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EARLY-MODERN JUDGES AND THE PRACTICE OF PRECEDENT

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The history of ideas of precedent is understandably important; it is the history of the logic of authority, what Maitland saw as the divide between historians and lawyers when using materials from the past.¹ It is remarked upon by the majority of writers dealing with legal theory in the time of the Year Books and the first nominate reports. However, investigations through the materials usually come to little: an acknowledgment that judges did, on occasion, describe what they were doing as making a 'precedent', followed by an admission that 'precedent' had a different meaning to that we have now, being associated with the record rather than reports.² This linguistic approach has not worked. Evidently early-modern judges did pay considerable attention to their predecessors, as

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¹ F.W.Maitland, 'Why the History of English Law is not written' in H.A.L.Fisher (ed.), *The Collected Papers of Frederic William Maitland* (1911, Cambridge University Press, Cambridge) p.480, 491 although Maitland's thought that lawyers look for authority 'and the newer the better' is not necessarily accurate in a sixteenth-century context (see n.29 and text below). Of course this means that investigate the history of precedent (and indeed notions of authority in general) is to engage in the vexed question as to the historical sense of early-modern lawyers best raised by J.G.A. Pocock in his *The Ancient Constitution and the Feudal Law* (1987, Cambridge University Press, Cambridge). However, to approach the issue from the perspective of authority suggests a new line of inquiry: not whether lawyers were unhistorical and if so, why, but rather whether we should expect them to have been. It is perhaps unsurprising that historians have not often considered this question, and never from this perspective (Anthony Musson has considered Edward Coke's notoriously poor historical sense and placed it firmly within an English historical tradition, 'Myth, Mistake, Invention? Excavating the Foundations of the English Legal Tradition' pp.63-81 in Andrew Lewis and Michael Lobban (eds.) *Law and History* (2003) 6 Current Legal Issues. Musson's approach is still to consider the question from the perspective of the study of history and the logic of evidence, rather than that of authority).

² A good example is Norman Doe, *Fundamental Authority in Late Medieval English Law* (1990, Cambridge University Press, Cambridge), pp.22-4 which addresses both 'legislative' expressions in the Year Books and express references to creating 'precedent'.

the plethora of case citations in printed and manuscript law reports of the time shows.³ Such citations are not necessarily precedent. What will be examined here is ‘precedent’ in the modern sense, that of previous decisions binding a judge in a case to a particular conclusion on a point of law, whatever the language used.⁴ It must be acknowledged that the evidence is relatively sparse, but even in a system with a functioning doctrine of *stare decisis*, judges being constrained by previous cases is relatively rare: given the opportunity, lawyers can, lawyers do, and lawyers did, distinguish cases not congenial to their argument rather than change their minds.

Broadly speaking, this paper concludes that there was a notion of the binding force of previous cases by the time of the Civil War, although it is only seen rarely. This development arose principally through the use of the court record, rather than law reports. As such, what we would describe as ‘precedent’ can be seen as directly associated with the medieval use of ‘precedents’. Crucially, early-modern lawyers began to conceive of the record in a different way to their predecessors, and derive different conclusions from it. At the same time, there was a theoretical movement to conflate record and report and claim the authority of the record for law reports. That theoretical development would seem to be laying the groundwork for any subsequent strengthening of the force of law reports, whilst other developments suggest a decline in importance for the record with an accompanying elevation of the role of printed law reports.

³ This is observed by J.W.Tubbs, *The Common Law Mind* (2000, John Hopkins University Press, Baltimore MA), pp.181-182. There is reason to be sceptical as to assertions of the precise nature of the impact of printing. English legal argument has never lacked a casuistic approach, often it seems that the principal difference concerned the type of cases put in argument and their referencing.

⁴ David J. Ibbetson, ‘Case-Law and Doctrine: a Historical Perspective on the English Common Law’ pp. 27-40 in Reiner Schulze and Ulrike Seif (eds.), *Richterrecht und Rechtsfortbildung in der Europäischen Rechtsgemeinschaft* (Tübingen: Mohr Siebeck, 2003), pp.28-9. I have attempted to avoid the word ‘authoritative’ with regard to prior cases. Tubbs in *The Common Law Mind*, p.182, comments that ‘[b]y the time of Coke and Bacon in the early seventeenth century, prior decisions unquestionably became authoritative’. The ambiguity here is important. Close reading of Tubbs would suggest that he did not mean to suggest prior cases were binding at this point, as he states on the previous page that cases were not binding until later. As such, one is left wondering quite what ‘authoritative’ does mean.

THE BINDING NATURE OF THE RECORD

In the late sixteenth-century it is apparent that law reports cannot be binding precedents. Judges, but much less frequently counsel, are seen disagreeing with cases put to them, simply as they disagree with the conclusion. *Dighton v Bartholmew* (1602) provides a good example: in that case ‘it was agreed by all [the Judges of the King’s Bench] that a villein may not maintain an appeal of mayhem against his lord, and yet Fenner cited that it was agreed in the reports of Keilway newly put in print by Mr. Recorder, that if the villein sue an appeal of mayhem against his lord, this well lies, and that if he obtains judgment in this he shall be enfranchised. But they all agreed that the law is not so’.⁵ This disagreement, and others like it, is not with the report, but with the conclusion, the point of law.⁶ Any system which has such a power in the judges cannot be considered to have a true notion of binding precedent if precedents can be undermined at will.

However, we also see judges disagreeing with the conclusion in law reports, but admitting that they will change their mind if the record, ‘precedents’, support the conclusion seen in the reports. An example can be found in *Stucley v Thynne*, where

⁵ *Dighton v Bartholmew* (1602) BL MS Add 25203 f.488, 489.

⁶ It must be acknowledged that many references to the record do seem to have been for the purposes of verifying a report and ensuring accuracy. *Dighton v Bartholmew* provides the most explicit example, where counsel produced a copy of the record of a case from the reign of Henry VI which had been ‘certified’ by the second prothonotary of the King’s Bench, Zachary Scott, at the time of *Dighton* itself (*Dighton v Bartholmew*, f.488, a list of prothonotaries can be found in Baker, *Spelman’s Reports* (1977) 94 SS 377). The use of a ‘certified’ copy of the record would suggest a concern for accuracy. This procedure has not been found replicated elsewhere, and is probably a consequence of the fact that here counsel produced the record independently, rather than having the justices direct him to search for the record. The concern for accuracy might be associated with humanist textual awareness and the increased focus on memory found in early-modern common law (see Richard J. Ross, ‘The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640’ (1998) 10 *Yale Journal of Law and the Humanities* 229-326). Indeed, Ross has noted the etymological association made by some early-modern common lawyers between ‘record’ and the Latin *recordor* (pp.302-3, especially Lambard, Fraunce, Dodderidge and Coke). Unfortunately Ross’ discussion does not consider that the word ‘precedent’ is more frequently used in English and law-French than ‘record’. As such, his discussion is probably more useful with regard to legal records being used as historical sources (its actual context), and cannot be easily extrapolated to the use of the record in curial argument. In any event, a focus on memory or accuracy does not explain why the record was considered by judges to determine their decision on a point of law, unless prior cases already had binding force. There is no evidence of this except in relation to the record. As such, to approach the argument from a memory and accuracy perspective is to misunderstand the issue and to focus again on the early-modern logic of evidence (fascinating as that topic is), rather than the change in the logic of authority in the period which the use of the record here outlined suggests. Naturally it would be a fallacy to suggest that the two were mutually exclusive, but this paper concerns itself solely with the question of the idea of authority.

Justice Browne of the Common Pleas rejected a Year Book case showing that a writ of distress had been issued in similar circumstances, but once it had been vouched by officials that there were precedents for such an issue, he said he would change his mind if he could be shown them.⁷ Evidently this seems to be a purely procedural issue, that of whether or not a writ should issue. To a modern legal historian there is clearly a substantive issue concealed behind the discussion: to refuse a writ would be to deny a remedy, and therefore limit the ambit of the substantive law of distress. There is no evidence of Justice Browne approaching the matter from such a perspective. As such, whilst law reports, and decisions, could be rejected, it seems that precedents from the record were regarded as conclusive. From a modern perspective we would therefore regard the record, where capable of being cited, as having more authority than a report.

This approach continues, in Easter term 1629 we see a judge consciously admitting that he will change his mind if a particular case put in argument is confirmed by the record.⁸ The judge therefore considers himself constrained to act in a particular way. In *Browne v Strode* in the King's Bench, Justice Jones said that 'if the case of 8.James 1 [previously put by Justice Hyde] is as my Lord has vouched it, I will no more doubt in

⁷ *Stucley v Thynne* (1567) in John H. Baker (ed.) *Reports from the Lost Notebooks of Sir James Dyer*, Vol.1 (1994) 109 Selden Society 127, p.128. Coke's report of *Manser's Case* 2 Co.Rep. 1a might be an example of binding precedent, certainly the use of the record seems to have been important in changing the views of the judges (3v). However, the report is not entirely clear, and Coke's description of the case cited (*Cooke v Wootton*) is different to that cited in Dyer 337v, making interpretation difficult.

⁸ Gawdy J seems to suggest in *Lowen v Cocks* (1599), BL MS Add 25203, 64, 64v, that 'perhaps' he would change his mind if Tanfield could show a case to be adjudged as he claimed. This is the only case where the authority of the record is not binding and might reflect Gawdy's somewhat combative nature on the bench. It is also a reminder that notions of authority were flexible and that a judge could, if he so desired, express sentiments seemingly contrary to them. Similarly, Jones J in *Jenkin v Griffith* (1630) (CUL MS Gg.ii.10, f.131, 132) noted that there was a judgment against his conclusion and 'many precedents agreeing with that', but persisted in his views. Jones argued that it had been agreed many times to the contrary in the King's Bench and that the precedents 'come too late'(for some reason this is rendered in English in the report). Given that Jones is the judge whose remarks in *Browne v Strode* (below) indicate an idea of binding precedent, this case suggests other possible notions of authority, and supports the idea that a reference to the record as binding was one of a number of responses open to judges, depending on their attitude to the case in hand (although it should be noted that despite the references to 'precedents' in *Jenkin*, there is no recourse to the record itself visible in the report). Judges did not always reference the record when it had been cited in argument. For example, in *Dighton v Bartholew Yelverton* referred to his 'consideration of all the books' (f.488v) but not the record cited by counsel for the plaintiff. In such these cases, the judges had decided for the party to whose advantage the record had been cited, so there would have been no need to cite the record again. Binding authority is only needed in cases of dispute, seemingly as a last resort, and the judges obviously considered those cases capable of resolution of other grounds.

this matter and so he spoke to Noy to search the roll for it'.⁹ The case does not seem to be reported in Trinity Term, but by Michaelmas of 1629, on the same question, Justice Jones is reported as saying that it 'is not necessary to be argued' and his view was now that of the others.¹⁰ The point, as with earlier examples of the record, seems to be purely procedural: it is whether joint covenantees are entitled to sue in the same action, and if both joint covenantees must be joined in the action. So far this is not that dissimilar to earlier references to the record. However, the report makes it clear that whilst the point appears to be procedural, participants were well aware that there was a substantive issue here, it was noted that only one of the joint covenantees had assured the covenant and was burdened by it to pay money.¹¹ Other cases put make it clear that the issue was seen as if 'he shall have the action[,] to whom the benefit of a promise is made'; in effect, the issue was one of privity of contract mixed with consideration.¹² Furthermore, argument was made showing the differences between parol promises and covenants.¹³ As such, there was a clear underlying tendency to see these issues as related to the general question of enforceability of contracts, not merely covenants, despite the fact that some of the contracts would have been unenforceable through the writ of covenant under discussion, as the contracts wanted writing.¹⁴ This case brings out an important trend in early-modern legal thought which needs to be understood.

The traditional categories of the forms of action were breaking down. This point has been made before, but it is important to realise that it did not necessarily constitute a problem.¹⁵ Some lawyers were happy to admit that the learning from the forms of action could be applied in new contexts, such as John Stone in the introduction to his 1612

⁹ CUL MS Gg.ii.19, f.2, 4. The case is reported much more briefly at BL MS Add. 35965, f.2.

¹⁰ CUL MS Gg.ii.19, f.110.

¹¹ CUL MS Gg.ii.19, f.2v.

¹² CUL MS Gg.ii.19, f.3.

¹³ CUL MS Gg.ii.19, f.3.

¹⁴ A similar discussion, combining covenant and contract can be seen in West's *Symbolaeographia* 1.5.

¹⁵ David J. Ibbetson, *Common Law and Ius Commune* (2001, Selden Society Lecture), repr. in *The Selden Society Lectures 1952-2001* (2003, William S. Hein & Co., Buffalo NY), 675-705, pp.696-8.

reading in the Inner Temple, who considered that ‘al reall accions learnings’ were applied in trespass and ejectment, rather than in the medieval real actions themselves.¹⁶ This is very important, as it meant learning associated with particular forms of action, whether in the Year Books, common learning, or found from the record, was no longer tied to a procedural context, but was instead free-standing, a source of general ideas, and treated it as such. This was not only novel, but seems to have been so recognised as such. Lawyers were extracting substantive legal ideas from earlier materials based around the availability (or not) of remedies in the form of writs. Seventeenth century lawyers were, therefore, acting just as a modern legal historian using the Year Books does: they saw where the remedies stopped, and from that could discern substantive law applicable in a wider variety of contexts. For the lawyers, rather than the legal historians, this was necessary to resolve disputes in the different procedural context of the seventeenth century. This is the paradigm example of Edward Coke’s new corn coming from old fields.¹⁷ Debate that would once have seemed to be procedural became substantive, more accurately was procedural and substantive simultaneously. The shift was small, but it was there. The record had previously been used to resolve procedural questions,¹⁸ but by the seventeenth century any answers would no longer be purely procedural; they would, in effect, have been decisions on points of law. In most contexts the record was not free standing as it lacked the necessary statement of facts to assess similitude, and as such was cited to corroborate a report. This is important, but it must not derogate from the fact that it is the record which compelled obedience and acceptance of a point. At this point,

¹⁶ Library of Congress Law MS 94109274, f.112.

¹⁷ *Calvin’s Case* (1608) 7 Co.Rep. 1, 3^v. Naturally this does not mean that all lawyers did this. Most legal debate continued much as before, with simple assertions as to whether cases were like each other. *Bronne v Strode* may not even be the first example of a new trend, but rather simply be the first that has been found in a law report. For most lawyers, this approach would have been their natural thought pattern, and therefore would not need to be discussed in court. Assertions as to the similitude of cases could represent the only necessary part of formal argument if all involved agreed with the reasoning process outlined here.

¹⁸ This seems to be case in *Kaynes v Kaynes* in 1285, *Earliest English Law Reports*, Vol.2, (1996) 112 Selden Society 185, p.186, where the Justices of the Common Bench justified giving judgment despite the absence of one of the parties, as had been done in the reign of Henry III ‘as will be found in the roll of Trinity Term in the fifty-fith regnal year’.

‘precedents’ in the early-modern or medieval sense can be seen as a binding force on later judges on points of law.

An important development here is in actions on the case. In the context of defamation, many actions concerned whether or not particular words could constitute defamation in particular circumstances. This is clearly a substantive question. However, defamation was an action on the case, and as such the words used, and their attendant circumstances, would all be included in the writ on the record. The question of whether words constituted defamation was both substantive and procedural, in that if words did not constitute defamation, then the writ did not lie, a classic procedural issue. In defamation we can therefore see Chief Justice Anderson of the Common Pleas in the 1590s saying that precedents should be followed and wanting to see them,¹⁹ and thirty years later Justice Crooke of the King’s Bench was unwilling to accept counsel’s argument (against a judgment in the Exchequer Chamber) unless precedents could be shown.²⁰

There is one important point to be clarified. Early-modern lawyers using the record do not seem to have been concerned with discerning the justification for the result in a case from the record. The binding nature of the record was being binding as to result, and the ‘reason’ of the case seemed to be of secondary concern at that point in the argument. The simple justification for this is probably that the record was only ever examined, and would be seen as binding, where a judge disagreed with an argument based on a prior case. At that juncture the judge clearly would not agree with the ‘reason’ of the case, indeed considered that ‘reason’ inclined to the other result. *Stucley v Thynne* is

¹⁹ *Holwood v Hopkins* (1600), *Select Cases on Defamation to 1600* (1985) 101 Selden Society 89, p.91.

²⁰ *George v Harvey* (1633) CUL MS Gg.ii.19, f.332v, 334. Evidently this gives a considerable role for prior cases without the record, but also shows that the record could override decided cases.

a good example of this. Justice Browne accepted that he would ‘sue my reason to the precedents’.²¹ In other words, the judge was constrained, or bound, by authority.

CONFLATING REPORT AND RECORD

The action on the case for defamation mentioned earlier is a practical demonstration, common to all actions on the case, of the other major development with regard to judges being bound by earlier cases, the conflation of the record and reports. This development was not simply practical, but also theoretical. The preface to Coke’s *Third Reports* makes it clear that the record was to be seen as consisting of ‘reports’ of ‘equall authoritie but lesse perspicuitie’ compared to the printed reports.²² This is interesting, as Coke clearly regarded the record as being capable of use in legal argument as a report. In functional terms, Coke therefore equated the record with reports. This is accurate as a description of early-modern legal argument, distinct from legal reasoning, in that reports were clearly the principal mode of legal argument by the time of Coke. Comparing the record to reports could be seen as paving the way for an increased use of the record in legal argument. Edward Coke the evangelist seems unlikely however, much more probable is that Coke was simply reflecting existing practice by counsel in argument, that the record was used like reports, but less frequently due to the difficulties in comprehension.

The difficulty with Coke’s remarks comes with the comment that the record has ‘equall authoritie’ with reports. The other evidence does suggest that if we conceive of authority in something like the modern manner, the record was more authoritative than law reports, being capable of overriding them and the only material seen in the sources

²¹ *Stucley v Thynne*, p.128. The other possibility is that Edward Coke’s idea of reason as based on discussion was more generally current amongst the profession, and it was taken for granted that precedents would therefore have ‘reason’. It may therefore be important that Browne J does not state that he considered the precedent to lack reason, merely that it is different to his reason.

²² *Le Tierce Part des Reportes del Edward Coke* (1610), sig.Cii^v.

binding judges. It may be that Coke was writing as the advocate he still was in 1602.²³ It is the judges who were bound by the record, seemingly willingly, and counsel may not have addressed argument to the judges in terms of being ‘bound’ by the record simply because such arguments may not have been politic.

Nevertheless, the theoretical equation of report and record remains here. Other lawyers went further, and sought to undermine reliance on the record. In the defamation case of *Holwood v Hopkins* from which Chief Justice Anderson’s earlier remarks came, Justice Walmesley of the Common Pleas made a presumably deliberate statement that ‘[o]ur books are good precedents to guide us’.²⁴ This was in response to Anderson CJCP’s desire to follow the precedents of the King’s Bench. Walmesley was clearly trying to argue that there was, at least, no difference between printed reports and the record. This was unorthodox at the time, and did not work. However, note that Walmesley was expressly trying to claim the authority of the record, through the use of the language of ‘precedent’, for printed law reports. This is an early version of the modern language of ‘precedent’ and is a deliberate piece of verbal disingenuity attempting to subvert the force of references to the record and transfer that to reports.²⁵ As such, it provides good evidence of the perceived strength of the record by an opponent of the view that the record in the case supported. Walmesley’s position would also seem to undermine Coke’s suggestion that the record enjoyed ‘equal’ authority to reports, as he tried to claim reports had authority equal to the record. In this regard, Walmesley’s argument, and

²³ Coke’s advice, also at sig.Cii^v, that one should set down ‘all authorities, presidents, reasons, arguments, and inferences whatsoever that may be probable applied to the case in question; For some will be perswaded, or drawn by one, and some by an other’ is the attitude of an advocate (or rhetorician) rather than someone handling binding material.

²⁴ *Holwood v Hopkins*, 91

²⁵ *Skymer’s Case* (1561) CUL MS Ll.3.14, f.59, 62v contains Catlyn CJKB apparently stating a view ‘contrary to the precedent’, where the record had not been put. Whiddon J had referenced an ‘adjudged’ case in the Common Pleas. Given the record is not referenced, the reporter (at least) was able to equate a verbal report of a case with a ‘precedent’ suggesting that there might have been a stronger tradition of equating report and record, albeit one that is not readily visible in the sources. If so, this would be further evidence of legal theory (as outlined here) running to a great extent behind practice.

attempted subversion, is actually more accurate and revealing as to the position of the record in argument, at least from the perspective of a judge.

Coke's discussion of the role and nature of citations from the record did not end or begin with his comments in the *Third Reports*. Coke's argument in, and report of, *Slade's Case* also discusses the role of the record.²⁶ This is especially important, as there is clear evidence of a reception of the ideas contained in Coke's report of *Slade's Case* by other common lawyers in the decades before the Civil War.²⁷ In *Slade's Case*, Coke explained that precedents are to be followed, and explains that this is due to following the judges, who are held in high regard. In itself this may not be especially important, it is Coke providing a justification for an existing form of legal argument. The conceptual development is the separation of judicial and non-judicial 'precedents', although Coke does not use that language until later in his career.²⁸ Coke regards 'precedents' in the sense of arguments from the record based on writs issued, as more powerful where the judges have debated them. The notion of debate leading to authority can also be seen with regard to reports of cases.²⁹ As such, Coke's justification for the authority of the

²⁶ *Slade v Morley* (1601) 4 Co.Rep. f.91, 93v. Coke's manuscript report contains the same idea, BL MS Harl 6686, f.526, 527-8. Coke's manuscript report does not include a reference to Coke being shown precedents by a prothonotary, and includes a legible deletion unsurprisingly not included in the printed version. The manuscript report is otherwise largely identical to the printed version. Coventry's report of Coke's argument also includes the point, BL MS Add 25203, f.391, 393v-394.

²⁷ Francis Bacon made use of the same ideas (expressly referencing *Slade's Case*) in the Star Chamber in 1614, T.G. Barnes, 'A Cheshire Seductress', p. 359, in M.S. Arnold *et al.* (eds.), *On the Laws and Customs of England, Essays in Honor of Samuel E. Thorne* (Chapel Hill, University of North Carolina Press, 1981), p.370. citing Folg.MS.V.a.133, f.35. However, Bacon's use of *Slade's Case* may simply have been an attempt to upset Coke, used to counter Coke's own views on the substantive merits of the case. The distinction between judged and unjudged precedents (and the corresponding lack of discussion) in *Slade's Case* is also cited in *Lord Mountjoy v Sir Henry Mildmay* (1632) CUL MS Gg.ii.19, f.293, 295 and by Finch CJCP in the case of ship money (*R v Hampden*), 3 State Trials 825, 1229 (although Finch's remarks at 1227-9 make it clear that he has a very different understanding to that of Coke as to the position of the record and indeed the nature of the common law). Coke's ideas as to silent precedents may have been influenced by the response to one of Coke's own arguments by Manwood CB in *Oguel v Paston* (1587) 2 Leonard 85, 87, where Coke cited precedents for the issuing of the relevant form of writ, and Manwood criticised such precedents for being 'silent'. The use of Coke's own argument in *Slade's Case* by later lawyers, rather than Manwood's judicial response over a decade earlier is testimony to the power of print in shaping early-modern legal thought.

²⁸ The language of 'judicial' precedents is not in *Slade's Case* itself, but is used in the preface to Coke's *Booke of Entries* (1614), Ai, relying on one of the same cases (9.H.6., fol.30, per Prisot) as cited in *Slade's Case*.

²⁹ It is already present in Plowden, *Les Comentaries* (1571), sig. qiiiv.

record shows a further clear tendency to conflate the record with reports, this time through a common theoretical justification for their place in argument.

There is a final, more practical, development which would tie record and report to each other. It is simply the practice of law reporting. Law reports acknowledged as of high quality (Plowden, and subsequently Coke) provided both the record and report. Coke's *Reports* would have had a particularly powerful impact in this regard, as they were cited much more frequently than Plowden. The record and report of a case were therefore not fully separate sources by the second decade of the seventeenth century, and a lawyer referring to one would also have access to the other. Although not a theoretical development in itself, such a presentation in the literature must have contributed to ideas that reports and record were not essentially different. If that were so, then it is only a small conceptual step to assume they would have similar authority.

THE DECLINE OF THE RECORD

As such, we can see that the record could be used in a new way, and at the same time at least some lawyers began to regard the record and reports as equivalent. This had the potential to create a situation where reports could be viewed with the same authority as the record, although Walmesley's approach in *Holwood v Hopkins* is the only express attempt at this yet found. The authority of the record had one other impact on the practice of precedent, albeit as a reaction to it.

In the dispute over the jurisdiction of the Common Pleas to grant writs of prohibition in the late sixteenth- and early seventeenth-centuries, arguments against the Common Pleas' jurisdiction had to contend with the fact that the Common Pleas clearly had 'precedents', albeit recent ones, supporting its claims. Papers and correspondence in the Ellesmere collection at the Huntington Library casts light on one response to this argument, albeit from non-curial material. Julius Caesar, on the part of the Court of

Requests, tried to meet the argument in 1600 by establishing older (and presumptively better) precedents against it.³⁰ Although this line of argument was never entirely rejected by those opposing the Common Pleas,³¹ later developments show a new approach. The doctrinally innovative position was to question the judges as to whether the jurisdiction of the Common Pleas could be justified by reference to printed material, in effect automatically excluding the record.³² This is possibly the first attempt consciously to manage the sources of legal argument, more specifically to limit how cases could be cited and proved.³³ In late 1608 or early 1609, the Bishop of Bath and Wells wrote to Lord Chancellor Ellesmere with a question from the king about prohibitions, to be put to, and answered by, the judges of the King's Bench. The question asked whether the contrary position to that taken by the Common Pleas was 'warranted by divers of youre *printed* lawe bookes' [emphasis added].³⁴ Similarly, an undated anonymous piece entitled 'Some

³⁰ HEH MS El 2924.

³¹ Collections of precedents on the prohibition jurisdiction were still being collected by Hobart AG in 1609 (HEH MS El 2007).

³² This approach would suggest that rather than print founding unorthodox arguments (as Ibbetson has suggested in *Common Law and Ius Commune*, 677), it was instead used to limit the range of legal opinions. Ibbetson's approach is not fundamentally misplaced, but should focus on law as text (a clear development through the sixteenth and seventeenth centuries associated with, but not limited to, print): an increased reliance on text clearly could found unorthodox arguments, but print could be a conservative force against more unorthodox manuscript material within that trend. The treatment of the record in the dispute over prohibition might suggest that, as in other contexts, manuscript material was often subversive in comparison to print. See Harold Love, *Scribal Publication in Seventeenth-Century England* (1993, Oxford, Clarendon), p.190. Whilst Love focuses on the Restoration, he acknowledges 'anti-court' uses of manuscript material in the reigns of James I and Charles I, p.78. Love strictly focuses on scribally produced material, rather than manuscripts in general, although it may be questionable how far contemporaries acknowledged such a distinction.

³³ The only possible equivalent found so far has been the occasional rejection of civilian material by common lawyers (eg the 'rebuke' given to Walmesley as counsel for citing civilian material in 'our law' in *Wood v Ash and Foster* (1586) Godbolt 112, 113). The deliberate attempt to limit source material to printed works might have interacted with the pre-publication control of printed legal material, and Francis Bacon's project to establish royal law reporters. If legal argument by cases (which was already clearly pre-eminent) were to be conducted solely through printed cases, whoever controlled the reporters and their work would have a massive impact on the range of permissible legal opinions. Hobart's remarks discussed in n.33 below suggest a degree of pre-publication control of law reports, perhaps partly for that purpose. See Elizabeth Wells, *Common Law Reporting in England 1550-1650* (1994, Oxford University DPhil), pp.41-45, where she considers Bacon's publication scheme, albeit solely as a device to ensure the 'veracity' of the reports.

³⁴ HEH MS El 2008, 2. 2^v indicates that the letter was received on the 21 January 1609. Thomas Walmesley was also consulted by Ellesmere on the issue of prohibitions and other developments in Common Pleas' jurisprudence, and on one question on tithes also expressly justifies his position with 'boke Cases' (although they are not referenced as Walmesley presumes Ellesmere knew them). It is quite possible that this had the same motivation as reliance solely on printed material with regard to prohibition (HEH MS El 2010).

observacions Concerninge the grantinge of prohibicions in the Comen place' discusses the position taken by the Common Pleas but only as 'may be demonstrated and proved by booke Cases in printe'.³⁵ That approach was inherently conservative, and opposed to the expansive position of Common Pleas jurisdiction.

This approach is especially interesting as it has not been found in the law reports. However, it may be a reflection of a wider trend. Even Edward Coke, by the time of the publication of his *Commentary on Littleton*, had removed the record from his list of types of legal argument.³⁶ Argument from 'authority' is there limited to references from the Yearbooks, and this is described as the 'strongest' form of legal argument. This position does not seem to be representative of its time,³⁷ but would presumably have exercised influence as the work was read.

Naturally this evidence can be interpreted in a number of ways. It may reflect the growing authority of print, presumably based on an ever increasing usage at the expense of other sources of legal argument, or it might be a genuine attempt to subvert established rules of legal argument when inconvenient. These two developments would probably not have been mutually exclusive. Given the need to descend into 'Hell' to view the record,³⁸ it is perhaps unsurprising that few lawyers fancied themselves an Orpheus, and instead relied on print.

³⁵ HEH MS El 2011, 3v. Presumably this was drafted by a legal official of the Crown. I suspect that Francis Bacon may have been the author, as Hobart continued to rely on the use of alternative 'precedents' from the record (HEH MS El 2924). However, Hobart as a judge was willing to challenge a report as printed without 'warrant' (*Wade's Case* (1622) CUL MS li.5.34, f.117, 123) suggesting he may have been sufficiently sensitive to the nature of source material to conceive how to avoid the record.

³⁶ Edward Coke, *The first part of the Institutes of the lawes of England. Or, A commentarie upon Littleton* (1628), f.11.

³⁷ *Bronne v Strode* would seem to be inconsistent with it.

³⁸ See John H. Baker, 'Why the History of English Law has not been Finished' (2000) 59 *Cambridge Law Journal* 62, p.70. The majority of references where the record can be seen as determinative consist of the judges asking counsel to show them the record, usually of a relatively recent case. As such, the record would need to be found. Samuel Thorne observed that Edward Coke's citations of the record in print seem to be attributable not to detailed archival research, but rather to selection from print and manuscript collections (W.O.Hassal (ed.) *A Catalogue of the Library of Sir Edward Coke* (1950, Yale University Press, London), vii). Such citations are not those seen as having binding force in contemporary law reports (binding references to the record are usually to recent cases), which raises some interesting questions about quite why Coke made use of the material.

CONCLUSION

By the Civil War there were clear changes in ideas of legal argument, and the manner of citation of earlier cases, especially from the record. Some of these developments suggest that the earliest experience of binding case-law in a modern sense was to be found through the use of the record, and that the unusual, but powerful, arguments using it were increasingly conflated with the much more common arguments using reports. An awareness of this fills in a gap in the history of case-law, and gives a suggestion as to why lawyers may have come to see law reports as having particular authority.