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THE CASE OF CHIEF JUSTICE WILLIAM DE GREY

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Reading judicial memoirs from the last three centuries, one gets the impression that the judge took the oath, stepped onto the bench, and proceeded to fill the judicial role as if born in the robe. Even those who admit to having had a learning curve remain coy about what they did to teach themselves how to be judges.[1] When asked directly, however, judges readily admit to the difficulties of learning their jobs.[2] As one said, "[B]ecoming a federal judge is like being thrown into the water

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[1] *See, e.g.*, Kathryn H. Vratil, *Notes from the Bench*, 42 U. KAN. L. REV. 1, 5-10 (1993) (discussing her experience upon joining the bench without going into significant detail about her self-education).

[2] *See* Robert Carp & Russell Wheeler, *Sink or Swim: The Socialization of a Federal District Judge*, 21 J. PUB. L. 359, 367-70 (1972). Other studies of judicial education include: Lenore Alpert, Burton M. Atkins & Robert C. Ziller, *Becoming a Judge: The Transition from Advocate to Arbiter*, 62 JUDICATURE 325, 329-30 (1979); Beverly Blair Cook, *The Socialization of New Federal Judges: Impact on District Court Business*, 1971 WASH. U. L.Q. 253, 253-57; Susan L. Goldberg, *Judicial Socialization: An Empirical Study*, 11 J. CONTEMP. L. 423, 426-31 (1985); J. Woodford Howard, Jr., *Judge Harold R. Medina: The "Freshman" Years*, 69 JUDICATURE 127, 127 (1985); *On Becoming a Judge: Socialization to the Judicial Role*, 69 JUDICATURE 139, 139 (1985) [hereinafter *On Becoming a Judge*] (interview with a panel of legal professionals about new judges and their effect on "American justice"); Thomas B. Russell, *Bridging the Gap: Between a Trial Lawyer's Experience and Becoming a Good Judge Is a Distance that Goes Beyond Ordinary Measurements*, JUDGES J., Fall 1988, at 16, 56-57; Stephen L. Wasby, "*Into the Soup?*": *The Acclimation of Ninth Circuit Appellate Judges*, 73 JUDICATURE 10, 10-14 (1989); Paul Wice, *Judicial Socialization: The Philadelphia Experience*, *in* COURTS AND JUDGES 149, 149-71 (James A. Cramer ed., 1981). For a more general study of the "freshman effect" on opinion writing see Virginia A. Hettinger, Stefanie A. Lindquist & Wendy L. Martinek, *Acclimation Effects and Separate Opinion Writing in the U.S. Courts of Appeals*, 84 SOC. SCI. Q. 792, 792-93 (2003) and the literature cited there.

and being told to swim."[3] Recognizing the need for formal training, in the last fifty years both the federal and state judiciaries have created what are affectionately known as baby judge schools, short orientation programs primarily aimed at instructing trial-level judges in law and judicial administration.[4]

Fifty years is a very short time in the life of a problem that began at least as early as the sixteenth century, when the English started to turn to experienced lawyers with no judicial experience to staff their central common law courts.[5] The United States inherited this system of selecting its judges from the general pool of lawyers, and thereby also inherited the dilemma of training those neophyte judges in their new roles.[6] Interestingly, however, despite evidence of the omnipresence of judges' need for education and the likelihood that early modern judges were no more able to step seamlessly onto the bench than their modern counterparts, scholars and historians of the

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[3] Carp & Wheeler, *supra* note 2, at 374 (internal quotation marks omitted); *see also* Alpert, Atkins & Ziller, *supra* note 2, at 330 ("It takes two or three years to get to where you finally feel sure of yourself." (internal quotation marks omitted)); *On Becoming a Judge*, *supra* note 2, at 140 ("Every judge I've ever talked to said, 'yes, there was a period in which I felt like a freshman.'"); Wasby, *supra* note 2, at 10 ("When I joined the court . . . I was left to stumble, bumble, and do injustice to other people. I was given no manual, no orientation, [and] no one came forward to help." (alteration in original) (internal quotation marks omitted)).

[4] *"Baby Judges School" Jump Starts Learning Process*, THIRD BRANCH, Aug. 2005, at 1, 10 (federal baby judges school); Larry Berkson & Lenore Haggard, *The Education and Training of Judges in the United States*, *in* MANAGING THE STATE COURTS 145-49 (Larry C. Berkson, Steven W. Hays & Susan J. Carbon eds., 1977) (detailing early history of state baby judges schools); Rex Bossert, *A Week at Boot Camp for Judges: Rookie Jurists Get a Crash Course and Swap Court Tips at Baby Judge School*, NAT'L L.J., Jul. 7, 1997, at A1 (federal baby judges school); Cook, *supra* note 2, at 263-66 (early history of federal baby judge seminars); *see also* Russell, *supra* note 2, at 17 ("Judicial education is a young science. It was only 25 years ago that the National Judicial College was founded by judges who recognized their need for professional judicial education.").

[5] The earliest English justiciars and justices, of course, had no judicial experience prior to taking the bench. However, as discussed below, between the fourteenth and sixteenth centuries judges were selected from among the serjeants-at-law, leading lawyers who served a sort of judicial apprenticeship before taking the bench. *See* discussion *infra* notes 29-31 and accompanying text.

[6] *See On Becoming a Judge*, *supra* note 2, at 142 ("Federal judicial recruitment processes are almost tailor-made to pick people who don't know an awful lot about what they're supposed to do to become a judge. I think typically the judges are successful practitioners, which requires a certain degree of specialization, and they get on the federal bench anyway and they're faced with all sorts of civil rights and constitutional law and criminal procedure questions about which they know relatively little.").

judiciary have paid limited attention to the question of how an appointee learns to be a judge.[7]

One reason for both the lack of scholarship and the need for judicial education may be the mystique of the judge, whom Blackstone called the "depositories of the law; the living oracles."[8] In civil law countries, the judiciary has long been viewed as a career, an honorable one, perhaps, but just one amongst many choices a young lawyer could make. The law student or law school graduate selects the judicial track, receives focused training, and progresses up the hierarchy of courts as his or her abilities, interests, and experience warrant.[9] In such a system, the fact of judicial education is openly acknowledged. In common law countries, by contrast, a judgeship long ago became a reward for a successful career as a practitioner. It was not a career the young lawyer prepared for; it was, and remains, the plum he hoped he might earn by service in another branch of the law.[10] This method of appointing top lawyers to the bench encourages a mentality that "the better the advocate, the better the judge is likely to be,"[11] and discourages admitting, as Chief Justice Warren Burger did in an interview, that "not every person appointed is immediately qualified to step right in and perform the function."[12]

The mystique of common law judges presumed to have "learn[ed] their roles en route to office" also has consequences

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[7] *See supra* notes 2, 4 (literature on modern judicial education).

[8] 1 WILLIAM BLACKSTONE, COMMENTARIES *69; *see also* JOHN P. DAWSON, THE ORACLES OF THE LAW, at xi (1968) (saying that Blackstone's comment "could not have seemed at the time he wrote to be greatly exaggerated. The predominant role of English judges in the creation and development of English law had been written for all to see. To us in this country, some 200 years later, the influence of judges has if anything increased.").

[9] The key elements across civil law system are that judges are formally trained and that there are separate hierarchies for judges and lawyers. Systems vary in how they recruit and train their judges. For the variations in some European judicial training systems see JOHN BELL, JUDICIARIES WITHIN EUROPE 52-58 (France); *id.* at 113-18, 120-24 (Germany); *id.* at 189-95 (Spain); *id.* at 244-46, 248-51 (Sweden); *id.* at 312-13, 319-20 (England) (2007).

[10] DANIEL DUMAN, THE JUDICIAL BENCH IN ENGLAND, 1727-1875: THE RESHAPING OF A PROFESSIONAL ELITE 72-99 (1982); DAVID LEMMINGS, PROFESSORS OF THE LAW: BARRISTERS AND ENGLISH LEGAL CULTURE IN THE EIGHTEENTH CENTURY 275-81 (2000) (reviewing pre-judicial career paths of English judges); WILFRID R. PREST, THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR, 1590-1640, at 135 (1986) ("The highest prize within the legal profession itself was a judge's place in one of the superior courts of Westminster Hall . . . .").

[11] Howard, *supra* note 2, at 127 (paraphrasing Charles Evans Hughes, Jr.).

[12] *Interview with Chief Justice Warren E. Burger*, U.S. NEWS & WORLD REP., Aug. 21, 1972, at 42.

for scholarship.[13] If the myth were true, then a study of judicial education would be uninteresting, if it were even conceived of at all. And because the perpetuation of the myth is incompatible with judges discussing their methods of self-training, evidence can be hard to come by.[14] Thus it is hardly surprising that so little has been written about the specific steps new judges have taken to acquire the knowledge necessary to serve on the court to which they have been raised.

But the myth is not true, and it has not been true for at least two centuries, as this study of the education of judges in eighteenth-century England, and specifically that of William de Grey (1719-1781), who served as Chief Justice of the Court of Common Pleas from 1771 to 1780, will try to demonstrate. This Article draws on an unusual and heretofore unexplored collection of archival material in Norwich, England and in Lincoln's Inn, London to shed some light on the way one important and well-regarded judge addressed his knowledge gap.[15] Although a work of legal history, it borrows from the discoveries of modern studies of judicial education to help give meaning to the historical evidence. And although as a work of history it claims to offer no lessons for the present, the story of how de Grey and his brethren learned their jobs does suggest the universality within the common law world of both the problem of judicial training and its solution.

Current scholarship calls the process of learning to be a judge "socialization." In these works, socialization is a broad

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[13] Howard, *supra* note 2, at 127; *see also* Edson L. Haines, *Judicial Education*, *in* HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL WRITINGS FOR MEMBERS OF THE JUDICIARY 230, 231 (Glenn R. Winters ed., 1975) ("Everyone seems content to operate on the assumption that the donning of judicial robes makes a man competent to perform all duties of office." In fact, however, "[a] judge needs opportunity, time and assistance in the reduction of his ignorance. In many instances it will not be a case of re-tooling—it will be tooling up for the first time."); Richard S. Arnold, *Irving L. Goldberg Lecture*, *Southern Methodist University Dedman School of Law: The Federal Courts: Causes of Discontent*, 56 SMU L. REV. 767, 771 (2003) ("You may find it a little disconcerting that people who are appointed to the bench need to go to school to learn how to do it. We hope that they know something before they are appointed . . . .").

[14] *On Becoming a Judge*, *supra* note 2, at 139 ("I think one of the reasons we have so little systematic and solid study of this is that it's difficult.").

[15] For contemporaries' views of de Grey, see 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 128 (1992) [hereinafter OLDHAM, MANSFIELD MANUSCRIPTS]; 1 HORACE TWISS, THE PUBLIC AND PRIVATE LIFE OF LORD CHANCELLOR ELDON 113 (London, John Murray, 2d ed. 1844) ("One of the most considerable among the judges of that time was Lord Chief Justice De Grey. 'He was the object,' says Mr. Farrer, 'of Lord Eldon's highest commendation. He spoke of him as a most accomplished lawyer, and of most extraordinary power of memory.'").

concept encompassing variously the pre-judicial career, acclimation to institutional norms, integration into the court organization, and acquisition of required knowledge.[16] This Article focuses on only one piece of the socialization puzzle: that of education in the procedural and substantive law. To a much lesser extent it touches on evidence of the transition from advocate to judge and the familiarization with court administration. By judicial education is meant any attempt to learn the rules, procedures, or history of the court or to prepare legal reference tools for use while hearing or preparing to hear cases. It excludes the use of reports or of certain canonical works in the preparation of opinions in the ordinary course of the judge's job. The citation to authorities was a normal part of the opinion process for all judges of the time, whether new or long-serving.

Furthermore, because most of the archival material concerns the books Chief Justice de Grey bought or used during his first two years on the bench, this Article concentrates on the book-learning aspect of judicial education. An important part of de Grey's studies appears to have involved very basic practice manuals and textbooks. That de Grey used books ought to have been then, as now, unremarkable. Yet given the insignificant attention such elementary works have garnered, few legal historians might have guessed that a highly experienced barrister like de Grey would have turned to basic student manuals for his information. Such a finding introduces a caveat into the current assumption that these sorts of works played little role in the development of English law prior to the nineteenth century.[17] In other words, the de Grey materials give entrée into two significant historical questions with modern resonance: how did judges learn their jobs and what kinds of texts shaped the development of the law?

Beyond the serendipity of the archival collections that permit an at least partial reconstruction of what de Grey did to teach himself how to be a judge, he is also an ideal exemplar because he took a well-blazed path to the bench. Called to the bar in 1742, he benefited early from patronage, became a king's

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[16] *See, e.g.*, Alpert, Atkins & Ziller, *supra* note 2, at 325-36; Cook, *supra* note 2, at 254; *On Becoming a Judge*, *supra* note 2, at 140.

[17] Michael Lobban, *The English Legal Treatise and English Law in the Eighteenth Century*, 13 IURIS SCRIPTA HISTORICA 69, 70 (1997); A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632, 639 (1981).

counsel in 1758, solicitor general to the queen in 1761, solicitor general in 1763, and finally attorney general in 1766.[18] He was a loyal government man, who served ten years in Parliament and even turned down an offer of the Chancellorship.[19] While attorney general, he maintained a lucrative private practice, becoming one of the first barristers to earn over £8000 in a year.[20] Such a résumé made him as completely qualified for his judicial appointment as one could be at the time. If he needed to read textbooks to learn the law and procedure of his court, so would many other judges of the age.

After discussing in Part I the historical reasons for the creation of the myth of the pre-trained judge and, conversely, the reasons for a new judge's lack of preparation, the Article turns in Part II to the usual methods of judicial education suggested by both the modern scholarship and the eighteenth-century evidence. Part III investigates the set of procedural books de Grey acquired soon after becoming a judge and asks what he might have learned from them. Part IV examines how, paralleling the practices of modern judges, he created his own bench book for use at trial.

I. WHY JUDGES NEEDED AN EDUCATION

The common law judiciary has been built on the assumption that legal practice is the best preparation for being a judge.[21] Given centuries of evidence that practitioners quite often do not "learn how to judge on the way to the bench," this belief must have its roots in the distant past.[22] This Part argues that the mystique of judicial preparedness arose from conditions unique to the medieval English legal community, while the need for education grew up in response to changes in the way law was practiced from the sixteenth century onward.

In his classic work on the history of judges, John Dawson points out a startling fact. In medieval and early

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[18] On de Grey's early patronage positions, see LEMMINGS, *supra* note 10, at 162 and DUMAN, *supra* note 10, at 64-65.

[19] Gordon Goodwin, rev. M. J. Mercer, *Grey, William de, First Baron Walsingham (1719-1781*), *in* 23 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 897 (H.C.G. Matthew & Brian Harrison eds. 2004) (giving a biography of de Grey); 4 HORACE WALPOLE, MEMOIRS OF THE REIGN OF KING GEORGE THE THIRD 420 (London, Richard Bentley 1845) (recounting refusal of offer of Chancellorship).

[20] DUMAN, *supra* note 10, at 107.

[21] *See On Becoming a Judge*, *supra* note 2, at 139-41.

[22] *Id.* at 139.

modern France, the royal courts were staffed by thousands of judges.[23] By contrast, in England until the nineteenth century, "the permanent judges of the central courts of common law and Chancery, all taken together, rarely exceeded fifteen."[24] Those central common law courts—King's Bench, Common Pleas, and Exchequer—sitting in Westminster and staffed, in de Grey's time, by four judges apiece, dealt with the mass of litigation flowing in from all over England.[25] On the one hand, therefore, only an extremely small number of judges had to be prepared to serve, and they could, in theory, be quickly socialized into courts with a long institutional memory, a small bar, and a coherent body of case law. On the other hand, a very few judges carried the weight of the nation's legal system on their shoulders, and they needed to know what they were doing.

When seeking an answer to the question of the origin of the belief that legal practice prepared judges for the bench, a dominant factor seems to be the existence in the Middle Ages of a single, tightly-knit hierarchy with the judge at the top as a *primus inter pares*.[26] Unlike the continental civil law judge today, who is often largely isolated from the bar, the medieval English judge spent his career immersed in it.[27] He learned the law as a student in an inn of court. He joined the inn when he became a member of the bar and often progressed up the ranks of its leadership.[28] Normally, he practiced as a serjeant-at-law, an elite group of senior barristers formed in the fourteenth century who for a time had precedence at the bar, a monopoly over pleading before the Court of Common Pleas, and a presumptive right to judicial appointments.[29] As a serjeant, the future judge served a sort of judicial apprenticeship. He could dine and have his chambers at the Serjeants' Inns alongside the judges, with whom he would discuss thorny legal issues

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[23] DAWSON, *supra* note 8, at 2.

[24] *Id.* at 3.

[25] *Id.* at 2-3.

[26] 6 JOHN BAKER, OXFORD HISTORY OF THE LAWS OF ENGLAND 1483-1558, at 411 (John Baker ed., 2003) [hereinafter BAKER, OXFORD HISTORY]; PREST, *supra* note 10, at 74.

[27] BELL, *supra* note 9, at 79-80.

[28] PREST, *supra* note 10, at 135-36.

[29] J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 157-58, 166 (4th ed. 2002) [hereinafter BAKER, INTRODUCTION]; JOHN HAMILTON BAKER, THE ORDER OF SERJEANTS AT LAW: A CHRONICLE OF CREATIONS, WITH RELATED TEXTS AND A HISTORICAL INTRODUCTION 14-15, 36, 42, 46 (1984) [hereinafter BAKER, SERJEANTS].

and imbibe the collegiality of the bench.[30] When a judge could not go on assize, a serjeant would fill in, hearing cases with his circuit partner, a real judge, nearby.[31] Thus, by the time a serjeant became a judge, he had acquired some experience of judging, knew the members of the court, and had for years watched them discuss and decide cases.

As a judge, he continued to participate in the same legal community in which he had spent his career as a practitioner. He retained a connection with his inn, and he mingled with the serjeants, whom he called his "brothers," in the Serjeants' Inns.[32] As a leading member of this legal community, the judge was an important conduit for the body of orally-transmitted knowledge called the "common erudition" or the "*communis opinio*" that all active members of the bar shared.[33] The common erudition, worked out as much in the teaching exercises and the discussions in the Inns of Court as from the bench, created an oral tradition of "received learning."[34] Thus, an experienced practitioner would presumably have possessed much the same expertise as the judges just by having spent sufficient time in the same legal culture. Consequently, it is not difficult to imagine how a serjeant could be assumed to move from bar to bench without needing to re-equip his toolkit.

But by the sixteenth century, a number of changes had been set in motion that would end the hegemony of the *communis opinio*, alter the practice of law, and turn judges into a different species of legal officer rather than merely the most esteemed lawyers among equals. First, the number and power of ordinary barristers increased dramatically in the sixteenth century. Where "[t]he medieval legal profession had been in

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[30] BAKER, INTRODUCTION, *supra* note 29, at 166; 6 BAKER, OXFORD HISTORY, *supra* note 26, at 411-12; 12 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 15 (1938); *cf.* Wasby, *supra* note 2, at 13 (forms of judicial apprenticeship in the modern American judicial system).

[31] BAKER, INTRODUCTION, *supra* note 29, at 166; BAKER, SERJEANTS, *supra* note 29, at 36.

[32] 6 BAKER, OXFORD HISTORY, *supra* note 26, at 411-12.

[33] *See* BAKER, INTRODUCTION, *supra* note 29, at 198; J.H. BAKER, THE LAW'S TWO BODIES 67-70, 81-82, 161-69 (2001) [hereinafter BAKER, LAW'S TWO BODIES]; J.H. Baker, *The Inns of Court and Legal Doctrine*, *in* THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW 37, 43, 50 (2000) [hereinafter Baker, *Inns of Court*]; David Ibbetson, *Case-Law and Doctrine: a Historical Perspective on the English Common Law*, *in* RICHTERRECT UND RECHTSFORTBILDUNG IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT 27, 34-35 (Reiner Schulze & Ulrike Seif eds., 2003).

[34] *See* 6 BAKER, OXFORD HISTORY, *supra* note 26, at 471-72 ("[I]t was in the inns, rather than in Westminster Hall, that those principles were expounded and refined as a coherent body of law."); BAKER, INTRODUCTION, *supra* note 29, at 198.

effect a guild, whose journeyman members practised their trade . . . under the oversight of a body of masters, the judges and serjeants at law," the early modern bar was more of an open market, where men with ability or connections could rise in the profession without being constrained by the old hierarchy.[35]

From this group of upstarts there emerged in the sixteenth century a new leadership: the solicitor and attorney general and the king's counsel.[36] King's counsel were royal law officers who, though remaining members of the bar, took cases on behalf of the King and could not appear against the Crown in their private practice without license.[37] The new king's counsel acquired a right of precedence in court, immediately jumping over other members of the bar, including most serjeants, in seniority.[38] Being forever trapped beneath the king's counsel lessened the desirability of becoming a serjeant, which in turn meant that the finest barristers were no longer to be found amongst their ranks.[39] Consequently, king's counsel became the preferred credential for judicial selection.[40]

By the mid-eighteenth century, although no single path to the bench had emerged, certain "avenues of advancement" were common, and these centered on indications of political loyalty and excellence at the bar.[41] Future judges usually spent over two decades in practice before their elevation.[42] Over half were king's counsel, and many had their preeminence at the bar recognized by an appointment to serve as solicitor and/or attorney general.[43] In addition, half—and over ninety percent of the chief justices of King's Bench and Common Pleas—had spent time in Parliament.[44] These men may have been excellent lawyers and in some instances skilled politicians, but they had not necessarily been trained to serve as judges on the courts to which they were appointed.

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[35] PREST, *supra* note 10, at 75.

[36] *See* BAKER, INTRODUCTION, *supra* note 29, at 158; BAKER, SERJEANTS, *supra* note 29, at 108, 111-14, 116-17; PREST, *supra* note 10, at 75.

[37] BAKER, INTRODUCTION, *supra* note 29, at 165.

[38] *Id*. at 164-65.

[39] *See* LEMMINGS, *supra* note 10, at 174.

[40] *Id.* at 262, tbl. 7.1, 264.

[41] DUMAN, *supra* note 10, at 73.

[42] *Id*. at 72.

[43] *Id*. at 73-75.

[44] *Id*. at 78, 87.

This lack of training posed a particularly pressing problem for the Court of Common Pleas because, with one exception, only serjeants could appear before that court.[45] The sole exception was the attorney general, who was permitted "to address the court from within the bar as an officer, though not to take the place of a serjeant at the bar. . . ."[46] But such appearances seem to have been rare and occurred only in the attorney general's official capacity and not in his private practice.[47] Yet, despite the serjeants' monopoly over the Court, during the eighteenth century the most trod path to the chief justiceship of Common Pleas lay precisely through service as the attorney general.[48] Almost by definition, this man had not been a serjeant, and while he may have appeared before the Court occasionally in his governmental role, he did not have the day-to-day expertise gained by long attendance at the Court's bar.[49] Indeed, given the status of Common Pleas in that era as second fiddle to King's Bench, the new chief justice may not even have observed the Court very often while a student or young barrister.[50] Furthermore, Common Pleas had remained a more traditionally procedural and black letter court than Chancery or King's Bench, where the former attorney general was likely to have spent much of his time.[51] The new chief may consequently have come to his job quite unfamiliar with the

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[45] BAKER, SERJEANTS, *supra* note 29, at 42.

[46] *Id*. at 43 n.5.

[47] Wilson's Common Pleas Reports for the period 1753 to 1774 include only one explicit mention of the Attorney General appearing before the Court. Rex v. Serjeant Mead, (1754) 2 Wils. 17. Even in the famous case of *King v. Wilkes*, when the Common Pleas granted Wilkes's petition for habeas corpus, Wilson only records serjeants arguing on behalf of the Crown. King v. Wilkes, (1763) 2 Wils. 151, 156. A search of the Court's rule books would undoubtedly turn up more appearances, but the fact remains that the attorney general did not spend a great deal of his time before the Court.

[48] DUMAN, *supra* note 10, at 84, 87.

[49] None of the solicitors or attorneys general of the eighteenth century had been serjeants.

[50] *See* LEMMINGS, *supra* note 10, at 172, 174; ROSE A. MELIKAN, JOHN SCOTT, LORD ELDON, 1751-1838: THE DUTY OF LOYALTY 154 (1999) (calling Common Pleas "something of a judicial backwater"); 1 OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 15, at 124-25; James C. Oldham, *Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century*, *in* LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILIP REID 119, 119 (John Philip Reid, Hendrik Hartog, William E. Nelson & Barbara Wilcie Kern eds., 2000).

[51] *See* BAKER, SERJEANTS, *supra* note 29, at 117; 12 HOLDSWORTH, *supra* note 30, at 452-53; LEMMINGS, *supra* note 10, at 183 ("[L]ists of leading counsel show that the attorney-general and solicitor-general, whose privileged positions allowed them to pick and choose among the most lucrative briefs, generally chose to concentrate their private practice in Chancery.").

basic operation of the court over which he found himself presiding.

At the same time as the number of lawyers expanded and the path to the bench ceased to lead inexorably through an apprenticeship as a serjeant, the *communis opinio* also broke down.[52] In the Middle Ages, the primary arena of interest to the legal community had been the back and forth between pleaders and judges aimed at the establishment of the pleadings in each case. "[M]uch of th[is] debate was tentative, extempore and inconclusive," looking not so much for a ruling but rather for an indication of the tactical moves the pleader should make.[53] But by the sixteenth century, the lawyers had begun to draft their pleadings in writing, working them out between the parties, and without the assistance of the judges.[54] When the case did finally come before the court on a point of law, the lawyers wanted answers, not debate, and those answers were supposed to be supported by chapter and verse citation to the case law reported more and more in authoritative, printed works.[55]

As a result, the position of the judge within the legal hierarchy changed. He was no longer the master who labored side-by-side with his journeymen. He now sat apart, tasked to rule on disputes brought before him, and confronted with the prospect that his words would be captured by reporters, published, and cited as the law in the future. If the observations of modern judges are any guide, this was a seismic shift. Judges today speak of the difficulty of learning "that there comes a time when he or she has to make a decision."[56] This is not a skill that a lawyer, even one who counsels clients rather than litigates, necessarily has to master.

The difficulty of moving from advocate to decision-maker can be glimpsed on de Grey's court in the 1770s. The

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[52] *See* Ibbetson, *supra* note 33, at 34-35 (discussing the decline of the *communis opinio* during the sixteenth century and its disappearance by 1600); *see also* BAKER, INTRODUCTION, *supra* note 29, at 198-99; Baker, *Inns of Court*, *supra* note 33, at 50-51; Richard J. Ross, *The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640*, 10 YALE J. L. & HUMAN. 229, 267-68 (1998).

[53] BAKER, INTRODUCTION, *supra* note 29, at 197-98; *see also* 6 BAKER, OXFORD HISTORY, *supra* note 26, at 386-89.

[54] *See* 6 BAKER, OXFORD HISTORY, *supra* note 26, at 338-39.

[55] *See* BAKER, INTRODUCTION, *supra* note 29, at 198.

[56] *On Becoming a Judge*, *supra* note 2, at 142. ("The inability to make decisions is an occupational hazard to which an unusually large number of our trial judges are exposed to and exhibit.").

most junior justice on the Court was George Nares, who had spent over a decade as a serjeant and a leader of the Common Pleas bar.[57] He also did an active business in writing opinions of counsel advising on questions of law based on a set of facts presented by the client or solicitor.[58] With regard to the substantive law and procedure, Nares probably had little to learn when he took the bench. He knew the case law of the Court better than any of his brethren, a fact he demonstrated frequently in his opinions, which were generally reported as consisting of little more than citing precedential cases, usually from Common Pleas and usually ones that had been decided while he was at the bar.[59] Yet of all his colleagues, he also seems to have had the most trouble becoming accustomed to making up his mind and was unsurprisingly not considered a strong judge.[60]

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[57] *See* BAKER, SERJEANTS, *supra* note 29, at 528; LEMMINGS, *supra* note 10, at 172. Nares was said to have been "bred an att[orne]y, called to the bar." Bray Family Papers, Surrey History Centre, G52/8/10/1, s.v. George Nares (recollections by the solicitor, William Bray, of leading people of his time, in alphabetical order by last name of person, no page numbers).

[58] *See* BAKER, LAW'S TWO BODIES, *supra* note 33, at 87-88. For a large collection of Nares's opinions, see Philadelphia Free Library, MS. LC.14.77.

[59] *E.g.*, Manuscript Reports, Lincoln's Inn Library, Hill MS. 15, fol. 32 (Parsons v. Lloyd, (1772) 2 W. Bl. 845; 3 Wils. 341) (citing cases); The Warden and the Commonalty of the Mystery of Grocers v. Backhouse, (1771) 3 Wils. 221, 227 (comment at the end of the first argument, citing precedent); Sanderson v. Baker, (1772) 3 Wils. 309, 317 ("I know of three actions of trespass against the sheriff in cases of this kind. Tyler versus Johnson, B.R. tried at Stafford in 1764 . . . ; I remember a similar case tried before Lord Chief Justice Wilmot, who was of opinion . . . ; I also remember a third action of the same kind . . . ."); Stevenson v. Hardie, (1773) 2 Bl. 872, 874; Manuscript Reports, Lincoln's Inn Library, Hill MS. 11, fol. 66 ("J. Nares was of ye same op[inio]n and to prove that the copyh[ol]d does not derive und[e]r ye L[or]d he cited these cases . . . all w[hi]ch he observed."); *see also* Smedley v. Hill, (1776) 2 W. Bl. 1105, 1106 (Nares had tried the case and had made a ruling on evidence that was overturned en banc. Blackstone reported that Nares "with great candour admitted the determination to be wrong; and cited a case before Willes, C.J. . . . wherein such evidence was admitted.").

[60] Bray Family Papers, Surrey History Centre, G52/8/10/1,, s.v. Nares. Samples of Nares's inability to make up his mind can be found in Cox v. Chubb, (1772) 2 W. Bl. 809, 810; Glead v. McKay, (1774) 2 W. Bl. 956, 957; Flureau v. Thornhill, (1776) 2 W. Bl. 1078, 1079. In *Howell v. Hanforth*, according to de Grey's bench notes, Nares said that he at first disagreed with the rule the majority put forth because the plaintiff had not followed the proper procedure but then let himself be persuaded to agree. William de Grey Bench Notes, Lincoln's Inn Library, Misc. MS. 183, fol. 21r. When presiding over a trial on circuit in 1776, Nares had to rule on the admissibility of evidence. Plaintiff had brought suit against a pastor for non-residence in his rectory and wanted to introduce evidence that the pastor had confessed himself to be the rector. Defendant objected that such parol evidence was inadmissible. Unable to decide, Nares "sent to consult Forster Serj[ean]t (who went that Circuit with him as Judge) & by him was informed that ye same point had been determined lately on the Norfolk Circuit by Willes J. The plaintiff therefore was nonsuited." The following term, King's Bench set aside the nonsuit, finding that such parol evidence against the interest of

Beyond learning how to make a decision, the new judge also had to know the law and procedure of his court, and this could pose a problem because, by at least the seventeenth century, some leading members of the bar had begun to specialize.[61] A man might have all or most of his practice in Chancery—a court of equity whose rules and procedures were quite different from those of the common law courts[62]—or take primarily revenue cases in Exchequer, or do criminal work at the London criminal court, the Old Bailey, and King's Bench.[63]

Because Chancery was the court of choice for eighteenth-century legal "high-flyers," many newly-appointed chief justices in de Grey's time found that their "promotion to a chief justiceship . . . involved hasty revision of their old common law knowledge, and no little personal nervousness about their competence on the bench."[64] Philip Yorke, who had primarily practiced in Chancery after achieving some renown as a barrister, and who thereafter served as chief justice of King's Bench from 1733 to 1737,[65] worried that "he had forgot[ten] his old practice in [King's Bench] for many years and was extremely uneasy how he should acquit himself in his new office."[66] A similar concern about his lack of familiarity with the common law was expressed about the appointment of the Chancery practitioner, Dudley Ryder, to the chief justiceship of King's Bench in 1754.[67] De Grey faced this problem as well, for he had spent much of the approximately

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defendant was admissible. Manuscript Reports, Lincoln's Inn Library, Misc. MS. 551, fols. 17b-18 (*Beavan v. Williams*, before Nares at Hereford Spring Assize, 1776).

[61] *See* PREST, *supra* note 10, at 70-71.

[62] *See* LEMMINGS, *supra* note 10, at 184 ("[E]quity cases . . . traditionally depended on natural law, reason, and 'conscience' rather than the issues of law or fact tried at common law.").

[63] *Id.* at 169, 171, 177-78, 181, 210-11.

[64] *Id.* at 171.

[65] Peter D. G. Thomas, *Yorke, Philip, First Earl of Hardwicke (1690-1764)*, *in* 60 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY 847-49 (2004).

[66] *Id*. at 171 (internal quotation marks omitted). Interestingly, Yorke received the chief justiceship of King's Bench rather than becoming Chancellor because the other candidate, "Charles Talbot, . . . was almost exclusively an equity lawyer, with little knowledge of the Common Law; and he would have found the duties of Chief Justice of the King's Bench . . . both difficult and distasteful. He desired ardently to remain in the Court of Chancery." 1 PHILIP C. YORKE, THE LIFE AND CORRESPONDENCE OF PHILIP YORKE, EARL OF HARDWICKE, LORD HIGH CHANCELLOR OF GREAT BRITAIN 117 (1913). At the time, Yorke, who also had a large Chancery practice, was attorney general and Talbot solicitor general. *Id.* at 116.

[67] LEMMINGS, *supra* note 10, at 171 n.77.

twenty years prior to his appointment as a Chancery barrister.[68]

Finally, the early modern English common law judge did not take the bench prepared to do his job because the scope of that job had widened considerably over the centuries to include matters that no individual practitioner would have mastered. In addition to his central tasks of hearing questions of law when sitting en banc at Westminster Hall and questions of fact when presiding individually over jury trials held during circuits (called assizes) twice a year in the country, the judge also heard both civil and criminal trials in London and Westminster throughout the year, served on admiralty and ecclesiastical appeals panels alongside civilian lawyers and churchmen, advised the House of Lords acting in its judicial capacity, advised the government on pardons in criminal cases, helped Parliament draw up legislation and advised it on petitions, and decided administrative appeals on tax matters.[69]

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[68] *Id*. at 353 (listing de Grey as one of the leaders of the Chancery bar in 1770). In de Grey's papers are several sets of accounts of fees received from 1764-1770. The accounts separate out the source of the fees, for example, briefs in King's Bench, or Chancery, or Exchequer. De Grey only listed Common Pleas once in that time. The 1764 account has an entry: "King's Bench & Common Pleas……115:7—." This appears to be his fees for being on brief in arguments before these two courts. (In later accounts this is made more explicit.) By way of comparison, the same year, out of a total income of over £4623, he earned over £237 for briefs in Exchequer and £114 9s. for briefs in the "Cockpit," a reference to the Privy Council chamber at Whitehall Palace. *See* GEORGE H. CUNNINGHAM, LONDON: BEING A COMPREHENSIVE SURVEY OF THE HISTORY, TRADITION & HISTORICAL ASSOCIATIONS OF BUILDINGS & MONUMENTS, ARRANGED UNDER STREETS IN ALPHABETICAL ORDER 789 (1927); 2 EDWARD RAYMOND TURNER, THE PRIVY COUNCIL OF ENGLAND IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 1603-1784, at 43, 49 (1928). The same trends appear throughout the accounts. He earned far more on Chancery briefs than in any other court, but also substantial amounts in Exchequer, and in briefs for the House of Lords. In 1766 and 1770, he listed no briefs in King's Bench. His 1768 King's Bench fees were his highest for that court at just over £264 (though this also included Old Bailey briefs), but his Exchequer total that year was over £313. *See* Accounts of William de Grey, Norfolk Record Office, WLS XIII/6/3-8, 10. Even while solicitor and attorney general, he was seemingly almost entirely absent from the motions books of King's Bench. By contrast, his predecessor in those two positions, Fletcher Norton, had been a constant presence in the motions books while holding the royal offices. *See* King's Bench Rule Books, National Archives (Kew, London), KB 125/158 (1763-64), KB 125/160 (1767), KB 125/161 (1769).

[69] Concerning the job of the common law court judges see variously: ABSTRACT OF CASES AND DECISIONS ON APPEALS RELATING TO THE TAX ON SERVANTS *passim* (London, T. Longman & T. Cadell 1781) (on tax appeals); G.I.O. DUNCAN, THE HIGH COURT OF DELEGATES 178-81 (1971) (on ecclesiastical appeals); 1 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW 244-45 (7th ed. 1956) (sitting as an appellate court in Exchequer Chamber); 1 OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 15, 118-19 (sitting en banc at Westminster and at trials in London and Westminster), 135-36 (concerning pardons); HENRY JOHN STEPHEN, A TREATISE ON THE PRINCIPLES OF PLEADING IN CIVIL ACTIONS 115 (London, J. Butterworth 2d ed. 1827) (on trials en banc at Westminster); A.S. TURBERVILLE, THE HOUSE OF LORDS IN THE XVIIITH CENTURY

Add to this that the chief justice served on the privy council,[70] and that he had to manage a large staff of mostly sinecured underlings with often obstructive traditions to which they clung as their prerogative, and the difficulty of the job becomes readily apparent.[71]

Referring to the baby judge school, one recent judicial appointee said, "I cannot imagine taking on such a multifaceted responsibility as becoming a federal district judge without having such classes and materials available . . . ."[72] An eighteenth-century English judge had responsibilities far more multifaceted than his modern counterpart could imagine, and he had no orientation course to attend. Yet he must have figured out how to do his job, for the English legal system did not grind to a halt, and "the perpetuation of the judicial system [is] dependent on the successful socialization of its judges."[73] The next Part explores how he might have accomplished this.

II. THE METHODS OF JUDICIAL EDUCATION

According to modern studies of judicial education, judges use four basic strategies to teach themselves what they need to know to do their jobs. First, they rely on skills they acquired before joining the court.[74] Second, they learn on the fly, for example, by asking lawyers at trial to review the law and precedent.[75] Third, they consult "more experienced colleagues."[76] Finally, they read books in an organized program of self-study.[77] Nowadays, of course, they might also attend baby judge schools and continuing judicial education courses,

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10-11 (1927) (advising the House of Lords); John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 8, 34-35 (1983) (presiding at Old Bailey trials); the eighteenth-century *Journals of the House of Lords* are full of references to petitions being referred to the judges and the judges being ordered to draw up a new bill.

[70] 2 TURNER, *supra* note 68, at 25-26.

[71] See, for example, the cases that came before de Grey and Common Pleas concerning the tradition of the Court's sealing office to close on certain days that were not Court holidays and to charge exorbitant fees for deigning to seal documents on those days. Sparrow v. Cooper (1779) 2 W. Bl. 1314, 1314-15; Figgins v. Willie (1778) 2 W. Bl. 1186, 1186-87.

[72] *"Baby Judges School" Jump Starts Learning Process*, *supra* note 4, at 1 (internal quotation marks omitted).

[73] Carp & Wheeler, *supra* note 2, at 363-64.

[74] *Id.* at 369-71.

[75] *Id.* at 380-81.

[76] *Id.* at 374-76.

[77] *Id*. at 387.

but such classes are arguably not a great deal more than an extension of talking to colleagues and reading books.

Eighteenth-century judges also apparently employed the same four learning strategies. The normal pre-judicial preparation has already been discussed, so the focus here will be on the other three methods. Of the group, the evidence for learning on the fly is the most limited. Reporters did not record verbatim what was said in court,[78] and they may have been particularly unlikely to write down, and later publish, examples of judges demonstrating their ignorance. Nonetheless, we do conserve at least two cases in which relatively new chief justices of Common Pleas admitted to not knowing the law. In the first, from 1784, Chief Justice Loughborough, who joined the Court in 1780 when de Grey resigned, asked for an explanation of the meaning of the statute under dispute, demonstrating in his disagreement with counsel that he did not understand the intent of the provision.[79] Justice Gould, at this time the longest-serving member of the court, explained the act, eliciting from Loughborough an astonished, "I had no Idea in all my practice but [that?] it extends to Cases prosecuted."[80] In the second instance, from 1800, Lord Eldon, who had become chief justice only seven months before, made a similar remark in court: "I confess, that when this application was first made, I was not aware, that under the circumstances of the case the Defendant was entitled to demand judgment: but my Brother Heath has satisfied me that the application is supported by the current of

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[78] *See, e.g.*, CAPEL LOFFT, REPORTS OF CASES ADJUDGED IN THE COURT OF KING'S BENCH, at xi, xiii (W. Strahan and M. Woodfall, 1776) (although claiming to take down the opinions "almost verbatim," acknowledging that he did not necessarily include everything that was said and did sometimes merely summarize) (emphasis omitted); 1 SYLVESTER DOUGLAS, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF KING'S BENCH; IN THE NINETEENTH, TWENTIETH, AND TWENTY-FIRST YEARS OF THE REIGN OF GEORGE III, at xiv (London, His Majesty's Law-Printers, 2d ed. 1786) ("The judgments of the court I could have wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither write short-hand, nor very quickly. Memory, however, while the case was recent, supplied at home, many of the chasms which I had left in court . . . .").

[79] Manuscript Reports, Lincoln's Inn Library, Hill MS. 21, fols. 119-120 (Nixon v. Clarke (1784)) (concerning the interpretation of an act instructing that if an excise officer obtained a certificate of probable cause from a judge before executing a seizure, the plaintiff should get no court costs). Alexander Wedderburn (Lord Loughborough, later Earl of Rosslyn) was attorney general from 1778 to 1780, chief justice of Common Pleas from 1780 to 1793, and Chancellor from 1793 to 1801. Alexander Murdoch, *Wedderburn, Alexander, First Earl of Rosslyn (1733-1805)*, *in* 57 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 909.

[80] Manuscript Reports, Lincoln's Inn Library, Hill MS. 21, fol. 121.

authorities."[81] Similarly, special juries of merchants often educated judges on commercial customs and practices in mercantile cases.[82]

Some evidence suggests that new judges also used the third method of education and sought advice from their more knowledgeable colleagues not only about legal matters but also about life on the court. Lord Mansfield, when he became chief justice of King's Bench, sent drafts of his opinions to two of his well regarded associate justices for their advice, and the third, Thomas Denison, supposedly taught Mansfield about pleading.[83] Mansfield's predecessor, Dudley Ryder, received advice from his predecessor, Charles Yorke, that "Denison would be a useful man in point of law to me especially in the form [of pleading] in which he was very good."[84] Ryder took Yorke's suggestion and consulted Denison, "who 'professed great readiness to acquaint me of everything he knew.'"[85] And when John Eardley Wilmot joined the Court and confessed a concern about hearing cases on circuit, Denison volunteered to "go with him all round the circuit because of the difficulty of the judge's going the first time."[86]

Unlike Mansfield and Ryder, however, de Grey had no group of experienced associate—or *puisne*—justices to advise him when he took the bench.[87] George Nares joined the Court the same day he did, and William Blackstone had only been

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[81] Keepers & Governors of the Possession, &c. of Harrow School v. Alderton, (1800) 2 Bos. & Pul. 86, 87; E. A. Smith, *Scott, John, First Earl of Eldon (1751-1838)*, *in* 49 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 420-21. "Heath" was John Heath, who became a judge on the Common Pleas when Blackstone died in 1780.

[82] See, for example, the 1798 maritime case of *Thwaits v. Angerstein* before King's Bench, where Chief Justice Kenyon "professed himself totally ignorant of navigation, except in so far as he had learned it from his apprenticeship in his judicial office. He had received a great deal of information from the different classes of merchants by whom he had had the honour of being assisted in the administration of justice." *Law Report*, TIMES, Nov. 14, 1798, at 3. (The author thanks James Oldham for this reference.)

[83] 1 OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 15, at 53, 55.

[84] *Id.* at 55 (internal quotation marks omitted).

[85] *Id*. at 55.

[86] *Id*. at 55 n.31 (internal quotation marks omitted); *see also id*. at 129-30 (detailing entries in the Ryder diaries concerning information he learned from other judges and court officers about the various circuits).

[87] *Cf.* 1 OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 15, at 53, 55 (Dudley Ryder, Chief Justice of King's Bench from 1754 to 1756 and his successor, Lord Mansfield, Chief Justice from 1756 to 1788, both took advice from their more experienced *puisne* justices).

appointed the previous year.[88] De Grey could and perhaps did rely on his senior *puisne*, Henry Gould, a solid judge who was then in his eighth year on Common Pleas.[89] But the new Chief Justice may not have known Gould very well, for before his appointment Gould had been an unremarkable barrister, had never been a member of Parliament, and had been serving on a court before which de Grey did not practice.[90]

Perhaps as a consequence of having no colleague to whom he felt comfortable turning for guidance, de Grey chose (at least in part) the final method: he read books. In his first ten months on the bench, he purchased six basic books on pleading and procedure. The following year, he bought a new edition of Francis Buller's *Introduction to the Law Relative to Trials at Nisi Prius* and proceeded to restructure it into a bench book to which he could refer while on circuit. The specific details of these acquisitions and how de Grey used them will be examined in the following two Parts. For now, the question is not only why de Grey sought information from books but also

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[88] 2 W. Bl. at 734-35.

[89] On Gould as a judge, see Emily Kadens, *Justice Blackstone*'s *Common Law Orthodoxy*, 103 NW. U. L. REV. (forthcoming 2009). Blackstone, for instance, at least twice sought Gould's advice on cases. 2 THE POLYANTHEA: OR, A COLLECTION OF INTERESTING FRAGMENTS, IN PROSE AND VERSE: CONSISTING OF ORIGINAL ANECDOTES, BIOGRAPHICAL SKETCHES, DIALOGUES, LETTERS, CHARACTERS, ETC. 195 (London, J. Budd 1804) (Letter from Blackstone to Gould datable to April 1774). Blackstone wrote: "Mr. Blackstone hopes he has not been too presumptuous in thus intruding a second time on Mr. Justice Gould's goodness, which nothing but an anxiety to perform the task which he has undertaken with as much accuracy as possible, would have induced him to have done." *Id.*

[90] Gould appears to have obtained his appointment to the bench (originally to the Exchequer, then after two years to Common Pleas) by means of patronage. His wife had an "interest" with the Chancellor at the time, and the Chancellor appointed *puisne* justices. Bray, *supra* note 57, s.v. Gould. On barristers knowing the Common Pleas judges see the observations of the lawyer, Isaac Espinasse, about bar and bench relations in the 1790s: "With the judges of the Court of Common Pleas, or Barons of the Exchequer, the members of the King's Bench Bar had little intercourse. It was confined to occasional meetings at *nisi prius* or on the circuit." [Isaac Espinasse], *My Contemporaries: from the Note-Book of a Retired Barrister*, 6 FRASER'S MAG. 220, 427 (1832). This would have been less true of de Grey, who would have interacted with the judges in his position as solicitor and then attorney general, but his dealings with Gould may have been limited to the performance of his official functions. However, if the chocolate and on one occasion, diet bread, de Grey purchased for Gould can be understood as his way of showing his appreciation, then during his years as chief de Grey probably came to rely heavily on his senior *puisne*, in particular because bad episodes of gout frequently forced de Grey to miss sittings. *See*, *e.g.*, Accounting Records of William de Grey, Norfolk Record Office, WLS LV/16/13 (Feb. 24, 1780) ("[P]aid for Diet Bread for Mr. Justice Gould at Westmr 0.0.6."); *id.* (Feb. 14, 1780) ("[P]aid for Chocolate for Mr. Justice Gould at Guild Hall 0.1.0."). Other examples of records showing de Grey buying chocolate for Gould are at: Norfolk Record Office, WLS LV/13/14 (June 14, 1776 and June 24, 1776); WLS LV/13/20 (April 26, 1776).

why he selected the particular sorts of practice manuals and reference works he did.

In an early but still seminal study of modern judicial education, the authors found that "the judge himself is responsible for much of his own socialization simply by going to his library and consulting the casebooks, legal treatises, reporters, and statute books which pertain to his particular judicial problems."[91] One judge interviewed admitted that his judicial education consisted of "an extensive study program, on the weekends and even at night."[92] For de Grey, too, turning to books may have been second nature. He came of age in the legal profession at a time when students embarking upon a legal career depended on textbooks for much of their education. The decline of the teaching function of the Inns of Court in the seventeenth century and the uncertainty of receiving any real training as a law clerk had given books a vital role in preparing students for the bar.[93] Having been acculturated as students to learning the law from books, lawyers appear to have continued the practice once they entered the profession.[94] In response, the legal printers produced a growing stock of textbooks, practice manuals, treatises, and reference works to meet the demands of both students and practitioners.[95] It should come as no surprise, therefore, that those same lawyers, when they

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[91] Carp & Wheeler, *supra* note 2, at 387.

[92] *Id*.

[93] *See* 12 HOLDSWORTH, *supra* note 30, at 85-87 (describing how students educated themselves); LEMMINGS, *supra* note 10, at 136-37, 139-40, app. B (discussing advice given in the eighteenth century to law students, listing books to be read); THE DIARY OF DUDLEY RYDER 1715-1716, at 49, 91, 147, 184, 281, 87, 113, 116 (William Matthews ed., 1939) (discussing the law books he was studying while a law student); Tariq A. Baloch, *Law Booksellers and Printers as Agents of Unchange*, 66 CAMBRIDGE L.J. 389, 419-20 (2007) (quoting letter of a law clerk giving advice in the 1790s to a new law student about what books to read); Lobban, *supra* note 17, at 70 (decline of Inns and use of commonplace books).

[94] Lobban, *supra* note 17, at 71, 73 (eighteenth-century market in books aimed at lawyers); Ian Williams, "He Creditted more the Printed Booke": Common Lawyers' Receptivity to Print (c. 1550-1640) (unpublished manuscript, on file with the author). With regard to lawyers' use of practice books and treatises, some evidence includes the notes Henry Bathurst, eventually a judge on Common Pleas, took on Geoffrey Gilbert's treatise on evidence, see Parliamentary Archives, HL/PO/LB/1/22/2, vol. 7; Michael Foster's notes on Hale's *Pleas of the Crown*, JOHN BAKER & ANTHONY TAUSSIG, A CATALOGUE OF THE LEGAL MANUSCRIPTS OF ANTHONY TAUSSIG 167 (2007) (ms. F2); Chief Justice John Willes's mention of "Booth on Real Actions" and "Mr. Pigot's Book of Recoveries" in opinions from 1742 and 1744 respectively (Willes 344, 345 and 444, 451).

[95] 6 BAKER, OXFORD HISTORY, *supra* note 26, at 499-504; Lobban, *supra* note 17, at 73-74.

ascended to the bench, returned once again to their books to teach themselves the law they now needed as judges.

Fortunately, it is not necessary merely to speculate on the judges' knowledge of such books. Evidence from their opinions indicates that they were familiar with a wide range of practice books and recent treatises. The overwhelming majority of books cited in Common Pleas in the 1770s were case reports or the sorts of canonical works Coke discussed in the preface to his tenth volume of reports in 1614 and that Blackstone denominated works of "intrinsic authority": Brooke's, Rolle's, and Fitzherbert's *Abridgments*; Littleton's *Tenures*; Coke on Littleton; Fitzherbert's *New Natura Brevium*; Bracton's *de Legibus*; Coke's *Book of Entries*, all works by de Grey's time written well in the distant past.[96] Nonetheless, a few more recent books also appeared in counsels' arguments and the judges' opinions. Chief among them were Hale's and Hawkins's *Pleas of the Crown*, Gilbert's *History of the Common Pleas*, Viner's *Abridgment*, and Comyns's *Digest*. Two of these—the Gilbert and the Comyns—would reappear on the list of books de Grey bought in his first months on the bench.[97]

More unexpectedly, the opinions indicate the judges' familiarity with the sorts of modern treatises and practice manuals with which they presumably had grown up professionally. In 1738, John Willes, chief justice of Common Pleas from 1737 to 1761, called the book, *The Common Law Epitomiz'd: With Directions How to Prosecute and Defend Personal Actions, Very Useful for All Lawyers, Justices of Peace, and Gentlemen* (1660), by William Glisson and Anthony Gulston "a book of good credit," and George Townesend's *Tables of Most of the Printed Presidents of Pleadings, Writs and Retort of Writs at the Common Law* (1667) "a book of very good authority."[98] In a 1757 case he "rel[ied] much" upon that "most excellent book," William Sheppard's 1641 *Touchstone of Common Assurances*, an early work on conveyancing.[99] In 1771, Justice Gould made a similar approbatory comment in *Dawkes v. De Lorane*, a case concerning the non-payment of a bill of exchange.[100] Plaintiff's counsel objected that defense counsel

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[96] *See* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 337-43 (Steve Sheppard ed., 2003); 1 WILLIAM BLACKSTONE, COMMENTARIES *72.

[97] *See* notes 159-164 and accompanying text.

[98] Kettle v. Bromsall, (1738) Willes 118, 120 (C.B.).

[99] Roe d. Wilkinson v. Tranmer, (1757) 2 Wils. 75, 78 (C.B.).

[100] (1771) 3 Wils. 207.

"had got all his cases out of Mr. Cunningham's book of Bills of Exchange."[101] Timothy Cunningham's *The Law of Bills of Exchange, Promissory Notes, Bank-notes, and Insurances* was first published in 1760, and its author was still alive at the time of *Dawkes*.[102] But the recent vintage of the work did not, apparently, bother Gould, whose response to plaintiff's complaint was to assert that, "Mr. Cunningham's book was a very good book."[103]

De Grey relied far more explicitly on a modern treatise in his jury instructions in the case of *Sayre v. Rochford* in 1776.[104] In October 1775, a successful American banker living in London, Stephen Sayre, had been arrested and detained on charges of conspiring to overthrow the King.[105] An American officer serving in the British Army had alerted the Secretary of State, Lord Rochford, to the plot. Sayre was released from custody after six days for lack of credible evidence, but not before Rochford's officers had searched his house and removed his papers.[106] Sayre sued for illegal search and seizure and false imprisonment, and de Grey presided over the trial.[107] A transcript of the witness testimony and of counsels' arguments was published at the time, but it excluded the jury instructions.[108] However, the court reporter, William Blanchard, took what appear to be verbatim notes of de Grey's discussion of the law and summation of the facts, and he presented a

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[101] *Id.* at 212.

[102] TIMOTHY CUNNINGHAM, THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES, AND INSURANCES (London, W. Owen 1760). Apparently the old rule of etiquette that judges may not cite living authors did not extend to counsel. *See* DAWSON, *supra* note 8, at 97; WILLIAM POPKIN, EVOLUTION OF THE JUDICIAL OPINION 29 (2007).

[103] Dawkes v. De Lorane, 3 Wils. at 212. A bit later in the argument Gould drew support from "a little book called *Lex Mercatoria*," *id.*, which could have been Gerard Malynes's oft-reprinted *Consuetudo, vel, Lex Mercatoria*, first published in 1622, though at two volumes that was hardly a "little book." Other possible candidates include Giles Jacobs's 1718 work *Lex Mercatoria, or, The Merchant's Companion* and Wyndam Beawes's massive 1752 *Lex Mercatoria Rediviva*.

[104] JOSEPH GURNEY, THE TRIAL OF THE CAUSE ON AN ACTION BROUGHT BY STEPHEN SAYRE, ESQ. AGAINST THE RIGHT HONOURABLE WILLIAM HENRY EARL OF ROCHFORD (London, C. Kearsely 1776).

[105] A summary of the plot can be found in James Lander, *A Tale of Two Hoaxes in Britain and France in 1775*, 49 HIST. J. 995, 1013-17 (2007).

[106] *Id.*

[107] *See generally* GURNEY, *supra* note 104.

[108] *See generally id.*

clean copy to the Chief Justice as a gift.[109] This manuscript is extant in the de Grey archives.[110]

De Grey, who clearly believed that Rochford should be found blameless, took great pains in explaining the controlling legal principles to the jury.[111] He borrowed the law he applied straight from that "very learned & able modern writer,"[112] Sir Michael Foster (1689-1763), late Justice of the Court of King's Bench and author of a work published in 1762 that combined reports of criminal trials with short "discourses" on various aspects of criminal law.[113] De Grey followed the gist, as well as the rhetoric, of Foster's chapter on "High Treason in Compassing the King's Death."[114]

De Grey instructed the jury, adhering to Foster, that intent to imprison the King—supposedly Sayre's plan—was alone sufficient to support a charge of high treason, even if mere intent to imprison an ordinary person would not be a crime. He continued:

> In the same learned author I mentioned to you before—it is said—writings not published but found in a mans [sic] Closet may be under circumstances evidence of high Treason. Letters & correspondence proved to be sent—the sending in such Case is an ouverte Act or the Evidence of an Ouverte Act at least that would be high Treason connected with the design that I mentioned and used as the Means or measure of effectuating the intent—nay that is so far settled in Law That Words & Discourse may be evidence of high Treason—may be Ouverte Acts of High Treason. And as this is going a great way and treading upon very tender ground[,] *I would not be content with*

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[109] On Blanchard see Page Life, *Blanchard, William Isaac (bap. 1741?, d. 1796)*, *in* 6 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 152-53. The author thanks John Gordan for the information about Blanchard.

[110] *See* Transcript of Sayre v. Rochford Jury Instructions, Norfolk Record Office, WLS XLIX/3/23.

[111] In fact, the explanation was probably largely for the benefit of counsel, presumably in case they wanted to object in order to reserve a point on error. *See*, *e.g.*, *id*. fols. 1-2 (de Grey commented, "I am very glad I do this in the presence of the Council [sic] on both sides who are almost all of them attend[in]g because I now call upon them & desire that if in saying what I apprehend to be the Law they think I am mistaken they will tell me so—and I shall be either able to change my opinion or put it in a course of inquiry as may be fit and proper for Justice to the partys [sic].").

[112] *Id*. fol. 3.

[113] *See* MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION OF OYER AND TERMINER AND GOAL DELIVERY FOR THE TRIAL OF THE REBELS IN THE YEAR 1746 IN THE COUNTY OF SURRY, AND OF OTHER CROWN CASES (Oxford, Clarendon Press 1762). De Grey owned the first edition. *See* Catalogue of the Home Library of William de Grey, Norfolk Record Office, WLS LV/4/2, fol. 2.

[114] *Compare, e.g.*, de Grey's wording in Transcript of Sayre v. Rochford Jury Instructions, Norfolk Record Office, WLS XLIX/3/23, fols. 3-6, *with* FOSTER, *supra* note 113, at 193-96.

> *giving you my opinion without quoting it as the opinion of that great Judge* who was one of the best wishers to this Government that ever sat upon the Bench.[115]

Foster *was* a "great Judge," who earned the approbation of his contemporaries, but he was also a modern writer whose statement of the law appeared not in a particular case, nor in a collection of case summaries, but in a discussion hung only at a remove upon the authority of a judicial opinion, and yet de Grey felt not only comfortable but compelled to cite him as an authority.[116]

What these examples suggest is that the methods of judicial education matter. If, for instance, the primary means of training new judges comes from the dispensing of wisdom by more experienced colleagues, then one might expect to see the perpetuation of institutional traditions even beyond their usefulness. On the other hand, if judges learned largely from books, then the content of those books and the way they organized and explained the law would color the judges' understanding and influence their opinions.[117] However, such influence has not been ascribed to the sorts of practice manuals and reference books de Grey purchased. Some of them have been written off as no more than textbooks for students or young lawyers.[118] As a group they have been declared to have had limited bearing on the development of the law in the eighteenth century.[119] The English legal historian, William Holdsworth, claimed that barristers did not read practice books.[120] Perhaps attorneys, those lesser members of the legal profession who filed papers and dealt with clients, read such books.[121] But the more elevated barristers who pleaded in court

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[115] Transcript of Sayre v. Rochford Jury Instructions, Norfolk Record Office, WLS XLIX/3/23, fols. 5-6 (emphasis added).

[116] 12 HOLDSWORTH, *supra* note 30, at 136 & n.6.

[117] David Ibbetson, *Legal Printing and Legal Doctrine*, 35 IRISH JURIST 345, 345 (2000) ("[T]here is a close relationship between the way in which the law operates and the sources that are available to the lawyers who operate it."); Simpson, *supra* note 17, at 633 (arguing for a "close relation between the forms of legal literature and lawyers' ideas of what they are doing, and of the appropriate way for jurists to behave.").

[118] Lobban, *supra* note 17, at 73 n.20.

[119] *Id*. at 70; Simpson, *supra* note 17, at 639 (ignores practice books, and claims that "abridgments and common-place books . . . remained dominant forms of legal literature until the nineteenth century").

[120] 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 436-38.

[121] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *25-28; 12 HOLDSWORTH, *supra* note 30, at 8-9.

required skills, such as advocacy and examining witnesses, that could only be learned in practice.[122]

But a judge needed more than courtroom skills.[123] He also needed to be familiar with those aspects of law and procedure, of which, as a barrister, he might have had only glancing knowledge. If he turned to books to acquire that knowledge, then those books in part shaped him as a judge. In de Grey's case, the evidence is insufficient to determine how the books he may have read formed his jurisprudence. However, given how little is known about judicial education historically, it is already a step forward even to identify the sorts of books a judge used. That is the subject matter of Part III.

III. STAGE ONE OF CHIEF JUSTICE DE GREY'S JUDICIAL EDUCATION

Preserved in the de Grey archives is a letter written on Monday, January 21, 1771, addressed to William de Grey from Lord North, the prime minister. It informs the then-attorney general that, "Lord Chief Justice Wilmot having this evening resign'd his office, I am commanded by his Majesty to inform you that he has pitched upon you for his successor."[124] The appointment was made official on Friday the twenty-fifth, and the next day de Grey took the coif as a serjeant-at-law, as was a prerequisite for all English common law judges, and was

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[122] *See* 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 438 (1924) ("The art of examining witnesses, and of presenting the facts in a manner favorable to his client, was more important than a minute knowledge of how to put and keep in motion the formal machinery of process.").

[123] *Cf*. Letter from William Blackstone to Lord Shelburne (July 29, 1762), *reprinted in* THE LETTERS OF SIR WILLIAM BLACKSTONE 1744-1780, at 93 (W.R. Prest ed., 2006) ("My Ambition now rises to the Post of an English Judge; for which I hope that my Studies have in some degree qualified me (else I should be ashamed to think of it) though I fear that my natural Diffidence will never permit me to make any very great Progress at the Bar; for which Talents very different are required than those . . . that will qualify for the Bench.").

[124] Letter from Lord North to William de Grey, Norfolk Record Office, WLS XIII/9/3. The letter is not dated. It only indicates that it was written on "Monday Night." However, Wilmot's resignation was made public by at least Thursday, January 24, 1771 and de Grey was sworn in on January 26, so the date of the letter can be securely identified. 2 W. Bl. 734 ("[O]n January 24th, Sir *John Eardley Wilmot* (on account of ill health) resigned his office . . . ."). The letter continues, "You will know better than I do the steps that are proper to take upon this occasion; as Lord Chief Justice Wilmot has actually resign'd, it will be right to proceed in them with all convenient speed."

sworn in as chief justice of Common Pleas.[125] At some point that same Saturday he, or someone on his behalf, made a visit to the bookshop of Barnes Tovey in Bell Yard, a few blocks from de Grey's house in Lincoln's Inn Fields.[126] From Tovey he purchased Robert Richardson's *The Attorney's Practice in the Court of Common Pleas*, a primer on Common Pleas procedure ostensibly aimed at students and young clerks but apparently also of use to neophyte judges.[127]

Between February 28 and November 16, 1771, according to the receipt from Tovey reproduced on the next page, de Grey bought five additional practical pleading or procedure manuals. The question is how he used these books. Since he does not cite the works in his judicial opinions and since none of his personal copies have been located, this is impossible to answer with certainty.[128] However, the nature of the books themselves, the order and timing of his purchases, and several additional pieces of evidence concerning his book-buying habits generally suggest that he bought the works in order to teach himself about his new court and its procedure.

In all, de Grey obtained eight works from Tovey between January 1771 and January 1772, six on pleading and procedure and, at the end of the period, two others that did not belong to his judicial self-education project: Francis Vesey's reports of Chancery cases from the years 1746-1755 and volume three of James Burrow's King's Bench reports for the years 1761-1766.[129] He presumably bought these two reports to add to an impressive collection that by 1781 included over seventy nominate reports, ten volumes of the Year Books,

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[125] 2 W. Bl. 734.

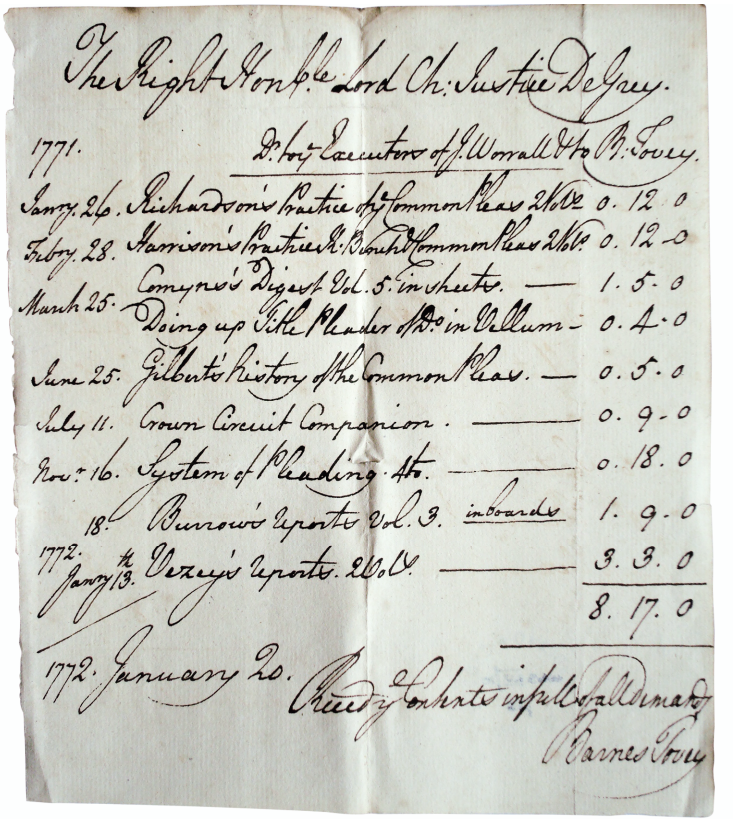
[126] Receipt for Purchases at Barnes Tovey Bookshop, Norfolk Record Office, WLS LV/10/25 (Jan. 20, 1772). On the location of Tovey's bookshop in 1771, see the title page to his edition of the *Crown Circuit Companion*, listing his shop at "the *Dove*, in *Bell-Yard*, near *Lincoln's Inn*." W. STUBBS & G. TALMASH, CROWN CIRCUIT COMPANION (London, J. Worrall & B. Tovey, 4th ed. 1768). De Grey lived in Lincoln's Inn Fields, just outside of Lincoln's Inn. *See* CUNNINGHAM, *supra* note 68, at 413.

[127] Lobban, *supra* note 17, at 73 n.20.

[128] According to de Grey's descendant, the ninth Baron Walsingham (de Grey was the first baron), the library remained in the family intact until it was dispersed through a sale in the late 1960s or early 1970s. No catalogue or record of the sale has been located. E-mail from Lord John Walsingham to Emily Kadens, Assistant Professor of Law, University of Texas at Austin (July 22, 2008, 21:15 CST) (on file with author).

[129] *See* 3 JAMES BURROW, REPORTS OF CASES ADJUDGED IN THE COURT OF KING'S BENCH SINCE THE TIME OF LORD MANSFIELD'S COMING TO PRESIDE IN IT (London, J. Worrall & B. Tovey, 2d ed. 1771); FRANCIS VESEY, CASES ARGUED AND DETERMINED, IN THE HIGH COURT OF CHANCERY, IN THE TIME OF LORD CHANCELLOR HARDWICKE, FROM THE YEAR 1746-7, TO 1755 (London, T. Cadell 1771).

assorted other collections of cases, and seventeen volumes of reports in manuscript.[130] Burrow and Vesey both reported decisions from important judges, respectively Lord Mansfield and Chancellor Hardwicke, so it is no surprise that de Grey would have wanted to own the works. Furthermore, the timing of the purchases can likely be accounted for at least in part by the fact that both volumes were published in 1771, the Vesey in January and the Burrow as a second edition put out by Tovey and his partner John Worrall in mid-November, just a few days before de Grey obtained it.[131]



The Right Hon.ble Lord Ch. Justice De Grey.

1771. D.r to y.r Executors of J. Worrall & to B. Tovey.

Janry. 26.	Richardson's Practice of Common Pleas 2 Vols.	0. 12. 0
Feby. 28.	Harrison's Practice K. Bench & Common Pleas 2 Vols.	0. 12. 0
March 25.	Comyns's Digest Vol. 5. in sheets.	1. 5. 0
	Doing up Title Pleader & D.o in Vellum	0. 4. 0
June 25.	Gilbert's History of the Common Pleas.	0. 5. 0
July 11.	Crown Circuit Companion.	0. 9. 0
Nov.r 16.	System of Pleading 4to.	0. 18. 0
18.	Burrow's Reports Vol. 3. in boards	1. 9. 0
1772. Janry 13.	Vezey's Reports. 2 Vol.s	3. 3. 0
		8. 17. 0

1772. January 20. Recd. y.r Contents in full & all Demands

Barnes Tovey

Receipt for the Purchase of Law Books. Norfolk Record Office, WLS LV/10/25, 428X2. Reprinted by courtesy of the Norfolk Record Office, Norwich, England.

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[130] Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fols. 1, 2-4; Catalogue of Home Library of William de Grey, WLS L/4/2, fol. 7.

[131] *See* Advertisement for the Burrow Volume, PUB. ADVERTISER, Nov. 11, 1771, at 1. The Vesey volumes appear to have been published in January 1771 by Thomas Cadell. The price listed in the advertisement is the same as that paid by de Grey in January 1772. *See* Advertisement for the Vesey Volume, PUB. ADVERTISER, June 6, 1771, at 1; Advertisement for the Vesey Volume, PUB. ADVERTISER, Jan. 31, 1771, at 3.

That leaves the six works on procedure. These fall neatly into two types. In one category are three basic procedural primers, aimed primarily at solicitors. In the second category are three more works that, due to tradition or the esteem in which their authors were held, had acquired sufficient authority to be cited in court. Nonetheless, these still had the characteristics of textbooks or reference manuals, albeit respectable ones.

A. Procedural Primers

To begin with the category of procedural primers, as mentioned above, de Grey acquired the first book on the list, Richardson's *Attorney's Practice in the Common Pleas*, the day he became a judge.[132] One month later, on February 28, two weeks after the end of his first term,[133] he purchased Joseph Harrison's *Present Practice of the Court of Common Pleas*.[134] The two books are virtually indistinguishable. Indeed, the Harrison was largely a bowdlerized version of the Richardson. They would have been ideal introductory or refresher "nutshells" for a new judge who had spent most of the prior two decades in Chancery and eight years serving in high government offices far removed from mundane common law practice.

Practice books such as these two appear to have been directed at the paper-filing attorneys rather than barristers. As such, they focused on the practical procedure of the courts, pleading technique, fee structures, and model forms.[135] Such information was of obvious use to de Grey, for, although he had practiced a certain amount in King's Bench (though, of course, not Common Pleas), he was unlikely to have retained an intimate knowledge of whatever arcane details of common law procedure that he might once have mastered.

Perhaps even more usefully, the long initial chapter in each work described the officers and machinery of the Court. This served two purposes for de Grey. First, it was a quick introduction—conveniently including name, position, and job

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[132] *See supra* note 127 and accompanying text.

[133] Hilary term ended on February 12. *See* PUB. ADVERTISER, Jan. 29, 1771, at 3.

[134] *See* Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 7. He also bought Harrison's PRESENT PRACTICE OF THE COURT OF KING'S BENCH; both Harrison volumes were published in 1761. The Richardson edition he purchased was published in 1769. *See id.*

[135] 6 HOLDSWORTH, *supra* note 122, at 437-48.

description—to his Court employees. Obtaining this information furthered a crucial element of his socialization, namely, learning his way around the organization.[136] Second, more crassly, the chapters informed him which of the Court's bureaucratic positions were under his patronage, this being a significant source of a chief's income.[137]

The case reports provide an inkling that de Grey needed to upgrade his knowledge of procedure. In two early cases, he demonstrated himself to be a bit at sea with the procedural question before the Court. In *Long v. Linch*, heard during de Grey's first term, the plaintiff had sued the defendant for a debt, and in order to hold defendant to bail, had filed an affidavit.[138] Defendant argued that plaintiff should have made a positive oath of the debt, and that an affidavit "only of mere inference and conclusion" was insufficient.[139] Gould and Nares disagreed.[140] Blackstone dissented, probably correctly.[141] Blackstone records de Grey as "*dubitante*."[142] The following term, in April 1771, Common Pleas heard a habeas corpus petition by the Lord Mayor of London, Brass Crosby, who had been ordered imprisoned by the Speaker of the House of Commons for violating the parliamentary privilege of a House officer.[143] The wily serjeants who argued the case ex parte on behalf of the Mayor initiated the proceedings by moving to have the return of the writ read then tried to maneuver the court into admitting that errors in the return should result in their client's discharge.[144] De Grey became quite embroiled in the dispute, demanding to see the writ and the return, which

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[136] *See* Wasby, *supra* note 2, at 10 ("[New judges] must learn to deal with court staff, both lawyers and non-lawyers—in short, the court bureaucracy.").

[137] DUMAN, *supra* note 10, at 112, 120.

[138] Long v. Linch, (1771) 2 W. Bl. 740, 740.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 740 & n.p (Elsley ed., 1828) (reviewing the development of the case law on the issue).

[142] *Id.* at 740. Wilson's report of the case has de Grey agreeing with the majority. Long v. Linch, 3 Wils. 154, 154.

[143] The situation arose when Norton issued a warrant for the arrest of John Miller, printer of the *London Evening Post*, for printing the debates of the House of Commons. In the 1771 "Printers' Case," Parliament and the London printers disputed the right to print the debates of the House of Commons, with the House asserting its privilege of secrecy of debate. The background to the Common Pleas case is described in ARTHUR H. CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 277-85 (2006). *See also* G. F. R. Barker, rev. S. J. Skedd, *Crosby, Brass (1725-1793)*, *in* 14 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 410.

[144] *Postscript*, MIDDLESEX J., Apr. 20, 1771, at 3.

"he perused . . . with great attention."[145] Gould and Blackstone eventually had to steer the neophyte chief out of trouble and move the case beyond the procedural hurdle.[146]

The fifth purchase de Grey made from Tovey, on July 11, was also an attorney's practice book, but this time the work, *The Crown Circuit Companion*,[147] concerned trial procedure on circuit rather than the procedure of the Court sitting en banc in Westminster. According to newspaper reports, de Grey left for his first assize three days after buying the book.[148]

He may have made this purchase because he felt some trepidation about sitting on assize. He would have had little recent circuit experience, as he likely had not gone a full assize circuit as a barrister for many years. For one thing, Chancery barristers often could not go on assize because Chancery did not cease its work during the months when the common law courts in Westminster shut down so that the judges could go on circuit.[149] Second, the solicitor general and attorney general generally did not go on circuit. In a big trial, they might be called in on the brief, but then they would not have had to occupy themselves with routine or technical matters.[150]

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[145] *Id.*

[146] *Id.*; *see also* Pole v. Jonson, (1771) 2 W. Bl. 774, 766 (heard during de Grey's third term, in which he gave the opinion of the Court and was promptly put in his place by his three *puisnes*, who announced that, though they "agreed, that the judgment should be for the defendant, [they] thought the rule laid down by the Chief Justice too lax and general, and introductive of infinite litigations").

[147] W. STUBBS & G. TALMASH, THE CROWN CIRCUIT COMPANION; CONTAINING THE PRACTICE OF THE ASSISES ON THE CROWN SIDE, AND OF THE COURTS OF GENERAL AND GENERAL QUARTER SESSIONS OF THE PEACE: WHEREIN IS INCLUDED, A COLLECTION OF USEFUL AND MODERN PRECEDENTS OF INDICTMENTS IN CRIMINAL CASES; AS WELL AT COMMON LAW, AS THOSE CREATED BY STATUTE (London, J. Worrall & B. Tovey 4th ed. 1768).

[148] *London*, GAZETTEER & NEW DAILY ADVERTISER, July 13, 1771, at 2; Norfolk Gaol Book, National Archives, ASSI 33/5, fol. 37 (listing de Grey and Adams as hearing suits). De Grey apparently did not go the Lent 1771 circuit. Although the *Middlesex Journal* of March 2, at page 1, reported that de Grey had set out for the Norfolk circuit during the Lent assize of 1771, he is not listed in the assize record for the circuit, and on March 6, the *Public Advertiser* noted at page 2 that, "Lord Chief Justice De Grey is at this Time so severely afflicted with the Gout as to be incapable of all Business." *See* Norfolk Gaol Book, National Archives, ASSI 33/5, fol. 15 (listing Adams and Serjeant Whitaker as hearing cases). However, de Grey's papers do include an account for this assize. Accounts for Lent Assize 1771, Norfolk Record Office, WLS LV/9/14. This might just reflect the share of the cut he received as Chief Justice.

[149] LEMMINGS, *supra* note 10, at 184.

[150] 1 TWISS, *supra* note 15, at 189 ("It is usual for a barrister, advanced to the rank of a law officer of the Crown, to quit his circuit and confine himself to the business of London, except when taken on special retainer to lead some particular cause at the assizes.").

To assuage his anxiety, de Grey presumably could rely on two sources of education. First, he went the circuit with Sir Richard Adams, baron of the Exchequer.[151] Adams had been appointed to the bench in 1753, making him at that time one of the longest-serving central court judges and therefore perhaps a very good person to mentor the neophyte.[152] However, on circuit the judges presided individually, usually with one judge hearing the civil suits and the other concurrently hearing the criminal cases.[153] Thus, de Grey was on his own in open court, which might explain why, shortly before the assize, he bought a reference book.

The *Companion* was part description of the circuit proceedings, part form book, and part fee schedule. The first section of the work briefed the reader on the details of the assize trial process: when things happened, which court officers did and said what, which forms had to be filed at different points in the process and what they said, and similar steps in the process. This was followed by model indictments for dozens of crimes and then an explanation of which fees were received by each court officer. If de Grey wanted to remind himself about the most basic choreography of the assize he could have obtained that information from this book. And if he wanted to look over the forms of indictments or the criminal procedure, he could do that too. This might have been especially useful for him because he had probably seen little routine criminal law since he had been a young barrister, if he had even then.

In his *Commentaries*, Blackstone indicated that books like the Harrison, the Richardson, and the *Companion* had a genuine role to play in teaching about court procedure. He instructed those students who wished to gain a deeper knowledge of procedure that "[a] book or two of technical learning will also be found very convenient . . . . These *books of practice*, as they are called, are all pretty much on a level in point of composition and solid instruction; so that which bears the latest edition is usually the best."[154] De Grey had certainly

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[151] Norfolk Gaol Book, National Archives, ASSI 33/5, fol. 37.

[152] According to de Grey's predecessor as Chief Justice, Sir John Eardley Wilmot, Adams "was a very good Lawyer, and an excellent Judge, having every quality necessary to dignify that character: I never saw him out of humour in my life, and I knew him intimately for forty years." JOHN WILMOT, MEMOIRS OF THE LIFE OF THE RIGHT HONOURABLE SIR JOHN EARDLEY WILMOT, KNT. 199-200 (London, White & Cochrane 2d ed. 1811) (internal quotations omitted).

[153] 1 OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 15, at 134-35.

[154] 3 WILLIAM BLACKSTONE, COMMENTARIES *271 n.(a).

known Blackstone before joining the bench, for they had been in Parliament together and had been opposing counsel on several cases in the 1760s.[155] De Grey must also have known that Blackstone, author of the already famous *Commentaries on the Laws of England*, knew books.[156] Indeed, only three years earlier, in the third volume of the *Commentaries*, Blackstone had published his own well-regarded 155-page mini-treatise on (primarily) Common Pleas procedure.[157] Thus, one might wonder whether, upon joining the Court, de Grey had sought from Blackstone advice about useful reference books and whether Blackstone had given the Chief the same advice about practice manuals that he had offered to his students.

B. Authoritative Works

Two of the books de Grey bought that fell into the second category, that of works authoritative enough to be cited in court, concerned pleading. Pleading had, in the previous centuries, become an excessively technical system, and one which skillful advocates could use to prevent the court from getting to the merits.[158] As a Chancery barrister, this was probably yet another common law skill at which de Grey was pretty rusty. The extent to which he felt it important to learn about pleading can be seen in the information provided on Tovey's receipt about de Grey's third purchase, on March 25, of volume five of John Comyns's *Digest of the Laws of England*. The *Digest* was a popular legal encyclopedia, in which the rules of law and the relevant cases and statutes were collected under alphabetically-organized general headings and subheadings. The work had originally been written in French but was translated into English and published posthumously in five

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[155] In *Lowe v. Joliffe*, (1762) 1 W. Bl. 365 (K.B.), Blackstone was on the brief for plaintiff, de Grey for the defendant; in *Baskett v. Cunningham*, (1762) 1 W. Bl. 370 (Ch.), de Grey was on the brief for the plaintiff, Blackstone for the defendant; in *Torriano v. Legge*, (1763) 1 W. Bl. 420 (Exch.), Blackstone was on brief for the plaintiff, de Grey for defendant; and in *King v. University of Cambridge*, (1765) 1 W. Bl. 547 (K.B.), de Grey moved for plaintiff in his role as solicitor general, Blackstone was on the brief for the University. Obviously there may have been other cases, but these are the cases that a search of the published reports turns up.

[156] WILFRID R. PREST, WILLIAM BLACKSTONE: LAW AND LETTERS IN THE EIGHTEENTH CENTURY 220-21 (2008) (discussing reception of the *Commentaries*).

[157] *Id*. at 221; *see also* 3 WILLIAM BLACKSTONE, COMMENTARIES *270-425.

[158] 9 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 308-10, 314-15 (3d ed. 1926) [hereinafter HOLDSWORTH, HISTORY].

volumes between 1762 and 1767.[159] De Grey owned the first edition of the whole five-volume set, and, given the importance of the Comyns as a reference, he probably had added it to his library as soon as it came out.[160]

In purchasing only volume five in 1771, de Grey had something special in mind. He bought the volume unbound ("in sheets") and then had the 300-page-long first heading or title, "Pleader," separately bound in vellum.[161] Comyns (*c*. 1667-1740), a serjeant practicing before Common Pleas, and later a judge on that Court and on Exchequer, had been particularly knowledgeable about the rules of pleading.[162] The title "Pleader" was "exceptionally well developed" and authoritative.[163] The Comyns also was, as a dense, encyclopedic compendium of case law on every conceivable issue that could arise on a given legal subject, very much a reference manual.[164] The fact that de Grey went to the expense of possibly purchasing a duplicate of a volume he already owned and of having the single title separately bound, indicates that he believed this was a reference work to which he would be referring repeatedly, either for its own information or as an index to the relevant case law.[165]

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[159] M. Macnair, *Comyns, Sir John (c. 1667-1740)*, *in* 12 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 910-11.

[160] Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 1. There is no record of his purchasing the whole set while on the bench.

[161] Read the receipt: "Doing up [the] Title, 'Pleader,' of Ditto in Vellum." Interestingly, the Cambridge bookseller, John Woodyer, hired to make a list of de Grey's law books in November 1781, soon after de Grey retired from the bench, did not understand what the Pleader volume was. The catalogue lists the book as "The Pleader a Law Book unfinishd [sic] & without a Title." Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, cover page & fol. 1.

[162] M. Macnair, *Comyns, Sir John (c. 1667-1740)*, *in* 12 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 910.

[163] *Id.* at 911; *see* W.S. HOLDSWORTH, SOURCES AND LITERATURE OF ENGLISH LAW 118-19 (1925) [hereinafter HOLDSWORTH, SOURCES]; 9 HOLDSWORTH, HISTORY, *supra* note 158, at 312 (quoting Serjeant Stephen calling the Comyns title on pleader "a more systematic compilation upon this subject than had previously appeared" (internal quotation marks omitted)).

[164] Baloch, *supra* note 93, at 420 (quoting a letter from an eighteenth-century law clerk stating that reading the Comyns "would prove but a dull task as he does not preserve a connected style and besides might give you a distaste for study" (internal quotation marks omitted)).

[165] The library catalogue does not indicate whether volume five of the set was incomplete, and there is no mention of an additional volume five. However, the Pleader volume is listed in the catalogue immediately before the Comyns is listed, so they were likely shelved together. Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 1. It is possible that de Grey bought a new volume five just so that he could have the title "Pleader" bound as a separate reference work.

The last book on de Grey's list, acquired on November 16, 1771, also concerned pleading. The anonymous *A System of Pleading* consisted of the first English translation, reworking, and updating of a well-known seventeenth-century law French work by Samson Eure called the *Doctrina Placitandi*, or the art and science of pleading.[166] The English legal historian, William Holdsworth, noted that the *Doctrina Placitandi* was "[o]ne of the earliest" systematic works on pleading,[167] and in 1759 John Willes, Chief Justice of Common Pleas, announced in court that there was "more law and learning in Doctrina Placitandi than in any book he knew."[168] De Grey did not seem to own the *Doctrina*, and he may have bought the *System of Pleading* when he did because it had been published in July 1771.[169] However, coupled with the Comyns, the purchase suggests that this clear and informative overview on the method and tactics of successful pleading could have been standing in for the sort of oral instruction Justice Denison gave to Mansfield and Ryder. De Grey may have had nowhere else to turn. Gould had been an apparently quite average barrister;[170] Blackstone was renowned as a weak advocate;[171] and Nares, though an experienced courtroom lawyer, may not have impressed de Grey with his judicial abilities.[172]

On June 25, de Grey purchased his fourth book, Geoffrey Gilbert's *The History and Practice of Civil Actions, Particularly in the Court of Common Pleas*.[173] The Gilbert was a standard work by an eighteenth-century judge and prolific writer of elementary texts, whose posthumously-published treatises enjoyed great popularity.[174] It was, as Blackstone said, "a book of a very different stamp [from other practice books]; it . . . traced out the reason of many parts of our modern

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[166] SAMSON EURE, DOCTRINA PLACITANDI, OU L'ART & SCIENCE DE BON PLEADING (London, Robert Pawlet 1677).

[167] HOLDSWORTH, SOURCES, *supra* note 163, at 118.

[168] White v. Willis, (1759) 2 Wils. 87, 88 (K.B.).

[169] *See* LONDON EVENING POST, June 22, 1771, at 4 (printing advertisements announcing the forthcoming publication of the *System of Pleading*); *see also* LONDON EVENING POST, July 6, 1771, at 4 (announcing the publication).

[170] *See supra* notes 89-90.

[171] *See* Kadens, *supra* note 89.

[172] *See supra* note 60.

[173] De Grey purchased the second edition published in 1761. The first edition appeared in 1737. Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 7.

[174] Michael Macnair, *Sir Jeffrey Gilbert and His Treatises*, 15 J. LEGAL HIST. 252, 258, 260-61 (1994).

practice, from the feudal institutions and the primitive construction of our courts, in a most clear and ingenious manner."[175] This historical approach may have appealed to de Grey, whose library and opinions demonstrate his interest in history.[176] But on another level, the Gilbert may have offered to de Grey, an interloper of sorts in the Common Pleas, a means to a greater sense of legitimacy. By learning about the history of the Court and the development of its procedure, he could also place himself in that story. It made him less of an outsider and helped him understand the reason for the procedures he was now obligated to continue. In the parlance of modern studies of judicial education, he was socializing himself to his new role by seeking "to find some sense of fit with the court organization."[177]

More pragmatically, the Gilbert was worth having because it was a respectable enough authority to be cited in court. Justice Blackstone referred to the book in an opinion in 1775 to state a rule on venue;[178] and defense counsel in 1772 relied on it for a rule concerning the actions that could be joined in a single declaration.[179] Defense counsel also used the book in 1776 alongside more traditional authorities such as Brooke's and Rolle's *Abridgments* to make a point about local custom;[180] and in the same term plaintiff's counsel adduced it as the source of a rule about the proper place to make a plea to

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[175] 3 WILLIAM BLACKSTONE, COMMENTARIES *271 n.(a).

[176] De Grey owned a remarkable variety of historical works, ranging from William Wotton's *History of Rome* (1701), to David Jones's *Compleat History of the Turks* (1701), to Michel Le Vassor's ten-volume *Histoire du regne de Louis XIII, roi de France et de Navarre* (1760), to, of course, Sir Matthew Hale's *History of the Common Law* (1739). Catalogue of the Home Library of William de Grey, Norfolk Record Office, WLS LV/4/2, fols. 13, 24; Catalogue of the Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 8 (Hale). His opinions, too, demonstrate an interest in history where that was called for. In *Wood's Case*, 2 W. Bl. 745, 745, heard during his first month on the bench, he "expressed his Surprize" at the claim that Common Pleas had no jurisdiction to grant a writ of habeas corpus at common law. To answer this assertion, de Grey examined the legal history, using cases and treatises, to demonstrate the origin of this belief and to prove its falsity. In *Rowning v. Goodchild*, (1773) 2 W. Bl. 906, 908-09, he deployed historical sources to interpret the meaning of the word "delivery" in one of the early statutes related to the post office. And in *Bolts v. Purvis*, (1775) 2 W. Bl. 1023, 1026-27, he examined the history of the law governing the East-India trade. Another case in which de Grey used historical analysis was *Barker v. Braham*, (1773) 2 W. Bl. 869, 871 (history of law of set off).

[177] Alpert, Atkins & Ziller, *supra* note 2, at 329-30; Wasby, *supra* note 2, at 10 ("Appellate judges must become acclimated to their jobs. They must . . . learn formal rules of the court and its informal norms, including the court's history and traditions.").

[178] Santler v. Heard, (1775) 2 W. Bl. 1031, 1033.

[179] Mast v. Goodson, (1772) 2 W. Bl. 848, 849.

[180] Mayor of Berwick v. Ewart, (1776) 2 W. Bl. 1068, 1069.

the jurisdiction.[181] In other words, this was a book with which de Grey was going to come into contact in court, which increases the likelihood that he bought it to read or consult. Furthermore, the fact that de Grey did not already own such a standard work is arguably evidence of how little he had concerned himself with Common Pleas procedure prior to his elevation to the bench.

C. Evidence of Self-Study

Although, based on his library catalogues, de Grey appears to have had a lifelong habit of collecting books on subjects about which his schooling, career, or merely personal interest demanded that he be familiar, it is unlikely that he purchased the books on Tovey's receipt from mere bibliophilic interest.[182] First, he kept them in his law library with what was evidently his active reference collection. Second, the other additions he made to his law library during his tenure on the bench did not have the coherence of the 1771 acquisitions. Between de Grey's accounts and his library catalogues, several purchases can be identified. He added three volumes of reports on King's Bench and Exchequer, the 1772 second edition of Henry Barnes's *Notes of Cases in Points of Practice Taken in the Court of Common Pleas at Westminster*, John Lilly's *Practical Register*, the 1777 edition of Joseph Sayer's *Law of Costs* to go with the 1768 first edition he also owned, and a volume of the laws of the province of Quebec.[183] While on the bench, de Grey may also have obtained the first edition of

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[181] Grant v. Lord Sondes, (1776) 2 W. Bl. 1094, 1095.

[182] *See* VIRGINIA F. STERN, GABRIEL HARVEY: HIS LIFE, MARGINALIA AND LIBRARY 194 (1979) ("The titles in an individual's library are usually an excellent indicator of his interests.").

[183] King's Bench reports by Sayer (1775), Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 2; the just-published volume four of Burrow's King's Bench reports, Record of Purchase, Burrow's Reports, Norfolk Record Office, WLS LV/13/14 (June 24, 1776); Exchequer Reports by Chief Baron Parker (1776), Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 2; Barnes's *Notes*, Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 6; the 1735 edition of Lilly's *Practical Register*, Record of Purchase, Lilly's Practical Register, Norfolk Record Office, WLS LV/14/13 (Jan. 15, 1777); Sayer's *Law of Costs* (1777), Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 6. He appears to have had a special interest in Quebec. Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 1. He had three more such volumes in his home library (a work on the custom of the French in the Province of Quebec also published in 1772 and two copies of a "Code of Laws for Quebeck" published in 1774). Catalogue of Home Library of William de Grey, Norfolk Record Office, WLS L/4/2, fols. 3, 22.

Blackstone's *Commentaries* that he kept in his law library.[184] Finally, as will be discussed at length in the next section, in 1772, he bought Buller's *Law of Trials at Nisi Prius*.

The third piece of evidence suggesting that de Grey bought the procedural works in 1771 as part of a methodical campaign to educate himself in the practice of Common Pleas is the fact that he did not immediately acquire the standard collections of Common Pleas cases. Coming in, case law was probably not his foremost concern. As the twentieth-century Canadian judge, Edson Haines, said in an article on judicial education:

> [S]ubstantive law will be recalled and learned as [the new judge] matures on the bench. He can take time to consider this and refurbish his knowledge. He cannot postpone the learning of the rules by which causes are tried and evidence admitted. The guarantees of a fair trial are found in the laws of procedure and evidence.[185]

As an experienced barrister, de Grey must have had a nearly encyclopedic knowledge of cases, albeit predominantly those decided in King's Bench.[186] He owned the primary seventeenth and early eighteenth-century Common Pleas reports as well as a collection of (unidentifiable) manuscript reports, but the records give no indication of when he obtained them, and none of the receipts or accounts from the 1770s records the purchase

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[184] According to his library catalogues, he eventually possessed two complete sets of the *Commentaries*. In his law library, he had the first edition of 1765-1769. Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 6. At home he had the pirated Dublin 1775 edition. Catalogue of Home Library of William de Grey, Norfolk Record Office, WLS LV/4/2, fol. 20. However, his papers also contain two receipts for the purchase of the *Commentaries*. One, from February 12, 1777, notes that he "paid Mr. Chamberlayne for Blackstone Commtries 0:6:6;" and the second records a purchase from the publisher in 1774. Record of Purchase, Lilly's Practical Register, Norfolk Record Office, WLS LV/14/13 (Jan. 15, 1777); Record of Purchase, Blackstone's Commentaries, WLS LV/12/11 (May 17, 1774); *see also* Record of Payment, Binding of Blackstone's Commentaries 1774, Norfolk Record Office, WLS LV/12/21 (July 5, 1774); Record of Payment, Binding of Blackstone's Commentaries, Norfolk Record Office, WLS LV/14/20 (June 4, 1777). The question is to which editions these receipts refer, if either.

[185] Haines, *supra* note 13, at 233.

[186] He was also said to have possessed an excellent memory. 1 TWISS, *supra* note 15, at 113 (Lord Eldon said he had a "'most extraordinary power of memory.'—'Lord Chief Justice De Grey,' said Lord Eldon, 'was a severe sufferer from gout. I have seen him come into court with both hands wrapped in flannel. He could not take a note, and had no one to do so for him. I have known him try a cause that lasted nine or ten hours, and then, from memory, sum up all the evidence with the greatest correctness. I have known counsel interrupt him in his summing up, and represent that he had mis-stated evidence. 'I am right,' he would say, 'I am sure I am right; refer to your short-hand writer's notes.' He invariably proved to be correct.'").

of Common Pleas reports.[187] Yet he did not include in his 1771 buying spree either the first edition of Henry Barnes's *Notes* on Common Pleas cases or George Cooke's *Reports and Cases of Practice in the Court of Common Pleas*, both of which were cited regularly by the serjeants in oral argument. At some point de Grey did acquire the second, expanded edition of the Barnes, though there is no record in his accounts of the purchase, and it is possible he received it as a gift from the author, who was an officer of the Court.[188] The Cooke, however, never appeared in either his purchase receipts or his library catalogues.

De Grey may not have worried a great deal about knowing the Common Pleas precedents for two reasons. First, counsel and the judges often cited King's Bench cases in their argument and opinions.[189] This may have been due to King's Bench's greater prestige, or it may simply have been a result of the comparative lack of published Common Pleas reports.[190] Second, the judges and barristers worked together to find the relevant cases and discussed them at the hearings, so that any lacunae in de Grey's knowledge could have been addressed in this give and take.[191]

However, when presiding on circuit, de Grey could not dodge substantive questions, so after squaring away his

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[187] Catalogue of Home Library of William de Grey, Norfolk Record Office, WLS L/4/2, fol. 7 ("Seventeen Vols of Reports in MS"—notably, kept in his home library).

[188] Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 6 (listing the Barnes in the law library catalogue). Barnes was a Secondary and Clerk of Errors in the Court of Common Pleas.

[189] Looking at the twelve cases from Blackstone's *Reports* in which de Grey is recorded as giving the greatest number of citations, references to King's Bench cases outnumber those to Common Pleas by more than two to one. The cases sampled were: Wood's Case, (1771) 2 W. Bl. 745, 745; Atkinson v. Teasdale, (1772) 2 W. Bl. 817, 818-20; Hitchin v. Campbell, (1772) 2 W. Bl. 827, 829-32; Parsons v. Lloyd, (1772) 2 W. Bl. 845, 846-47; Powel v. Milbank, (1772) 2 W. Bl. 851, 852-53; Murray v. Harding, (1773) 2 W. Bl. 859, 862-86; Barker v. Braham (1773) 2 W. Bl. 866, 867-69; Doe d. Wightwick v. Truby, (1774) 2 W. Bl. 944, 946-47; Abbott v. Smith, (1774) 2 W. Bl. 947, 949-51; Hawkins v. Plomer, (1776) 2 W. Bl. 1048, 1049-50; Miller v. Seare, (1777) 2 W. Bl. 1140, 1144-46; Cameron v. Lightfoot, (1778) 2 W. Bl. 1190, 1192-95.

[190] Oldham, *Underreported and Underrated*, *supra* note 50, at 119-21. De Grey also seems to have known many decisions from the 1740s and early 1750s by John Willes, Chief Justice of Common Pleas from 1737-1761, because he cites them in the annotations to his Buller's *Nisi Prius*.

[191] Counsel seems to have been expected to produce case reports at argument. See, for example, the statement of counsel in the trial of *Fabrigas v. Mostyn* (1773), *in* 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 169 (Francis Hargrave ed., 4th ed. 1781) ("I have Sir *Bartholomew Shower*'s parliamentary cases upon the table.").

knowledge of pleading and procedure, he turned to the rules of law. The next Part examines how he did this.

IV. STAGE TWO: CREATING A BENCH BOOK

One of the educational services the Federal Judicial Center provides to new federal judges is a bench book tailored to the law and procedure of their type of court and distributed in a three-ring binder to facilitate updating and supplementing.[192] Even judges who do not need to make use of the supplied bench book end up writing their own checklists, notes, and cheat-sheets.[193] Not having the benefit of a pre-made guidebook to the job of a Common Pleas judge, de Grey created his own. And much like modern judges might do with the supplied bench book, he began with a printed text and built onto it an extensive structure of additions and annotations that would make the final work useful to him. His choice of base text was the 1772 edition of the *Introduction to the Law Relative to Trials at Nisi Prius*, by Francis Buller, a precocious, brilliant, and successful young barrister who would soon become the youngest judge to be appointed to the Court of King's Bench.[194]

That work, popular enough to be published repeatedly until 1817,[195] contained a summary of the law encountered at civil trials on assize (so-called *nisi prius* trials). It consisted of seven parts covering, first, injuries to the person, to personal property, and to real property, then a long section on actions on contract, followed by a series of brief accounts of actions given by statute, criminal prosecutions relative to civil rights, and traverses to land titles and stays of proceedings in lower courts.[196] The last two parts concerned trial practice, with an

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[192] FEDERAL JUDICIAL CENTER, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (5th ed. 2007) ("[T]he purpose of . . . the *Benchbook* . . . is to provide a quick, practical guide to help judges with situations they are likely to encounter on the bench . . . . New judges in particular should benefit from the *Benchbook* . . . .").

[193] Carp & Wheeler, *supra* note 2, at 383. I thank Judge Sam Sparks (W.D. Tex.) and Judge Lee Rosenthal (S.D. Tex.) for discussing with me the material they created when they took the bench.

[194] LEMAN THOMAS REDE, STRICTURES ON THE LIVES AND CHARACTERS OF THE MOST EMINENT LAWYERS OF THE PRESENT DAY 108-09 (London, G. Kearsley 1790); James Oldham, *Buller, Sir Francis, First Baronet (1746-1800)*, *in* 8 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 617-18.

[195] James Oldham, *Buller, Sir Francis, First Baronet (1746-1800)*, *in* 8 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, *supra* note 19, at 617-18.

[196] *See* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT *NISI PRIUS* (London, C. Bathurst 1772). The "Actions given by Statute" include

extensive treatment of evidence preceding a miscellany of "General Matters relative to Trials."

The *Nisi Prius* was the logical book for de Grey to choose. Buller described it in the preface to his sixth edition as "a *vade mecum* on the circuits," intended to provide practitioners with a mobile law library containing much of what they needed to get through assize trials.[197] At least some late eighteenth-century lawyers took him at his word. Copies survive with blank pages interleaved with the text and bound in leather with large flaps that tied over the book to protect the pages and keep out the dust of the road. On the blank pages the owners made notes on existing precedent, added new law, and reported on trials they attended.[198] For them, the Buller was a storage site for *nisi prius* law. On the other hand, Isaac Espinasse, who later wrote a competing guide to *nisi prius* law, took issue with the claim that Buller's work was an aid for experienced practitioners. Instead, he said, "it was certainly used by the younger part of the Profession for a very different purpose: it was used by them as an Elementary Book on the Law of *Nisi Prius*, as a necessary Volume of preparatory legal information."[199] For de Grey, the Buller may have served as both elementary guide and reference library. Either way, he made the book his own. In a manner far more extensive than the interleaved lawyers' copies and unusually invasive of the author's text, de Grey reconstructed Buller's book, adding pages of new material and hundreds of marginal annotations to turn his own copy into something quite different from the original.

By the time he purchased the Buller around December 1772,[200] Chief Justice de Grey had presided over at most two assizes in the country and several sets of trials for London.[201]

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actions upon the statute of hue and cry, *id.* at 180-83, and actions on the statute of 5 Eliz. governing apprenticeships, *id.* at 188-90. The section on "criminal Prosecutions relative to Civil Rights" concerns writs of mandamus and quo warranto. *Id.* at 195-209. Traverses to land titles was a method of proving possession of land against the King.

[197] FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS, at first page of the unpaginated "Advertisement" (London, R. Pheney 1793).

[198] BAKER & TAUSSIG, *supra* note 94, at 80, 106 (mss. 217, 218, 278).

[199] ISAAC ESPINASSE, A DIGEST OF THE LAW OF ACTIONS AND TRIALS AT NISI PRIUS, at vi (London, T. Cadell 2d ed. 1793).

[200] *See infra* note 243 and accompanying text for a discussion of the dating.

[201] He did not go on the Lent 1772 circuit according to the Norfolk Gaol Book, National Archives, ASSI 33/5, fol. 63, even though he was scheduled to go, MIDDLESEX J., Feb. 4, 1772, at 3. For Summer 1772, he was scheduled for the Midland Circuit. GEN. EVENING POST, June 25, 1772, at 1.

Thus, although he did not yet have a great deal of trial experience, he presumably had some idea of the sorts of law he would encounter and the sorts of reference material that would be helpful to have at hand. He knew, for instance, that presiding over a trial, especially on assize, was different from hearing a case en banc in Westminster. Sitting en banc, de Grey had the assistance of his brethren.[202] Gould had more experience on the bench; Nares, the former serjeant, had spent a career practicing before Common Pleas; Blackstone had the authorities at his fingertips.[203] And if the Chief was unsure about the law or the cases, he could adjourn the hearing until the judges had time to research and consider the issue.[204] At assize trials, by contrast, de Grey sat alone. He had to make decisions immediately, in open court, before a jury, and in the face of aggressive and compelling arguments by counsel.[205] He would often have to hear many cases in a row, had less time to prepare for them, and did so with access to fewer books.[206] He could not carry a load of law books with him on the road, and provincial cities could not always provide the books a judge

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[202] Bernard v. Bishop of Winchester, (1774) Lofft 401, 415 (C.B.) ("Lord Chief Justice *De Grey*—I find, on conferring, *we* agree in opinion, and will give no further trouble, though we are always glad to hear you." (second emphasis added)); Tyssen v. Clarke, (1774) 3 Wils. 541, 548-50 (K.B.) (trial at bar, heard en banc, all four judges giving opinion on objection regarding admissibility of evidence).

[203] *See supra* note 89.

[204] *See, e.g.*, *Parsons v. Lloyd*, (1772), Manuscript Reports, Lincoln's Inn Library, Hill MS 15, fol. 30 ("Serj[ean]t Glynn not ready in his Cases so Per Curiam: It requires looking into the Cases.").

[205] *See, e.g.*, THE WHOLE PROCEEDINGS IN THE CAUSE ON THE ACTION BROUGHT BY THE RT. HON. GEO. ONSLOW, ESQ. AGAINST THE REV. MR. HORNE 31-41 (best evidence rule), 43-48 (variance in declaration) (Joseph Gurney ed., London, T. Davies & J. Gurney 1770) (recording the aggressive arguments made by counsel to Blackstone, J. in *Onslow v. Horne*, heard at the lent assize in 1770).

[206] In Westminster, judges were supposed to receive papers from counsel containing the pleadings in the case several days before it was heard. 1 ROBERT RICHARDSON, THE ATTORNEY'S PRACTICE IN THE COURT OF COMMON PLEAS 190, 192, 201-02 (London, J. Worrall 1769) (attorneys must deliver copies of the issue or demurrer book to the judges several days in advance of the hearing). The issue book consisted of the pleadings, procedural history, and any jury verdict. STEPHEN, *supra* note 69, at 103-04; *see also* 1 SYLVESTER DOUGLAS, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF KING'S BENCH IN THE NINETEENTH, TWENTIETH, AND TWENTY-FIRST YEARS OF THE REIGN OF GEORGE III, at xii (London, T. Cadell & E. Brooke, 2d ed., 1786) (mentioning briefs of counsel). On assize, the judge presumably also received the pleadings in advance, but it is unclear how much in advance. *See* the letter of William Blackstone to Lady Blackstone, (Mar. 29, 1775) *in* THE LETTERS OF SIR WILLIAM BLACKSTONE, *supra* note 123, at 151 ("I have 20 Causes at this place, none of them of considerable Length. Three are tried already, & the rest will be finished with Ease on Friday Morning, or perhaps Thursday Night.").

might require.[207] What de Grey needed was a compact reference book, an encyclopedia of *nisi prius* law.

To turn Buller's *Nisi Prius* into that encyclopedia, de Grey had to do some significant reengineering, and because only half of de Grey's copy of the *Nisi Prius* is extant, reconstructing his steps takes some guesswork. The 1772 edition that de Grey bought consisted of an unbound 330-page text, plus some front matter and an index.[208] Although the book was usually bound as a single volume, one of the first things de Grey did was to separate the pages into two volumes of unequal size.[209] The second volume has not been located and may be lost; nonetheless, the division can be reconstructed from a table of contents to both volumes that de Grey wrote on the inside front cover of volume one and a separate index he created covering both volumes.[210] These sources suggest that volume one primarily, though not completely, covered substantive law, while evidence and procedure ended up in volume two.[211]

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[207] *See*, *e.g.*, Trial Report, Lincoln's Inn Library, Dampier MS, Buller Bundle 51, at 2 (unnumbered) (Blackstone, J. relating in one trial report that he "in vain sent all round East Grinstead for an Edition of ye Statutes, which had in it the Book of Rates with the Rules thereunto annexed."); *see also* PUB. ADVERTISER, Feb. 29, 1776, at 2 (judges at criminal trial in London calling for statute books and reading them prior to commencing the case).

[208] The booksellers were advertising the book "in sheets," meaning unbound. In addition, the dimensions of de Grey's copy (11" (27.8 cm) x 8.5" (21.6 cm)), roughly similar to copies in the British Library and Middle Temple indicate that the book could not have been disbound and rebound, with the concomitant trimming.

[209] What became volume one consists of pages 3-112, 125-92, 265-78, 299-306, 311-12. Most of the remaining pages ended up in volume two. The divisions did not always occur along part or chapter lines, one result being that pages on occasion break off or start in the middle of a sentence. In addition, the front matter, the original index, and pages 1 and 2 are presumably missing entirely. De Grey evidently discarded any pages that had no value to him. He did not need the title page or the dedication, for example, and the table of contents was no longer relevant, as will be seen. The index was also rendered unnecessary after he wrote his own. The likely explanation is that de Grey wanted to trim the book as much as possible if he was going to carry it with him on assize.

[210] Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS LV/17.

[211] The first volume includes all of part one, books one and two on injuries to the person and injuries to personal property, respectively. It also includes the first two chapters—on trespass and ejectment—of book three on injuries to real property. All of part two, on contract, is in volume one, as is all of part three on actions given by statute. The remaining sections in this volume come from two pockets carved out of pages otherwise found in volume two. These pockets shifted to volume one consist of pages 265-78 and 299-306. These include the material on notes and bills, Statute of Frauds, juries, pleas *puis darreign continuance*, and abatement by death. Volume two, by contrast, consisted of the old, mostly little used real property writs, the majority of the long chapter on evidence, and most of the miscellaneous chapters on procedural matters. De Grey's reason for including the sections on bills and the Statute of Frauds

However, de Grey did not stop with reorganizing the Buller, because he also felt that the original book left out, or failed to cover adequately, several areas of law that he considered important.[212] Sale of goods, for example, did not have its own section in the Buller, neither did nuisance, nor such procedural matters of importance to judges as special verdicts, nonsuit, and granting certificates of notice to the court in

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in volume one is easy to explain. Although the treatment of bills and notes occurs in the long chapter on evidence, the section itself is mostly substantive. Furthermore, it deals in part with contracts, a subject included in volume one, and mentions sale of goods, about which de Grey included manuscript pages in volume one. The bills and notes section also required several additional manuscript pages to hold all the annotations. For reasons discussed below, de Grey likely wanted all the manuscript additions to be in volume one. The two pages on the Statute of Frauds—not a separate section in the Buller—remained in volume one essentially by accident. The bills and notes section ended on the top of page 277, followed on the bottom of the page by the beginning of Statute of Frauds, and 278 is the verso of 277. By contrast, the pages on juries, pleas *puis darreign continuance*, and abatement by death have no obvious connection to volume one. They all focus on procedural matters and none has a great deal of marginalia.

Furthermore, retaining these pages in volume one forced de Grey to split two gatherings, thereby orphaning pages in both volumes. Understanding this requires an explanation of bookbinding techniques. Each page, or leaf, of a book, consisting of a front and back (or recto and verso), is a folio. However, eighteenth-century books were not composed of a stack of folia. Each page was in fact a double page—a bifolium—consisting of four text pages. The bifolia were folded and nested together to form a gathering, and the gatherings stacked to form the volume. In de Grey's *Nisi Prius*, each gathering had two bifolia, and the whole book consisted of forty-eight gatherings. To give a concrete example, pages 1 to 8 made up the second gathering. The first bifolium—the outer part of the gathering—was page 1 (recto) and 2 (verso) and also 7 (recto) and 8 (verso). The inside bifolium was page 3 (recto) and 4 (verso) and 5 (recto) and 6 (verso). If de Grey pulled out a single leaf, it would have to be cut off its bifolium partner, leaving a small tail in the margin. So, if de Grey removed page 1, page 8 would be orphaned, and in order to bind it in, a small piece of the inside margin of page 1 would have to be left attached to page 8. Conversely, he might choose not to cut any pages but rather to remove an entire bifolium. If he removed the bifolium composing pages 3 to 6, for instance, the remaining pages would go: 1, 2, 7, 8. The last two pages of volume one, 311-12, deal with bills of exception, which de Grey's table of contents lists in volume two though half the section is in volume one. These pages clearly ended up in volume one because they are part of the bifolium with pages 305-06. De Grey appears not to have cared much about them, since he wrote only one annotation on the two pages and since he split the chapter on bills of exception in half in order to keep 311-12 in volume one, even though he had already divided the gathering of which they were a part. What is odd is that de Grey split gatherings in other parts of the book, so there would seem to be little reason not to do it with these two pages as well.

[212] Evidence that de Grey was correct in believing that Buller's treatment of some of these topics was inadequate, or, if nonexistent, that they were necessary additions can be found in ESPINASSE, *supra* note 199, at vii-viii, where he writes,

> it may, perhaps, be considered as a more serious objection, that several very material heads of the Law are totally omitted [from the Buller]. The Law of Policies of Insurance, a part of the Law of great extent and importance, is not touched on at all: The Law of Bills of Exchange and of Bankruptcy, very imperfectly. . . .

Westminster. De Grey's response to these lacunae was to add pages, some consisting of his own handwritten notes, others coming perhaps from one or more printed sources.

To the front of volume one, he appended blank pages on which he wrote his own entries on Servants' Contracts,[213] Sale of Goods, Special Verdict, What Maintains the Issue, Damage feasant, and Judge Certifying. At the end of the volume he wrote a half page on usury and eleven additional pages of overflow annotations from the book, in particular from the section on bills of exchange.[214] The pages in front were marked A through M; the pages at the end were numbered 312a-312m, 312 being the last printed page in this volume.

In volume two, by contrast, de Grey added pages both at the end and in the middle of the book, and all pages were numbered, but the numbers were neither continuous with the Buller pages nor in numerical order. The additional entries in volume two are as follows:

> [Evidence] What the Best 381, 378
>
> [Evidence] Copies of 375
>
> Demurr[e]r to Evidence .....299[215]

These additions fell in the middle of the volume, in the section on evidence, coming between what de Grey in the table of contents called "Evidence vivâ voce" at page 279 and "Bills of Exceptions" at page 309.[216] At the end of the table the list continues:

> Witnesses not attend[in]g 385
>
> Plees, w[hi]ch tryed first 383

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[213] He did not list this page in the table of contents, perhaps because he viewed it as overflow from the text. However, the *Nisi Prius* does not have a section on master and servant, and the few scattered paragraphs to which de Grey cross-referenced his extra page mention servants only in passing. By contrast, he separately lists the page on usury, even though he cross-references that page to a paragraph in the text, which also mentions usury only in passing. It may be that he wrote the page later, after the table of contents was made, though the writing shows no signs of the distortion that would have occurred if it had been done after binding.

[214] Usury was at 312a, followed by overflow notes on malicious persecution (312b), false imprisonment (312c to 312e), rates (312f), trespass (312g), and bills and notes (312h to 312m).

[215] The Buller contained a section on demurrer to evidence at page 307, which de Grey left out of his table of contents.

[216] The Buller table of contents did not break up the content of the evidence chapter nor were there subheadings in the text. De Grey created his own subheadings.

[Insurance] Policies .....347[217]

General Issue 113a

Nonsuit &c. 365

Commoners Pleedgs [sic] &c. .332

Nuisance 357

Insolvent Debtor .....380 ~~363~~

Customs proved 335

Copyhold 113u

Customs & Prescriptions 373

Commons 368

He also moved the *Nisi Prius* pages 253-264 (fraudulent conveyances, wills of land, and stamps) out of order, extracting them from the general discussion of evidence and sandwiching them as a group between the last section of the book, on costs, and the new material on witnesses not attending. The fact that the pages in the second volume were in part arranged with no semblance of numerical order apparently did not hinder de Grey in using the book.

Without the second volume and without being able to identify the source or sources of the extra material, which has thus far proven elusive, it is not possible to demonstrate conclusively how de Grey rebuilt his *Nisi Prius*. However, the evidence that does exist suggests that he did what a modern judge might do. He inserted his own notes in some places and used the eighteenth-century equivalent of photocopying pages from treatises in others.[218]

The handwritten additional pages in volume one probably came from de Grey's commonplace books. Nearly every individual note is attributed to one or more reports, just as they would be in a commonplace book. In volume two, pages 113a and 113u, resembling in their numbering the handwritten pages in the back of volume one, suggest that de Grey might have used notes he had written at the end of another book.

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[217] The Buller table of contents just reads "Policies," but de Grey's index makes it clear that this refers to insurance. Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17, fol. 398; *see also supra* note 212.

[218] *Cf.* BAKER & TAUSSIG, *supra* note 94, at 104 (ms. 270: printed attorney's manual bound with manuscript notes).

These he may have cut out and inserted into the *Nisi Prius*, or he may have recopied them, maintaining the original page numbering so that he could find the originals easily in the book from which they came.[219]

By contrast, it seems rather doubtful that the remaining extra material came from de Grey's notebooks. His equity notebooks, his bench notebook from 1775-76, and his *Nisi Prius* index suggest that he preferred relatively small, top-bound lawyers' notebooks.[220] The Buller, by contrast, was a large folio measuring 11" (27.8 cm) x 8.5" (21.6 cm). Not only would the notebook pages have been significantly smaller, but they would have had little marginal space for rebinding, and, because they were top-bound, the writing on the back of each page would have been upside-down if bound into the Buller along the side margin. If de Grey had recopied the pages onto larger sheets, it would have made little sense to retain the original page numbering, because the size differential of the pages would have meant that the pagination would quickly cease to correspond. Furthermore, in volume one of the Buller, de Grey numbered his additional manuscript pages consecutively, and it is unclear why he would have chosen an inconsistent system for volume two.

The logical explanation for the odd page numbering is that the pages came already numbered, presumably meaning they were pages from printed books.[221] Although this raises the question whether de Grey would have bought new copies to

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[219] De Grey's index indicates that these sections consisted of multiple pages. "Copyhold," for instance, had at least four: 113u, 113w, 113x, and 113y. Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS LV/17, fols. 41-42. The index lists only three pages for "General Issue": 113c, 113d, 113e. *Id*. fol. 80.

[220] Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS LV/17 (index); William de Grey Equity Notebooks, Lincoln's Inn Library, Misc. MS 178, 179, 180, 181, 182; William de Grey Bench Notebook, Lincoln's Inn Library, Misc. MS 183.

[221] It is technically possible, given the page numbers listed in his Index, that de Grey took all of the material from a single book. If so, then he reorganized them entirely, as the table of contents demonstrates. Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17. To give one example, the Index entry for "Commoner[s]," contains references to pages 368-72 and 332-34. *Id.* De Grey's table of contents lists Commoners Pledges beginning at page 332, followed by some intervening material by Customs Proved at 335, Customs & Prescriptions at 373, and Commoners at 368. If his Index lists the contents of pages 332-34 under the same heading as the contents of pages 368-72, it is not clear why de Grey would have kept them apart in the book when he was already reordering the pages such that page 373 came before pages 368-72, and page 335 was separated from pages 332-34 by page 357 and page 380.

take apart or cut pages out of existing books,[222] the fact that the pages of the other books would likely not correspond in size to the Buller might explain why so much substantive law—insurance policies, commoners, nuisance, etc.—ended up in the volume dominated by procedure.[223] Rather than have both volumes be ungainly, de Grey may have wanted to put all the odd-sized pages in one place.

However, after arranging his volumes and adding quite a few additional pages, de Grey was only part way finished with his reconstruction project. His next step was to annotate the books. This he did in two steps. First he went through the Buller and made signposting annotations in the inner margin.[224] (See the picture of page 265 of de Grey's book reproduced on the following page.) He numbered the main points on each page, starting from the top, and often wrote very brief descriptions summarizing the issue covered by each point. On some pages, he added additional text in the bottom margin, to which he also assigned numbers following in order on the marginal numbers he had placed next to the printed text. These signposting annotations permitted de Grey to make cross-referencing notes throughout the volume that pointed him not only to a particular page but also to a paragraph or even a sentence on that page.[225]

Nevertheless, if the signposting marginalia made the book easier for de Grey to navigate, they did not fill the gaps he found in the Buller. Consequently, on nearly every page, he made extensive annotations, sometimes filling the margins and even flowing over onto the following page and onto the pages added at the end of the book. These notes provide a window into the sorts of information de Grey felt that he needed to have when preparing for trials.

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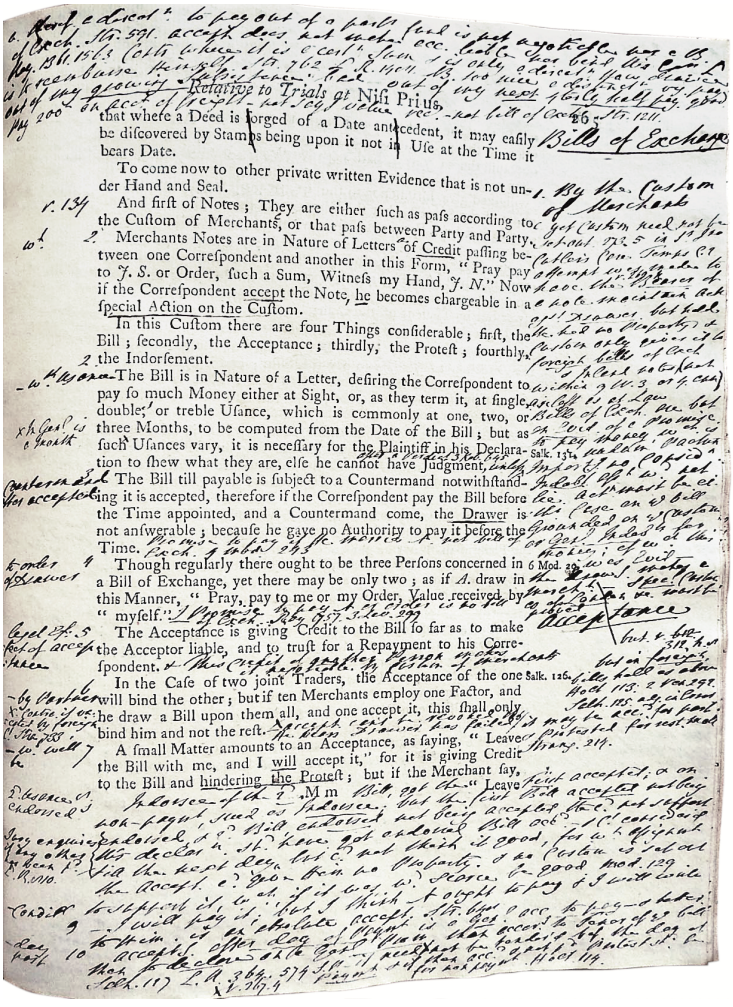
[222] Neither seems terribly likely, especially given that de Grey was something of a bibliophile. This might argue that the source of the extra material was a single book.

[223] De Grey's edition of Comyn's *Digest*, for example, was a much larger work than the Buller; whereas his *Tryals per pais*—a precursor to the Buller—was a far smaller volume. The law library catalogue, Norfolk Record Office, WLS LV/4/1, lists the Comyns under folio (fol. 1), as does the English Short Title Catalogue, citation number T140618, and the *Tryals per pais* under octavo (fol. 8), as does the English Short Title Catalogue, citation number T121428.

[224] These annotations clearly preceded the other notes, because de Grey had to write his longer notes around them. Among the evidence that de Grey actually read the book fairly carefully are the corrections he makes throughout to typographical errors.

[225] Thus, a note such as the one found at the very bottom of the illustration on the next page that reads "v. 267.4" meant, "see page 267, point 4." William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17.

The disjointed mélange of substantive rules, instructions on proper pleading, and strings of case squibs in Buller's *Nisi Prius* offered the lawyer a checklist of sorts. If his client had been accused of conversion, for instance, the *Nisi Prius* explained what evidence had to be proved, beginning with the general reminder that "it must be known how the Goods came to his Hands," then proceeding through a series of specific scenarios relating to refusal to return a good: a carrier's failing to deliver, an inn-keeper retaining possession of a guest's horse, an attorney's refusing to turn over a document, and so on.[226]



Relative to Trials at Nisi Prius.

that where a Deed is forged of a Date antecedent, it may eaſily be diſcovered by Stamps being upon it not in Uſe at the Time it bears Date.

To come now to other private written Evidence that is not under Hand and Seal.

And firſt of Notes; They are either ſuch as paſs according to the Cuſtom of Merchants, or that paſs between Party and Party.

2. Merchants Notes are in Nature of Letters of Credit paſſing between one Correſpondent and another in this Form, "Pray pay to *J. S.* or Order, ſuch a Sum, Witneſs my Hand, *J. N.*" Now if the Correſpondent accept the Note, he becomes chargeable in a ſpecial Action on the Cuſtom.

In this Cuſtom there are four Things conſiderable; firſt, the Bill; ſecondly, the Acceptance; thirdly, the Proteſt; fourthly, the Indorſement.

2. The Bill is in Nature of a Letter, deſiring the Correſpondent to pay ſo much Money either at Sight, or, as they term it, at ſingle, double, or treble Uſance, which is commonly at one, two, or three Months, to be computed from the Date of the Bill; but as ſuch Uſances vary, it is neceſſary for the Plaintiff in his Declaration to ſhew what they are, elſe he cannot have Judgment.

The Bill till payable is ſubject to a Countermand notwithſtanding it is accepted, therefore if the Correſpondent pay the Bill before the Time appointed, and a Countermand come, the Drawer is not anſwerable; becauſe he gave no Authority to pay it before the Time.

4 Though regularly there ought to be three Perſons concerned in a Bill of Exchange, yet there may be only two; as if *A.* draw in this Manner, "Pray, pay to me or my Order, Value received by myſelf."

The Acceptance is giving Credit to the Bill ſo far as to make the Acceptor liable, and to truſt for a Repayment to his Correſpondent.

In the Caſe of two joint Traders, the Acceptance of the one will bind the other; but if ten Merchants employ one Factor, and he draw a Bill upon them all, and one accept it, this ſhall only bind him and not the reſt.

A ſmall Matter amounts to an Acceptance, as ſaying, "Leave the Bill with me, and I will accept it," for it is giving Credit to the Bill and hindering the Proteſt; but if the Merchant ſay, "Leave

De Grey's Annotations in his *Nisi Prius*. Norfolk Record Office, WLS LV/18, 428X4. Reprinted by courtesy of the Norfolk Record Office, Norwich, England.

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[226] *Id.* at 44-45.

To this material, de Grey added notes that supplemented, explained, and even occasionally questioned the text, and in so doing readied himself to perform the primary tasks of a trial judge: instructing the jury and making decisions on motions. This required him to know the law in detail, of course, and to be able to call up the signature cases, but perhaps even more importantly, he had to be prepared to address and parry counsels' arguments, and he had to have sufficient depth and breadth of knowledge such that he could deal with unusual cases and explain his decisions in a manner that sounded authoritative and convincing. He used different sorts of marginal notations to meet these needs.

Most of the annotations elucidated the law in greater detail than did the *Nisi Prius*, providing the more obscure exception or paraphrasing another case on a slightly narrower point. So, for example, the text discussing the special right of an innkeeper to refuse to hand over a horse until his feed had been paid for gave rise to this marginal comment:

> [A]n innkeeper cannot by law sell a horse for his feed except in London and Exeter, and there by custom the innkeeper may call 4 neighbours and value the horse and meat, and if the meat is worth the horse, the property is changed and he may sell.[227]

In an interlinear note on the same text, de Grey also observed, "nor can a stable keeper retain because not obliged to take in."[228]

His annotations could grow quite long. To the text addressing the husband's liability for the debts of his wife due to the "Credit the Law gives her by Implication in Respect of Cohabitation," de Grey added,

> even during cohabitation they should be proper for her rank and by Holt, where she bought fine Clothes, unknown to Husband, and left them at a Friend's house, and dressed and undressed there and went into public and visited, Husband not liable. 1. Never came to his use. 2. Secrecy takes away presumption of consent. Contra, if he had seen her in them. 3. Not necessary apparel. He is liable during his life for her debts contracted before coverture. If she is used to trade by herself, and takes up goods, he is liable because cohabitation. If he declares his dissent, so that it came to the knowledge of the tradesman or his servant, Husband not liable. She must be content

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[227] *Id*. at 45 marginal note a. The actual text of the note reads: "an Innkeeper cannot by Law sell a Horse for His Feed Salk 388 except in London & Exeter, & there by Custom the Innkeeper may call 4 Neighbours & value the Horse & meat & If the meat is worth the Horse, the Property is changed & He may sell."

[228] *Id*. at 45 interlinear note at end of carry-over paragraph.

> with what he provides her or apply to Spiritual Court. If she takes up silks and pawns them, Husband is not answerable because they did not come to his use.[229]

With such notes, de Grey readied a checklist so that he would have at hand the factors he might have to list for a jury or upon which he could base a decision.

He displayed a similar interest in thoroughness in reacting directly to Buller's case summaries. Where de Grey thought that Buller had described a case inadequately, he would fill in additional facts,[230] and where he felt that the *Nisi Prius*'s treatment of a subject was incomplete, he would add more cases. In the discussion of defamation, for instance, he added several more case squibs, including one about *King v. Newport*, heard during Hilary Term 1728 by the Chief Justice of King's Bench, Lord Robert Raymond, at a trial held in the Guildhall in London. In that case, de Grey wrote, an information was brought "for publishing a libel called '*the Post Boy*' in which was contained *a paragraph* reflecting on A. It is not sufficient to prove that Defendant ordered that *paragraph*

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[229] *Id.* at 132 marginal note c. The note reads,

> even during Cohabitation They sh^{d} be proper for Her rank and by Holt, where She bought fine Cloaths, unknown to Husb^{d}, & left em at a Friends house, & dresst and undresst there & went into pub. & visited, Hus. not liable 1. never came to his use. 2. Secrecy takes away Presumption of consent. Contra, if He had seen Her in Them. 3. not necessary apparel. He is liable during His L for her debts contracted bef. coverture. 3. W. 411. If she is used to trade by Herself, & takes up Goods, He is liable bec. Cohabit. Holt. Salk. 113. If he declares his dissent, so y^{t} it came to the Knowledge of the Tradesman or His Serv^{t}., H. not liable. She must be content wth w^{t}. he provides Her or apply to Spir^{l} C^{t}. Ld R 1006. If She takes up Silks & pawns them, H. is not answerable bec. they did not come to His use. d^{o} & Salk 118.

For a similar example, see *id.* at 266 marginal note o:

> There are 3 sorts of Protests. 1. When party can't be found. 2. refus^{g} to accept. 3. refus^{g} to pay—protest proves itself. A Protest of a Foreign Bill is part of the Constitut^{n} of the Custom enabling the Payee to recover agst. Drawer. Ld R. 993[,] Salk 131. If He has protested for non-acc. He may tender the bill for paym^{t}. when the time comes; & then He protests <u>for non-paym^{t}</u>. V. J. Strange Can. 39 on the first He sends the <u>Protest</u> on the Last, the Protest (<u>& Bill</u>. Q. this i[s] bec. of recovery agst Drawer).

[230] For instance, see *id.* at 28 interlinear note to Buller's description of *Woolston v. Scott* (1753), about proof of marriage even by non-Anglicans, where de Grey wrote,

> & This was an Anabaptist; & not in the Church nor by the Church Service; & not being a Q^{n} to be certifyed by the Bp. but act^{n} agst a wrongdoer Denison J. was so clear He w^{d}. not suffer it to be debated but s^{d} they might move for a new Trial, w^{ch} they did not do. tho' dam were 500^{L}.

to be inserted, it being a charge for *publishing* the whole Post Boy."[231]

Although the *Nisi Prius* focused on cases, it also provided some model forms. In such instances, de Grey used his annotations to offer alternative phrasing, presumably to remind himself what changes would not vitiate the form. As part of a form for a bill of exception asking that a case be heard en banc, Buller provided the instruction, "(So set out the Evidence on both Sides, and then proceed as follows) 'Whereupon the said Council for the said Defendants, did then and there insist . . . ,'"[232] to which de Grey added, "or 'P *offered* to give in evidence,' or 'Defendant' or either party 'insisted that such evidence ought not to have been admitted,' or 'desired the Judge to inform the Jurors or declare to them the Law to be' etc."[233]

Although most annotations provided additional law or cases to supplement the text of the Buller, de Grey also extended his own thinking into analogous matters. In one note he wrote, "In contracts, action by sole Plaintiff, Defendant may prove Plaintiff a partner with other. Contra in tort; must plead it. If Plaintiff should recover for half the wrong, it would discharge the whole."[234] In another annotation he explained, "a plea that A was bankrupt within the several acts is enough without saying how. Contra of simonist to show some act that brings them within the statute because it does not mention the word simony."[235]

A number of de Grey's notes pertained to judges and judging. He was quite interested in the doctrinal disputes of his

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[231] *Id.* at 5 marginal note 4. The note reads,

> but in Informat^{n} for publish^{g} a Libell called "the Post Boy" in wh^{ch} was contain'd a Paragraph reflecting on A. it is not sufficient to prove y^{t} D. order'd That Paragraph to be Inserted, it being a Charge for publish^{g} the whole Post boy. K^{g} & Newport. H. 13. G. 1. G.H. Raym^{d}. C.J.

[232] *Id.* at 312.

[233] *Id.* at 312 marginal note s. The note reads, "or 'P. offer'd to give in Evid.' or 'Def' or Either Party 'Insisted that such Evid. ought not to have been admitted' or 'desired the Judge to inform the Jurors or declare to them the Law to be' &c." Regarding the word "evidence" in the text, de Grey noted, at note m, "all the Evidence, & not That only on w^{ch}. the Q^{n}. arises." *Id*. at 312 marginal note m.

[234] *Id.* at 149 marginal note m. The note reads, "In Contracts, act^{n} by Sole P. D. may prove P. a Partner wth oth^{r} Contra in Torts must plead it. If P. sh^{d}. recover for half the wrong it w^{d} disch. y^{e} whole v. Salk. 440 290 2 Lev. 56, 112. 2 Mod 82. 3 K 39."

[235] *Id.* at 43 marginal note s. The note reads, "a Plea y^{t} A was a Bank^{t}. within the Sev^{l} acts is eno' w^{t}. say^{g} How—Contra of Simonist to shew some act y^{t} brings Him within y^{e} Stat. bec. it does not mention the word Simony. Comb. 108."

predecessors, in particular the renowned judges of the early and mid-eighteenth century. Perhaps so that he would know where the pitfalls lay, he devoted many annotations to a review of these disagreements. To give a brief example, though these sorts of notes were often quite long, regarding a text about set-off in the context of a bankruptcy, he wrote, "Eyre C.J. held Defendant could not set off against assignees, a debt due to him from bankrupt. Afterwards Willes, C.J. doubted on such point and gave no opinion."[236]

Just as de Grey was interested in what other judges had decided and thought in specific cases, he also provided himself with reminders of things he needed to keep in mind when he was on the bench. With regard to a jury viewing a crime scene, he wrote, "The Judge at Nisi Prius may direct it. If 3 attend at the View, or if 6, and 3 at the Trial, it is Sufficient. They may inform the rest. The Court may compel attendance by amercing absentees for a contempt."[237] In another place, where Buller stated that it was at the discretion of the judge whether to hear a plea from defendant that some new evidence had arisen after the issue was joined but before trial,[238] de Grey noted that, "it may be tried perhaps so far as to enable the judge to see whether he ought to accept or reject it, not to join issue on it."[239]

Finally, de Grey did not limit himself to strictly legal observations. His marginalia also contain the occasional bits of history, background explanation, and color. Annotating a discussion of the length of time after her husband's death that a woman was considered to have given birth to a legitimate child, he wrote, citing a work on civil law, "9 months & 10 days, 30 days [per] month solar, not lunar; may be a perfect birth at 7. May go 10 or more—at Wittenburg one held legitimate in

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[236] *Id.* at 177 marginal note at the top of the page. The note reads, "Eyre C.J. held Def^{t}. c^{d} not set off agst assignees, a debt due to Him from B^{t}. afterw^{ds} Willes. C. J. doubted on such point & gave no opinion."

[237] *Id.* at 300 note m. The note reads,

> The Judge at ni: Pri: may direct it—If 3 attend at the View or if 6, & 3 at the Trial, it is Suffic^{t} they may Inform the rest. the C^{t}. may compel attendance by amerc^{g} absentees for a Contempt. L^{d} Hard. In D^{n}. of Ely & S^{r}. J. Stuart. 5 June 1746.

[238] *Id.* at 95.

[239] *Id.* at 95 note w. The note reads, "1 Sid. 238 says it may be tried Perhaps so far as to enable the Judge to see W^{r} He ought to accept or reject it. not to join Issue on it."

11th month; at Paris, 14 months after."[240] When Buller discussed the origin of trials at *nisi prius*, de Grey added, "Circuits first erected into 6 by Henry 2, A.D. 1179, 3 Judges to each," and cited Paul Rapin de Thoyras' *History of England*, a work he owned.[241] At the beginning of the chapter on trover, de Grey explained, "it is an action on the right. Trespass on possession; it was introduced instead of detinue to avoid wager of law; and of trespass to avoid the necessity of pleading specially. Yet it is founded on tort, and sounds in trespass."[242]

The marginalia show that de Grey sought to have at his fingertips the various types of information that would help him decide questions of law, give explanations to juries, and engage with counsel. He put into his notes not just the rules and checklists, but also summaries of judges' discussions, conflicting opinions, pointers to analogous concepts, and bits and pieces of background material that would prepare him to address all the angles and arguments that might arise.

According to his accounts, de Grey completed the restructuring and annotation of the Buller over the course of at most two weeks during early December 1772.[243] Under those

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[240] *Id.* at 112 marginal note o. The note reads, "9 mo. & 10 days. 30 days to mo. solar. not lunar. may be a Perfect birth at 7.—may go 10. or more—at Wittenburgh one held legitimate in 11th mo.—at Paris, 14 mo. after. v. Redley's Civil Law. 55."

[241] *Id*. at 299 note m, which reads, "Circuits first erected into 6. by Hen. 2. A.D. 1179. 3 Judges to Each 1 Rapin 239." The Rapin is listed in a 1732 edition in his home library, Norfolk Record Office, WLS LV/4/2, fol. 5. If de Grey was using the 1732 edition, however, he got the page number wrong. The correct page was 276, and the year Rapin referred to was 1176. Similarly, on page 180 at marginal note c, to the text "the Hundred within which any Robbery is committed shall be answerable for the same," William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17 ,de Grey wrote: "a neighbor by 1 Rapin 151 means 'near pledge' or 'Burghs' 10 families composing one, & the Heads pledging for Each other—Qui est in Eadem vice. but in West 2. extending Stat. Merton to neighbors & neighbor means all in adjoining Towns. 2 Ins 474 . . . ." *Id.* at 180 marginal note c. The correct page in the 1732 edition was 179, and the Rapin text speaks of a "near security" rather than a "near pledge."

[242] *Id.* at 32 note d, which reads, "it is an act[n]. on the right. Trespass on Poss[n]. it was introduced instead of detinue to avoid wager of Law; & of Trespass, to avoid the necessity of pleading specially. yet it is founded on Tort, & sounds in Trespass."

[243] According to his accounts, he bought the book in December 1772, though the account does not indicate when in the month he made the purchase, and it could be, perhaps, that the book had been purchased somewhat earlier. Accounts of William de Grey, Norfolk Record Office, WLS LV/10/43. The archives also contain a receipt from a bookbinder that reads, "Rec'd Dec[embe]r 16. 1772 Of the Rt. Hon. Lord Grey the Sum of Nine Shillings for binding two vols. of Nisi Prius in Vellum . . . ." Record of Payment, Binding of Nisi Prius, Norfolk Record Office, WLS LV/11/43. The same receipt indicates that two days later de Grey paid an additional 2 shillings sixpence for unspecified alterations. *Id.* The total price of 11 s. 6 d. for binding in vellum is odd. By comparison, de Grey paid 7 s. to have two large folio volumes of the *Journals of the House of Commons* half-bound in leather in April 1772. Record of Payment, Binding of Journals of the House of Commons, Norfolk Record Office, WLS LV/10/3. Based on the

circumstances, it comes as no surprise that his annotations do not appear to represent new research. Most of the authorities cited in the annotations came ultimately out of sixteenth-, seventeenth- and early eighteenth-century reporters. When de Grey cited unreported cases and attributed them to a specific judge, the judges mentioned most frequently were those, current and recently past, of greatest prominence when he was a student and young barrister in the late 1730s and 1740s.[244] Citations to cases and to the judges serving during the years of his mature practice were very rare. Despite Mansfield's importance to the jurisprudential development of the time, he was never mentioned by name, and only one case was cited from Burrow's reports of Mansfield's opinions.[245] De Grey's predecessor on Common Pleas, John Eardley Wilmot, merited only two mentions,[246] and de Grey made only three references to cases decided during his own first two years on the Court.[247] Furthermore, he did not continue to update the *Nisi Prius* with new law made while he was on the bench.[248] Apparently, he intended his copy of the Buller exclusively as a storage place for older precedents. Very likely he used separate bench notebooks to record new material.[249]

Given the speed with which the book was compiled, the best explanation for the choice of sources is that he copied from predigested material and did not, except perhaps in rare instances, return to the original reporters to cull material for

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fact that the marginalia show no sign of the distortion that would have occurred had he done them after binding, he must have completed the annotations prior to this date.

[244] These include most prominently, John Holt (Chief Justice of King's Bench 1689-1710), Robert Raymond (Chief Justice of King's Bench 1725-1733), Lord Hardwicke (Chief Justice of King's Bench 1733-1737, Chancellor 1737-1756), William Lee (Chief Justice of King's Bench 1737-1754), Robert Eyre (justice on King's Bench 1710-1723, Chief Baron of the Exchequer 1723-1725, Chief Justice of Common Pleas 1725-1735), and John Willes (Chief Justice of Common Pleas 1737-1761).

[245] William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17, at 86 marginal note c.

[246] *Id.* at 88 marginal note a, 103 marginal note c.

[247] *Id.* at 5 marginal note 4, 103 marginal note c. Both have references to 1772 cases before Common Pleas. *See id.* at 274 marginal note m for a reference to a Common Pleas case from 1771.

[248] For instance, he decided a case in 1776 that was exactly on point with notes he made on page 133 of the Buller concerning elopement, yet he did not add a citation to the later case. Hatchett v. Baddeley, (1776) 2 W. Bl. 1079, 1080-82; Inner Temple MS 97, fols. 132, 133-39, 140-41.

[249] We know, for instance, that he kept a bench notebook when sitting at Westminster. The one from 1775-76 is extant, and it mentions other notebooks, *e.g.*, William de Grey Bench Notebook, Lincoln's Inn Library, MS. 183, fol. 2r ("v. my notes"); *id.* fol. 4v ("v. 1st arg^{t}. from vol: 97 & Popes Book.").

his annotations. While he could have copied from someone else's annotated *Nisi Prius*, certain stylistic similarities with the method of annotation in his equity notebooks tend to argue against this.[250] Instead, a quirk in the form of the marginalia suggests the hypothesis that de Grey created the notes by searching his own commonplace books for relevant cases and observations. This quirk is that he used only thirteen letters (a, b, c, d, h, k, m, n, o, s, w, x, and z) to key the text to the marginalia. For example, an "a" written above a word in the text led him to a note in the margin marked with an "a."[251]

The letters did not correspond to placement on the page. He made no obvious attempt to use the letters in order from top to bottom, nor did he always use certain letters in the top, middle, or bottom quadrants of the page. Furthermore, he occasionally used the same letter multiple times on a single page, corresponding to different annotations.[252] It is likely, therefore, that each letter referred to a specific source, and given the fact that the notes corresponding to a certain letter do not come from the same book—for instance, the "m" notes refer to cases from many different reporters—and that no other published book covered the same material as the Buller, it is rather unlikely that de Grey was using printed material.[253]

A more plausible hypothesis is that de Grey used his own notebooks and commonplace books. If so, he worked something like this. He began by pulling only the thirteen notebooks that contained relevant material. The notebooks were likely labeled with letters.[254] For each topic in the Buller,

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[250] He also uses the first person on occasion. *See, e.g.*, William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17, at 66 marginal note c ("I always do it."); *id.* at 189 interlinear note after last line ("I suppose not liable to penalty.").

[251] Of these, a, c, m, and s were by far the most common. The letters b, d, k, n, o, x, w, and z were infrequently used. The letter z was used only once; x four times; d five times; n seven times; o eleven times; b twelve times; w fifteen times; k sixteen times.

[252] For example, m is used three times in the text on page 88, keyed to two different notes, *see id.* at 88, or where m and o are both used twice, keyed to different notes. *See id*. at 274.

[253] Of course, the choice could simply be random. That is, de Grey liked using these particular letters, perhaps because he felt they were distinct and would not be confused with other letters. But if the letters were indeed chosen at random, one might expect a more random distribution. And yet, certain letters predominate throughout the book, and other letters are used in fits and starts. In the first 125 pages of de Grey's copy of the *Nisi Prius*, for example, "o" appears only on pages 5 and 112, and "n" shows up on pages 13, 33, and 89. In the same range, "m" appears on almost every page that has annotations.

[254] *See, e.g.*, the eighteenth-century notebooks of Charles Fearne at the Middle Temple library, labeled on the spine with letters.

he looked through the notebooks, starting generally with the one corresponding to the letter "a," because the "a" annotation was usually placed in the top margin.[255] He may normally have ended with the notebooks "s" and "w," because those notes were often written in the bottom margin.

If de Grey were indeed using his own notebooks, it would not be at all exceptional to find that most of the citations came from reporters and judges prominent in the 1730s and 1740s when he was a young barrister building up his personal library of legal reference material.[256] Increasing the likelihood that this was how de Grey worked are two other examples of judges using this sort of letter system to refer to their own notebooks. In his commonplace book, Sir Matthew Hale marked each entry with a letter code to denote the notebook from which he had taken the case he was abstracting.[257] A similar system is apparent in a notebook of cases that might have been owned by Justice Gould or one of the justices of the Common Pleas who immediately preceded de Grey on the court.[258]

The amount of work de Grey put into remaking his *Nisi Prius* suggests he placed a great deal of importance upon having a compact circuit reference book that gathered together all the relevant law previously recorded in a number of different notebooks. That such a reference could have been useful is demonstrated by a manuscript report of a trial for slander over which de Grey presided in London, recorded, ironically, in an anonymous lawyer's copy of Buller's *Nisi Prius*.[259] "This was an Action for calling the Plt. a Sodomite & a Bugger[e]r," began the report. The question was whether

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[255] One reason an "a" note might be displaced is because the top margin is already filled with a note carried over from the prior page. *See, e.g.*, William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17, at 269.

[256] The system could also explain why he evidently on occasion forgot to write the key letter at the beginning of a note and only added it above the annotation later, and why he sometimes did not place a key letter in the text of the *Nisi Prius*, even if he did write it in front of the annotation. If he were copying notes from another Buller, these sorts of omissions would be unlikely, since he would copy exactly what he saw. But if he had to go back and forth between notebooks, searching for, then copying or maybe only paraphrasing into the *Nisi Prius* what he had written in the notebook, he may easily have lost track of the letter of the source notebook or forgotten which word exactly had spurred him to make this notation.

[257] 2 J.H. BAKER, ENGLISH LEGAL MANUSCRIPTS IN THE UNITED STATES OF AMERICA: A DESCRIPTIVE LIST 365-66 (1990).

[258] BAKER & TAUSSIG, *supra* note 94, at 148 (ms. 381).

[259] *Id.* at 80 (ms. 217) (the case, from the "Sittings after Mich[aelma]s Term" possibly 1778, is reported on the interleaved page between text pages 8-9).

defendant had a right to make such a comment because she was speaking to the plaintiff's wife, her niece, and speaking out of concern. The *Nisi Prius*, and one of de Grey's annotations, squarely addressed this legal issue in the chapter on slander.[260]

The last question is whether de Grey actually used his bench book. The evidence is indirect because, notwithstanding the example just given, his *nisi prius* trials were rarely reported, and he did not update the book with new law. First, a bookmark remains in the book. It is a scrap of paper torn from a book auction catalogue that can be identified as dating to around February 1777,[261] and the summer 1777 assize may have been the last time de Grey rode circuit.[262] Second, a piece of paper is folded and tucked between pages 312d and 312e. It contains fragmentary notes on at least two different legal issues—lack of proof in an action for possession of real property by prescription and an action for a ship—neither of which correspond to marginalia in the book, and which could possibly be trial notes. Third, the Buller was not included in either of de Grey's library catalogues, and it found its way into the archives with his papers. This suggests that it was a desk book, a book for use, and not a book for sitting on the shelf.

Finally, there is de Grey's index. The Buller came with an index, but de Grey ignored it and created a new one in a separate notebook. He relied neither on the headings in the Buller index nor on its list of topics under each heading but instead devised his own. The Buller index, for example, begins with: Abatement, Abuttals, Account, Actions, Administration, and Admittance, while the de Grey index begins: Almanacs, Abatements, Abstract, Attaint, Awards, Assets Real.[263] Under

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[260] BULLER, *supra* note 197, at 10.

[261] Bookmark Between Pages 162-63 in William de Grey's *Nisi Prius*, Norfolk Record Office, WLS LV/17. The paper was torn from BENJAMIN WHITE, A CATALOGUE OF SEVERAL LIBRARIES LATELY PURCHASED, CONTAINING A VERY LARGE COLLECTION OF THE MOST VALUABLE BOOKS IN EVERY LANGUAGE AND CLASS OF LEARNING 219-20 (n.d.) (the catalogue indicates that "The Books will begin to be Sold on Thursday the 6th of February, 1777").

[262] According to his accounts, serjeants seem to have gone the circuit for him in the summers of 1778 and 1779. Accounts of William de Grey, Norfolk Record Office, WLS LV/15/5 (Sept. 22, 1778), WLS LV/16/18 (Dec. 23, 1779) (gratuities of £10 de Grey paid to Serjeant Foster and Serjeant Heath respectively in appreciation for their taking over his assize circuit during those summers). He was supposed to go on circuit with Blackstone in 1776 but did not because of an attack of the gout. PREST, *supra* note 156, at 261. De Grey generally appears to have skipped the lent assize, as did Chief Justice Mansfield. 1 OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 15, at 129.

[263] Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS LV/17, fol. 1 (unpaginated first page).

each heading, de Grey included anywhere from one to dozens of listings summarizing, in a manner similar to Buller, the point referenced. For instance, under "Lost Evidence" he wrote:[264]

1. Postea, proved by associate 343.8.
2. Verdict [proved] by his Notes ib. 9
3. Circumst[antia]l Proof of orig[ina]l suffic[ien]t ib.9
4. Record proved by a Copy 229.3[265]

And the list continues for another two pages. All of this organizing and summarizing must have taken de Grey a quite substantial amount of time, and the index is entirely in his hand. He would have had little reason to do all this work unless he believed that he needed a means to access the information he had stored in his *Nisi Prius*. Furthermore, the index shows signs of a certain amount of updating. In particular, the last several pages of the notebook contain notes on customs officials deriving from cases heard en banc by Common Pleas between 1772 and 1777.[266] These additional notes indicate that de Grey continued to make use of the index, and the index would have been useless without his reconstructed Buller volumes nearby.

V. CONCLUSION

The fortuitous preservation in the de Grey archives of traces of his approach to his own judicial education cracks open a tiny window into this mysterious rite of passage that judges have undergone for centuries. In revering its judges, the

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[264] *Id*. at fol. 100.

[265] The number represents the page number followed by de Grey's own internal marginal numbering.

[266] The first page and a half of notes follow the standard practice of the rest of the index, with each new entry being consecutively numbered and taking up one or two lines. But the remaining pages read more like bench notes, abstracting judges' opinions from a case heard en banc; see also 1) a reference on fol. 32 in the section on Certificate of Judge to a case from 1778 (or 1775, the 8's and 5's on rare occasions can be difficult to tell apart), Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17; 2) the entry on fol. 33 [116] added at the end of the section on Criminal Conversation, reading: "Prostit[utio]n bef[ore] marr[iage] Ev[idence] to mitigate If Husb[and] knew it then. Ld Mansf[iel]d—If did not. Q[uery] by me." Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17, fols. 32-33. De Grey and Mansfield obviously did not sit on the same court, and it seems unlikely that this entry referred to a case considered by the judges together in Serjeants' Inn. But Mansfield and de Grey did ride circuit together during the Summer assize of 1777. 2 OLDHAM, MANSFIELD MANUSCRIPTS, *supra* note 15, at 1498.

common law systems have been loath to acknowledge that they do not always, or even very often, come to the bench prepared to serve. And in desiring, perhaps, to preserve their aura of authority, judges, too, have been reluctant to admit to their own deficiencies. Fortunately, the recent era of the baby judge schools has seen a growing transparency about the need for judicial training.[267] Such openness facilitates the study of judicial education, and the topic deserves more attention than it has received from either modern scholars or legal historians. If the sources from which judges learn their law affect the law they make, then uncovering and investigating those sources might provide significant insights into how and why the law developed as it has.[268]

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[267] *On Becoming a Judge*, *supra* note 2, at 144.

[268] See, for example, observations that what judges learn at baby judges school later affects their judging in Arnold, *supra* note 13, at 771 ("[T]he impetus towards settlement is becoming the major theme, it seems to me, in classes that are held for new judges."); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 SUFFOLK U. L. REV. 67, 79 n.74 (2006) ("[T]here are . . . pressures to keep you in line. In baby judge school, one trainer went so far as to begin a session on employment discrimination by saying, 'here's how you get rid of these cases!'" (internal quotation marks omitted)).