

THE GRIFFITH OPINION BOOKS: A COMMENTARY

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Nearly a century after his death it is interesting to speculate what Sir Samuel Griffith would make of the rediscovery of his opinion books. One contemporary description of his character as ‘lean, ascetic, cold, clear, collected and acidulated...[with a]...sceptical and almost cynical manner’¹ is rather unpromising. But Griffith was a complex and rather vain man.² It is not uncommon for outwardly cynical men to be possessed of an emotional or sentimental element in their makeup. There is plenty of evidence that this was so in Griffith’s case.³ On balance I suspect that he would probably be pleased. Legal historians and indeed anyone who cares about the legal history of Queensland and Australia should be pleased as well.

Since the days of Frederic Maitland there has been a strong manuscript tradition amongst legal historians working in the Middle Ages. This may be something of a mixed blessing.⁴ Closer to modern times more printed sources are available. As a result manuscripts have, until quite recently, been less prominent. In the last twenty-five years legal historians have begun to engage rather more with manuscript sources from the post-medieval period. Lord Mansfield’s, trial notes, edited by Professor James Oldham and published as *The Mansfield Manuscripts* is the best example.⁵ Those of you in the audience who are members of the Selden Society should shortly receive the transcribed trial notes of a lesser known eighteenth century judge, Soulden Lawrence. The notes of Sir Dudley Ryder, a Chief Justice of the King’s Bench in the 1750’s, have also been mined to good effect.⁶ There is still a great deal to do. Lord Hardwicke’s⁷ and Lord Ellenborough’s notebooks⁸ are just two

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¹ Roger Joyce, *Samuel Walker Griffith* (UQP, St Lucia, 1984), p. 89.

² *Ibid.* p. 22.

³ Joyce, n 1, pp. 251-54.

⁴ David J Seipp, ‘The Law’s Many Bodies, and the Manuscript Tradition in English Legal History’ (2004) 25 *Journal of Legal History* 74.

⁵ James Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* 2 vols (The University of North Carolina Press, Chapel Hill, 1992).

⁶ John H Langbein, ‘Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources’ (1983) 50 *University of Chicago Law Review* 1.

⁷ In addition to his trial notes (BL Add MS 36045-36069) some of Lord Hardwicke’s legal opinions as Attorney General are also in the collection (BL Add MS 35908).

⁸ These are deposited at Harvard HLS MS 1267 and contain a wide selection of Lord Ellenborough’s trial notes mostly written whilst he was Chief Justice of the King’s Bench.

major collections which are yet to be transcribed.⁹ Both men were significant figures in the history of Equity and the Common law respectively. But their notes have wider importance. Trial notes, fill in the gaps in printed reports, and enhance the printed reports in numerous other ways.¹⁰ Members of the Bar took and collected trial notes as well. These were an essential part of keeping up to date with legal developments. A handful of these collections were published as law reports.¹¹ The most comprehensive extant set of trial notes belonged to Serjeant George Hill, nicknamed Serjeant Labyrinth because ‘his memory of case law was so extensive that he was utterly confused by his own learning’,¹² remain in manuscript form.¹³

Law reporting in England was a private enterprise, without any official sanction until 1865.¹⁴ Even cases in the Central Courts at Westminster went unreported. Trials at *nisi prius* were hardly reported at all before the 1790s.¹⁵ Fellow barristers sought advice from men like Hill and manuscript reports were sometimes cited in court.¹⁶ Manuscripts are equally valuable for legal historians wanting to fill in the gaps in printed reports, although this particular resource has not so far been exploited to anywhere like its full potential.¹⁷

The private material of lawyers including correspondence, precedents and indeed opinion books also contain important material for historians. These are even more neglected than the trial notes.¹⁸ Opinion books exist from a century after the inception of the Common law. The earliest examples of legal opinions are unusual. They were written by a judge, Chief Justice Hengham, as part of a consultation process with his fellow judges, in the late thirteenth century.¹⁹ Counsel of course gave opinions to clients. Before the sixteenth century these were

⁹ For a valuable starting point in relation to Lord Hardwicke, see Henry Horwitz, ‘The nisi prius Trial Notes of Lord Chancellor Hardwicke’ (2002) 23 *Journal of Legal History* 152.

¹⁰ James Oldham, ‘Eighteenth Century Judges’ Notes: How They Explain, Correct and Enhance the Reports’ (1987) 31 *American Journal of Legal History* 9.

¹¹ Notable examples include the reports of Sir John Strange and Edward Hyde East.

¹² A.W.B. Simpson (ed.), *Biographical Dictionary of the Common Law* (Butterworths, London, 1984), p. 242. Hill who was born in 1716 did not die until 1808.

¹³ Preserved as, LI MS Hill, for details see J.H. Baker, *English Legal Manuscripts*, 2 vols. (Inter Documentation Co., London, 1978), vol II, pp. 80-90.

¹⁴ When The Council for Law Reporting was established.

¹⁵ James Oldham, ‘Law Making at Nisi Prius in the Early 1800s’ (2004) 25 *Journal of Legal History* 221, 223.

¹⁶ James Oldham, ‘Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century’ in Hendrik Hartog et al (eds.), *Law as Culture and Culture as Law* (Madison House, Wisconsin, 2000) 119, 127.

¹⁷ James Oldham, ‘The indispensability of manuscript case notes to eighteenth century barristers and judges’ in Anthony Musson and Chantel Stebbings (eds.), *Making Legal History* (Cambridge University Press 2012), ch. 4.

¹⁸ Sir John Baker, ‘Reflections on ‘doing’ legal history’ in Anthony Musson and Chantel Stebbings (eds.), *Making Legal History* (Cambridge University Press, Cambridge, 2012) 7, 10.

¹⁹ Paul Brand, *The Making of the Common Law* (The Hambledon Press, London, 1992), ch. 18.

given orally, often in the vicinity of the courts at Westminster Hall, Guildhall, or St Pauls.²⁰ The tavern, the Cardinal's Hat was also a popular and no doubt more congenial meeting place for lawyers and their clients.²¹

Because they were spoken rather than written, these opinions only survive in the correspondence or minutes of clients.²² By the early seventeenth century opinions started to be written down for the first time.²³ From the mid-eighteenth century the phrase 'to take counsel's opinion' entered common usage.²⁴ There is a good survival rate amongst opinions of government law officers.²⁵ Collections of private opinions are rarer. Most are scattered amongst client papers in County archives.²⁶ A few sets of opinions belonging to individual barristers have also survived.²⁷ A fair number are in depositories in the United States. One set belonging to Matthew Hale, later Chief Justice of the Kings Bench and who found posthumous fame as a legal writer, re-side in Los Angeles.²⁸ By the eighteenth century attorneys also began to collect counsel's opinions and retention rates are greater.²⁹ The opinions were seen as a useful source of reference in advising future clients. Such was the demand that before too long the opinions of some eminent counsel were appearing in printed form. The publishers of *Cases in Law and Equity, with the Opinions of Eminent Counsel*³⁰ unsurprisingly emphasised the value of printed opinions for an attorney. It was said that the work would 'assist his judgment' and 'make it in some degree unnecessary for him to have the further opinion of counsel in almost any case that can occur'. Another similar but larger work appeared in 1791.³¹ The well-known antiquarian and political writer George Chalmers published

²⁰ J.H. Baker, *The Legal Profession and the Common Law* (The Hambledon Press, London, 1986), pp. 101-102.

²¹ J.H. Baker, *The Law's Two Bodies* (Oxford University Press, Oxford, 2001), p. 69 n 38; E.W. Ives, *The Common Lawyers of Pre-Reformation England* (Cambridge University Press, Cambridge, 1983), p. 106. For some contemporary evidence from the mid-fifteenth century, see J.S. Davies (ed.), *The Tropenell Cartulary, 2 vols* (Wiltshire Archaeological Society, Devizes, 1908), vol II, p. 348.

²² For examples see Baker, *ibid.*, pp. 171-73

²³ There is an early surviving example from the mid-sixteenth century, Baker, above n 21, p. 87

²⁴ Baker, above n 21, p. 87. Examples include, *Le Neve v. Le Neve* (1747) Amb 436, 441; *Hervart v. Guis* (1752) 1 Lee 160, 165.

²⁵ Examples include, BL MS Hargrave 145; BL MS Add 22675; BL MS Add 36134-36144.

²⁶ There are not many examples, but the few include: Cumbria Record Office (D Ing); Cornwall Record Office (LR/140); Warwickshire County Record Office (CR 1998/LCB/22).

²⁷ There are a number of examples from the seventeenth century: J.H. Baker, *English Legal Manuscripts in the U.S.A.*, 2 vols (Selden Society, London, 1990), vol II, nos. 229, 230, 251, 1042, 1043, 1121, 1122.

²⁸ Baker, *ibid.*, vol II, no. 251.

²⁹ Opinions also circulated amongst barristers. Precisely how this happened is not certain. Some extensive examples of collections of opinion from the eighteenth century are to be found at Cambridge University: J.H. Baker, *A Catalogue of English Legal Manuscripts in Cambridge University Library* (Boydell Press, Woodbridge, 1996), Add 6628; CUA Collect. Admin. 33. A important collection which includes opinions by William Murray, later Lord Mansfield, is held by Kansas University, Baker, above n 27, no. 1124.

³⁰ (London, 1776).

³¹ *Cases, with Opinions of Eminent Counsel, in Matters of Law, Equity, and Conveyancing*, 2 vols. (London, 1791).

a set of opinions in 1814.³² A subsequent edition appeared posthumously in 1858.³³ The fashion for producing printed opinions was brief. Like other older forms of legal literature including the abridgments published opinions were eclipsed by the emergence of the legal treatise in the nineteenth century.³⁴ It would be another hundred years before a major series of opinions were published. Once again these were the opinions of the law officers.³⁵

In Australia the opinions of the Commonwealth Law Officers are deposited in the Australian National Archives.³⁶ Selections taken from these opinions from the birth of the Federation until 1945 have been published and are now available on-line.³⁷ There are older examples of published opinions as far back as the nineteenth century. These are listed in *Castles' Annotated Bibliography of Printed Materials on Australian Law*.³⁸ The vast majority concern issues relating to the Crown or governance of the colony.³⁹ The opinion of Frederick Darley, later Chief Justice of New South Wales, is more unusual because it deals with an issue of private law - loss or damage to goods carried by sea.⁴⁰ The story is much the same in Queensland where the State Archives preserve the opinions of the Crown Solicitor.⁴¹ With the exception of a selection of legal opinions relating to local government law edited by William Morris and dated 1907,⁴² there are no published opinions from Queensland.

The trial notes of judge's in the High Court of Australia have not always been systematically preserved.⁴³ Those belonging to Sir Edmund Barton,⁴⁴ Sir Adrian Knox⁴⁵ and Sir Isaac Isaacs⁴⁶ have survived but so far they have

³² G. Chalmers (ed.), *Opinions of Eminent Lawyers on Various Points of English Jurisprudence, chiefly concerning the Colonies, Fisheries and Commerce of Great Britain* 2 vols. (London, 1814).

³³ (London, 1858).

³⁴ A.W.B. Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632.

³⁵ In ninety-seven volumes and edited by Clive Parry, *Law Officers Opinions to the Foreign Office 1793-1860* (Farnborough, 1970-3).

³⁶ These are largely listed as series no. A425 but appear elsewhere as well.

³⁷ <http://legalopinions.agps.gov.au/>

³⁸ A. Castles, *Annotated Bibliography of Printed Materials on Australian Law 1788-1900* (Law Book Company, Sydney, 1994).

³⁹ Examples include, *ibid.* 595.

⁴⁰ *Ibid.* 695: FM Darley, *Ex parte The Steamship Owner's Association* (Sydney, 1880)

⁴¹ Queensland State Archives Series ID 12261, 12262, Opinion Books.

⁴² *Legal opinions on local government laws in Queensland obtained from leading counsel and solicitors by the Local Authorities Association of Queensland between the years 1896 and 1907* (Brisbane, 1907)

⁴³ Tony Thew, 'Judges' notebooks' in Tony Blackshield et al (eds.), *The Oxford Companion to the High Court of Australia* (OUP, Melbourne, 2001).

⁴⁴ NAA MS A10612.

⁴⁵ NAA MS A10638.

⁴⁶ NLA MS 2755.

been little used by historians.⁴⁷ In Queensland the judges' trial notes from the Supreme Court from its beginnings in Moreton Bay are retained by the State Archives.⁴⁸ Legal opinions are much rarer. There none to be found amongst the private papers of Isaacs and Sir Owen Dixon.⁴⁹ Sir John Latham's private papers exceptionally contain a set of opinions.⁵⁰ Aside from the opinions of law officers and High Court judges, tracking down legal opinions in Australia is far from easy. Some have probably survived in the sets of personal papers of lawyers or clients. A few of these can be identified.⁵¹ A few more may come to light. It is unlikely that there are a large volume of opinion books waiting to be discovered. Unless some hidden treasure is recovered the Feez Ruthning collection is unique and significant.

In considering the value of legal opinion books, it is worth reflecting on the words of the two greatest legal historians since Maitland. Professor S.F.C. Milsom has reminded us that:

Fundamental change [in the law] happens slowly and by stages so small that nobody at the time could see them as in any way important...legal history more than most kinds of history, depends upon the assumptions by which the materials are read...people do not formulate their assumptions for themselves, let alone spell them out for the benefit of future historians, and in the case of the law there is never the occasion to write down what everybody once knew.⁵²

It is here that opinion books really matter. They help legal historians unpick assumptions. But they need to be used with care. Legal opinions can only tell us so much. Professor Sir John Baker has said that:

What a single barrister thought can only be of limited weight as evidence of a general opinion. Still opinions show us what was thinkable and arguable, or what was thought safe and reliable, throw light

⁴⁷ For an exception see, Sir Gerard Brennan, 'Three Cheers for Engineers' in Michael Coper and George Williams (eds.), *How Many Cheers for Engineers?* (Federation Press, Sydney, 1997) 144, 146.

⁴⁸ Queensland State Archives Series ID 18554, Judges' Notebooks (Supreme Court).

⁴⁹ NLA MS Acc09.166.

⁵⁰ NLA MS 1009 series 13.

⁵¹ Examples can be found in the National Library of Australia: NLA MS 2688 (Papers of Geoffrey Sawyer); NLA MS 8220 (Papers of Fitzherbert Adams Marriot); NLA MS 1624 (Papers of Geelong and Dutigalla Association).

⁵² S.F.C. Milsom, *The Natural History of the Common Law* (Columbia University Press, New York, 2003), pp. 75-76.

on branches of law and practice which are not well covered in the law reports, and give us a direct insight into the practitioner's mind.⁵³

Legal historians have sometimes been tempted to ignore the mundane every-day of which sources like opinion books are part. Forty years ago at Harvard, the illegitimate child of legal realism, the Critical Legal Studies movement was born.⁵⁴ The older traditional of legal history was suddenly seen as passé. What lawyers and judges said and wrote was no more than window dressing. Legal change was the product of bigger political and economic forces. The law and lawyers were not politically neutral but manifestations of political power whether they were conscious of it or not. Morton Horwitz who was sympathetic to these ideas produced his brilliant *Transformation of American Law*.⁵⁵ Patrick Atiyah applied these lessons to England in his *Rise and Fall of Freedom of Contract*.⁵⁶ Although these writers provide a valuable reminder that the law does not develop in a vacuum, unfortunately these works were, on closer examination, found to be flawed.⁵⁷ Facts were passed over in the cause of a good story. Legal history which sidelines lawyers and judges or fails to recognise the role of the individual is doomed to fail.

The sort of legal history which engages properly with primary sources rather than the latest fashionable theory suffers some disadvantages of course. It is both difficult and time consuming to do properly. Some of the Feez Ruthning collection cannot be transcribed. The paper has disintegrated beyond repair. Even that which survives is fragile. The paper is thin and of poor quality. Legal opinions are not after all usually intended to be a record for posterity. The opinions are handwritten which even in the relatively clear hand of clerks still present a challenge to modern readers. But it is worth the effort. The judgements of the superior courts, whether our own Supreme Court or the High Court of Australia, are of course important for legal historians, yet legal history that stops there is incomplete. Legal development is a product of the possible. The majority of disputes never reach the superior courts. They are settled or go before a local tribunal. To concentrate attention on the superior courts alone gives a false picture.

⁵³ Baker, above n 21, 89.

⁵⁴ For a useful statement of the aims and assumptions of CLS, see Roberto Unger, *The Critical Legal Studies Movement* (Harvard University Press, Cambridge Mass, 1983).

⁵⁵ (Harvard University Press, Cambridge Mass., 1977).

⁵⁶ (OUP, Oxford, 1979).

⁵⁷ A.W.B. Simpson, 'The Horwitz thesis and the History of Contracts' (1979) 46 *University of Chicago Law Review* 533. A detailed critique of Atiyah is contained with W. Swain, *The History of the Law of Contract 1670-1850* (CUP, Cambridge, 2014).

Surprisingly little attention has been paid to the working practices of lawyers. Historians are only now beginning to take an interest in legal publishing.⁵⁸ The tools of lawyers, the books and law reports, which were available to them, can help to explain a great deal about legal development. Legal opinions are a crucial part of this story as well. As Mr McKenna has shown, Griffith was not one to cite authority unnecessarily and when he did so those that he did cite were largely English. What this tells us about the Australian legal culture of the nineteenth century cannot be determined by this evidence alone. But nor can it be ignored, especially when set against the fact that there were no officially sanctioned Queensland law reports until 1901.⁵⁹ For some of the time newspaper reports were all that was available.⁶⁰

Sir Samuel Griffith was a civilised man and like many educated men of his day took great delight in the classics.⁶¹ In his spare time he enjoyed translating the gloomier parts of the writings of Dante. This is an appropriate note on which to end. In Canto 8 of the *Divine Comedy*, Virgil and Dante are initially rebuffed when trying to gain access to the City of Dis or lower Hell. Dante pleads: 'Do not, I beg you, leave me here undone. If we are denied a clear way on, then let us quickly trace our footsteps back'.⁶² Legal history which takes no account of the everyday working of the law is indeed 'undone'. Mr McKenna's valuable work on Sir Samuel Griffiths' opinion books is already bearing fruit. When complete it will, like all good legal history, allow us better to trace our footsteps back.

⁵⁸ It may be that this is changing, for examples see: M.H. Hoeflich, *Legal Publishing in Antebellum America* (Cambridge University Press, New York, 2010); Angela Fernandez and Markus Dubber, *Law Books in Action Essays on the Anglos American Legal Treatise* (Hart, Oxford, 2012).

⁵⁹ John McKenna, *Supreme Court of Queensland A Concise History* (UQP, St Lucia, 2012), pp. 81-82.

⁶⁰ Elaborate collections of scrap books of newspaper case reports were kept by lawyers, *ibid.* 58. English cases were also reported in the newspapers for example: *The Sydney Gazette* 10th September 1832.

⁶¹ His undergraduate lecture notes on Law and Greek have survived: NLA MS 3461.

⁶² Robin Kirkpatrick (trans.), Dante, *The Divine Comedy* (Penguin, London, 2012), p. 37.