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‘The glorious uncertainty of the law’: life at the bar, 1810-1830

Michael Lobban

The history of the Georgian legal profession has attracted much attention in recent years.¹ Scholars have become increasingly interested in the education of the legal profession, the earning capacity and career structures of practising barristers, the social organisation of the bar, and the wider cultural life of the profession. In reconstructing legal lives, historians have drawn not only on the records of the bar, but also on biographies, memoirs, diaries and correspondence, which are invaluable in offering insights into the daily practice of men at the bar, and in tracing the waxing and waning of careers. They are replete with information about the education of lawyers – in the offices of special pleaders or equity draftsmen – as well as often being rich in gossip about fellow barristers or judges.² If social and cultural historians have made much use of barristers’ diaries and memoirs, however, legal historians, more interested in forensic argument and the operation of the courts, have shown less interest in these sources. In what follows, it will be suggested that unpublished diaries can also offer us significant insights into the nature of daily practice, shedding light on the nature of the workings of the common law.

Our focus will be on the diaries of two barristers at work in the 1810s and 1820s, who had very different career trajectories. Born in 1775 in Bury St Edmunds, Henry Crabb Robinson initially intended to qualify as an attorney, but gave up the law in 1797 when an inheritance allowed him to follow his literary and philosophical interests. He returned to the law in November 1809, when he was admitted to the Middle Temple, and received his call in May 1813. He continued to practice as a barrister for fifteen years, before giving up the law once more in 1828. Robinson’s great cultural legacy was his diary, selections from which were published in three volumes in 1869, two years after his death. His diaries are also a treasure trove for legal historians, for he describes life at the bar in the 1810s and 1820s in greater detail than any other contemporary diarist.³ John Taylor Coleridge, nephew of the poet, was another keen lawyer diarist.⁴ Although fifteen years younger than Robinson, their early

¹ See especially David Lemmings, *Professors of the Law: Barristers and English Legal Culture in the Eighteenth Century* (Oxford, 2000), Raymond Cocks, *Foundations of the Modern Bar* (London, 1983), and P. Polden, ‘Barristers’, in W. Cornish et al., *The Oxford History of the Laws of England, vol. XI: 1820-1914* (Oxford, 2010), 1067-82.

² E.g. [Mrs Hardcastle], *Life of John Campbell, Lord High Chancellor of Great Britain*, 2 vols. (London, 1881), P. C. Scarlett, *A Memoir of the Right Honourable James, First Lord Abinger* (London, 1877), *Memoirs of the Life of Sir Samuel Romilly, Written by Himself* (London, 1840), and H. Twiss, *The Public and Private Life of Lord Chancellor Eldon* (London, 1844).

³ There are thirty-three volumes of his diaries held in Dr. Williams’s Library, Gordon Square, London. The Henry Crabb Robinson Project, led by Timothy Whelan and James Vigus, is engaged in producing an edition of the entire diary: see www.crabbrobinson.co.uk/. For earlier published extracts, see Thomas Sadler, *Diary, Reminiscences and Correspondence of Henry Crabb Robinson*, 3 vols. (London, 1869), and Derek Hudson, *The Diary of Henry Crabb Robinson: An Abridgement* (London, 1967).

⁴ Thirty-four notebooks of the journal which he kept from 1814 to the end of his life in 1876 are in the British Library (BL): MSS Add. 86027-60. In what follows, the folios are cited

careers at the bar overlapped, for John was also a barrister of the Middle Temple, called in 1819. Coleridge's career was in many ways different from Robinson's: whereas the dissenter was barred from study at the universities, the Anglican Coleridge had a glittering career at Oxford, where he became a close friend of John Keble and Thomas Arnold. Where the young Robinson had supported the principles of the French Revolution and was a friend of the Radicals, Coleridge was a staunch Tory, who was sceptical about Catholic Emancipation and opposed to the 1832 Reform Bill. He was also very keenly devoted to the Anglican church – often regretting the fact that his father had forced him to follow a career in the law, rather than the church – and spent much more time in his diary considering spiritual and ecclesiastical matters than legal ones.⁵

The barrister's business

Barristers' diaries give great insight into daily life at the bar, and the flow of business they engaged in. For those lacking metropolitan connections, the lion's share of their early income came from business done at their local Quarter Sessions⁶ or during the visit of the circuit judges to their home towns.⁷ Success here would pave the way for more clients at other assize towns, and eventually in London.⁸ Barristers had to take the chance of business as and when it came. During a lean summer circuit in 1817, Robinson 'found at my lodgings briefs & others came in before dinner which satisfied me that Norwich would supply the deficiencies of the other places on the Circuit.'⁹ Business could come by way of luck, such as the chance mention of one's name to a local attorney, or the fact that the preferred lawyer was absent. Barristers might not have much time to prepare. Attorneys would give them briefs at the sessions or the assizes, to be studied in lodgings before they came to court. A more predictable income could be secured if the barrister received a retainer for a case in advance;¹⁰ better still if he got a general retainer either from a local attorney or a client (as

according to Coleridge's original numbering.

⁵ For a life of Coleridge, which draws extensively on these diaries, see Timothy J. Toohey, *Piety and the Professions: Sir John Coleridge and his Sons* (New York, 1987).

⁶ For the importance of sessions to the young barrister, see Lemmings, *Professors of the Law*, 154-5.

⁷ Of the £40 19s. Coleridge earned at his first summer assizes, £32 11s. came from Exeter and £6 6s. from Bodmin. It was not enough to cover his expenses of £49 9s. 7d. At the following Michaelmas sessions in Exeter, his earnings were £43 16s. 6d., and his outgoings £12 15s. 18½d. BL Add. MS 86063, fos. 5-6.

⁸ Contrast Romilly, *Memoirs*, vol. I, 72, 92-4; [Hardcastle], *Life of Campbell*, vol. I, 195, 209; Scarlett, *Memoir of Abinger*, 48-9.

⁹ Robinson Diary, vol. 6, fo. 13 (5 August 1817).

¹⁰ In February 1826. Coleridge was retained in seventeen causes for the circuit, having never had more than five previously: Add. MS 86034, fo. 96. Campbell explained that retainers were given '[w]hen a man has a cause coming on, [and] he is frightened out of his wits lest you should be against him': [Hardcastle], *Life of Campbell*, vol. I, 275.

Coleridge did in 1825, when retained to deal with the king's interests as Duke of Cornwall).¹¹

Much of the barrister's life was peripatetic, with long periods away from home, involving (as Coleridge put it) a 'long and tedious journey to scramble and wrangle for a few pounds.'¹² Only when a barrister's name was very well established could he afford to stop making the regular trips to his local Quarter Sessions (as Coleridge did in 1829). Barristers were ever keen to cultivate business in London, but this could take time to develop. In 1825, Coleridge complained, 'I can hardly say that I have anything arriving purely from London connection'.¹³ Two years later, he wrote, 'every circuit I come as it were a fresh man, for I hardly open my mouth between circuit and circuit.'¹⁴ It was not the experience of arguing in Westminster Hall which put men with London business at an advantage, according to Coleridge, but the fact that they were 'habituated to the regular, admirable nature of London Nisi Prius proceedings'.¹⁵

When in London, much of the barrister's time might be spent watching proceedings in court or waiting for business to come on. Robinson's entry for 9 December 1816 is not untypical: 'I read law in the forenoon and I lounged down to Westminster to see the progress of the Westminster sittings.'¹⁶ He spent a good deal of time watching interesting cases - such as the notorious case of *Ashford v. Thornton*¹⁷ - and commenting on the performance of counsel and judges.¹⁸ In part, this was educational - for he would mull over legal points raised in the cases he attended - but it was also a form of entertainment.¹⁹ Many visits to court were

¹¹ BL MS Add. 86034, fo. 195, 23 November 1825. For other retainers he obtained, see BL Add. MSS 86032, fo. 147, 86034, fo. 101, and 86035, fos. 31-32.

¹² BL MS Add. 86032, 12 January 1823, fo. 8.

¹³ BL MS Add. 86034, fo. 112 (22 April 1825). See also Add. MSS 86032, fo. 134 (12 November 1823) and 86031, fo. 53 (18 June 1822).

¹⁴ BL MS Add. 86035, fo. 50 (12 April 1827).

¹⁵ BL MS Add. 86036, fos. 36-37 (28 August 1828).

¹⁶ Robinson Diary, vol. 5, fo. 111.

¹⁷ *Ashford v. Thornton* (1818) 1 B & Ald 405. The case has attracted the attention of a number of literary scholars: e.g. Gary R. Dyer, "'Ivanhoe', Chivalry and the Murder of Mary Ashford', *Criticism* 39 (1997), 383-408, and Mark Schoenfield, 'Ashford v Thornton, Ivanhoe and Legal Violence', *Prose Studies*, 23 (2000), 61-86.

¹⁸ He observed that Joseph Chitty had got his pupils to provide the inept translations of *Bracton*, and he had delivered an argument which 'resembled a building framed of loose stones cemented by nothing': Robinson Diary, vol. 6, fo. 82 (6 February 1818). Cf. Campbell's description of meeting other young barristers in the King's Bench, where 'we criticise the leaders, quiz the judges, and abuse the profession': [Hardcastle], *Life of Campbell*, vol. I, 195.

¹⁹ However, not all cases were interesting: on 31 May 1816, Robinson noted, 'I spent some time at the Old Bailey - I translated while in Court part of [Heinrich] Voss's Junior's essay on the Clouds of Aristophanes and read for an hour Hobhouse's letters from France.'

occasioned by business to be done. Sometimes, counsel might have to wait for days for a case to come on; but at other times, business might come on unexpectedly.²⁰ ‘I went down to Westminster Hall to make a Motion and luckily ascertained that my Copyhold Argument was to come on tomorrow,’ Robinson wrote on 29 May 1815, ‘This furnished me with occupation for the rest of the day.’²¹

Much of the young barrister’s business in term time was routine. It included attendance in the Bail Court, where a single judge dealt with challenges to bail in cases where arrests for debt had been made. On several occasions, Robinson was frustrated by having to wait six hours here to earn a half-guinea fee.²² Other business included making motions of course, and arguing on motions for new trials, arising from cases handled on circuit. In addition, there was work to be done in chambers, including the drawing of pleadings or advising solicitors on cases.²³ A good day might be a very busy one: in February 1815, Robinson described the busiest day he had ever had, ‘having justified twice in bail, put in three Motions of course And argued in Support of a Motion against E. Alderson.’²⁴ The latter kind of business was the best way of making one’s name known in London: the more important the case – and the longer the argument – the better. Appearing before the House of Lords or the Privy Council²⁵ might also enhance one’s reputation. Having one’s name in the law reports was always an object of ambition: ‘it is my game to keep up a reputation as a lawyer,’ Coleridge noted in 1831, ‘and that in some measure depends in the eye of the profession generally in both classes, upon filling a prominent part in the reports.’²⁶

The diaries also give us an insight into the variety of business engaged in by rising barristers, which might include bankruptcy proceedings, election petitions, parliamentary business, and arbitrations. Early in his career, in 1814, Robinson was given a brief by a solicitor, who happened to be a fellow debater at the Surrey Institution, to examine a creditor before

Robinson Diary, vol. 5, fo. 56.

²⁰ Ibid., vol. 3, fo. 122 (5 February 1814).

²¹ Ibid., vol. 4, fo. 116 (29 May 1815).

²² Ibid., vol. 5, fo. 104 (16 November 1816); vol. 6, fo. 44 (15 November 1817).

²³ E.g. *ibid.*, vol. 3, fo. 134 (12 March 1814): ‘Jameson called with a case on a foreign bill of Exch: in which he wanted an immediate Opinion. This worried me as the Case was all indigested and not formally drawn up – tho’ the law was simple on the case when understood.’

²⁴ Ibid., vol. 4, fo. 68 (3 February 1815). The case in question was *Banks v. Brand* (1815) 3 M & S 525. Compare the description in [Hardcastle], *Life of Campbell*, vol. I, 194-5.

²⁵ In 1818, Robinson appeared (with Romilly) in a Gibraltar case in the Privy Council - *Ross v Viale*: Robinson Diary, vol. 6, fo. 81 (2 February 1818).

²⁶ BL MS Add. 86037, fo. 179, 15 June 1831. Cf. his earlier expression of hope in Add. MS 86034, fo. 115, 29 April 1825: ‘I may now look forward to finding a place in every number of the reports’

Commissioners of Bankruptcy meeting in a coffee house.²⁷ In the following year, he acted for the first time as a country commissioner in Cambridge, where he was glad to have an experienced barrister to guide him in this novel work.²⁸ Coleridge does not seem to have had a large bankruptcy practice, but was nonetheless promised a London commissionership in 1827. He welcomed this opportunity not only for the income and it offered, but also for ‘the insight which I shall get into bankruptcy law by it’.²⁹ Bankruptcy business clearly needed a lawyer’s forensic skills: proceedings might stall (for instance) if a petitioner seeking to establish that a trader had committed an act of bankruptcy in locking his doors earlier than usual – a standard charge – failed to prove that his intention in so doing was to deny his creditors.³⁰

Election work was also desirable, for reasons of both profit and reputation. Coleridge gained much attention in 1826 when he acted in a contested election case at Leominster, where Rowland Stephenson challenged the candidacy of the Lottery contractor, Mr Bish. Having persuaded the assessor to make a double return and express an opinion in Stephenson’s favour, Coleridge’s ‘health was drank with three times three’ in the town.³¹ The case also gave him his first chance to argue at the bar of the House of Commons, where he succeeded, gaining thereby both a considerable fee and the attention of new clients.³² Parliamentary business could also be highly remunerative. In 1826, Robinson accepted a lucrative brief to attend the committee proceedings on a Norwich and Lowestoft Navigation Bill, even though he admitted to being ‘ignorant on the subject of the Bill’.³³ The experience revealed to him the arbitrary nature of proceedings in this forum. The bill was rejected by a majority, after the MP for Yarmouth (whose seat was at risk if the bill passed) marshalled a large number of members who had never attended any of the hearings to vote against it.³⁴

Barristers also made a useful income from arbitrations, primarily those which were referred by a court in which litigation had begun.³⁵ Young barristers were keen to obtain references

²⁷ Robinson Diary, vol. 3, fo. 161 (20 May 1814).

²⁸ Ibid., vol. 4, fo. 83 (13 March 1815).

²⁹ BL MS Add. 86035, fos. 72 (11 June 1827) and 156-157 (12 December 1827), and MS Add. 86036, fo. 38 (30 August 1828). Cf. his letter to John May: Bodleian Library (Bodl.) MS Eng. lett. c. 289, fo. 138 (17 January 1827).

³⁰ Robinson Diary, vol. 5, fo. 32 (27 March 1816).

³¹ BL MS Add. 86034, fo. 140 (18 June 1826); see also *The Times*, 18 June 1826, 1.

³² BL MS Add. 86035, fos. 30-31 (19 February 1827).

³³ Robinson Diary, vol. 12, fos. 17, 28, 30 (3, 8, 10 April 1826).

³⁴ Ibid., fo. 38 (2 May 1826). Cf. [Hardcastle], *Life of Campbell*, vol. I, 204, 227.

³⁵ Under the 1698 Arbitration Act, the agreement of parties who had not commenced litigation to refer their disputes to arbitration could be enforced by being made a rule of court. See further Henry Horwitz and James Oldham, ‘John Locke, Lord Mansfield and Arbitration during the Eighteenth Century’, *Historical Journal*, 36 (1993), 137-59.

wherever possible. In August 1823, with only two prisoners to defend at Bridgewater, Coleridge ‘determined to remain and take the chance of a reference’ coming his way.³⁶ On Robinson’s Norfolk circuit, there was much chatter by juniors over ‘the distribution of references by the Seniors’, for they worried that preferential treatment was given to some when names were to be suggested by senior counsel.³⁷ Arbitrations were financially attractive: in the late 1810s, Robinson received between ten and twenty guineas for an arbitration,³⁸ while other counsel (including Coleridge) could command over fifty guineas. They could also lead to other work: in 1819 at Aylesbury, Robinson unexpectedly received a brief ‘from a London attorney who was the winning party on a reference in which I was an arbitrator – a proof of the effect of having references given to barristers’.³⁹

Barristers’ professional lives could be precarious, and diarists were prone to record in some detail not only the nature and amount of their earnings, but also their standing relative to rivals at the bar.⁴⁰ Rising young men could always pose a threat to the success of older ones. ‘The melancholy thing upon the circuit is to see the approaching fate of such really good men as Gaselee, Selwyn and Merewether, who are gradually declining and will sink to cyphers probably,’ Coleridge observed in 1824, ‘unless they should get elevation to the Bench.’⁴¹ Observing the new appointments in 1827, he observed, ‘Launcelot Shadwell is the new Vice [Chancellor]: a lucky fellow; for his business was declining.’⁴² Robinson, whose own business was languishing in the 1820s, particularly after the arrival on the circuit of Fitzroy Kelly,⁴³ resolved to leave the bar in 1828. Coleridge worried a good deal about the business taken by rivals such as Wilde or Follett, and whether he would be able to maintain his position. Ever ambitious to reach the bench, but fearing being overtaken, he noted in 1830, ‘I may go downhill so, and lose business & character so much, that it may become more and more difficult to place me.’⁴⁴

³⁶ BL MS Add. 86032, fo. 89 (9 August 1823). In 1820, he was pleased at Bodmin to have ‘disputes referred to my arbitration, not as a matter of influence and patronage from other counsel, but by the selection of attornies before the assizes and without bringing up their causes to be tried’. Letter to John May, Bodl. MS Eng. lett. c. 289, fo. 86 (9 August 1820).

³⁷ Robinson Diary, vol. 6, fo. 11 (30 July 1817).

³⁸ Ibid., vol. 4, fo. 141 (27 July 1815), vol. 6, fo. 146 (19 June 1818).

³⁹ Ibid., vol. 7, fo. 38 (5 March 1819).

⁴⁰ Cf. [Hardcastle], *Life of Campbell*, vol. I, 279.

⁴¹ He added, ‘It would do well for the country if room were made for them – such a judge as Burrough is really a disgrace to us’: Add. MS 86032, fos. 185-186 (13 March 1823).

⁴² BL MS Add. 86035, fo. 125 (27 October 1827).

⁴³ ‘Clever as he is,’ Robinson noted of Kelly, ‘he has no qualities that excite admiration.’ Robinson Diary, vol. 12, fo. 69 (20 July 1826).

⁴⁴ BL MS Add. 86037, fo. 34 (29 March 1830). For his praise of Follett, see letter to John May, Bodl. MS Eng. lett. c. 289, fo. 152 (5 April 1830).

For lawyers like Robinson and Coleridge, the law was a means of earning a living, rather than a passion in itself. In his diaries, Coleridge constantly lamented both his lack of interest in law and his lack of talent for it. He found the law thankless and irksome, and worried about his 'own ignorance and want of legal principles.' When he took 'a case in hand determined to go to the bottom of it, ... my mind wanders, or my powers of attention give in before I have got half through it.'⁴⁵ Although Coleridge's self-deprecation was no doubt greatly exaggerated, his diaries do not reflect a man with a deep intellectual interest in the law. Only on the rarest occasions do his diaries mention which legal books he was reading, and then without enthusiasm: 'This very evening I have been in vain puzzling over a passage in Fearn, which half the men of the bar would have had no more difficulty in than in reading the newspaper,' he wrote on 22 October 1827, 'It is very melancholy'.⁴⁶

Robinson's diaries are much more informative about his reading. This was not so much systematic, as tailored to the immediate needs of his practice. 'I know not what I can profitably read but *pro re nata*', he wrote two years after his call, 'And that is a wretched system.'⁴⁷ On resuming his legal studies in 1811 after an eleven-year-hiatus, he had begun with Blackstone's *Commentaries*. Although a book in constant demand - and one which Coleridge would edit while at the bar - Robinson was immediately unimpressed, finding it 'of no practical importance' and 'not a book of study'.⁴⁸ Instead, he took up Samuel Marshall's *Treatise on the Law of Insurance*,⁴⁹ which he thought would be more practically useful. He supplemented his reading by looking at the article on insurance in William Selwyn's *Abridgement of the Law of Nisi Prius* (whose 'selection of topics [was] judicious in reference to actual business')⁵⁰ and listening to insurance cases in Westminster Hall. He soon gave up on Blackstone, though he did read Richard Wooddeson's lectures after his call, commenting that 'the views it gives of the general system and the connection of the law might be useful if I had a practical head to apply them'.⁵¹ He also found *Coke upon Littleton* (recommended by his pupil-master) heavy going. He was only able to make progress with it by using J.H. Thomas's 1818 *Systematic Arrangement of Lord Coke's First Institute*, which 'made this very famous book really useful - It is now possible to preserve some connection of thought in reading it'.⁵² Robinson did read a wide variety of legal works for interest's sake - including the biographies of eighteenth-century judges, and reformist works from William

⁴⁵ BL MS Add. 86032, fo. 3 (2 January 1823).

⁴⁶ BL MS Add. 86035, fo. 120.

⁴⁷ Robinson Diary, vol. 4, fo. 188 (16 December 1815).

⁴⁸ *Ibid.*, vol. 1, fo. 24 (6-7 March 1811).

⁴⁹ *Ibid.*, vol. 1, fo. 24 (7 March 1811). The *Treatise* was first published in 1802; a second edition was issued in 1808.

⁵⁰ *Ibid.*, vol. 1, fo. 43 (25 April 1811). The second edition of Selwyn's work was published in 1810.

⁵¹ *Ibid.*, vol. 4, fo. 188 (16 December 1815). Richard Wooddeson's *A Systematical View of the Laws of England*, based on his Vinerian lectures, was published in three volumes in 1792.

⁵² *Ibid.*, vol. 7, fo. 122 (2 September 1819).

Eden's *Principles of Penal Law* to Bentham's *Scotch Reform* – but they were not works he drew on in his practice. For instance, as a pupil, he read Jones on *Bailments* on a stage coach journey to Bury, Wynne's *Eunomus: Or, Dialogues concerning the Law and Constitution of England* on a leisurely walk in the fields beyond Islington, and St German's *Doctor and Student* in bed.

Law reports furnished the bulk of his regular reading. Many mornings were spent making notes 'in my books of reports from the Numbers of Term Reports' – a 'tiresome' if 'useful' employment.⁵³ He was aware that judges like Sir Vicary Gibbs 'spoke against the Term Reports as very injurious to the young men of the profession by occasioning them to neglect note taking'. Gibbs wanted to see lawyers who could argue on principle, and worried about the number of cases reported: 'by the multiplication of these, law is become not a difficult, but an unattainable science.'⁵⁴ Robinson also protested against excessive reporting, expressing exasperation at East's 42-page report of Dr Povah's case,⁵⁵ and denouncing Chitty's *Reports of Cases, principally on Practice and Pleading* as 'a book absolutely disgraceful to have written – the most gross and palpable catch penny work ever published under the form of reports'.⁵⁶ However, while he continued to take notes in court, and to collate them with the printed reports, he questioned the utility of his own note taking,⁵⁷ and used the printed ones as the prime source of his day-to-day legal knowledge (while also making sure to send reports of significant cases in which he had appeared to the law reporters).⁵⁸

Robinson also made extensive use of digests and dictionaries,⁵⁹ spending much time collating

⁵³ *Ibid.*, vol. 5, fo. 172 (29 May 1817).

⁵⁴ *Ibid.*, vol. 6, fo. 145 (16 June 1818).

⁵⁵ *R. v. Archbishop of Canterbury* (1812) 15 East 117. Robinson Diary, vol. 2, fo. 151 (1 November 1812): 'This book-making is one of the Curses of the profession!'

⁵⁶ *Ibid.*, vol. 7, fo. 76 (22 May 1819). Joseph Chitty's *Reports* were published in two volumes, in 1820 and 1823.

⁵⁷ *Ibid.*, vol. 3, fo. 92 (23 October 1813). On 18 November 1814 (vol. 4, fo. 40), he noted 'I sat up till one copying notes taken in Court, but I believe I shall soon alter my plan & attend less to arguments in Court than I have done for I lose a great deal of time there.'

⁵⁸ *Ibid.*, vol. 7, fo. 3 (7 December 1818), sending 'two reports today for the Term Reports of my case', referring to *Farrer v. Billing* (1818) 2 B & Ald 171: 'These I wrote this morning.'

⁵⁹ When starting out in his studies, his friend Manning 'shewed me his MS Law Common-Place book – it professed to be formed as a continuation of Comyns digest. And the Index was made according to the plan laid down by Locke. It appeared to me better to make references to the MS notes in Comyns itself, if that book be considered as the fittest index to the law. There might be a MS alphabetical Index to the MSS.' Robinson Diary, vol. 1, fo. 29 (22 March 1811). Sir John Comyns's *A Digest of the Laws of England* was published in five volumes between 1762 and 1767.

materials from these works,⁶⁰ and indexing the recent numbers of the law reports into them.⁶¹ When it came to legal treatises, most of his professional attention was directed to practical works, such as Abbott on *Shipping* or Bayley on *Bills*, which he filled up with cases from recent case law.⁶² He also made sure to check the latest editions of practical books.⁶³ With his extensive practice at sessions, he found Michael Nolan's treatise on the poor laws⁶⁴ 'more directly and instantaneously useful than any professional work I have yet read', even if it was untheoretical.⁶⁵ By contrast, he was unsure how useful Evans's edition of Pothier on *Obligations* was: 'By mingling Opinions however valuable and intimation of the law of foreign Countries with our own legal decisions, I am in danger of confounding what ought to be with what is.'⁶⁶ General textbooks were only consulted on the hoof, to help solve a particular question he needed to argue, as when in 1816 he 'looked over Whitmarsh's bankrupt law' on the way to a hearing.⁶⁷

Criminal law

Although civil litigation provided the path to both riches and reputation, rising barristers also engaged in a significant amount of criminal work, and the diaries offer a valuable insight into the strategies used by criminal barristers in this era. They often learned on the job. In 1822, Coleridge was glad to take on some criminal cases – 'an odious business' – since 'it is to me

⁶⁰ Cf. *ibid.*, vol. 2, fo. 141 (14 January 1813).

⁶¹ Cf. *ibid.*, vol. 2, fo. 115 (26 July 1812): 'Spent the forenoon at home, Indexing the last numbers of East Rep. into Tomlin's Digest', referring to T. E. Tomlins, *Repertorium juridicum: A general index to all the cases and pleadings in law and equity* (London, 1786-87).

⁶² Charles Abbott, *A Treatise of the Law relative to Merchant Ships and Seamen* (London, 1802; and later editions), and John Bayley, *A Short Treatise on the Law of Bills of Exchange* (London, 1789; and later editions). Cf. Robinson Diary, vol. 5, fo. 18 (22 February 1816): 'I spent the forenoon reading Crown Law and putting the recent Statutes into East's Pleas of the Crown', referring to E. H. East, *A Treatise of the Pleas of the Crown*, 2 vols. (London, 1803).

⁶³ *Ibid.*, vol. 2, fo. 167 (27 December 1812): 'All the forenoon till ½ past 4 at home Reading the 5th Edition of Tidd & making notes of the additions in the 4th Edition, rather a tedious task, but useful as it forces a closer attention than I should otherwise give to points of practice. And I may perhaps not want the new edition.' The reference is to William Tidd's *The Practice of the Court of King's Bench in personal actions*, the first edition of which was published (in two volumes) in 1790-1794.

⁶⁴ Michael Nolan, *Treatise of the Laws for the Relief and Settlement of the Poor* (London, 1805).

⁶⁵ Robinson Diary, vol. 3, fo. 22 (18 March 1813).

⁶⁶ *Ibid.*, vol. 2, fo. 172 (20 January 1813). R. J. Pothier, *A Treatise on the Law of Obligations, or Contracts*, trans. W. D. Evans, 2 vols. (London, 1806).

⁶⁷ Francis Whitmarsh, *A Treatise on the Bankrupt Laws* (London, 1811).

an instructive business, for I know practically far too little of the criminal law.’⁶⁸ High profile criminal cases were also very useful in attracting the notice of attorneys. After successfully defending two men charged with murder in 1823 after the ‘Chippenham Riots’ – a brawl between men from neighbouring towns – Coleridge noted that ‘this was a case of great notoriety and interest, and I believe it is likely to do me a great deal of service.’⁶⁹ Another case which he regarded as important for his career prospects was ‘my great Salisbury case’. There were in fact two linked cases: in the one, John Seymour, a gentleman of fortune from Ramsbury, was indicted for unnatural offences with a servant (including a capital charge of sodomy); in the other, two of Seymour’s other servants – Coleridge’s clients – were indicted for a conspiracy to make a false accusation against him. ‘I have almost every thing to gain and much to lose according to the manner in which I conduct the trial,’ Coleridge noted, ‘If I should do well, I may expect almost any thing for the future in Wilts.’⁷⁰ Seymour’s case was tried at the end of July 1827, when Coleridge sensed that the judge was against him and that he had little chance of obtaining a conviction on the capital charge, which rested on the testimony of the servants peeping under a door. Under the circumstances, ‘I thought it better to reserve my fire, remove the indictment for the misdemeanour by a certiorari which I had provided for the event, and keep that as a set off against the indictment for a conspiracy.’⁷¹ Seymour was convicted of the misdemeanour at the following assizes, and soon absconded. Coleridge’s clients were then formally acquitted of conspiracy (though he admitted privately that ‘they may unintentionally have coloured their story’). After the event, he wrote, ‘I cannot but rejoice – and it is matter (I hope of honest and allowable) self congratulation to me, that I was not found wanting in my arduous task.’⁷²

As the Seymour case illustrates, there were various strategies that defence counsel might use to secure victory. In 1823, Coleridge was retained at the last minute at the Exeter sessions to defend the Revd John Kingdon Cleeve for an indecent assault, committed one week earlier on an eighteen-year-old man. Cleeve had a bad reputation locally, and on the Sunday following the event, his congregation deserted their pews when he entered the church. Coleridge’s advice to the clergyman (who could not find bail) was to go to trial at once, since it would catch out the prosecution and come across as a bold assertion of innocence. At the trial, Coleridge sought to use the very local prejudice against Cleeve in his favour with the jury, and after seventeen hours of deliberation, the jury acquitted him.⁷³

⁶⁸ BL MS Add. 86031, fo. 28 (10 March 1822). Contrast Romilly, *Memoirs*, vol. I, 90-1.

⁶⁹ BL MS Add. 86032, fo. 33 (13 March 1823), *Trewman’s Exeter Flying Post*, 20 March 1823. He was also pleased by being praised in court by Garrow B for his prosecution of William Marshall: MS Add. 86033, fo. 62 (24 August 1824); letter to John May, Bodl. MS Eng. lett. c. 289, fo. 123 (23 August 1824); *Trewman’s Exeter Flying Post*, 26 August 1824.

⁷⁰ BL MS Add. 86035, fo. 89 (26 July 1827).

⁷¹ BL MS Add. 86035 fo. 5 (12 August 1827); *Bristol Mercury*, 6 August 1827; *Morning Chronicle*, 13 August 1827.

⁷² BL Add. MS 86036, fo. 29 (27 July 1828); letter to John May, Bodl. MS Eng. lett. c. 289, fo. 142 (5 April 1828); *Morning Chronicle*, 17 March 1828; *The Examiner*, 23 March 1828; *Annual Register*, vol. 70 (1828), 323-37. His rival, Wilde, succeeded two years later in moving for a new trial for Seymour: *The Times*, 10 February 1829, 3, and 8 July 1829, 3.

⁷³ BL MS Add. 86032, fo. 120 (19 October 1823), *Trewman’s Exeter Flying Post*, 16 October

The diaries show us how, in an era when the adversarial trial bound by rules of evidence had become established, lawyers were careful in sifting and testing evidence. Robinson's first major trial came at his first assizes in Norwich in 1813, when he was given a brief in court to defend James Maxey, who was to be tried the next day for poisoning his wife and her daughter. All the evidence was circumstantial. The women had been poisoned by drinking tea from a kettle containing a corrosive substance, a quantity of which had recently gone missing from Maxey's master. The prisoner was on bad terms with his wife, who before her death had named her husband as the only person who could have put poison into the kettle. Robinson began timidly, fearing that his cross-examination might reveal incriminating information unknown to him – 'for we were in the situation of persons walking in a wood at night with reason to believe that spring guns and steal [sic] traps were scattered in all directions' – but he took courage when sensing that Chief Baron Alexander was with him. He drew attention to circumstances which might cast a doubt in the jury's mind, such as the fact that the latch on the house door had not been fastened when Maxey left, and that other people had access to the poison. The Chief Baron then told the jury that 'all the links of the chain must be entire' where the evidence was circumstantial, and summed in the prisoner's favour. After much hesitation – and against the public feeling – Maxey was acquitted.⁷⁴

If the diaries detail careful forensic examinations, they also reveal blunders. Defending a man accused of stealing meat during a riot in 1816, Robinson called a witness who (he had been informed) would swear that she had seen the defendant leaving the premises in question without the meat. The presiding judge 'Gibbs called me to him and cautioned me not to examine her on such a point, as if the jury did not believe her such a testimony would make the fate of the prisoner certain.' He took the hint and was grateful for this 'benevolent interference.'⁷⁵ On other occasions, he was less fortunate. In 1820, he defended two young men on a case of highway robbery, in which the main evidence came from the victim. During the case, he 'asked very injudicious questions and certainly made a bad defence in a bad case'. In particular, 'I forgot myself so far as to ask whether certain conversations did not take place between [the prosecutor] and the boys – which as Blosset [presiding] - rather unkindly towards me observed, was an admission that they were there. The remark exposed my blunder and it was not called for on his part.'⁷⁶

Robinson was particularly irked when judges admitted evidence that they should have rejected. In 1815, he was annoyed when clients were transported for seven years for stealing feather beds, in a case where the only evidence against them came from the wife of a transported accomplice. He noted that Heath's sentence was wrong, 'as far as the want of legal evidence renders a conviction bad', though he admitted that 'the fellows were clearly guilty and notoriously part of a gang of house breakers.'⁷⁷ In 1816, when three men were

1823.

⁷⁴ Robinson Diary, vol. 3, fos. 70-1 (20 August 1813). For the case, see *Morning Post*, 30 August 1813.

⁷⁵ Robinson Diary, vol. 5, fo. 86 (16 August 1816).

⁷⁶ *Ibid.*, vol. 8, fo. 8 (30 March 1820).

⁷⁷ *Ibid.*, vol. 4, fo. 92 (1 April 1815). The case is that of Jeremiah Moyse, Samuel Hasell and

convicted of possessing forged notes, after collecting (but not opening) a package which had been accidentally opened and resealed in transit, he noted, 'I was not satisfied with a conviction of one man obtained under such evidence, tho' I had no doubt of the prisoner's guilt.'⁷⁸ Sometimes he raised his concerns with the judge. In 1828, he protested to Garrow for having admitted evidence against his client that his wife had pawned some of the stolen goods – 'It not being proved that the husband and wife were living together!!' Garrow told him that 'he had thought anxiously on the subject and that 'no harm should come of it''⁷⁹

Although until 1836 the law stipulated that counsel could not address the jury for the prisoner in cases of felony, it was evident that lawyers routinely found ways of doing so. After the Maxey trial, Robinson wrote, 'In my Cross examining I thought I had some portion of the talent of Garrow in giving to a question the effect and impression of a little Speech'.⁸⁰ Similarly, after an unsuccessful defence of men for uttering bad silver money in 1816, he wrote, 'I made a short speech to the jury which was more favourably received by the bar than anything I had done before.'⁸¹

The diaries also reveal how far random factors might shape trial outcomes. Proofs might fail because key witnesses had failed to appear, or because the barrister knew 'so little from the brief of the character of the witnesses that I did not dare to cross examine them much.'⁸² Juries might be unable to remember the names of individual prisoners, thereby undoing careful forensic examinations designed to exonerate particular individuals.⁸³ They might on occasion betray 'a stupidity quite disgraceful to the county and even to the mode of trial so much and often so absurdly eulogized.'⁸⁴ Much might also depend on the character of the judge hearing the case. In 1815, Robinson defended Elizabeth Woolterton in a poisoning case, before Gibbs CJ. The case rested on circumstantial evidence similar to that in Maxey's, but on this occasion he lost. Reflecting on the two cases, he observed that 'the verdict would have been in both cases different under the other judge.'⁸⁵ Judges might also be prone to

William Towns: *Bury and Norwich Post*, 5 April 1815.

⁷⁸ Robinson Diary, vol. 5, fo. 28 (19 March 1816). The case was that of Robert Lord (alias Davies), John Lake and John Wheatley, mentioned in *The Bury and Norwich Post*, 27 March 1816.

⁷⁹ Robinson Diary, vol. 13, fo. 107 (26 March 1828), fos. 109v (28 March 1828).

⁸⁰ *Ibid.*, vol. 3, fo. 70 (20 August 1813). For the case, see *Morning Post*, 30 August 1813.

⁸¹ Robinson Diary, vol. 5, fo. 33 (29 March 1816).

⁸² *Ibid.*, vol. 3, fo. 83 (7 October 1813).

⁸³ *Ibid.*, vol. 5, fo. 86 (17 August 1816). See also his similar experience at sessions, *ibid.*, fo. 76 (23 July 1816).

⁸⁴ *Ibid.*, vol. 4, fo. 138 (22 July 1815), followed by a side heading 'Trial by Jury'. The perjury charge arose out of an accusation of dangerous driving made by the prisoner against a witness. The jury first found a verdict of 'not guilty' relating to the witness's driving, before having to be asked twice to find a verdict against the prisoner.

⁸⁵ *Ibid.*, vol. 4, fo. 137 (22 July 1815). The case was that of Elizabeth Woolterton: *The Bury*

make errors. In one case, Justice Heath became impatient with Robinson's excessively minute examination of witnesses when prosecuting for larceny. Thinking the case clearly made out, Heath cut him off and told the jury that if they believed the witnesses, they must convict; but against the judge's expectations, they returned a verdict of not guilty.⁸⁶

We can also gain an insight into how lawyers reacted to capital punishment from the diaries. In 1822, Coleridge reflected on his feelings after hearing the death sentence imposed on a man he had prosecuted under Lord Ellenborough's Act. 'I can hardly tell how it is that I feel so little about it,' he wrote: 'at the time one's feelings are naturally much swallowed up both by the necessity of attention to your case, and the anxiety to make it out and succeed – then when it comes to the sentence, you are generally warm from the struggle of the trial, and much impressed with the wickedness of the party'.⁸⁷ When he had become a judge, and had to impose the death sentence, Coleridge found it rather more troubling, with many entries describing his distress at imposing the sentence.⁸⁸

Civil litigation

The diaries give a good insight into the nature of the civil business which barristers engaged in and into their litigation strategies. Much of the lucrative work at sessions was made up of Poor Law appeals, which generally centred on rival parishes disputing about where particular paupers were settled. Such cases could lead to absurd conflicts: Robinson observed a case brought at the Middlesex Sessions to establish which parish was responsible for a pauper whose bed crossed the parish line.⁸⁹ If parishes sought to escape liability by repeatedly litigating what amounted to a settlement, the cases also reveal that they often engaged in questionable practices, such as conniving at bigamous marriages to avoid granting settlements, or escorting dying paupers to the parish border to pass on the burden.⁹⁰ Furthermore, since the magistrates decided by vote, outcomes might not rest on law alone. In 1817, Robinson argued a case for the parish officers of Carlton, near Newmarket, against an appeal against the Poor Rates by the Rector, who argued that he should not be rated for corn rents taken in lieu of tithes. The case was lost: 'there being but one or two laymen on the

and Norwich Post, 26 July 1815. See Thomas Middleditch, *Murder by Poison!! The Trial at Large of Eliz Woolterton for the wilful murder of Robert Sparkes, a child of six years old, who partook of a cake in which the prisoner had mixed arsenic* (Bury St. Edmunds, [1815]).

⁸⁶ Robinson Diary, vol. 4, fo. 88 (23 March 1815).

⁸⁷ BL MS Add. 86031, fos. 24-5 (March 7 1822); cf. letter to John May, Bodl. MS Eng. lett. c. 289, fo. 81 (27 March 1820).

⁸⁸ He was particularly troubled by the case of Charles Wakley, whose unexplained killing of a farm girl was 'more like an overwhelming possession for the moment, than the act of a rational being' (Add. MS 86042, fo. 95: 23 August 1839. During sentencing, 'sobs choked his utterance, and he was obliged to cover his face with his handkerchief', and he had to leave the courtroom. *Champion and Weekly Herald*, 18 August 1839. See further P. Handler, 'John Taylor Coleridge and the Criminal Law' (forthcoming).

⁸⁹ Robinson Diary, vol. 4, fo. 186 (7 December 1815), *Morning Post*, 8 December 1815.

⁹⁰ Robinson Diary, vol. 5, fo. 74 (19 July 1816); *ibid.*, fo. 84v (9 August 1816).

Bench, no wonder that the Clergyman had the victory.⁹¹

While business at sessions might be very short-term in nature, litigation before the superior courts could be much more complex, and occupy more time. As part of his retainer for the Duchy of Cornwall, Coleridge was counsel in the case of *Rowe v. Brenton*. This was a complex dispute over Cornish mining rights, and his diary describes how, over several months in 1827, Coleridge worked his way through ancient manuscripts at the Duchy office, while also advising the King's agents on how to secure the Duchy property from future encroachments.⁹² By the end of the following year, his chambers had become the headquarters of a team working twelve hours a day preparing the brief for the trial.⁹³ The diary also describes his anxiety at the replacement of James Scarlett as Attorney-General by Charles Wetherell, whom he regarded as far inferior; but in the end, the Crown won an easy victory (and Coleridge over £500 in fees).⁹⁴

Given the pressure of business, it is perhaps not surprising that mistakes were often made in litigation. Robinson was nonsuited in his first Common Pleas trial in London (an action for freight), when three witnesses failed to appear. Only then did he notice that the defendants' plea constituted no defence, and that James Parke (who had drawn the pleadings) should have demurred rather than take issue on it.⁹⁵ In 1817, he was given another difficult hand to play in *King v. Simms*, an action on a covenant by the defendant to pay money in exchange for a covenant by the plaintiff to transfer stock. Robinson realised that he could only succeed in his defence if he could show that the covenants were dependent, and despaired of Joseph Chitty's ineptitude in pleading *non est factum*, instead of demurring for failure to aver a willingness to perform. When Robinson attempted 'laboriously and wretchedly' to persuade the court that the covenants were dependent, Ellenborough 'became impatient' and told him that he had no time to hear him *de omni re scibili*, leaving Robinson anxious that he would never conquer his 'disabling fear' of Ellenborough.⁹⁶ He also noted his own mistakes. In *Farrer v. Billing*, he won when the court 'looked over the local act with more sharpness than I had done and found out clauses in my favor which I had overlooked'.⁹⁷ In another case, he blundered by forgetting an obvious clause in the Statute of Frauds. He felt no moral qualms - thinking his client's defence was unprincipled - but worried that he had exposed his

⁹¹ When the bench refused him a case, he moved for a mandamus to overturn their decision, but got short shrift from the King's Bench. Robinson Diary, vol. 5, fo. 158v (18 April 1817); *ibid.*, fo. 168 (17 May 1817), *The Times*, 19 May 1817, 3. When another appeal was brought, he continued to attempt to get a case to raise the legal question at Westminster: Robinson Diary, vol. 6, fo. 28 (17 October 1817).

⁹² BL MS Add. 86035, fo. 121 (27 October 1827).

⁹³ BL MS Add. 86036, fo. 60 (1 November 1828).

⁹⁴ *Ibid.*, fo. 69 (30 November 1828). *Rowe v. Brenton* (1828) 8 B & C 737.

⁹⁵ Robinson Diary, vol. 3, fo. 125 (15 February 1814).

⁹⁶ *Ibid.*, vol. 5, fo. 174 (3 June 1817).

⁹⁷ *Ibid.*, vol. 6, fo. 183 (17 November 1818), discussing *Farrer v. Billing* (1818) 2 B & Ald 171.

ignorance to the attorneys.⁹⁸ Robinson was also thankful to be helped out by kindly judges. During one replevin case, where the complex pleas had been badly drawn, he ‘felt so thoroughly in a maze that had I been left to myself the cause must have been lost’. After Chief Justice Best stepped in and explained the matter to the jury, Robinson noted, ‘For such as me Best is an excellent judge – He will not do as Gazelee has done, suffer a case to be decided contrary to justice, because the Counsel did not perceive the points in the case.’⁹⁹

The diaries also give insight into informal advice given by lawyers to broker settlements. In 1814, Robinson received an unexpected brief to defend D.W. Harvey (who would later gain notoriety when rejected by the Benchers of the Inner Temple for a call to the bar) in an action for trespass. The worse for drink, Harvey had boorishly forced his way onto the plaintiff Merest’s land when refused permission to hunt there. Robinson tried to persuade the jury that in a civil action they should only give such damages as reflected the actual injury to the plaintiff. However, after Heath J instructed them to give damages for the insult, they returned a verdict of £500 damages – the sum laid in the declaration. Over dinner, Heath told Robinson that the jury would have found whatever sum the pleader had inserted, and everyone agreed the verdict would be set aside.¹⁰⁰ However, on the following Wednesday, Robinson went to see Merest confidentially – and without consulting Harvey – and suggested that for the sake of his own honour, he should propose that Harvey should give £50 to some charity, and not enforce the judgment. Although Merest said he would think about it, he did not follow Robinson’s advice; and when the case came to the Common Pleas on a motion for a new trial, the court upheld the verdict, Justice Heath now saying that ‘he recollected £500 being given for knocking a hat off a man’s head’.¹⁰¹ This was not the only time when Heath’s inconsistencies made Robinson marvel at ‘the glorious uncertainty of the Law’.¹⁰²

The dairies also offer us novel insights into two aspects of barristers’ work, which were central to civil litigation. The first concerns writs of inquiry.¹⁰³ When cases in which judgment had gone by default were sent to sheriffs’ juries to assess damages, the parties were entitled to be represented by counsel. In such hearings, the jury did not simply hear evidence relating to the extent of damage suffered, but also heard evidence relating to the cause of action. Robinson appeared in many such hearings, and his diaries reveal the process to be very like the kind of trial heard at *nisi prius*. For instance, in February 1817, he attended on a

⁹⁸ Robinson Diary vol. 7, fo. 29 (11 February 1819). As Campbell put it, an attorney ‘always judges by the event’: [Hardcastle], *Life of Campbell*, vol. I, 241.

⁹⁹ Robinson Diary, vol. 12, fo. 64 (11 July 1826).

¹⁰⁰ *Ibid.*, vol. 3, fo. 138 (22 March 1814).

¹⁰¹ *Ibid.*, vol. 3, fo. 152 (30 April 1814).

¹⁰² *Ibid.*, vol.3, fo. 135 (16 March 1814).

¹⁰³ While Coleridge’s diaries do not shed much light on his experience of writs of inquiry, on 14 August 1819 he told John May of a ‘salutary disappointment’ he had in a case before a sheriff’s jury, where his client had improperly taken goods under a warrant and sold them. Coleridge had no witnesses to call and had ‘to rely wholly upon my speech in mitigation of damages’; but the jury found damages ‘considerably more than double of which the evidence warranted’. Bodl. MS Eng. lett. c. 289, fo. 70.

writ of inquiry at the Sheriff's Office in Bedford Row, in an action of negligence in the use of a hired horse. Rather than simply assessing how much the horse had been damaged by admitted negligence, counsel at the hearing disputed whether there had been any negligence which had damaged the horse. For the plaintiff, it was shown that the horse had been returned 'in a very bad condition broken winded' after a week. Robinson made a spirited speech in which he attempted to argue that his client had not misused the horse and was not responsible for its health, but his witnesses failed to show that it had been broken winded before, and could not explain why there was a delay in returning it (which implied there was something to hide). In the end, the jury gave a verdict for £40.¹⁰⁴

In the same month, in another writ of inquiry in the Secondaries' Office in Coleman Street, Robinson acted for the defendant in a writ of inquiry in *Haslam v. Drage*, brought for the value of shop goods delivered to his wife. Instead of being asked simply to assess damages, the jury were invited to consider the liability of the defendant to pay. Robinson explained to them that the defendant was a poor shepherd whose son had become a farmer. The goods in question had not been ordered by the father, but by his son, who shared the same name. When they were delivered to the defendant's wife, she accepted them as the agent of her son, and not as the agent of her husband. Furthermore, it was only after the son's bankruptcy that his father had been arrested for the debt. Robinson managed to prove his case through the testimony of the son, and a verdict of only 1 shilling was given; though he conceded that 'if there had been a Counsel on the other side there might have been a different verdict'.¹⁰⁵ He won the case by persuading the jury that the defendant had no legal liability to pay, even though this was precisely the point apparently conceded by the default judgment.

Barristers also spent much time conducting arbitrations, or appearing before them. In many instances, cases were referred to barristers simply because of pressure of time at the assizes.¹⁰⁶ Other reasons to refer to arbitration might be the complexity of the issues involved¹⁰⁷ or questions of confidentiality, whether personal¹⁰⁸ or commercial.¹⁰⁹ A reference might also provide the kind of flexible, equitable solution which a common law jury was unable to provide, as where parties disputed rights to water.¹¹⁰ One example of the latter was

¹⁰⁴ Robinson Diary, vol. 5, fo. 132 (10 February 1817).

¹⁰⁵ *Ibid.*, vol. 5, fo. 131 (7 February 1817).

¹⁰⁶ E.g., *ibid.*, vol. 6, fo. 27 (16 October 1817): 'It was a question of boundary and there were many old witnesses on both sides – It would have taken up a long time in court.' Cf. BL MS Add. 86039, fo. 114 (20 April 1835).

¹⁰⁷ Robinson sat on a reference in an ejectment case 'full of points of nicety and great difficulties both legal and equitable arising out of the relation of the parties.' Robinson Diary, vol. 7, fo. 141 (20 October 1819).

¹⁰⁸ Robinson Diary, vol. 6, fo. 105 (23 March 1818), referring to *Ayres v. Rowley*, where an action was brought against the son of Sir W. Rowley for the maintenance of his mistress.

¹⁰⁹ *Ibid.*, vol. 12, fo. 10 (21 February 1826), referring to the insolvency of the Cambridge banking partnership of Hollick, Nash, Searle and Nash.

¹¹⁰ As Coleridge explained to John May, 'as a verdict in such a case must always do mischief by giving the whole to one party, it is always the object to refer to an arbitrator, giving him

Winter v. Lethbridge. The reference required Coleridge to settle all matters in dispute between the parties relating to a stream which flowed through both parties' lands and to regulate its future use. Coleridge's diary makes it evident that this case was not referred to him because the parties wished to have their case settled by 'love' rather than 'law'. For this was 'one of nearly a hundred quarrels between the two men and their respective fathers', concerning rights to land which intersected. Indeed, at the very time that Coleridge was conducting his arbitration, the parties were litigating another dispute relating to their property at the Somerset summer assizes.¹¹¹ He wrote, 'there is so much jealousy on both sides [that] it has been impossible for me to preclude any course of inquiry that either party thought material.'¹¹² Coleridge clearly did not enjoy the task: before resuming his hearings in September, he noted, 'it will be no very pleasant way of spending my time to have little Williams and Jeremy [the counsel on both sides] squabbling all day before me'.¹¹³ Eventually, Coleridge's award set out how the stream was to be managed to give both parties a reasonable supply. Though he thought the parties were satisfied by his performance, the litigation did not end with the award, for the following spring Winter moved (unsuccessfully) to set it aside, on the ground that Coleridge had exceeded his jurisdiction.¹¹⁴

The fact that a reference to arbitration did not close off the continuation of litigation can also be seen in the 1826 case of *Cubitt v. Porter*, in which Robinson acted for the defendants. This was an action to try the right to a wall, which his clients had extended. When Best CJ referred the case to arbitration,¹¹⁵ he directed that the cottages which had been built by the defendant on the wall should not be pulled down (in case the finding went against him), but that compensation should be given. Before the arbitration commenced, the arbitrator, Andrews, required the plaintiff's landlord to be a party, so that he could also be bound by the decision. This was objected to by the plaintiff, whose counsel Fitzroy Kelly advised the landlord only to consent on condition that if the arbitrator found for the defendant, he would direct a nonsuit, so that the landlord would not be bound. This was unacceptable to the defendant and the arbitration stalled. When Robinson later sought to make the plaintiffs pay the costs of the reference, he lost, after Bayley J took the 'strange view' that Best CJ had meant that the tenant was to receive compensation if the wall was found to belong to the landlord, but that the landlord was not to be bound in an action of trespass.¹¹⁶ In this case, the reference to arbitration was regarded by one of the parties as only a step in a continuing litigation strategy,

power to divide and regulate the use in such a way as may be serviceable to both parties': Bodl. MS Eng. lett. c. 289, fo. 133 (6 August 1826).

¹¹¹ *Lethbridge v. Winter* (1824) 2 Bing 49.

¹¹² BL MS Add. 86032, fo. 108 (20 September 1823).

¹¹³ *Ibid.*, fo. 105 (14 September 1823).

¹¹⁴ *Winter v. Lethbridge* (1824) M'Cle 253, 13 Price 533.

¹¹⁵ *Bury and Norwich Post*, 26 July 1826.

¹¹⁶ 'I was mortified both by being wrong in my opinion and in not having the power to convince Bayley': Robinson Diary, vol. 10, fo. 91 (25 November 1826). For later common law proceedings in this case, see *The Bury and Norwich Post*, 22 August 1827, and *Cubitt v. Porter* (1828) 8 B. & C. 257, 2 Man. & Ry. 267.

which took the parties back to court.

Court-directed arbitrations were conducted before lawyers by lawyers, who sometimes came in gown and wig.¹¹⁷ Some cases – such as *Oliver v. Lucas*, a dispute over the payment due from a landlord to a tenant for crops – were conducted very much like trials, save in being held after hours at the lodgings of the arbitrator.¹¹⁸ Other cases might have a broader chronological and geographical span. In *Hurrell v. Underwood*, an action for digging a sluice which had flooded the plaintiff's mill, the arbitration was held at Bassington, near the site at issue, and stretched over several months. While both sides sought to make their cases out by the evidence of witnesses, including surveyors, the defendant also sought to give a practical demonstration of the limited impact of his sluice by opening it, in the presence of all the parties. This demonstration did not settle the matter, however, since there was a dispute over whether Underwood had declared in public that he would flood the land, which he denied before the arbitrator.¹¹⁹

If references to arbitration often mimicked court proceedings, the strict rules of court which excluded party evidence did not apply here.¹²⁰ Nonetheless, questions of the admissibility or probative value of evidence could be raised at arbitrations, just as at trial. In 1818, Robinson was counsel in an arbitration in the case of *Weldon v. Ind*, where the plaintiffs had sought an account from an executor. The dispute had already led the parties into the Chancery,¹²¹ but was referred to an arbitration before Trower, which came to be conducted in a number of London coffee houses in the first half of the year. During the course of the arbitration, counsel and arbitrator disagreed over the rules of evidence. The only evidence which the plaintiffs had for their claim was a note of hand given to them, together with accounts in the hand of the testator. Trower held that the accounts could only be evidence *against* the claimants: that is, they could be used to show what money had been paid out by the executors, but not as evidence of what remained to be paid – a ‘monstrous absurdity’ according to Robinson. ‘He confounding these accounts considered as Evidence with the allegations of a party in an Answer,’ Robinson noted: ‘in the latter case what a man admits is taken against him, and what he asserts in avoidance of his admission is still to be proved – But when accounts like these are taken as Evidence by a party he makes both sides Evidence.’¹²² The matter continued to be disputed between Trower and Robinson (who

¹¹⁷ Robinson Diary, vol. 13, fo. 100 (8 March 1828), commenting on the appearance of Flanagan, who ‘was with difficulty prevented making a display of eloquence’.

¹¹⁸ *Ibid.*, vol. 5, fo. 23 (7 March 1816).

¹¹⁹ This was another reference which took much time: *ibid.*, vol. 4, fo. 136 (19 July 1815), and vol. 5, fos. 34 (5 April 1816) and 43 (26 April 1816).

¹²⁰ The powers of the arbitrator, including whether he had the power to examine parties, were determined by the reference, drawn up by the attorneys. On the parameters, as explained by Coleridge, see the entry on ‘Arbitration’ in *Encyclopaedia Metropolitana or Universal Dictionary of Knowledge*, ed. Edward Smedley, Hugh James Rose and Henry John Rose, vol. 14 [Miscellaneous and Lexicographical, vol. 1], (London 1845), 738.

¹²¹ *Weldon v. Ind* (1816): PRO, C 13/1682/24.

¹²² Robinson Diary, vol. 6, fo. 76 (20 January 1818).

invoked the assistance of his friends Basil Montague and James Stephen),¹²³ though in the end this issue did not need to be resolved, since the ‘troublesome’ case was compromised.¹²⁴

Arbitrators sometimes had to decide what were in essence legal questions. For instance, Serjeant Frere was arbitrator in the case of *Skrimshire v. Dover*, concerning an overreaching bargain: the plaintiff had let the tithes of his vicarage at considerable undervalue, but since he had never resided in the vicarage, he claimed to be able to void the lease by virtue of an old statute. This raised a question of law: ‘whether the lease be good by retrospection, the Statute of 43rd of Geo: 3rd having repealed the old statute.’ This turned out to be a knotty legal point which Robinson and Alderson argued until half past one in the morning.¹²⁵ At other times, the questions were largely factual, and required the arbitrator to weigh conflicting evidence. This could also be challenging. Faced with the directly contradictory evidence of ‘two religious professors’ in the case of *Wilcox v. Borsley*, arbitrator Robinson wrote, ‘Whom am I to believe? I can but guess after all and do as juries must often do, take probabilities into my consideration and decide because there must be a decision, not because I know with whom the justice lies.’¹²⁶ However, unlike judges at common law, arbitrators could attach conditions to their awards, with proceedings on an award in one party’s favour being stayed if the other party performed certain stipulated acts.¹²⁷

Conclusion

If these diaries give us a fascinating glimpse into the day-to-day lives of practising lawyers, their struggles to maintain an income and secure preferment in the great competition of the profession, they also offer some important insights into the nature of legal practice. In particular, they shed new light on some aspects of legal practice which have not as yet received the level of attention accorded to the Superior Courts. They show not only the centrality to the lives of many young lawyers of the ‘public law’ litigation which made up so much of the business of Quarter Sessions, revealing the nature and quality of legal arguments in that forum, but also how doctrinal legal argument found its way into inquiries before sheriffs and into arbitrations before barristers. In this way, they can enrich our understanding of the nature of legal culture in a number of under-explored legal forums. They also show the practical challenges faced by lawyers conducting litigation and the strategies that they employed on behalf of their clients.

More broadly, the insights they give into the mind of the lawyer dealing with day-to-day issues underscore the point, long argued by doctrinal legal historians, that the common law’s development often owed more to trial and error in forensic argumentation as lawyers strove to achieve the best results for their clients than to any systematic vision of doctrine held by

¹²³ *Ibid.*, vol. 6, fo. 139 (4 June 1818).

¹²⁴ *Ibid.*, vol. 6, fos. 143 (12 June 1818) and 147 (19 June 1818).

¹²⁵ *Ibid.*, vol. 6, fo. 14 (7 August 1817).

¹²⁶ *Ibid.*, vol. 13, fo. 132 (28 May 1828).

¹²⁷ Such was his award in *Doe d. Brook v. Roper*: *ibid.*, vol. 8, fo. 16 (19 April 1820).

learned lawyers.¹²⁸ For the diaries tell a story of men who had no great vision of law - and often a limited appetite for the niceties of doctrine - and who often learned on the job, as they strove to win whatever cases had by chance come their way. Forensic ingenuity might have laid the foundations for significant new doctrinal developments, but these would need to be honed and refined over time through repeated litigation, and *ex post facto* reflection.

¹²⁸ See especially S. F. C. Milsom, *A Natural History of the Common Law* (New York, 2003).