print statutes and proclamations. The grant of the patent to Tottel seems to have been at the behest of lawyers and judges but it is difficult to see clearly from the evidence why this should have transpired. Early competitiveness and wrangling in the early printing business may provide one explanation. Competition and the quest for quality and reliability could only be desirable if it meant that better law texts were being printed. Competition may not have achieved that end. Tottel, after the grant of the monopoly, was critical of earlier legal printing efforts although this is not to say that all of them were bad or unreliable. The ground breaking work by Rastell and Fitzherbert and the moves by Redman to print the law in English were indicative of humanistic influences and provided some sign posts for possible law printing futures. However, a concern for quality may have motivated the desire for the appointment of a single common law printer, although it must be conceded that, as at the grant of the patent, Tottel had a *de facto* monopoly anyway – the “last man standing” after other printers had died or chosen to print other material. Certainly the profits from legal printing were not immediate and Tottel was not an innovator. That was left to others as the business of law printing progressed into the seventeenth century.

The 1637 Star Chamber Decrees came to grips with the underlying qualities of print and were the first serious attempt to impose a comprehensive regulatory structure across the industry.<sup>2</sup> Combining both content control and a level of industry control that even addressed the manufacture of type, these Decrees addressed problems that were identified not so much by

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<sup>2</sup> In terms of their scope and potential impact the 1637 Decrees were more wide reaching than the Decrees of 1586.

the Crown but by the Stationers themselves. Their objective was to protect the established interests of the Company and its members. More than any other single regulatory action the 1637 Decrees attempted to place boundaries on how the technology could be used and who could use it. Like all the other regulatory steps and structures that had been put in place the effect was to moderate the qualities of print and the impact of regulatory structures would provide a foundation context for the way in which the law printers carried out their business and the type of texts that may be printed. At the same time, a structure such as the common law patent contained limitations which were recognised in the seventeenth century, and law books about legal matters that fell outside the patent began to be published.

### **The Business of Law Printing**

The business of law printing is a story about a developing trade and a growing market within the regulatory context which I have discussed. Lawyers, as an intellectual group involved in the imparting and sharing of information, saw the advantages over manuscript of the volume, speed of production and availability of information that the printing press enabled. Texts well known to lawyers comprised the early output of the printing press. It is no accident that Littleton's *Tenures*, already well known in manuscript, should be the first law book printed in England. Printed law books offered advantages and opportunities for students to engage with a text without the necessity for prior transcription, although the scribal culture and the learning practices of lawyers meant that there were few inhibitions about transcribing one's own copy of a printed text.

In addition the titles that were printed and that became available over the period indicate an audience wider than just the lawyers for printed law texts. The education offered by the Inns of Court and Chancery contributed to this. This "Third University" provided a training ground not only for lawyers but for courtiers, those who looked to a career in the administrative framework of the various Courts and the State, and those who were to act in a judicial role in the various courts in the shires and counties. The Inns of Chancery provided a stepping stone for those who wished to progress to one of the Great Inns and train as a barrister, or offered an education for those who wished to work in the "lower branch" as a solicitor or attorney. And for those of the lower branch who did not attend an Inn, printed books provided some of the information necessary to supplement the experiential training that they may have received as a clerk to a practitioner. Thus for these audiences and within

the developing framework of regulatory structures, the business of law printing developed. Thus printed texts provided new or alternative opportunities for the acquisition of legal information for those within and without the Inns.

The business of law printing over the sixteenth and early seventeenth centuries falls into three distinct phases. These phases arise as a result of the pattern of regulatory activity of printing that had begun to develop. The first phase was dominated by Pynson, who held the office of Royal Printer, Rastell and Redman although there were other law printers such as de Machlinia, Powell and Myddleton. This phase was characterised initially by a slow development but gradually the number of titles printed increased, although the law printing business was not without risk. Tottel was virtually the only printer publishing law books and his grant of the common law patent and the forty or so years that he dominated law printing marks the second phase. The law printing undertaken by Tottel was careful and conservative and set the direction for the genre during this time, although new forms of law text, such as “name” reports were printed. The third phase is the period following Tottel which saw the common law patent move between printers until it became part of the English Stock and was held by the Stationers Company. This phase saw the printing of a number of new texts that went beyond the scope of the common law patent and dealt with discrete areas of the law. Perhaps the most significant aspect of law printing in the third phase was the printing of the *oeuvre* of Sir Edward Coke.

Regulatory activity during the first phase was of a protectionist nature, providing initially for exemptions for foreign printers and then, as more Englishmen came to the trade, the removal of those exemptions. During this period and indeed throughout the whole time frame under study the Royal Printer was active in printing legislative and proclamatory material. There were incidents of content regulation, which were directed mainly towards heretical texts, but these had little direct effect upon law printing. Indirectly they did because, as has been demonstrated, law printing was one aspect of a printer’s business and it was important not to attract the unwelcome attraction of the authorities for questionable printing which could impact upon one’s business overall. The most direct element of regulation that impacted upon the printing was Henry VIII’s proclamation of 1538 although it addressed content rather than industry control.

The second phase of the business of law printing which followed the grant of the common law patent to Tottel in the closing months of the reign of Edward VI and its confirmation by Mary also saw the incorporation of the Stationers Company in 1557. Both these regulatory mechanisms were to have an effect upon the business of printing generally and law printing especially. The Stationers Company was granted, as a result of incorporation, extensive powers to manage the industry itself and thereby set the direction of the trade. It is therefore an irony that the combination of regulatory structures such as monopolistic patents and the licensing practices of the Stationers gave rise to “disorders” within the trade that led to litigation resulting in the Star Chamber Decrees of 1586.

This demonstrates that the business of printing should not be viewed in isolation. The intermeshing of the various regulatory structures influenced law printing indirectly (in the form of the various enactments in the early part of the period, along with the controls that later were imposed by the Stationers) and directly by means of the appointment of the Royal Printer (an early innovation) and the grant of the common law patent. The Royal Printer did not control the material that he was directed to print, but the common law patent holder could do so, effectively being able to select which texts of the common law *oeuvre* he was going to print. Of course the holder of the patent would be responsive to the market, and the evidence suggests that there were interest groups of lawyers and judges who probably had some influence and advised the type of texts that should be printed. As we shall see, however, the continued co-existence of the manuscript culture meant that those works which were not printed, whilst being absent from the printed selection available, were still available in manuscript and often had been available in that form before being printed. But it is safe to say that the grant of the common law patent reflected a wider strategy of monopolistic grants by the Crown that characterised the printing trade in general and had a moderating effect upon the way in which the development of print took place.

### **Other Influences on Law Printing**

Regulatory structures were not the only influence upon the business of law printing and there were other factors that impacted upon the use of printed law texts. The humanists saw the printing press in general and law printing in particular as fulfilling wider societal objectives. The law was seen as essential to a properly and orderly functioning of society. Knowledge of the law, earlier achieved by promulgation and proclamation, and education in it was seen as

necessary for the diligent citizen. The underlying multi-faceted and nuanced concept of the “common weale” demanded legal information be made available and in a form that was understandable. Law in the vernacular and in print was seen as a means of achieving these ends. Print presented an opportunity to challenge the perceived disadvantages presented by ignorance of the law in the overall humanist scheme of things and as part of the “common weale.” Print also enabled what was seen as the sovereign’s duty to promulgate the law – a duty that had theoretical implications for the validity of law. Thus, as has been observed, the regulatory structure surrounding the monopolistic grant of the appointment of the Royal Printer becomes significant, for the holder of that office was essential in printing and thereby communicating or promulgating the “Royal Message” by printed proclamations or statutes.

### **Cultural Frictions and Coteries**

One could conclude from these influences and the steady development of print that it would have become the principal if not only written source of legal information for those interested in law, but it was not to be. As we have seen, manuscript resources co-existed with those in print. There were a number of factors that influenced these resources as competition for those in print.

The tentative development of legal printing and the slow production of law texts between 1481 and the second decade of the 16<sup>th</sup> century together with a total abeyance of law printing for a period in the 15<sup>th</sup> century inevitably meant that manuscript resources would predominate in this early time. Although printing continued to develop and “preserved” in print the information contained in the Year Books, especially after their demise in the 1530s, lawyers continued to develop and use their own manuscript resources. A number of reasons may be advanced:

1. The lawyers were a small but growing group. Of that group the barristers and students at the great Inns formed a smaller sub group. Although printed law texts interested them and they were a market for them, the size of that market restricted the commercial viability of the printing of specialist law texts.
2. Therefore specialist and often personal materials were produced and circulated in manuscript form – works that had a specific focus for lawyers but would not appeal to the wider audiences for law text. An example may be seen in

Egerton's *Discourse*, a text of some importance for lawyers who were coming in contact with the increased volume of statutes and who were required to use them for the benefit of clients. There is a certain irony that one of the principal manuscript texts on statutory interpretation should have become necessary because statutes were widely available in print, but even more ironic is the fact that the *Discourse* did not see print during our period. I suggest that it was a specialist text for a limited audience, probably not authorised for print by Egerton and therefore remained in manuscript. A similar work that was available in manuscript and belatedly printed was Hudson's *Treatise on Star Chamber* which was itself critical of those authors who put themselves into print.

3. Lawyers themselves had their own cultural practices that encouraged the continued use of manuscript, and that were possible within the small community or coterie that constituted especially the barristers.

- (a) It is difficult to say whether the lawyers were disdainful of print but the early works of Coke and the apologia of Plowden suggest that there may have been a reluctance or a hesitation in seeing their works in print. The attitude to print was one of disdain on the part of other literate elites and although there may have been some contact between them and lawyers in the Inns there is no available evidence to suggest that one influenced the other. Other evidence of hesitancy may be found in the way in which some reports found print. Posthumous publications suggest that works available in manuscript were printed at the behest of executors or beneficiaries no doubt for a number of purposes. It may also be concluded from Coke's account of *Shelley's Case* that such works may have been well known in manuscript form before they were finally printed. Thus print was not an inevitable destination for the author of a law text and indeed the number of manuscript texts or reports suggests that lawyers and Judges continued to use their own notebooks.<sup>3</sup>

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<sup>3</sup> See for example the notebooks of Sir John Port, Dyer's Reports and Caryll's Reports.

(b) There were other cultural norms that seem to have been present and could be said to have accounted for the use of manuscript works:

(i) The law reporting efforts of Paynell and his associates seems to suggest that copies of the reports were possibly provided by the *pecia* system employed by the *scriptoria* – the manner of coverage of the Courts would seem to suggest this. Thus there may have been a commercial means of providing copies and certainly even by the end of our period print had not driven scriptoria out of business.

(ii) The lawyers were well used to transcribing texts from manuscript in an age where copyright could not exist because copying was the only way of manuscript preservation and circulation. An entitlement to publish was only present in the patent or licensing systems that regulated print, whereas transcription by hand as a means of retaining a text was a given. Lawyers would have little hesitation in obtaining and transcribing a manuscript text if they desired it for their own use.

(iii) As an aspect of (ii) above the Inns of Court, where gatherings or coteries within which information sharing and the immersive education system took place, lent themselves to a sharing of texts as a part of the lawyers' culture. Thus manuscript law texts would be shared among groups and it would not be beyond the bounds of possibility that printed texts or part of them were transcribed or found their way into a barrister's common place book.

4. Lawyers continued to use manuscript resources as well as printed texts. Although citation of "authority" had not become a practice, the admonition

of Fitzherbert J in 1536<sup>4</sup> and the comments in *Sir Edward Dimmockes Case*<sup>5</sup> suggest the use of various resources as a record of cases.

I have described the print/manuscript co-existence as a comfortable one and it could be said that it was typical of a transition period where one form of information technology gradually subsumes another. What is of interest is perhaps not that the co-existence took place, for that is implicit in transition, but that it continued for so long.<sup>6</sup> What is significant is that the “authority” of and reliance upon these texts co-existed as well.

### **Law Texts and Law Printing – the Sixteenth Century**

As has been noted, sixteenth century law printing developed tentatively and slowly, gradually gathering pace until the grant of the common law patent. The early titles printed were what one may expect – “safe” texts that were well-known in manuscript although a few innovative texts such as Perkins’ *The Profitable Book* indicated a trend that would increase later with the publication of guidebooks for those who were involved in aspects of legal practice, study and administration.

It was not unexpected that the Year Books would be printed given that they were staple pleading guides for students. The careful and conservative Tottel continued to print the Year Books even although their manuscript circulation had ceased. However, there was an unfilled gap in the availability of new law reports until the printing of texts that relied upon a respected name such as Plowden or Dyer to enhance market attractiveness. It is possibly of note that some of the “name” reports that were printed were done so posthumously and from existing manuscript resources, perhaps demonstrating the comfortable co-existence of print and manuscript.

Sixteenth century law printing established the medium as an alternative to lawyers’ manuscript resources but did not drive out the latter. Although the *oeuvre* of the Readings did not see print for reasons that have been discussed, other texts, based upon manuscript

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<sup>4</sup> Year Books 27 Hen 8 23.

<sup>5</sup> Cited in Ian Williams “‘He Creditted More the Printed Book’: Common Lawyers’ Receptivity to Print c. 1550 – 1640 (2010) *Law and History Review* 39 at p.49.

<sup>6</sup> And continues to do so. Law students transcribe their lecture notes, although pen and paper are seen alongside equal numbers of laptop computers in lecture rooms of the twenty-first century.

practices such as common placing, in the form of abridgements and digests of statutes, were becoming available.

The history of sixteenth century law printing demonstrates that the printing of innovative works came towards the end of the century. What sixteenth century law printing did was to make standard texts available and in a quantity that was not seen in the manuscript period. The printing was clearly for the market and there can be little doubt that Tottel's patrons and supporters may have recommended the texts to be printed. At the same time law printing had become valuable and securing the monopoly of the common law patent became a contest between printers until it was taken over by the Stationers. Sixteenth century law printing, primarily as a result of Tottel's work, had become a valuable business and a contest for quality and authority and although there was a substantial quantity of legal information that was not available in print, the printing press had made alternative resources available to lawyers, students and administrators.

### **The Transition to Seventeenth Century Law Printing**

The expansion of titles printed at the end of the sixteenth and into the seventeenth centuries, some of which were printed by the holder of the common law patent (held for most of the seventeenth century period by the Stationers Company) and by other printers, demonstrates a slightly more innovative approach to the titles and subject matter printed, indicative too of the wider audience of students, members of the "lower branch", administrators and local officials. If those audiences were slightly more limited than those anticipated by the humanists it probably demonstrates a sharper focus for law printing that was taking place. Even the issue of "Englishing" was being challenged, not directly against the humanist precept of access to legal information but on concerns for the absence of "deep meaning" or *nos erudition* that printed legal information could not capture. This was a lawyer's concern for meaning and may be reflective of the quest for meaning that texts were seen to enable and at the same time emphasised what law texts could not do.

The spread of titles beyond the scope of the holder of the common law patent also demonstrates the limitations of that form of monopolistic regulation. The grant of the common law patent had been made at a time when the titles were standard and did not encompass a wide range of innovative texts about legal subjects.

Thus issues of regulation in its various forms can be seen to have had flow on effects within the law printing trade. The evidence demonstrates in fact that most of the regulation was not primarily content based but was industry or technology based. Issues of censorship, whilst of concern to the authorities and of that there is no doubt, seem to have taken second place to the overall interest of the trade and interestingly enough some of the most important and significant regulatory measures came at the behest of the trade itself. Proposals such as Lambarde's legislative measures seemed to gain little traction and there is no evidence that the Stationers supported such moves which may well offer an explanation why Lambarde's proposals for legislation were not advanced.

### **The Role of the Lawyers**

We have seen how lawyers themselves played a role in influencing law printing from "behind the scenes". But lawyers also used print themselves by providing content. Their objectives may have been varied. Dalton had the objective of encouraging proper practices. Pulton sought to put some coherence or a thematic approach to the law by gathering together statutory material. Fulbecke wished to provide guidance to students. Plowden wanted to protect his reputation and control the way in which his work appeared in the new medium. Ashe provided abridgements and guides to Plowden and as a form of devotion to the works of Sir Edward Coke. From his statements and prefaces Coke's early aims seemed to echo the humanists and their focus upon the "common weale". But as more and more of Sir Edward's *oeuvre* saw print there was a focus on the preservative and distributive powers of print to ensure the survival of the "Coke approach" to the common law and particularly the theory that the common law was superior in authority to any other source of law. It would be difficult to support the proposition that Sir Edward "propagandised" this view of the common law, but there can be no doubt that he used print to make his views known. Certainly the preservative powers of print ensured his reputation as England's leading jurist at least until the time of Blackstone. The works of Ashe in providing abridgements for Plowden and Coke and also Fulbecke's "recommended reading list" in *The Direction* demonstrate the way in which law readers and students were inevitably directed to works in the new medium rather than to manuscript and the manner in which later printed law texts cross referenced to earlier ones. This form of referencing necessarily narrowed the line of enquiry to earlier printed works for justification or evidence for a proposition. In this way print subtly enhanced its

own “authority” and would continue to do so, gradually consigning manuscript texts to a limited, restricted “coterie” audience.

### **Seventeenth Century Developments**

Seventeenth century law printing saw a shift towards a more narrative form of law book – what may be described as a treatise or text. Such books brought information about the law to a wider community than just the lawyers and further emphasised the importance of the law in an ordered society. Society had a stake in the law although the *minutiae* of legal theory and practice may be lost upon those who had not undertaken the experiential legal training offered by the Inns. The difficulties in expression in English of legal concepts that had a “deep meaning” that was understood only by those who had been through legal training and understood *nos erudition* was being voiced not as a challenge to the concept of “Englishing” the law but more as a caution directed towards the importance of understanding and meaning.

Law printing also was seen as a means by which good and standard practices could become the norm. Although there had been sixteenth century guides for local officials, the printing of works such as Dalton’s *The Countrey Justice* demonstrated a perceived need for such a text to combat unsatisfactory practices in local administration and to possibly enable the easier detection of malpractice or the capricious abuse of power. Furthermore, as a means of addressing the problems accompanying the hermetic nature of *nos erudition*, printed texts helped to present and explain the law and legal concepts. The works of Sir Edward Coke, while certainly not typical of law texts of this period, provide an example.

Behind this desire to explain and expound the law was a recognition of the qualities of print – especially in the way in which large volumes of material could be printed and distributed – that challenged manuscript publication. The efforts of Paynell and the Grays Inn manuscript law reporters may have been directed to a coterie audience – colleagues of their Inn or other subscribers – but printed texts had a greater reach and were designed for lawyers, students and for a wider audience.

Finally there must be a comment on one of the unintended consequences of print, and in the long term for the law this may be the most significant. Egerton’s *Discourse* on the principles

of statutory interpretation was written in the middle part of the sixteenth century and heralded what was to become an important aspect of legal analysis – legal hermeneutics or the analysis of the language of a text - which depended first upon the textualisation of the law and secondly upon the availability of textualised law in multiple copies. Thorne states that the history of statutory interpretation starts in the sixteenth century and after the Henry VIII's legislative outburst accompanying the break with Rome. I have already observed that whilst print seems to have had little causative effect upon legislative and proclamatory activity of the Henrician Reformation, nevertheless the new technology was employed as a tool to disseminate the royal message. Thus detailed, textualised law, printed by the holder of the Royal Printing monopoly, became available in multiple copies enabling a greater consideration of the legislation and, importantly, its purpose as stated in the preamble. Assuming an absence of print, and assuming the historical progress of the Henrician Reformation with Cromwell's legislative programme, it is possible that hermeneutics may have developed – probably more slowly - and it would have relied on manuscript materials. It must be remembered that some instances of conflict between print and manuscript copies of legislation were resolved in favour of the latter but in either event the text of the manuscript or in print required scrutiny. Print made this process easier for the lawyers and Judges in that the wider availability of printed material allowed for closer and lengthy engagement with the text. Thus it can be suggested that print contributed to the development of hermeneutics although that development may have been one of the unintended consequences of the State's interests in the printing of statutes.

Whilst print may not have a direct impact upon changes in the nature of statutes themselves as identified by Baker, it may have enabled them and it certainly must have had an impact upon the distribution, consideration and analysis of statutory material, providing a fresh context within which statutes might be considered. Even although there may have been occasions where a manuscript version of a text was preferred to a printed one, the fact that such a comparison was taking place demonstrates that printed material was occupying an important place in the spectrum of legal information.

## **To Conclude**

What may be advanced from this study is this. Printed law books had progressive roles in influencing and assisting certain changes for lawyers and legal culture. They provided alternative sources of information. They enabled the potential for standardised practices. They provided the basis of the beginnings of the wider role that textual analysis was to play in legal practice beginning with statutory interpretation. But the printing press was not a master. It was, as is all information technology, a servant. Its influence as an agent of change and the extent of any changes that took place must be viewed within the wider context of diverse regulatory structures, which have had a much wider influence than may have originally been thought, and the roles of those whose activities were to impact upon the use and development of the press and its product.

These combined interactions dictated, intentionally or unintentionally, the extent to which print might influence change. The changes in the way in which lawyers dealt with information and in legal culture and that had taken place were gradual, incremental and slowly progressive, marked significantly by their co-existence with earlier information creation, gathering and distribution practices. But there was no revolution.





- tout iustice, & la vie de la ley* (Adam Islip, London, 1600) STC 5493
- 2 Cokes Reports  
 Cokes, Edward *Le second part des reportes del Edward Coke Lattorney Generall le Roigne de diuers matters en ley, avec graunde & mature consideration resolue, & adiudge, queux ne fueront vnques resolue ou adiudge par deuant, & les raisons & causes de yceux, durant le raigne de tresillustre & renommes Roygne Elizabeth, le fontaine de tout iustice, & la vie de la ley* (Adam Islip, London, 1602) STC 5495
- 3 Cokes Reports  
 Coke, Edward *Le tierce part des reportes del Edward Coke Lattorney generall le Roigne de diuers resolutions & iudgements donnes avec graund deliberation, per les tresreuerend iudges, et sages de la ley, de cases & matters en ley, queux ne fueront vnques resolue, ou adiudges par deuant, & les raisons et causes des dits resolutions & iudgements, durant les tresheureux regiment de tresillustre & renommes Roigne Elizabeth, le fontaine de tout iustice, & la vie de la ley* (Adam Islip, London, 1602) STC 5499.2
- 4 Cokes Reports  
 Coke, Edward *Le quart part des reportes del Edward Coke Chiualier, L'attorney general le Roy de diuers resolutions & iudgements dones sur solemnes arguments, & avec graund deliberation & conference des tresreuerend iudges & sages de la ley de cases difficult, en queux sont graund diuersities des opinions, et queux ne fueront vnques resolues, ou adiudges, & reporte par deuant: et les raisons & causes des dits resolutions & iudgements; publies en le premier an ... de tresheureux regiment de treshault et tresillustre Iaques* (Adam Islip, London, 1604) STC 5502.3
- 5 Cokes Reports  
 Coke, Edward *Quinta pars relationum Edwardi Coke Equitis aurati, Regij Attornati Generalis de varijs resolutionibus & iudicijs, magnâ &*

*maturâ deliberatione in rebus permagni momenti & ponderis, à reuerendis iudicibus & iuris-consultissimis latis; vnâ cum resolutionum & iudiciorum rationibus & causis* (Adam Islip for the Stationers, London, 1605) STC 5504

6 Cokes Reports

Coke, Edward *La size part des reports Sr. Edw. Coke Chiualer, chiefe Iustice del Common banke des diuers resolutions & iudgements dones sur solemne arguments, & avec grand deliberation & conference des tresreuerend iudges & sages de la ley, de cases en ley queux ne fueront vnques resoluë ou adiudges par deuant: et les raisons & causes des dits resolutions & iudgements. Publies en le cinq' an de treshaut & tresillustre Iaques* (Adam Islip for the Stationers, London, 1607) STC 5509

7 Cokes Reports

Coke, Edward *La sept part des reports Sr. Edw. Coke Chiualer, chiefe Iustice del Common Banke des diuers resolutions & iudgements dones sur solemne arguments & avec grand deliberation & conference des tresreuerend iudges & sages de la ley, de cases en ley queux ne fueront vnques resoluë ou adiudges par deuant: et les raisons & causes des dits resolutions & iudgements. Publies en le size an de treshaut & tresillustre Iaques* (Adam Islip for the Stationers, London, 1608) STC 5511.2

8 Cokes Reports

Coke, Edward *La huictme part des reports de Sr. Edw. Coke Cheualier, chiefe Iustice del Common Banke des diuers resolutions & iugements donez sur solemne arguments & avec grand deliberation & conference des tresreuerend iuges & sages de la ley, de cases en ley queux ne fueront vnques resoluë ou adiudgez par deuant: et les raisons & causes des dits resolutions & iudgements. Publies en le neufme an de treshaut & tresillustre Iaques* (Adam Islip for the Stationers, London, 1611) STC 5513

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11 Cokes Reports

Coke, Edward *La vnzme part des reports de Sr. Edw. Coke Chiualier, chiefe Iustice Dengleterre des plees destes tenus deuant le Roy mesme assignee, et del Conseil prive d'Estat des diuers resolutions & iugements donez sur solennes arguments & avec grand deliberation & conference des tresreuerend iuges & sages de la ley, de cases en ley queux ne fueront vnques resoluus ou adiudges par deuant: et les raisons & causes des dits resolutions & iugements. Publie en la troisisme an de treshaut & tres-illustre Iaques* (Adam Islip for Stationers, London, 1615) STC 5521

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Coke, Edward *The twelfth part of the Reports of Sir Edward Coke, Kt. of diuers resolutions and judgments given upon solumn arguments, and with great*

*deliberation and conference with the learned judges in cases of law, the most of them very famous, being of the king's especiall reference, from the Council table, concerning the prerogative : as for digging of saltpeter, forfeitures, forrests, proclamations, &c. : and the jurisdictions of the Admiralty, Common-Pleas, Star-Chamber, High Commission, Court of Wards, Chancery &c. : and expositions and resolutions concerning authorities, both ecclesiasticall and civill, within this realm : also the formes and proceedings of Parliaments, both England, & Ireland : with an exposition of Polynings law ... : with alphabeticall tables, wherein may be found the principall matters contained in this booke. (T.R. for Henry Twyford and Thomas Dring, London, 1656) Wing C4969*

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*Le premier part de les reports del' cases en ley que furent argues en le temps de le tres haut & puissant prince roy Edward le Tierce. Ore nouvelment imprimes, corriges & amendes, avec les notations & references a l'abregement de l'tres reverend & tres sages juges de cest royaulme, Brook & Fitzherbert. , (George Sawbridge, William Rawlins, and Samuel Roycroft, assigns of Richard and Edward Atkins Esquires, London, 1679) Wing (2<sup>nd</sup> Ed) P3213B.*

*Statuta apd westmonasteriu edita anno primo Regis Ricardi*

*tercii* (William de Machlinia, London, 1484) STC 9347

*The kynge our souernyn lorde henry the seuenth after the conquest by the grace of god kyng of Englonde of Fraunce and lorde of Irlonde at his parlyamet holden at Westmynster the seuenth daye of Nouembre in the first yere of his reigne* (William Caxton, London, 1491) STC 9348

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*See Anno secundo et tertio Edouardi Sexti actes made in the session of this present Parliament, holden vpon prorogacion at Westminster the fourth daie of Nouember, in the second yere of oure moste drad souereigne lorde Edwarde the VI.* (Thomas Berthelet, London, 1549) STC 9422.5

*Anno primo Henrici Octavi the Kynge Our Soueraigne Lorde Henrie the Eight after the conquest, by the grace of God Kyng of England & of Frau[n]ce and Lorde of Irelande, at his Parliament holden at Westminster the xxi day of January, in the fyrst yere of his most noble reigne* (Thomas Powell, London, 1563) STC 9360.5

*Anno octauo reginae Elizabethae. At the Parliament by prorogation holden at Westminster the last day of September, in the eight yeere of the raigne of our foueraigne lady Elizabeth, by the grace of God, of Englande, Fraunce, and Irelande queene, defender of the fayth, &c. and there continued to the ende and dissolution of the fame* Richard Jugge, London, 1563 STC 9469.5

*Anno xxuii. reginae Elizabethae at the Parliament begunne and holden at Westminster, the xxiii. day of Nouember, in the xxiiiii. yeere of the reigne of our most gracious soueraigne lady Elizabeth, by the grace of God, of England, France, and Ireland queene, defender of the faith, &c. and there continued, vntill the xxix. of March following* (Christopher Barker, London, 1585) STC 9485.7

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*and most necessary for eche subiect to knowe. Moreouer, the authoritie and duetie of all iustices of peace, erifes, coroners, eschetors, maiors, bailiffes, customers, comptrollers of custome, stewards of leets and liberties, aulnegers and purueyors, and what things by the letter of seuerall statutes in force they may, ought, or are compellable to do. Collected by Fardinando Pulton of Lincolnes Inne Gentelman, and by him newly corrected and augmented* (Christopher Barker, London, 1579) STC 9528

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- Wentworth, Thomas *The office and dutie of executors. Or A treatise of wils and executors, directed to testators in the choise of their executors and contrivance of their wills With direction for executors in the execution of their office, according to the law, and for creditors in the recovery of their debts. Expressing the duty, right, interest, power and authority of executors, and how they may behave themselves in the office of executorship. With divers other particulars very usefull, profitable, and behovefull for all persons, be they either executors, creditors or debtors. Compiled out of the body of the common-law, by Thomas Wentworth, late bencher of Lincolnes Inne* (TC for Andrew Crook, Laurence Chapman and William Cooke, London, 1641) Wing 1359A
- West, William *Symbolaeography which may be termed the art, description or*

- image of instruments, extra iudiciall, as, couenants, contracts, obligations, conditions, feffements, graunts, wills, &c., or, The paterne of praesidents, or, The notarie or scriuener : the first part and second booke* (Richard Tottle, London, 1592) STC 25267.5
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Magna Charta cum statutis quae antiqua vocantur, iam recens excusa, & summa fide emendata, iuxta vetusta exemplaria ad Parliamenti rotulos examinata: quibus accesserunt nonnulla nunc primum typis edita (Richard Totelli, London, 1556) STC 9277.5

Statuta apud westmonasteriu edita anno primo Regis Ricardi tercii (William de Machlinia, London, 1484) STC 9347

The kyng our souernyn lorde henry the seuenth after the conquest by the grace of god kyng of Englonde of Fraunce and lorde of Irlonde at his parlyamet holden at Westmynster the seuenth daye of Nouembre in the first yere of his reigne (William Caxton, London, 1491) STC 9348

Statuta. vii. Parlamento Henrici .vii (Wynken de Worde, London, 1508)

See Anno secundo et tertio Edouardi Sexti actes made in the session of this present Parliament, holden vpon prorogacion at Westminster the fourth daie of Nouember, in the second yere of oure moste drad souereigne lorde Edwarde the VI. (Thomas Berthelet, London, 1549) STC 9422.5

Anno primo Henrici Octavi the Kyng Our Soueraigne Lorde Henrie the Eight after the conquest, by the grace of God Kyng of England & of Frau[n]ce and Lorde of Irelande, at his Parliament holden at Westminster the xxi day of January, in the fyrst yere of his most noble reigne (Thomas Powell, London, 1563) STC 9360.5

Anno octauo reginae Elizabethae. At the Parliament by

prorogation holden at Westminster the last day of September, in the eight yeere of the raigne of our foueraigne lady Elizabeth, by the grace of God, of Englande, Fraunce, and Irelande queene, defender of the fayth, &c. and there continued to the ende and dissolution of the same (Richard Jugge, London, 1563) STC 9469.5

Anno xxiii. reginae Elizabethae at the Parliament begunne and holden at Westminster, the xxiii. day of Nouember, in the xxiuii. yeere of the reigne of our most gracious soueraigne lady Elizabeth, by the grace of God, of England, France, and Ireland queene, defender of the faith, &c. and there continued, vntill the xxix. of March following (Christopher Barker, London, 1585) STC 9485.7

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Cunningham (1762) 1 Black W 371
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