The Origin and Effect of the Nisi Prius Reports

Abstract

For some 70 years, rulings made by judges sitting at nisi prius were regularly reported, despite those reports being held in low esteem by the legal profession and such rulings being regarded as of little value as precedents by the judges of the time. This article considers why those rulings, at least on matters of substantive law, were rejected as authorities, and sets out the reasons why they were nevertheless reported and cited in court. The article explains that the principal purposes of these reports were to introduce new members of the profession to the practicalities of preparing cases for trial, and to provide some authority, however slight, to cite in court. The article also explains that, while nisi prius rulings on substantive law were cited by nineteenth century judges, they were used differently to decisions of courts in banc. The greater authority of such rulings on points of evidence, at least up to the mid-nineteenth century, is also explored. The article concludes by examining the tendency of more recent judges to ascribe greater weight to nisi prius rulings than their nineteenth century counterparts, due to the modern profession's ignorance of the former difference in the treatment of nisi prius rulings and the decisions of courts in banc.

Keywords Law reporting; nisi prius; precedent; evidence; Isaac Espinasse; Thomas Peake; John Campbell.

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1. Introduction

The history of nominate law reporting is a relatively under-studied area of academic research, which is curious given the central role played by cases in the common law and the consequent importance of accurate and reliable records of them. Nisi prius reporting is particularly poorly served in this respect: the sum total of the scholarly writings on the subject amount to two articles.[1]

Yet these reports raise a number of interesting issues. Despite being an important part of the English civil justice system for more than 600 years, nisi prius cases were largely ignored by the law reporters from the time of the Year Books until the end of the eighteenth century. During that period, reporters concentrated on judgments of the courts sitting in banc at Westminster Hall, as they were regarded as the exclusive forum for decisions on legal principles. By contrast, the nisi prius process was focused on the fact-finding role of the jury, so that reporters considered that little of future interest or use to the profession could be gleaned from the rulings made and directions given to the jury on any substantive legal principles necessary for the determination of the issue at nisi prius.

Despite this, law reports dedicated to nisi prius rulings began to appear in the mid-1790s and continued thereafter to be regularly published until the mid-1860s. However, these reports were not predicated on, nor did they lead to, enhanced judicial recognition of the authority of nisi prius rulings on matters of substantive law. On the contrary, just as earlier law reporters had eschewed the reporting of nisi prius cases for their lack of worth, at the time they came to be regularly reported judges refused to treat any substantive legal principle arising from them as determinative of anything, unless the matter had been reviewed and decided upon by a court in banc.

[1] Peter Luther, 'Campbell, Espinasse and the Sailors: Text and Context in the Common Law', 19 *Legal Studies* (1999), 526; James Oldham, 'Law-Making at Nisi Prius in the Early 1800s', 25 *Journal of Legal History* (2004), 221.

The apparent contradiction between the regular reporting of nisi prius rulings and their low standing as authorities gives rise to some interesting questions: why did these cases come to be regularly reported when they did? Who were the reports for and what was their purpose? Why were they bought and read in sufficient quantities to sustain their publication for so long? What, if any, effect have they had on the development of the common law?

2. The authority of nisi prius rulings

The authority of the nisi prius judge was delegated from the court in which the action was commenced, so that the nisi prius court was as much a superior court of record as the courts in banc.[2] By the beginning of the nineteenth century a decision of one court would generally be followed by a court of co-ordinate jurisdiction, unless it was regarded as contrary to reason and justice to do so.[3] Thus, as a matter of strict legal theory, a ruling of a judge sitting at nisi prius had the same standing as a decision made by the court in banc, and the precedent value of a nisi prius ruling should have been subject to the approach taken to the application of decisions of the full court.

However, when nisi prius rulings came to be cited in hearings of the full court, which occurred with increasing frequency after those rulings began to be regularly reported, they were never treated as having the same authority as decisions of a court in banc.[4] The lack of authority accorded to nisi prius rulings was well-established from an early juncture[5] and remained consistent throughout the eighteenth and nineteenth centuries. There are numerous instances of judges regretting the reporting and citation of these cases, often in vivid terms: one particularly florid example came from Best CJ, who remarked in 1824 that 'I wish such cases were never cited. It is not right to repeat opinions hastily formed and delivered in the hurry of trial, and the practice of referring to them has occasioned all the confusion that the enemies of our law object to'.[6] Courts refused to follow rulings of even the most eminent judges because they were delivered at nisi prius,[7] unless they had been subsequently acted on by judges sitting in banc;[8] and the low regard in which these cases were held generally had little to do with how well they were reported:[9] even the citation of a case reported by John Campbell, generally regarded as the best of the nisi prius reporters,[10] drew the typically acidic comment from Gibbs CJ that: 'a sad use is made of these nisi prius cases'.[11]

The judicial rejection of the authority of nisi prius rulings was based not on precedent, but on pragmatism: there were a host of factors which combined to prevent them from having any weight as persuasive or reliable statements of the law.

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[2] *R v Faulkner* (1835) 10 L.O. 228, 230 per Lord Abinger CB; *Ex parte Fernandez* (1861) 10 C.B.N.S. 3, 38-57 per Willes J.

[3] James Ram, *The Science of a Legal Judgment,* London, 1834, 67.

[4] See, generally, ibid., 98; and see Sir Frederick Pollock, *A First Book of Jurisprudence for Students of the Common Law*, London, 1896, 322-323.

[5] See the judgment of Sir Orlando Bridgman CJ in the great case of *Manby v Scott* (1662) O. Bridg. 229, 251-252.

[6] *Johnson v Lawson* (1824) 2 Bing. 86, 90.

[7] See, e.g., *Steel v Houghton* (1788) 1 H. Bl. 51, 55 per Lord Loughborough CJ and 63 per Wilson J.

[8] *Parton v Williams* (1820) 3 B. & Ald. 330, 341 per Best J; *Ward v Const* (1830) 10 B. & C. 635, 653-654 per Parke J.

[9] Anon, 'Railway Litigation: The Nisi Prius Sittings', 33 *Legal Observer* (1846), 169.

[10] See *Readhead v Midland Railway Co* (1866-67) L.R. 2 Q.B. 412, 438 per Blackburn J.

[11] *Tomkins v Willshear* (1814) 5 Taunt. 431.

2.1. Time constraints

Most trials of the time were conducted in great haste, usually because of the large number of causes which had to be got through, particularly after the sharp increase in civil litigation at the beginning of the nineteenth century. Lord Kenyon CJ was said to have often decided twenty to twenty-five cases each day;[12] and in 1812 Lord Ellenborough CJ conducted, on average, at least eleven trials per day,[13] and he once disposed of eighteen defended causes in a day.[14]

As a result, rulings on legal points were intended to enable the swift dispatch of the particular case rather than to be authoritative decisions for future cases. Judges would avoid initiating legal debate[15] and would seek to curtail long arguments, encouraging counsel to accept their immediate impression of the law;[16] and counsel would often facilitate this by immediately deferring to the judge's opinion on legal issues without undertaking substantial argument.[17] As James Scarlett (later Lord Abinger) recalled from the start of his practice in the late 1790s: 'It was not the fashion of the Bar to make long speeches, or to occupy any time in resisting the opinion of the judge once declared.'[18] Other ways of avoiding complex legal argument included quickly reserving the point for the full court and agreeing to have the case referred to arbitration.[19]

2.2. Lack of focus on legal principles

Further, the trial phase of the civil litigation process was not well suited to determining questions of law, as the focus was on the need to identify the issues on which the jury's verdict was required. Further, the judge could avoid having to rule on a point of law by putting the question to be submitted to the jury in broad terms, without seeking to separate out questions of law and fact. This practice was said in 1839 to be a growing trend, and to result in almost every case depending on the view taken of it by the jury, to the detriment of legal certainty;[20] and eighty years earlier, Lord Mansfield CJ explained that orders for new trials were required because 'Most general verdicts include legal consequences, as well as propositions of facts: in drawing these consequences the jury may mistake and infer directly contrary to law.'[21]

Even where this tendency to concentrate on the factual matters in issue did not lead to legal points being subsumed within the facts, the law would often need to be greatly simplified so it could be more easily understood by the jury. In this aim, judges would often be abetted by counsel, who had learnt that verdicts were more likely to be obtained by avoiding displays of

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[12] George Kenyon, *The Life of Lloyd, First Lord Kenyon,* London, 1873, 391.
[13] Oldham, 'Law-Making', 227.
[14] Anon, 'Mr Baron Garrow', 1 *Law Review and Quarterly Journal of British and Foreign Jurisprudence* (1845), 318 at 326.
[15] Lord Kenyon CJ apparently never brought a book with him into a nisi prius court to refer to, a common practice amongst the other judges: William Townsend, *The Lives of Twelve Eminent Judges of the Last and Present Century*, 2 vols., London, 1846, vol.1, 114.
[16] Anon, 'The Divisional Court Deposed', 89 *Law Times* (1890), 302 at 303.
[17] Henry, Lord Brougham, *Historical Sketches of Statesmen who Flourished in the Time of George III*, 3rd ser., 2 vols., London, 1845, vol.2, 21-22.
[18] Peter Campbell Scarlett, *A Memoir of the Right Honourable James, First Lord Abinger*, London, 1877, 49.
[19] See *Taff Vale Rly Co v Nixon* (1847) 1 H.L. Cas. 111, 125-126 per Lord Campbell and 127 per Lord Brougham.
[20] Anon, 3 *The Jurist (O.S.)* (1839), 1089.
[21] *Bright v Eynon* (1757) 1 Burr. 390, 393.

legal learning and appearing as plain men like the jury.[22] As Henry Bliss QC, in his 1863 lectures on how to conduct cases at nisi prius, said: 'If you would crush your opponent, it is by your facts that you must crush him. At Nisi Prius, an ounce of fact is worth a ton's weight of law.'[23]

The distinction between fact and law was further blurred by the practice of defendants pleading generally to the claim,[24] which enabled them to deny the allegations in general without having to identify what their defence would be until the close of the plaintiff's case. This practice placed a particularly heavy onus on the judge, who was required to extract the issue from the proofs and allegations before him, sever correctly the law from the facts, and present the facts in issue in an coherent way to the jury for their consideration. In the hurry of business at nisi prius, this series of tasks would leave the judge with relatively little time to consider the law.[25]

Moreover, the general issue enabled the defendant to take the plaintiff and the judge by surprise as to the defence to be run at trial, which made it more difficult for the judge to deal properly with any legal issue which might arise when the grounds of the defence finally became known. This element of surprise was exacerbated by the absence of any obligation to inform the other side in advance whether a witness was being called.[26]

2.3. The courtroom experience

Another, more practical, reason for the unsuitability of the nisi prius process for determining points of law was the general physical state of the courtrooms in which the trials took place.[27] The assize process meant that provincial justice was administered in periodic bursts rather than continuously, and as a result there was no need for the construction of buildings which served exclusively as courthouses. This meant that, with the exception of the Old Bailey, the accommodation of trials in England was not the only, or even usually the primary, function of the buildings used for that purpose. Accordingly, nisi prius business, even on the comparatively civilized Home Circuit, was often conducted in ancient and unsuitable buildings, insanitary and noisome, freezing in the winter and boiling in the summer.[28]

Quite apart from the state of the courthouses, the tradition of open justice meant that the assize courts were often crowded with members of the public, eager to be entertained by the proceedings. The atmosphere of many courts would accordingly have appeared, by modern standards, disorderly, even chaotic; and the noise of the crowds, allied to the poor acoustics of many courthouses, would have challenged the concentration of the judge faced with having to consider tricky legal points arising during a trial.

Further difficulties were caused by the judge often having to deal with the distractions caused by the practice of local dignitaries being permitted or invited to sit alongside him. The assizes would, for many towns, be the highlight of the social calendar, and visitors of both

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[22] See the description of Sir John Holker QC in W.D.I. Foulkes, *A Generation of Judges, by their Reporter*, London, 1886, 123.

[23] Henry Bliss QC, *On Practice at Nisi Prius*, London, 1864, 61.

[24] Sir John Baker, *An Introduction to English Legal History*, 5th ed., Oxford, 2019, 96-98; W.S. Holdsworth, 'The New Rules of Pleading of the Hilary Term, 1834', 1 *Cambridge Law Journal* (1923), 261 at 266-270.

[25] *Second Report of HM Commissioners on the Practice and Proceedings of the Superior Courts of Common Law*, London, 1830, 46.

[26] *Preston v Carr* (1826) 1 Y. & J. 175, 179 per Garrow B.

[27] See, generally, Clare Graham, *Ordering Law: The Architectural and Social History of the English Law Court to 1914*, Aldershot, 2003.

[28] J.S. Cockburn, *A History of English Assizes 1558-1714*, Cambridge, 1972, 53-54, 66-67.

sexes as well as the county magistrates hoped to find a space beside the judge on the Bench, perhaps assisted by the payment of a bribe to the doorkeepers.[29]

Other practical constraints on the consideration of legal issues at nisi prius included the absence of adequate library facilities[30] and the inability of counsel to carry around bulky law reports when riding on circuit, even if they had been sufficiently briefed beforehand so as to be aware of the relevant legal principles. This would have led either to relevant authorities not being cited during the trial, or to reliance on potentially inaccurate or incomplete digests and abridgments. Judges in that situation were realistically not expected to recollect every decided case, and it was regarded as sufficient for them to act in accordance with general principles.[31]

Another constraint was the fact that the nisi prius judge's attention would often be diverted from more important considerations by the need for him to take full notes of the evidence, which would be relied upon as the only record of the facts should the case be considered further after trial.[32] Moreover, all such notes had to be written in longhand, in case the judge was not a member of the court before which the case subsequently came, so that his notes would have to be read out by another judge.

2.4. Return of the case to the court in banc

Perhaps the most important factor against a full consideration of legal principles at nisi prius was that the return of all such cases to Westminster Hall for the verdicts to be entered and judgment given afforded ample opportunity for any legal points to be deliberated upon in a more mature fashion, with proper recourse to the authorities.[33] Accordingly, the inability or unwillingness of judges at nisi prius to make proper determinations on legal issues did not appear to concern them unduly: their state of mind was described in 1828 in this way: 'mistakes are of little consequence as they can be set right by the court'.[34] Whether the parties to the case, having to bear the extra costs and delays associated with having the legal principles argued or reargued in post-trial proceedings, were as relaxed about the arrangement is another matter.

3. The commencement of nisi prius reporting

The prospects for the reporting of cases which had no precedent value and which received short shrift from the judiciary were, to say the least, unpromising. Yet reported they were. What were the factors that drove the first regular nisi prius reporters to commence their work?

3.1. Lord Raymond and Sir John Strange

Some law reports, digests and treatises published prior to the end of the eighteenth century had contained a few nisi prius cases. However, two sets of mid-eighteenth century reports included

[29] George Butt, *A Peep at the Wiltshire Assizes*, Salisbury, 1819, 42.
[30] A problem even for judges sitting at Westminster Hall: Anon, 'Removal of the Courts from Westminster', 29 *Law Magazine* (1842), 162 at 165.
[31] *Anderson v Shaw* (1825) 4 L.J. (O.S) C.P. 53, 54 per Best CJ.
[32] This point was made by Henry Brougham in his great 1828 speech to the House of Commons on civil law reform.
[33] William Wright, *Advice on the Study and Practice of the Law: with Directions for the Choice of Books Addressed to Attorneys' Clerks*, 3rd ed., London, 1824, 118.
[34] Evidence from John Evans, a Welsh Barrister, to a royal commission on the common law courts, recorded in *First Report of HM Commissioners on the Practice and Proceedings of the Superior Courts of Common Law*, London, 1829, appx., 432.

a larger number of such cases, and these reports merit some consideration as they provide the context for the beginning of regular nisi prius reporting a few decades later, not least because the earliest regular nisi prius reporter, Isaac Espinasse, specifically referenced them as providing the justification for his work.[35]

The first set of reports was attributed to Robert Raymond, Chief Justice of the King's Bench from 1725 to 1733.[36] 101 nisi prius cases from the beginning of the eighteenth century were included in the two volumes of reports, seventy-three of which, tried between 1698 and 1701, were reported together at the end of volume one, under the heading *Some Points Resolved by Holt Chief Justice of the King's Bench Upon Evidence In Trials at Nisi Prius*. The second set of reports were compiled from the papers of Sir John Strange, Master of the Rolls from 1750 to 1754.[37] These contain far more nisi prius cases than any other early source – over 170, decided between 1716 and 1748. Both sets of reports have generally good reputations.[38]

Two particular points should be noted about these reports, as being relevant to the later regular nisi prius reporters.

The first relates to the abbreviated style of the nisi prius reports, which was adopted by the first regular nisi prius reporters. In Lord Raymond's reports, the cases from the courts in banc are a mix of short and much longer reports, with each case taking up on average roughly one and a third pages: 542 cases in 717 pages. The typical report begins with an identification of the nature of the action and a description of the parties' pleas; the arguments of counsel are then summarised; and the report concludes with a precis of the judgment of the court and a short comment on it. By contrast, the cases collected in the nisi prius section at the end of volume 1 are in the main very shortly reported, with each page containing on average more than three cases: seventy-three cases in twenty-two pages. These reports say little or nothing about the facts of the case or the arguments of counsel and do not even record the verdict of the jury. Instead, they refer only to the ruling of the judge on the point of law or evidence, without providing any context, not even a reference to the form of action. Strange's reports of nisi prius cases are even more concise, rarely taking up more than a paragraph and never extending beyond a page; and unlike his reports from other courts, the reports of nisi prius decisions focus exclusively on the principle derived from the judge's ruling, and none of them refer to counsel's arguments.

Secondly, the principal focus of the reported nisi prius cases was on points of evidence, and many of them were cited in subsequent evidence law treatises.[39] The potential influence of nisi prius rulings on this rapidly developing area of law would not have been lost on the subsequent nisi prius reporters.

3.2. The early regular nisi prius reporters

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[35] Isaac Espinasse, *Reports of Cases Argued and Ruled at Nisi Prius*, 6 vols., London, 1796, vol.1, iii.
[36] Lord Raymond, *Reports of Cases Argued and Adjudged in the Courts of King's Bench and Common Pleas*, 2 vols., London, 1743.
[37] Sir John Strange, *Reports of Adjudged Cases in the Courts of Chancery, King's Bench, Common Pleas and Exchequer*, 2 vols., London, 1755.
[38] J.W. Wallace, *The Reporters Arranged and Characterised with Incidental Remarks*, 4th ed. rev. by Franklin Fiske Heard, Boston, 1882, 401-403; *Lynall v Longbothom* (1756) 2 Wils. K.B. 36, 38 per Willes CJ.
[39] For example, more than a dozen nisi prius cases from Raymond's reports were cited in Sir Geoffrey Gilbert, *The Law of Evidence,* 3rd ed., London, 1769.

In the mid-1790s, after centuries of being largely ignored, not one but two sets of reports dedicated to nisi prius cases were published, followed a few years later by a third. An analysis of the reasons for the commencement of regular nisi prius reporting at this time must begin with a consideration of the early reporters: Isaac Espinasse, Thomas Peake and John Campbell.

Espinasse was a descendant of a French Huguenot family, which had emigrated to Ireland after the revocation of the Edict of Nantes. His father was an army officer who later became a magistrate and served as High Sheriff of County Dublin.[40] Espinasse was born in County Dublin in 1758 and graduated from Trinity College in 1774 at the age of sixteen. He was admitted to Gray's Inn in 1780 and was called to the Bar in 1787. Espinasse was predominantly a nisi prius practitioner, which may explain why he never took silk, as the physical distinction between senior and junior counsel, in terms of the rows in which they sat, was not recognised at nisi prius.[41] He was elected a Bencher of his Inn in 1809 and became Treasurer in 1811.[42]

Peake was born in 1770 into an old Welsh family, who had settled in Denbeigh during Edward I's conquest of Wales.[43] His father was an attorney and minor court official. Peake was called to the Bar by Lincoln's Inn in February 1796, practised as a special pleader and on the Oxford Circuit and the Worcester and Stafford sessions, and was appointed a serjeant in 1820.[44]

Campbell was born in Fife in 1779, the son of a minister of the Church of Scotland. Having studied at St Andrews, he moved to London in 1798 to work as a tutor before becoming a student in Lincoln's Inn two years later, being called to the Bar in 1808. After a slow start, his unbounded self-confidence and ambition led him to become one of the leading lawyer-politicians of his day, becoming Chief Justice of the King's Bench in 1850 and Lord Chancellor in 1859.[45]

The first point to note about these reporters is that they were all - geographically and professionally - outsiders: none of them was English, and none had any close family members already established at the Bar who could assist either with their advancement in the profession or in obtaining employment in associated offices such as commissions in bankruptcy. Whilst family connections could not overcome lack of talent or effort, and even barristers with good contacts would usually have to wait many years before a foothold in the profession could be established, without such assistance preferment was even more difficult; and law reporting was regarded as one way of getting ahead.

This was undoubtedly the principal motivation for Campbell, whose decision to report nisi prius cases was made after a miserable first year in practice.[46] In a letter to his brother written in November 1807, Campbell said that: 'the chief advantage of the scheme is gaining a little notoriety. I have a sober hope that it may introduce me to business, and lay a foundation for my professional success … It was necessary to try something, as there was no prospect of my getting on at all without striking out of the common path'.[47]

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[40] Francis Elrington Ball, *A History of the County Dublin*, Dublin, 1902, 52.
[41] *R v Carlile* (1834) 6 C. & P. 636n.1.
[42] Michael Lobban, 'Isaac Espinasse', *Oxford Dictionary of National Biography*, 60 vols., Oxford, 2004, vol.18, 604.
[43] John Burke and John Bernard Burke, *A Genealogical and Heraldic Dictionary of the Landed Gentry of Great Britain and Ireland*, 2 vols., London, 1857, vol.2, 1024.
[44] C.J.W. Allen, 'Thomas Peake', *Oxford Dictionary*, vol.43, 276.
[45] Gareth H. Jones and Vivienne Jones, 'John Campbell', *Oxford Dictionary*, vol.9, 825-830.
[46] Mary Scarlett Hardcastle, *Life of John, Lord Campbell*, 2 vols., 2nd ed., London, 1881, vol.1, 193-211.
[47] Ibid., 213.

Peake, like Campbell, compiled his reports as a newcomer: they were published in 1795, when Peake was aged twenty-four and still several months away from being called to the Bar. Although the publication of law reports by a student barrister was probably without precedent, there was no rule or convention in place at that time which restricted the publication of authoritative law reports to those prepared by qualified barristers.[48] By contrast, Espinasse turned to law reporting later in his career: he was aged thirty-eight when his first set of reports came out in 1795, and he had already been at the Bar for eight years. Whilst this might suggest that his practice remained at a relatively low ebb when he turned to reporting nisi prius cases, as explained below there is evidence to the contrary and another likely reason why he did so.

Another feature of these reporters is that they became successful practitioners, albeit to varying degrees: Peake was appointed a Serjeant; Espinasse, according to his own account, held a considerable share of nisi prius business during Lord Kenyon's tenure as Chief Justice of the King's Bench;[49] and Campbell attained the highest judicial offices. Whilst these achievements cannot necessarily be attributed to their careers as reporters, it is possible that the drive and commitment they showed to create and establish law reporting in a new forum also spurred them on to achieve success at the Bar.

A further factor connecting Espinasse and Peake was that they both published other works which were closely associated with the nisi prius courts. By the time Espinasse began his career as a reporter, he was already an established and successful author of a digest of nisi prius law, which was first published in 1791 and was then in its second edition.[50] As with an earlier digest on the same subject written by Francis Buller,[51] there were numerous references to unreported rulings at nisi prius, and in the Advertisement to the third edition,[52] Espinasse said that his work 'can only derive its value from accuracy in collecting, and from industry in compiling the whole of the cases which comprise the law of Nisi Prius'. It is therefore likely that the production of separate reports of nisi prius cases grew out of his work in preparing and revising his digest, no doubt with the encouragement of the publisher Andrew Strahan, who published both the digest and his early reports. Peake, by contrast, published his successful and well-regarded manual of evidence law in 1801, several years after his volume of nisi prius reports,[53] but again it is likely that his interest in nisi prius reporting was associated with this work, which was heavily reliant on trial rulings and which contained, in the appendix, reports of six otherwise unreported nisi prius cases cited elsewhere in the book.[54]

In addition to these particularly personal motives, there are a number of more general reasons which help to explain why nisi prius cases began to be reported at the end of the eighteenth century, notwithstanding that they had for centuries been largely ignored by other reporters.

3.3. The development of modern evidence law

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[48] The first formal reference to such a restriction was in an obscurely-reported 1834 bankruptcy decision of Lord Brougham C: *Ex parte Hawley* (1834) 2 Mon. & Ayr. 426, 435. It was not given official recognition as a rule of practice until a speech of Lord Westbury C in the House of Lords in 1863: John Fraser Macqueen QC, ed., *Speech of the Lord Chancellor on the Revision of the Law*, London, 1863, 9.

[49] Isaac Espinasse, 'My Contemporaries: from the Note-Book of a Retired Barrister', *Fraser's Magazine*, Nov. 1832, 417 (vol.6).

[50] Isaac Espinasse, *Digest of the Law of Actions and Trials at Nisi Prius*, 2 vols., 2nd ed., London, 1794. This work was described as in extensive circulation (Anon, 3 *Law Journal* (1807), 265) and eventually ran to four editions.

[51] Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius*, London, 2nd ed., 1772.

[52] Espinasse, *Digest*, 3rd ed., London, 1798, vol.1.

[53] Thomas Peake, *A Compendium of the Law of Evidence*, 1st ed., London, 1801. This ran to five editions.

[54] Ibid., 172-179.

It is likely that the primary reason for the emergence of nisi prius reports was the rapid development of the modern exclusionary rules of evidence in the last decades of the eighteenth century, as discussed below. The increase in the number of rulings on evidential points provided a source of material for reporters and fuelled the demand for publication of the rulings so that they could be used to prepare cases for trial and for citation should an evidential dispute be raised in court. Indeed, the greater prominence of nisi prius rulings on evidence at this time is illustrated by the citation of unreported rulings in treatises on evidence law during the eighteenth century, most notably those of William Nelson and Geoffrey Gilbert:[55] this use of unreported nisi prius rulings would have suggested that there was a market for dedicated reports of them.

3.4. Relation of the strict rules of pleading

An important reason why evidence law progressed so rapidly during this period, which provided fertile ground for the reporting of nisi prius rulings on evidence, was the relaxation of the strict rules of pleading during the eighteenth century.

By the late seventeenth century, the process of special pleading had transformed from a simple and clear technique, originally delivered orally, to a complex and rigid written system that Sir Matthew Hale described as 'but a snare and trap and piece of skill'.[56] The slightest error in a writ would be fatal to a cause, and the possibility of error was magnified by the need to render the pleadings into Latin, which created difficulties particularly where matters of everyday modern life had to be translated into a dead language.[57] Even after the requirement to use English in pleadings was introduced by legislation in 1731,[58] pleaders stuck with the grammatical constructions and syntax of the past which made the pleadings read very oddly indeed.[59] It was therefore common for cases to fail at trial due to non-compliance with the strict rules of pleading, which in turn meant that relatively few nisi prius cases proceeded to a point where points of law, evidence or practice arose that would be of general interest to the profession and therefore merit reporting.

Two developments in the eighteenth century operated to reverse this trend, and to reduce the number of causes that turned at trial on pleading points: the abolition of the "rule against duplicity" which allowed a party to take a special plea on only one issue per cause of action; and the rising popularity of defendants pleading the general issue over special pleading.[60]

As the need to control the jury in advance by special pleading receded, a different method of ensuring that the jury was prevented from having undue regard to irrelevant or prejudicial material was required, which fell to the law of evidence. This in turn led to the increasing importance of evidential issues at trial, giving rise to nisi prius rulings which were of general interest and therefore suitable to be reported.[61] Further, special pleading kept legal

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[55] William Nelson, *The Law of Evidence,* London, 1717; Gilbert, *Evidence*: see Henry Horwitz, 'The Nisi Prius Trial Notes of Lord Chancellor Hardwicke', 23 *Journal of Legal History* (2002), 152 at 154-155.

[56] *Anon* (1672) 2 Treby Rep., MS in Middle Temple, 717.

[57] Baker, *Introduction*, 95.

[58] 4 Geo. II, c.26

[59] Baker, *Introduction*, 95.

[60] Ibid., 96-97.

[61] Michael Lobban, 'The English Legal Treatise and English Law in the Eighteenth Century' in Serge Dauchy *et al*, eds., *Juris Scripta Historica XIII: Auctoritates Xenia R.C. Van Caenegem Oblata*, Brussels, 1997, 69 at 82.

issues away from consideration by the jury, whereas pleading the general issue meant that issues of fact and law were no longer separated and isolated as a matter of pleading. This increased the occasions on which points of law arose at trial, requiring rulings which again were worth reporting.[62]

3.5. The state of law reporting

Another, more general, contributory factor was the state of law reporting at the time. Prior to the mid-eighteenth century, lawyers complained about the general lack of accuracy, reliability and punctuality of the reports.[63] However, at the time regular nisi prius reporting began, the quality and utility of law reporting had improved considerably. A new era began in 1766 with the publication of reports of King's Bench cases by Sir James Burrow, who developed a layout for his reports which marked an important evolutionary step in the technique of reporting, and set the standard for future reporters. He was the first reporter to begin each report with a statement of the facts and issues separate from the judgment of the court, and he followed a regular pattern of setting out the arguments of counsel, the opinions of the judges, and the judgment of the court. Burrow, and his successors Henry Cowper (who reported between 1774 and 1778) and Sylvester Douglas (who reported between 1778 and 1784), established clear and durable standards for the method of reporting and the format of reports, which hold good to this day.

Another development at this time was the first publication of law reports in serial form, rather than in single monograph volumes, which provided the opportunity to reduce delays and deliver speedy access to the most recent caselaw. In 1786 Charles Durnford and Edward East began to publish *The Term Reports*, comprising King's Bench cases reported within a short time after the end of each term. The venture was immediately successful, and the practice of publishing reports of recently-decided cases in separate parts spread to reporters in other courts.

These developments made the late eighteenth century a propitious time for the publication of new law reports in a form that enabled rapid access to recent cases; and the emergence of new reports of nisi prius cases in the 1790s was part of a more general trend that saw substantially more law reports printed in that decade than in any other decade of the century.[64]

Although this was a good time for law reporting, it was not a particularly good time for the production of new reports of cases from the Westminster Hall courts, due to the system of authorised reporters that had sprung up in those courts.

From around the mid-1780s, judges started to appoint or recognise a particular reporter for their court and to give him assistance in revising oral judgments and providing access to court papers and copies of their written notes before publication. Perhaps surprisingly for so relatively modern a practice, there is much about authorised reporting that remains obscure and controversial, particularly the claim that judges would allow only the authorised reports to be cited in their courts.[65] Whether or not this in fact happened, as a practical matter the authorisation of reporters gave their reports a cachet which would have made it difficult for other reporters to compete with.[66] A real or perceived judicial preference for reports which had

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[62] Ibid., 84-85.

[63] See, e.g., William Blackstone, *Commentaries on the Laws of England*, 4 vols., Oxford, 1765, vol.1, 72.

[64] Lobban, *English Legal Treatise*, 84.

[65] The claim was originally made by W.T.S. Daniel QC in *The History and Origin of the Law Reports*, London, 1884, 265, but was contested by P.H. Winfield in *Chief Sources of English Legal History*, Cambridge, MA, 1925, 192.

[66] Anon, 'Reports and Reporters', 9 *Monthly Law Magazine* (1841), 20 at 26-27.

been produced with the assistance of the judges whose decisions were being reported probably resulted in those reports being favoured over those which did not enjoy that privilege, which in turn would have dissuaded rival reporters from trying their luck.

It is accordingly likely that, by the mid-1790s, the authorised reporters had an effective monopoly in the reporting of cases in all the superior courts; and for those who wished to follow in their footsteps as reporters but who found themselves effectively barred from those courts, alternative sources of reportable cases had to be found: the nisi prius courts provided an obvious target.

3.6. The rise of commercial litigation

Another factor encouraging the reporting of nisi prius cases was the increase in levels of commercial litigation in the late eighteenth and early nineteenth centuries, due partly to the Industrial Revolution leading to a substantial increase in contracts of every description, and to litigation over those contracts.[67] Another factor was Britain's declaration of war with Napoleonic France following the breakdown of the Peace of Amiens in 1803. Reflecting late in life on the beginning of his law reporting career, Campbell recalled that 'An opportunity for Nisi Prius reporting now opened such as will never recur'. He attributed the rise in reportable nisi prius cases to Napolean's violations of neutral commerce, and to the practice of merchant ships carrying false papers to enable them to overcome regulations limiting the areas of trade and the nature of their cargo. These gave rise to a host of novel legal issues between underwriters and merchants, shipowners and shippers of goods, foreign consigners and English factors. Other reasons for the explosion in commercial cases being tried at nisi prius included the fluctuation in the price of commodities resulting in disputes as to the fulfilment of contracts, and the suspension of cash payments and growing depreciation of the paper currency causing speculations and numerous failures and a mass of bankruptcy litigation. Campbell said that, for these reasons, the amount of nisi prius business at Guildhall was ten times larger than in Lord Mansfield's day.[68]

3.7. Fortune and fame

An obvious reason for reporting nisi prius cases, which applied to law reporting in general, was the opportunity it created to make money, an attractive prospect particularly for young barristers beginning to make their way in the profession such as Peake and Campbell. There was, after all, a large potential market for nisi prius reports, as since the early seventeenth century most barristers regarded circuit work as their principal means of support.[69]

Law reporting at this time was a lucrative exercise, both for the reporters and their publishers. Those reports which were favoured by the profession commanded a large circulation and so yielded large profits. In 1813, Campbell noted that the King's Bench reporter was worth more than £1000 a year.[70] It was reported that the yearly circulation of the Queen's Bench Reports, which began in 1840, reached and for many years was maintained at 4000, and the annual remuneration of the reporters Barnewell and Cresswell in the 1820s was as high as £2000 per volume of their reports,[71] although this was small in comparison to the profits made by the publishers.[72] As a result, publishers were keen to exploit the market for law reports, and

[67] Christopher Brooks, *Lawyers, Litigation and English Society since 1450*, London, 1998, 36.
[68] Hardcastle, *Life*, vol.1, 214.
[69] Cockburn, *Assizes*, 143.
[70] Hardcastle, *Life*, vol.1, 298.
[71] Daniel, *History*, 268.
[72] Ibid., 12-13.

found barristers to be willing partners in the money-making exercise: 'Wherever there is the smallest opening, the profitable trade of law bookselling establishes a fresh series of reports.'[73]

The high cost of law reports was of great concern of the profession: the future Lord Langdale MR, in a letter to his parents written as a young barrister in 1811, said that a law book generally cost twice as much as any other book of the same size;[74] and in the mid-1830s, Sir Frederick Pollock (then Attorney-General) spent £30 a year in the purchase and binding of law reports,[75] which would be beyond the means of most barristers of several years' call.

It is not clear whether nisi prius reporting made money for Espinasse, Peake or Campbell. It is certainly possible, as the prices charged for their reports were comparable to those charged for the authorised reports. In 1795, a part of Espinasse's first volume was being sold for 5s, which was the same price as a part of Henry Blackstone's Common Pleas reports.[76] In 1796, the volume of Peake's nisi prius reports was priced 7s 6d,[77] which was the same as the sixth volume of *The Term Reports* published later that year.[78] In 1811, a part of volume two of Campbell's reports was priced at 7s 6d, compared to 5s being charged for each part of Taunton's and Wightwick's reports.[79] However, the fact that Peake stopped at one volume might suggest that he did not find reporting to be a particularly lucrative exercise, and an obituary of Campbell suggested that Espinasse reported with limited pecuniary success.[80] As for Campbell, it has already been noted that his principal motive for reporting was to bolster his professional practice: in 1813, having noted the substantial sum earned by the King's Bench reporter, Campbell remarked that 'if it were double the value I should decline it without hesitation, as it is almost entirely inconsistent with practice at the bar.'[81]

Quite apart from any profit to be made, law reporting was regarded as 'a good channel to professional notoriety',[82] and two aspects of Campbell's reports were likely to have been directed to this end.

The first was Campbell's practice of publishing the names of the attorneys in the cases he reported, which no doubt led to useful introductions.[83] Campbell himself said that he did this so that, in the event of any doubt arising as to the accuracy of his reports, it might be known to whom to apply for a reference to the papers in the cause.[84] However, it was regarded by many as verging on touting for business, which was much frowned upon by the profession: contemporaries described Campbell as 'the greatest jobber that had ever flourished at the bar'.[85]

The second aspect of Campbell's reporting that seemed designed to increase his professional standing was the care he took in rejecting for publication any ruling which he considered to be bad law, which was doubtless done partly to put the judge concerned in the

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[73] Ibid., 402.
[74] Thomas Duffus Hardy, *Memoirs of Henry Lord Langdale*, 2 vols., London, 1852, vol.1, 280.
[75] Lord Hanworth, *Lord Chief Baron Pollock: A Memoir*, London, 1929, 22.
[76] *The Oracle*, 1 May 1795, 7.
[77] *The Oracle,* 4 Feb. 1796, 1.
[78] *St James's Chronicle*, 10 Nov. 1796, 2.
[79] *Morning Chronicle*, 7 Nov. 1811, 2.
[80] Hugh F. Murray, 'The Late Lord Campbell', 27 *Albany Law Journal* (1883), 364 at 366.
[81] Hardcastle, *Life*, vol.1, 298.
[82] James Stewart, *Suggestions as to Reform in some Branches of the Law*, 2nd ed., London, 1852, 82-83.
[83] Campbell was not the first to do this. There were some earlier isolated examples (such as *Ayliff v Scrimsheire* (1689) 1 Show. K.B. 46, *Skinner v Kilbys* (1689) 1 Show. K.B. 70 and *Wilkes v Wood* (1763) Lofft. 1) and the practice of doing so throughout a volume of reports was instituted by Henry Clifford in his 1802 reports of Southwark Election Cases.
[84] Anon, 'Law Reporters and Law Reporting', 100 *Law Times* (1896), 338.
[85] Attributed to Serjeant Storks in William Ballantine, *Some Experiences of a Barrister's Life*, London, 1882, 213.

best possible light. This was particularly so with regard to the rulings of Lord Ellenborough CJ: Campbell's quip about having a drawerful of bad Ellenborough law is famous,[86] and it is perhaps no coincidence that Sir James Mansfield CJ was said to have found - to his apparent surprise - that Ellenborough's rulings as reported by Campbell were 'uniformly right'.[87] This practice may well have contributed to the respect Ellenborough generally showed Campbell when he appeared before the usually irascible Chief Justice.

For these reasons, amongst others, law reporting achieved its purpose for Campbell, who later said that his reports had been 'of the most essential service to me'.[88]

4. Why did nisi prius reporting survive?

The above factors explain why nisi prius reporting started. The next question is: why did they survive for so long? They received little encouragement from the legal press: Campbell's reports were described as 'wholly unnecessary' and as a 'bulky, and, as we conceive, almost useless, publication';[89] Carrington and Marshman's nisi prius reports fared no better in this regard, as one reviewer said of them: 'We would gladly avoid speaking of [them] if we could do so consistently with our plan, for we find some difficulty in discussing this work with becoming gravity';[90] and in its review of what turned out to be the last volume of nisi prius reports to published,[91] *The Law Journal* delivered a doleful epitaph, noting that they had met with little favour by the profession.[92]

Yet, even as the reports of cases from other inferior courts came and went,[93] nisi prius reporting continued, more or less continuously, for seventy years. This suggests that the venture proved financially worthwhile for both reporters and publishers during that period: as Campbell remarked of Espinasse's and Peake's reports: 'though sneered at, [they] were bought and were quoted'.[94]

A clue to why nisi prius reports survived despite press and judicial criticism comes from how the reporters themselves sought to explain the purpose of their labours, in the prefaces to their reports. These reveal that the purpose for which many of the reports were produced was limited in scope, and different from the reports of courts in banc. The reporters frankly recognised that the cases they were reporting were not as authoritative on matters of substantive law as cases decided by the full court; and instead they focused on the practical utility of the cases, in particular on points of evidence and practice which could be useful to lawyers when conducting nisi prius business.[95] The reporters themselves thought that the cases they reported would be of greatest benefit where issues of evidence and procedure arose and could be used

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[86] Hardcastle, *Life*, vol.1, 215.
[87] Ibid.
[88] Ibid, vol.1, 294.
[89] Anon, 1 *Legal Review* (1813), 330 at 332.
[90] "J.P.T", 'Modern Common Law Reports of Decided Cases', 27 *Law Magazine and Review* (1842), 320 at 335.
[91] Michael Cababe and Charles Gregson Ellis, *Reports of Actions Tried in the Queen's Bench Division of the High Court of Justice*, London, 1885.
[92] Anon, 18 *Law Journal* (1883), 664: the review was of the first part of those reports, published in 1883.
[93] For example, one volume of parliamentary and military cases was produced in 1792, twenty-one volumes of Bail Court cases between 1820 and 1854 and sixteen volumes of Ecclesiastical cases between 1822 and 1865.
[94] Hardcastle, *Life*, vol.1, 214.
[95] Espinasse, *Reports*, vol.1, ii-iii. See also F.A. Carrington and J. Payne, *Reports of Cases Argued and Ruled at Nisi Prius in the Courts of King's Bench and Common Pleas and on The Circuit*, 9 vols., London, 1825., vol.1, iii-iv.

to introduce newer members of the profession to the practical requirements for preparing cases for trial. Accordingly, those student barristers who could afford them would have provided a market for these reports, and books and journals advising students on the books they should read included the nisi prius reports.[96]

Once qualified, most barristers at this time, especially at the start of their practice, would spend a good deal of their working lives reading and noting up the latest law reports, particularly those who had yet to acquire busy practices; and nisi prius reports would usually be amongst their reading material. For example, Henry Crabb Robinson, while a member of the Norfolk Circuit from 1813 to 1828, recorded in his diary spending long periods of time reading and making notes from Starkie's nisi prius reports, despite considering them to be 'very moderate' and 'very indifferent'.[97]

Despite their shortcomings, nisi prius reports were valuable to barristers for two principal reasons.

First, as explained above, they provided an insight into the daily practice of the nisi prius courts on matters of evidence and on the application of established legal principles to particular factual situations, which could not be gleaned from reports of the courts in banc or from other publications. Given that much of young barristers' work was on circuit, the value of the nisi prius reports to their practices made them required reading.

Secondly, however slight the authority of nisi prius rulings were, they were better than nothing: accordingly, the canny special pleader Joseph Chitty remarked that the only justification for reporting nisi prius cases was '… the laudable ground that one side or the other usually wants to have some materials, however questionable, to support a bad case, and so far Nisi Prius decisions … may be useful in a desperate case'.[98] The possibility that they might furnish the advocate with some support, however slight, for a legal proposition that would otherwise be required to bear its own weight, meant that the barrister could not afford to ignore the nisi prius reports.

Another market for the reports were merchants. The explosion of trade and commerce in the early nineteenth century referred to earlier led to a much closer connection between law and commerce, given the greater prominence in commercial life of such matters as insurance, agency, liens, partnerships, bankruptcy and bills of exchange. It was at this time that commercial law became a freestanding topic of analytical study,[99] and an experienced tradesman was exposed to more law and needed more legal advice than his predecessors.[100] It appears that some merchants went further and read the nisi prius reports themselves: Campbell recalled that, from the outset of their publication, his reports were purchased by merchants as well as by lawyers.[101] Compared to the reports of Westminster Hall cases, the relatively short and accessible nature of the nisi prius reports would have made them easier to understand by the non-lawyer, and their topicality would have enabled ambitious men of commerce both to keep abreast of the latest developments in the courts, and to impress clients or intimidate business rivals with their legal knowledge.

5. The use of nisi prius rulings by the nineteenth century judges

[96] See, e.g., Richard Whalley Bridgman, *Reflections on the Study of the Law*, London, 1804, 89.
[97] Dr Williams's Library (DWL) Henry Crabb Robinson Archive (HCR). See, e.g., the entries for 1 Dec. 1817 (HCR/1/6), 23 Feb. 1819 (HCR/1/7) and 18 Sept. 1819 (ibid.).
[98] Joseph Chitty, *The Practice of the Law in All its Departments,* 3 vols., London, 1836, vol.3, 7n.(c).
[99] See Joseph Chitty, *Prospectus of a Course of Lectures on the Commercial Law*, London, 1810.
[100] Sir George Stephen, *Adventures of an Attorney in Search of a Practice*, London, 1839, 194.
[101] Hardcastle, *Life*, vol.1, 215-216.

Irrespective of the above reasons as to why nisi prius reports commenced and continued, they could not have survived if the judiciary of the time had not permitted them to be cited by counsel and had not referred to them in their judgments. This gives rise to the question of why the judges did not convert their regret at the citation of nisi prius cases into a hard and fast rule prohibiting their use.

One possible reason is the fact that, as discussed below, nisi prius rulings on matters of evidence had a significant influence even on courts in banc until the mid-nineteenth century: judges may have decided that the usefulness of those rulings was worth permitting nisi prius cases on matters of substantive law also to be cited, and that a ban on the latter would have been difficult to apply in practice in cases where the line between evidential and substantive legal issues was difficult to draw.

Perhaps more relevantly, as a matter of general practice there was no attempt by nineteenth century judges to limit the citation of authority by counsel, either formally or informally by means of critical statements in judgments as to the conduct of counsel in that regard. Although there are occasional anecdotes about excessive citation of authority receiving mild rebukes from the Bench,[102] there is no evidence of judges of the time requiring restrictions to be placed on the number of authorities cited to them.

Whatever the reason, nisi prius rulings were not only allowed to be cited but would often be referred to in judgments without criticism. An understanding of how these rulings were used by the judges is necessary to assess whether they had more influence on the common law than their reputation amongst the profession would suggest.

5.1. Substantive law

A survey of the positive citation by judges of nisi prius rulings on substantive legal principles as reported by Peake and Espinasse, drawn largely from cases reported in either *The English Reports* or *The Law Reports*, shows that those rulings were treated very differently from the decisions of courts in banc, no doubt because of the different weight accorded to them as authorities.

Of those citations, the largest number can be disregarded as they treated the nisi prius rulings in question as makeweights, in that those rulings were cited by judges together with at least one other decision of a court in banc in support of the substantive legal principle being relied upon. Judges were able to rely on the nisi prius case in support of a point without the need to refer to its lack of status as an authority, because of the separate existence of an authoritative decision on the same point.

In the next most substantial number of cases, the nisi prius rulings are not being used as authorities at all: they are not cited because of their inherent worth as previous decisions, but as examples of principles which the judges have articulated independently of those rulings. In this respect, the nisi prius case may be compared to a judicial dictum: of no inherent worth as an authority, but capable of being applied if the judge is persuaded that it is legally correct. This is to be contrasted with the treatment of cases decided in banc, which would generally be followed without prolonged consideration of whether the principle in the case was correct.

A good example of this approach to nisi prius rulings is *Laugher v Pointer*.[103] The issue in that case was whether the defendant owner of a carriage was liable to be sued for an injury suffered by reason of the negligence of the driver provided by the defendant. In holding that

[102] Lord Eldon recounted the story of Serjeant Hill, who began his submissions by asking for the Court's pardon that he had seventy-eight cases to cite, to which Lord Mansfield CJ replied: 'you can never have our pardon, if you cite seventy-eight cases': A.L.J Lincoln and R.L McEwan, eds., *Lord Eldon's Anecdote Book*, London, 1960, 42.
[103] (1826) 5 B. & C. 547, 573-580.

the defendant was not liable, Abbott CJ referred to three nisi prius rulings in the defendant's favour, stating that they were decisions of a very learned judge, that they had been capable of revision but had not afterwards been questioned, and that the last of the three bore directly on the case before him. However, instead of resting his decision on the authority of those rulings, the judge went on to analyse in detail how he regarded the case 'as it might stand independent of prior decisions', concluding that both principle and common sense led him to the same conclusion as the rulings.

The third principal reason for judges citing nisi prius rulings was to illustrate legal principles that were regarded as so obvious that there was no need to raise them with the court in banc. The citation of these cases would typically be justified on the basis that they had never been questioned.[104] The small number of superior court judges, combined with the close relationship between Bar and Bench through the Circuit and Bar mess systems, made it easier to facilitate a common understanding amongst the profession that certain legal principles were sufficiently clear as not require any further debate beyond the trial stage; this would also benefit litigants by saving them the costs of reopening the issue before the court in banc.

Yet even in these cases, judges on occasion felt constrained to justify their reliance on nisi prius rulings by reference to some other feature, which would not have been necessary had the case been decided by the court in banc. For example, judges have fortified their decision to follow such rulings because of the high repute of the trial judge, the careful consideration given by the trial judge, the antiquity of a decision which, since made, has been acted upon, the approval given to the decision by an authoritative textbook, or the likelihood that the trial judge would have discussed the issue with his brethren.[105]

Another feature of the judicial consideration of nisi prius cases at this time was the emphasis placed on the quality of the report. One of the consequences of the patchy quality of early law reporting was that an integral aspect of determining the authority of a reported case was the reputation of the reporter, but the emergence of high quality and consistent law reporting from the mid-eighteenth century meant that judges could less easily justify disregarding an authority on the basis that it had been misreported or had been reported by an unreliable reporter. However, in the nineteenth century, the lack of weight to be accorded to nisi prius cases, and the consequent closer scrutiny of what the trial judge said, was accompanied by the need also to consider how the trial judge's words had been reported - or, rather, who had reported them. This led the editor of the *Law Magazine*, Abraham Hayward, to suggest that reported nisi prius cases could have value, not as binding authorities but by putting them 'on the same footing as more ancient collections, which were respected in exact proportion to the learning and judgment of the collector'.[106] The clearest example of this approach was the heavy criticism by the Victorian judiciary of the quality and accuracy of Espinasse's reports, which destroyed his reputation as a law reporter.[107]

The cases referring to nisi prius reports are also notable for what they do not show: there are no examples of judges feeling compelled to follow a nisi prius ruling of which they

[104] In 1911 it was said that there were around 100 nisi prius cases that should be included in a general digest of case law, because 'there existed no other authority upon the point ruled, and the direction of the Judge was likely to be endorsed': A.E. Randall, 'Digest of English Case Law', 27 *Law Quarterly Review* (1911), 187 at 189.

[105] See, e.g., *Folkingham v Croft* (1795) 3 Anstr. 700, 701 per MacDonald CB; *Garland v Jekyll* (1824) 2 Bing. 273, 301 per Best CJ; *Hall v Wright* (1859) E. B. & E. 765, 781 per Bramwell B.

[106] Abraham Hayward, 'Reports and Statutes', 4 *Law Magazine* (1830), 1 at 18.

[107] See, e.g., *Small v Nairne* (1849) 13 Q.B. 840, 844 per Lord Denman CJ.

disapproved, on the grounds of precedent or comity; and there are no examples of courts following a nisi prius ruling in the face of a contrary decision of a court in banc.

Thus, a survey of how nisi prius rulings on substantive legal issues were used by nineteenth century judges supports the numerous statements from them about the dangers of treating those rulings as having any authoritative weight. Where those rulings were cited in support of a principle of law, the judges were generally careful to endorse the principle at issue in the ruling, rather than simply relying on the ruling itself. This treatment of nisi prius cases is consistent with the comment of a King's Bench judge in 1790 that: 'as Judges of Nisi Prius we do not affect to alter or make new law'.[108]

5.2. Evidence law

What about rulings on points of evidence which, as noted above, some of the nisi prius reporters regarded as providing the principal purpose for publishing those cases?

A review of the caselaw of the time shows that nisi prius rulings on points of evidence had a greater influence on eighteenth and early nineteenth century judges sitting in banc than such rulings on points of substantive law. The evidential issues that came before the full court would often have only previously been considered at nisi prius; and a judge's desire to ensure consistency in decision-making, and their respect for fellow judges, meant that they could be expected to take account of those rulings and be minded to follow them without enquiring too deeply into the underlying principle. Indeed, the general wish to follow established nisi prius practice on matters of evidence led trial judges to disregard earlier trial rulings which they considered to be out of kilter with such practice.[109]

However, the influence of nisi prius rulings on evidence did not equate to the authority of a binding precedent, where the judge considered there to be a good reason not to follow them; and not all trial judges were prepared to permit circuit practice to override their views on the principle of the issue in question. For example, in *Harris v Oke*,[110] an action tried by Lord Mansfield CJ at the Winchester assizes in 1759, the plaintiff pleaded a special agreement and a general indebitatus assumpsit, and the question was whether the plaintiff should be allowed to prove the general count having failed to prove the special agreement. Mansfield allowed the plaintiff to proceed, and in court next day he said that he had asked Wilmot J, who was also on circuit, who had said that Mansfield's ruling was contrary to circuit practice. Mansfield said that he did not approve of that practice and confirmed (with the concurrence of Wilmot J) that the plaintiff could in that situation recover on the general count.[111]

In addition to trial judges, courts in banc would follow general trial practice on points of evidence law: for example, in *Harwood v Sims*[112] hearsay evidence from a deceased parishioner as to the amount payable by way of a tithe was admitted by the Court of Exchequer notwithstanding the parishioner's interest as a tithe payer, Wood B stating that he had 'heard this evidence given at Nisi Prius a hundred times, without any objection being taken to it'.

The influence of nisi prius cases on evidence law was such that courts of this time would follow both general circuit practice and specific rulings without looking into the correctness of the principle, even where the court did not necessarily agree with the result.[113] The willingness

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[108] *R v The Inhabitants of Eriswell* (1790) 3 Term Rep. 707, 711 per Grose J.
[109] See, e.g., *Doe d Pile v Wilson* (1834) 6 C. & P. 301, 306 per Lord Denman CJ.
[110] Cited in Francis Buller, *An Introduction to the Law Relative to Trials at Nisi Prius*, London, 2nd ed., 1772, 137.
[111] Many years later Mansfield upheld this ruling in banc: *Payne v Bacomb* (1781) 2 Doug. K.B. 651.
[112] (1810) Wight. 112. See also *Berkeley Peerage* (1811) 4 Camp. 401; *Gomersall v Serle* (1827) 2 Y. & J. 5.
[113] See, e.g., *Duke of Somerset v France* (1725) 1 Stra. 654.

to follow circuit practice could cause difficulties where different practices applied on different circuits. A striking example of this is *Morewood v Wood.*[114] On a motion for a new trial heard by the King's Bench, the issue was whether general evidence of reputation as to a prescriptive right of digging stones on a particular estate was correctly excluded. The Court was evenly divided on the matter: Lord Kenyon CJ and Ashurst J would not permit such evidence to be adduced; whereas Buller and Grose JJ were of the view that it was admissible, provided that it was corroborative of other evidence of the right. The latter two judges, however, were of the view that the contrary evidence was so strong that a new trial ought not to be ordered. This division of judicial opinion reflected the different circuits on which the judges had previously practised: Kenyon and Ashurst were of the Oxford Circuit, where the general practice was not to allow such evidence; Buller and Grose were of the Western Circuit, where such evidence was allowed. The unsatisfactory state in which the general principle was left following this decision makes it a notable illustration of the desire for judges in banc to adhere to circuit practice as the basis for their decision, or at least to use such practice as a freestanding ground of support for their view as to the correct answer.

The clearest explanation for the court in banc's reliance on circuit practice came from Lord Ellenborough CJ in *Weeks v Sparke*.[115] The issue there was whether reputation evidence could be adduced to support the establishment of private rights over land. Ellenborough noted that it was the habit and practice of different circuits to admit this evidence, explaining the basis for applying that practice as follows:

> That certainly cannot make the law, but it shows at least from the established practice of a large branch of the profession, and of the Judges who have presided at various times on those circuits, what the prevailing opinion has been upon this subject, amongst so large a class of persons interested in the due administration of the law.

Ellenborough affirmed the status of general circuit practice on disputed evidential issues as influential, rather than authoritative as a matter of formal binding precedent; but even that status had ended by 1850, when *Weeks v Sparke* was disapproved by the Exchequer Chamber in *Earl of Dunraven v Llewellyn*:[116] Parke B, giving the judgment of the Court, said this:

> But it is said that there are cases which have decided that, where there are numerous private prescriptive rights, reputation is admissible; and the case of *Weeks v Sparke* … is relied upon as establishing that proposition. The reasons given by the different Judges in that case would certainly not be satisfactory at this day; some putting it on the ground of the custom of the Circuits, some upon the ground that where there was proof of the enjoyment of the right reputation was admissible. Both these reasons are now held to be insufficient.

In rejecting the proposition that circuit practice on a point of evidence would be followed where the court in banc did not agree with it, it is not clear whether Parke B was laying down a new principle or simply reflecting a prior rejection of that proposition. In any event, there appear to be no further reported examples of courts according any particular influence to such practice.[117]

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[114] (1792) 14 East 327n.(a).

[115] (1813) 1 M. & S. 679, 687. This judgment was described as 'remarkable for the light it throws on the history of the Law of Evidence': Sir James Fitzjames Stephen, *A Digest of the Law of Evidence*, 1st ed., London, 1876, 148-149.

[116] (1850) 15 Q.B. 791, 811-812.

[117] Circuit practice would still occasionally be regarded as relevant where there was no authority to support the judge's view on the evidential issue: see, e.g., *Andrew v Motley* (1862) 12 C.B.N.S. 514, 532 per Williams J.

Turning from general circuit practice to specific cases, the high watermark of the court in banc's reliance on nisi prius rulings on evidential matters was the Court of Exchequer's 1825 decision in *Binns v Tetley*.[118] The question for the Court was whether a bankrupt could give evidence of any fact which supported or undermined the validity of the bankruptcy. The Court was faced with a number of nisi prius cases in which that evidence had been declared inadmissible, on the basis of the bankrupt's interest in the matter. On what Graham B described as a point of 'perhaps very considerable importance', all the members of the Court followed the nisi prius cases, but with reluctance: they said that they would have held differently had the matter been free from authority but, in the words of Hullock B:'They are only nisi prius cases on which the Court now founds itself, but every judge in Westminster Hall, I believe, will be found to have adopted them in practice, not because they are good decisions, but because they are decisions.'

However, the tide soon began to turn against such blind reliance on nisi prius rulings. In the 1834 case of *Summers v Moseley*,[119] the issue before the Court of Exchequer was whether a person who was compelled by the plaintiff to produce a document under a subpoena duces tecum had to be sworn as a witness, and so was liable to be cross-examined by the defendant. The plaintiff sought to rely on a number of nisi prius rulings and submitted that all the rulings on this issue were in his favour; the defendant responded that they were all merely nisi prius decisions on an issue which had never come before the court in banc. Bayley B, delivering the judgment of the Court, declined to follow the nisi prius rulings as a matter of course, and instead consulted the judges of the other common law courts on the issue, who confirmed the correctness of those rulings.

Thereafter, there appear to be no examples in the reports of judges sitting in banc simply following nisi prius rulings on matters of evidence irrespective of their own views on the matter; it is likely that any such approach would have been subject to the same disapproval as to the use of general circuit practice expressed in *Earl of Dunraven v Llewellyn*.

The waning influence of nisi prius rulings and circuit practice on evidential issues by the middle of the nineteenth century coincided with an increase in the willingness of trial judges to get through the crowded cause lists by reserving all but the plainest propositions of law and evidence to the full court,[120] which placed a greater onus on that court to consider evidential points as matters of principle.

Another relevant factor was the increase in the grant of new trials if the nisi prius judge wrongly allowed or disallowed evidence. It was not until the beginning of the eighteenth century that the King's Bench would grant a new trial if the nisi prius judge wrongly allowed or disallowed evidence;[121] and even after that, there were relatively few decisions of the courts in banc on evidential issues prior to the end of eighteenth century: for example, of the 108 cases reported in *The English Reports* as decided by the King's Bench and Common Pleas in 1755, less than seven per cent considered the presentation of evidence in court or its effect on the

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[118] (1825) M'Cle. & Y. 397. See also *Sayer v Garnett* (1830) 7 Bing. 103.

[119] (1834) 2 Cr. & M. 477.

[120] W.F. Finlason, *Our Judicial System*, London, 1877, vii; see also *Smith v Clench* (1865) 4 F. & F. 578, 585n.1. This practice began in the middle of the eighteenth century: David Ibbetson, *A Historical Introduction to the Law of Obligations*, Oxford, 1999, 161-162.

[121] *Thomkins v Hill* (1702) 7 Mod. 64. It had long been the practice to grant a new trial in the case of misconduct by juries, such as where a member of the jury had previously been a juror in the same cause: see *Argent v Darrell* (1699) 2 Salk. 648. Since the thirteenth century, a party who objected to the trial judge's ruling on a point of evidence could include this in a bill of exceptions, but this process suffered from limitations, in particular its non-application to cases to which the Crown was a party: W.S. Holdsworth, *History of English Law,* 17 vols., 3rd ed., London, 1922, vol.1, 224.

jury.[122] A probable important factor in this inactivity was the refusal of the courts in banc to grant a new trial on an evidential issue unless it was likely that the correct answer would have led to a different result,[123] a condition that was only removed for all courts in 1837.[124]

Prior to that, there is no doubt that judges accorded considerable weight to nisi prius rulings and general circuit practice on evidence law. However, that does not necessarily mean that nisi prius cases made a substantial contribution to modern evidence law, despite the claims of distinguished academics that the nisi prius reports were an important factor to the development of the law. A notable example was John H. Wigmore who, in his enormously influential 1904 treatise on the law of evidence, described these reports as the 'dominant influence' in this respect.[125]

Two factors give credence to Wigmore's claim. First, the modern exclusionary rules of evidence, based on the nature of the witness's testimony rather than the character of the witness, were developed by the courts in the late eighteenth and early nineteenth centuries, which roughly aligned with both the regular reporting of nisi prius cases and the greater weight accorded by judges to nisi prius rulings on matters of evidence, as explained above. Secondly, the nisi prius reports added greatly to the body of accessible decisions on points of evidence law: those reports probably contained more rulings on evidence than in all the reports of the previous two centuries.[126]

However, it is likely that these points can be overstated.

As to the chronology, Wigmore's view was that the modern principles of evidence law were already in a relatively advanced state of development in the later part of the eighteenth century, and that the nisi prius reports built on those principles by enabling them to be more widely known and more regularly applied during the following generation. However, more recent work in this field by John Langbein[127] and Thomas Gallanis[128] suggests that these exclusionary rules did not begin to be developed until later, at the end of century.

Using the notebooks of civil trials produced by Sir Dudley Ryder, Chief Justice of the King's Bench from 1754 to 1756, Langbein notes the prevalence of rules relating to written evidence and the competency of witnesses, and the almost complete absence of objections to oral testimony, such as hearsay, which make up the bulk of the modern law of evidence. He also illustrates the lack of rigid adherence to rules of evidence by the practice of judges of this time dealing with issues of admissibility in the presence of the jury, which obviously undermined the exclusionary approach to inadmissible evidence.

Langbein's theory was that the principal catalyst for the development of the modern rules of evidence was the rapid advancement of counsel-led adversary criminal procedure in the last quarter of the eighteenth century, which rendered the judge a more passive presence in the courtroom, unable to influence the jury as before, and required new rules governing the functions of judge and jury, which in turn influenced the conduct of civil trials. Substance was added to this theory by Gallanis, whose research showed that the broad discretion exercised by

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[122] Thomas P. Gallanis, 'The Rise of Modern Evidence Law', 84 *Iowa Law Review* (1999), 499 at 509-511.

[123] See, for example, *Horford v Wilson* (1807) 1 Taunt. 12, 14 per Mansfield CJ; *Tyrwhitt v Wynne* (1819) 2 B. & Ald. 554, 559 per Abbott CJ.

[124] *Wright v Doe d Tatham* (1837) 7 Ad. & El. 313, 330 per Lord Denman CJ, adopting the practice of the Court of Exchequer.

[125] John H. Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 4 vols., 1st ed., Boston, 1904, vol.1, 26-27. See also Holdsworth, *History*, vol.9, 222.

[126] Wigmore, *Treatise*, vol.1, 26.

[127] John H. Langbein, 'Historical Foundations of the Law of Evidence: A View from the Ryder Sources', 96 *Columbia Law Review* (1996), 1168.

[128] Gallanis, 'Modern Evidence Law'.

trial judges in the eighteenth century had given way by the end of that century to much less flexible exclusionary rules, applied in a more recognisably modern way. Gallanis also attributes this to the increased participation of lawyers in criminal trials from the 1780s onwards, leading to a more active role being taken by counsel in shielding the jury from untrustworthy testimony by means of objections, and this more aggressive approach to oral evidence quickly migrated into the civil courts, because of the participation by the same counsel in both criminal and civil trials.

The work of Langbein and Gallanis, and subsequently that of Stephen Landsman,[129] placed the development in earnest of the modern rules of evidence in a later period than that claimed by Wigmore, putting into considerable doubt the claim that the commencement of nisi prius reporting was a significant contributory factor to that development. If the key period for change was the last quarter of the eighteenth century and the principal forum for the change was the criminal courts, it is more difficult to regard the reporting of civil trials at the very end of the century as being the principal catalyst for change.

As to the increase in the number of cases on evidence being reported, there are real doubts as to whether this contributed to the continued development of evidence law into the nineteenth century. On the contrary, the caselaw suggests that, in a number of areas, the development of a clear logical rule of evidence was hindered by unprincipled and inconsistent nisi prius rulings, and it was not until the later intervention of the court in banc that the rule in question came to be put on a sound legal footing.[130]

There are several reasons for this. First, there was a lack of consistency in how nisi prius judges dealt with evidential issues of particular difficulty, particularly where there was no uniformity of practice on circuit. Secondly, in many of the reported nisi prius rulings, the judge was recorded as simply giving his opinion on the admissibility of the evidence, without giving any reasons for that opinion, and in others the reasoning tended to be perfunctory, without a consideration of arguments to the contrary. Thirdly, the reports were of such a narrow scope that they could never hope to provide a comprehensive survey of the evidential rulings being made at nisi prius. Only a very small number of nisi prius cases were reported, and only a small number of those reported cases were tried at the assizes, being selected from the circuit of which the reporter happened to be a member: most reported rulings came from the London and Middlesex cases decided at Guildhall or Westminster. The final reason was the assumption that all evidential matters were attributable to a principle of evidence law, when the issue often related to the rules of pleading, procedure or substantive law.[131] This caused the law of evidence to be overloaded with cases, many of which belonged to other branches of law

The glut of nisi prius cases did not assist in the development of the law through the production of treatises either. Books on evidence law in the early nineteenth century spent little time formulating the relevant principles in a coherent and systemic way.[132] The aim of most writers of this period was to create reference works for practitioners, particularly as there was no developed formal system of legal education either to create a student market or to encourage deeper thinking on the underlying principles. These writers instead succumbed to the wish of

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[129] Stephen Landsman, 'The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England', 75 *Cornell Law Review* (1990), 496.

[130] An example was the admissibility as primary evidence of statements made by a party against their interest, on which there were many so conflicting rulings at nisi prius that, according to a leading contemporary treatise, 'there is probably not one [issue] to be found in the whole law of England, which has caused greater difference of opinion': W.M. Best, *A Treatise on the Principles of Evidence and Practice as to Proofs in Courts of Common Law*, London, 1849, 396.

[131] James B. Thayer, *A Preliminary Treatise on Evidence at the Common Law*, Boston, 1898, 4.

[132] William Twining, 'The Rationalist Tradition of Evidence Scholarship", in Enid Campbell and Louis Waller, eds., *Well and Truly Tried*, Sydney, 1982, 222.

the profession to have all the cases on points of evidence referred to in their books, which grew considerably in size as a result. For example, the second edition of Samuel March Phillipps' *Treatise on the Law of Evidence*, published in 1815, was 520 pages long and cited around 1500 cases; the ninth edition, published in 1843, ran to 1176 pages and cited around 3500 cases.

As stated earlier, it is more likely that, far from the nisi prius reports shaping the modern law of evidence, it was the developments in that area that caused the rise and fall of those reports. Thus: the increased significance of points of evidence in civil trials towards the end of the eighteenth century created a market for reports of rulings on those points; the consequently greater number of rulings on evidence formed the content of those reports; and the assumption of responsibility by the courts in banc for determining points of evidence by the mid-nineteenth century meant that nisi prius rulings were no longer of use to the profession, which hastened the demise of the reports.

6. The modern approach to nisi prius cases

The approach of the nineteenth century judiciary to the use of nisi prius cases can be contrasted with how modern judges approach those cases.

A survey of caselaw during the past hundred years shows that judges have more recently tended to accord more weight to nisi prius decisions. In particular, modern judges have generally paid no attention to the already-discussed practical constraints which caused earlier judges to regard nisi prius rulings as having little worth as authorities in their own right. There are very few cases during this time that have even explicitly recognised the different status of nisi prius rulings; and amongst the handful of cases in which judges have expressly qualified the authority of nisi prius rulings, reliance on those rulings was nevertheless justified on the basis of the reputation of the judge or the careful consideration given to the ruling.[133]

As a result, nisi prius cases have in the modern era achieved a greater influence as a matter of authority than had been previously permitted. Even where judges have noted that they are not formally bound by nisi prius decisions, they have been careful to state that they should nevertheless be accorded significant weight, in terms which were unlikely to have been used in the nineteenth century. Perhaps the most egregious examples of this are the references by both the Court of Appeal and the Supreme Court in *Fearn v Board of Trustees of the Tate Gallery*[134] to an observation of Le Blanc J at nisi prius as being 'of the highest authority'.

This change of approach is not merely of academic interest, as there are a number of examples of the change in the treatment of nisi prius cases having a significant influence on the development of the common law, not necessarily in a positive way.

A good example of this concerns the legality of lobbying contracts.

Norman v Cole[135] is a typical example of a peremptory and precipitate ruling made by an impatient judge during the hurly-burly of nisi prius business, which was based on instinct rather than authority and which may well not have survived in its original form had it been subject to a more detailed analysis by the court in banc.

The case concerned the payment of £30 by the plaintiff to the defendant to use his influence with 'persons of interest' to procure a pardon for a condemned prisoner. It is not clear from the report whether the defendant was unsuccessful, or else did not contribute enough to the securing of the pardon, but the plaintiff sought to recover the sum by way of an action of

[133] See, e.g., *Admiralty Commissioners v Owners of the SS Amerika* [1917] AC 38, 51 per Lord Sumner; *Everett v Griffiths (No.1)* [1920] 3 KB 163, 214 per Atkin LJ; *Brown v Dagenham UDC* [1929] 1 KB 737, 745 per McCardie J.

[134] [2020] Ch 621 at [54] and [61] per curiam; [2023] UKSC 4 at [97] per Lord Leggatt.

[135] (1800) 3 Esp. 253.

assumpsit. At the opening of the case, Lord Eldon, who was sitting at nisi prius during his short tenure as Chief Justice of the Common Pleas, expressed a doubt as to whether the action was maintainable and said that he would hold the plaintiff to very strict proof of the means used to procure the pardon. After counsel sought to justify the claim, the judge quickly nonsuited the plaintiff, saying this:

> I cannot suffer this cause to proceed. I am of opinion, this action is not maintainable; where a person interposes his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money: the doing an act of that description should proceed from pure motives, not from pecuniary ones. The money is not recoverable.

This ruling is, on its face, startlingly wide: it suggests that no-one retained to assist in seeking an exercise of the royal prerogative of mercy could be remunerated for their efforts; and by pronouncing against an agreement for consideration to influence the policy of a public body, the ruling could even cast doubt on the legality of the general lobbying industry. Moreover, the case is contrary to earlier authority, not cited to or mentioned by Lord Eldon, in which similar contracts had been upheld without reference to their purpose.[136] *Norman v Cole* was accordingly stated by a prominent American law reporter in 1840 to be a nisi prius decision of no authority[137] and was treated as doubtful by Willes J in 1870.[138]

Thereafter, the case languished, uncited, for nearly fifty years, until it was resurrected by Shearman J in *Montefiore v Menday Motor Components Co Ltd*.[139] A claim for commission following the procurement by the plaintiff of a loan from the Treasury to the defendant company was held to be illegal, on the precedent of *Norman v Cole*, which the judge cited for the proposition that 'it is contrary to public policy that a person should be hired for money or valuable consideration when he has access to persons of influence to use his position and interest to procure a benefit from the Government'. The judge was not referred to the earlier caselaw which undermined the authority of that decision, and there was no qualification to its value by reason of its status as a nisi prius ruling.

Montifiore was doubtless influenced by the wartime conditions in which the contract in question was agreed; and in more recent times, judges have had to dilute the rigour of the principle in *Norman v Cole* as applied in *Montifiore*, leaving the state of the common law in a somewhat unsatisfactory position. Thus, in *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd*,[140] Phillips J derived from *Norman v Cole* and *Montifiore* the principle that it was undesirable for intermediaries to charge for using influence to obtain benefits from public bodies, which enabled him to hold that there were certain circumstances in which the employment of intermediaries to lobby for benefits was a recognised and respectable practice.[141] The basis of the illegality in the *Lemenda* case has since been explained as the fact that the public body in question was unaware that the person using his influence was charging for doing so.[142]

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[136] *Lampleigh v Braithwait* (1615) Hob. 105; *Walker v Chapman*, cited by Buller J in *Lowry v Bourdieu* (1780) 2 Doug. K.B. 468, 471.
[137] Theron Metcalf, 'Law of Contracts', 22 *American Jurist* (1840), 258.
[138] *Elliott v Richardson* (1870) 39 L.J. C.P. 340, 343 (*arguendo*).
[139] [1918] 2 KB 241.
[140] [1988] QB 448.
[141] Ibid., 458.
[142] *Marlwood Commercial Inc v Kozeny* [2006] EWHC 872 (Comm) at [182].

The unsatisfactory state of the law is illustrated by *Tekron Resources v Guinea Investment Co*,[143] in which Jack J held that an agreement pursuant to which the claimant acted as an intermediary in negotiations with a foreign government was lawful. The judge distinguished both *Norman v Cole* and *Montifiore* on the basis that they involved the simple sale of influence, to be used improperly to obtain a pardon or a loan, rather than the provision of any 'proper services', such as the introduction and negotiating services provided by the claimant. Not only does this involve reading into *Norman v Cole* an improper motive on the part of the plaintiff (other than the pecuniary reward) which is not apparent on the face of the report, but it also raises fine distinctions which may be difficult to apply in practice.

If, instead, the modern courts had not applied *Norman v Cole* as an authority but had recognised the basic legality of lobbying agreements as permitted by earlier cases, there would have been no need to create artificial qualifications so as to justify accepted commercial practices in the face of the extreme position taken by Lord Eldon. In this way, *Norman v Cole* has had a significant and unhelpful influence on the development of the common law.

Why have modern courts treated nisi prius cases with such respect? The answer is simple: out of sight, out of mind. The nisi prius system began its descent into desuetude in the mid-nineteenth century, the seeds of its demise apparently sown by the trial judges themselves: as stated earlier, contrary to the previous practice of ruling on all but the most difficult legal issues at nisi prius, the desire to get though court business caused trial judges from the mid-nineteenth century to reserve all but the plainest propositions of law to the court in banc, thereby reducing jury trials to a mere formality. Other causes of the decline of nisi prius business included Lord Denman's Act of 1841 restricting the award of costs in cases of small value and the introduction in 1846 of the nationwide system of county courts, which took smaller cases out of the scope of the superior courts.

An important factor contributing to the end of the nisi prius system was the replacement of the superior courts with a single High Court by the Judicature Acts 1873 and 1875: by s.30 of the 1875 Act, a judge sitting at nisi prius was deemed to constitute a court of the High Court. Although that did not immediately end the practice of the divisions of the High Court sitting in banc,[144] it did quickly lead to the end of the requirement for nisi prius verdicts to be validated as judgments by the full court.[145] The connection between the nisi prius court and the court in banc was thereby severed, and the term 'nisi prius' began to fall out of common legal usage. A legal commentator accordingly stated in 1883 that the term was now or should be obsolete;[146] and in the preface to their reports, Cababe and Ellis said that '"Nisi Prius", properly so called, no longer exists.'[147]

By the beginning of the twentieth century, the nisi prius system, as understood by judges of the previous century, was gone, together with the practical constraints, referred to earlier, that had caused nisi prius judges to spend little time on legal issues at trial.

What followed was the setting in of a collective amnesia amongst the legal profession regarding the former low standing of nisi prius rulings. As the distinction between those rulings and the decisions of courts in banc was forgotten, greater weight became attached to those rulings. This practice may well have been exacerbated by the fact that first instance decisions following the Judicature Acts, which were followed by courts of co-ordinate jurisdiction as a matter of comity, were still being referred to as 'nisi prius' decisions: judges and lawyers

[143] [2004] 2 Lloyd's Rep. 26 at [95] and [101].
[144] W. Cornish, S. Anderson, R. Cocks, M. Lobban, P. Polden and K. Smith, *Oxford History of the Laws of England*, 4 vols., Oxford, 2010, vol.XI, 768.
[145] By s.17 of the Appellate Jurisdiction Act 1876, the trial judge was required finally to dispose of the case, subject to any appeal.
[146] Anon, review of Cababe and Ellis, *Reports*, 2 *Gibson's Law Notes* (1883), 381.
[147] Cababe and Ellis, *Reports*, iii.

therefore got used to following recent 'nisi prius' decisions, and came to forget the distinction between those cases and rulings under the old nisi prius process.

This danger was identified as early as 1902, when the editor of *The Revised Reports*, Sir Frederick Pollock, wrote as follows:[148]

> We rather think there has been some recrudescence in late years, in text-books at any rate, of the habit of citing Nisi Prius cases. Some such decisions have acquired authority by being approved in more considered judgments. Others may be used to illustrate familiar and elementary rules for which there is not much reported authority. The rest should be trusted only with great caution. But probably a large proportion of our modern students do not know the difference between a Judge at Nisi Prius and the Court in banc.

The best explanation for the modern treatment of nisi prius cases is that Pollock's suspicions were borne out in practice: law students' ignorance of the differences between the courts in Pollock's time continued through subsequent generations of lawyers, causing nisi prius cases to be given a status as authorities which would have surprised the legal profession of the previous century.

7. Conclusion

The nisi prius reports are a curious footnote to the history of law reporting, and follow an unusual path for old reports, whose influence with judges tends to wane the further away one gets from the time at which they appeared. By contrast, when the odd enterprising barrister began in the 1790s to publish nisi prius reports they were unloved and unheralded by the profession, except as a practical tool for the education of young barristers in the ways of nisi prius and as a last refuge for those desperately in need of something to cite in court. Outside of the law of evidence, they were regarded as of no authority, little better than illustrative of principles which stood or fell on their own merit, and by the mid-nineteenth century, even rulings on evidence were barely regarded by the full court.

However, the end of the nisi prius system by the beginning of the twentieth century caused the legal profession to forget the former low standing of nisi prius cases, which in turn led to greater weight being attached to them, as memories of the distinction between them and decisions of courts in banc became lost in time. Consequently, more attention is now paid to nisi prius cases by the courts than at any other time in the history of the common law, not necessarily to the benefit of the law's development.

[148] *The Revised Reports*, 152 vols., London, 1902, vol.67, v.