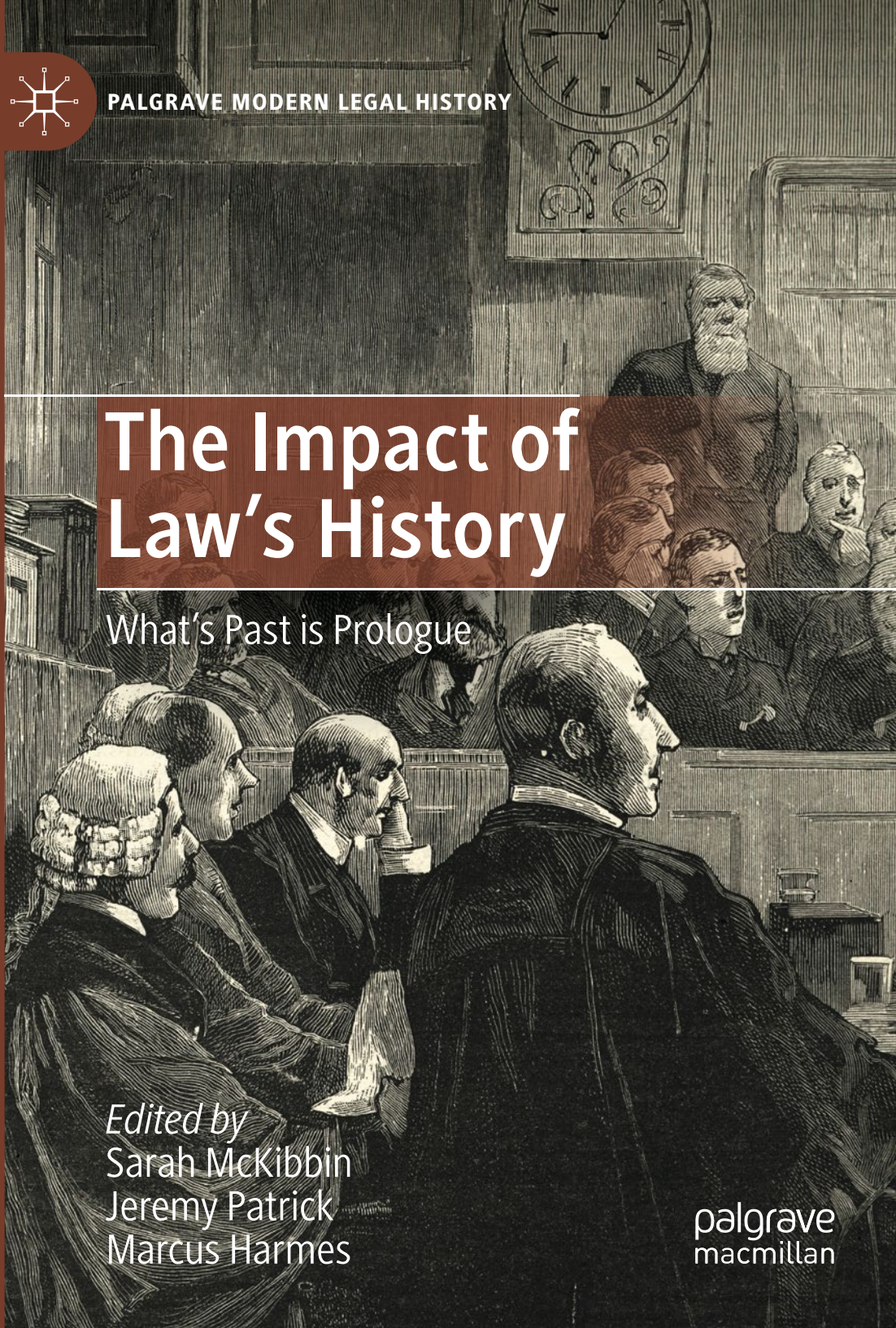

PALGRAVE MODERN LEGAL HISTORY

The Impact of Law's History

What's Past is Prologue

Edited by
Sarah McKibbin
Jeremy Patrick
Marcus Harmes

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Palgrave Modern Legal History

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Foreword

This volume shows the variety of approaches currently adopted by scholars working on the law and legal institutions of England and Australia and it is one which convincingly demonstrates the continuing importance of legal history for the understanding of the legal institutions and legal doctrine of these two common law jurisdictions. Of the thirteen papers included in the volume two focus on specific individuals (the English eighteenth-century Attorney General Sir Dudley Ryder and the Australian twentieth-century High Court judge Albert Bathurst Piddington) but place them in their wider contemporary context by looking at the development of the office of Attorney General and Ryder's relationship with his governmental colleagues and by sketching in Piddington's prior and subsequent career and explaining the circumstances which led to Piddington being appointed but never sitting in the High Court. Four papers focus on English and Australian constitutional law and development. One looks at Lord Atkin's famous dissent in the 1942 case of *Liversidge v Anderson,* a case which challenged the arbitrary exercise of executive discretion to imprison indefinitely. It locates that dissent in its contemporary social and legal context and then traces the stages by which Atkin's dissenting opinion came to be accepted as the constitutional orthodoxy. A second provides an ambitious overview of UK constitutional history over the four decades down to 2019. It looks at some of the major changes of that period (increasing centralisation of governmental power under Margaret Thatcher, devolution in Scotland and Wales under Tony Blair, the decline of Cabinet government and the impact of the Brexit referendum) and

their short and longer-term impact on the UK's unwritten constitution. A third paper suggests that the concept of path dependency may be a useful tool for understanding why some doctrines of Australian constitutional law have been able to change quite dramatically over time while others have remained pretty much the same and uses two specific areas of constitutional law to show how that works in practice. A fourth argues that modern lawyers need to understand the deeper normative values which underlay the 1867 Constitution Act of Queensland if they are to be given a modern meaning in allowing the allocation of property as wealth on just and principled lines. Two papers focus on aspects of the modern history of the legal profession in England and Australia. One looks at the representation of members of the English legal profession of an earlier era (and particularly of English barristers defending the accused) in British television series of the second half of the twentieth century as one of the ways in which a non-academic public acquires its knowledge of the workings of the legal profession in the past. The other looks at the restrictions on the promotion of the services of members of the legal profession in Australia and New Zealand prior to the 1970s and shows how that was an inheritance from prior history of the legal profession in England from the Middle Ages onwards. It then traces how and why they were removed but also shows that the removal of the restrictions has had relatively little impact on the way lawyers sell their services to their clients. Two papers are mainly concerned with the history of private law. One traces the very long-term change in the law of tort from strict liability to the allocation of liability on the basis of the defendant's fault and why it occurred. This starts in the Ancient World with the Code of Hammurabi and the Twelve Tables of ancient Rome but brings us down to the present day (and beyond). A second paper demonstrates the way in which the High Court of Australia from the 1980s onwards has shifted Australian private law in new directions by creatively invoking common law arguments derived from English legal history, showing just how important knowledge of that legal history can be for Australian lawyers. Two papers take the legal treatment and status of Australia's indigenous people (its First Nations) in the past and in the future as their topic. One looks at the first half century after the arrival of the first group of British colonists in 1788 and the arrival of English law in Australia and what evidence there is of the settlers coming to treat indigenous people during this period as being entitled to the protection of English law. A second makes a brave effort to utilise the example

of Magna Carta as a precedent for the acceptance of a version of legal pluralism which might provide a conceptualisation for the constitutional recognition of indigenous rights in Australia alongside the existing framework of Australian law and common law rights. One final chapter gives an overview of the history of biosecurity regulation in Australia and its successes (including the exclusion of phylloxera) and failures (the ill-advised introduction of the cane toad) and the lessons which can be learned from them.

This is a valuable collection of essays on English and Australian legal history which illustrates the strengths of a variety of approaches to the doing of legal history and their complementarity. It also helps to demonstrate the continuing value of legal history to a broader understanding of current law. It can be commended to not just students but also teachers of both law and history and practitioners.

All Soul's College, Oxford Paul Brand

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Notes on Contributors

A. S. Bell was appointed President of the New South Wales Court of Appeal in February 2019. His Honour was a dual University medallist at the University of Sydney and Vinerian Scholar at Oxford University, where he took a BCL and DPhil. He was a silk at the NSW Bar prior to his elevation to the Bench.

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CHAPTER 1

Introduction

Marcus K. Harmes, Sarah McKibbin, and Jeremy Patrick

"What's past is prologue." These words from Shakespeare's *The Tempest* are uttered by Antonio to explain why he and Sebastian are about to make the fateful choice of entering a conspiracy to commit murder.[1] If carried out, this bloodshed would be no rash act of momentary impulse, but a cold, calculated manoeuvre selected from among competing options. But premeditated murder—as dramatic and irrevocable a decision as a human can make—would be inexplicable without understanding everything that had come before. When Antonio makes this famous statement, he's attempting to answer the question: "why?" Why have he and Sebastian somehow reached the point where murder seems like the best choice?

[1] Act 2, Scene 1.

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The question of "why?" is also the theme of this book. In *The Tempest*, Antonio's and Sebastian's conspiracy is foiled by a magical sprite and they're eventually forgiven for their actions—without any recourse to law. But for those of us without the good (or bad) fortune to live on a remote island ruled by a sorcerer, law forms the unavoidable parameters of what we can and can't do. Law delineates the boundaries of our freedoms, imposes the constraints of duties and responsibilities, and makes the final decision of how something as mundane as a tax dispute or as serious as a murder plot should be resolved. But the laws we have weren't the result of pure syllogistic logic, the inevitable march of progress, or even the system "working itself pure." Antonio's reference to the past providing prologue is meant to give Sebastian *context* to why murder had become a viable choice, but it was still that—a *choice*. Similarly, the laws that govern us exist because choices were made against the backdrop of a particular historical context that impacted what seemed ideal or feasible at the time.

This book explores the question of how historical developments in particular contexts have shaped the legal system we have today.[2] A cynic might add a second "why" to the first one, and ask even if we could learn why we have the laws we have, *why* should we care? A decade ago in "Why Legal History Matters"—a John Salmond Lecture delivered at the Victoria University of Wellington—Jim Phillips provided a clear and persuasive answer. Phillips wrote:

> [There are] four principal reasons why *legal* history especially matters: [1] legal history teaches us about the contingency of law, about its fundamental shaping by other historical forces; [2] legal history shows us that while law is shaped by other forces, it can be at the same time relatively autonomous, not always the handmaiden of dominant interests; [3] legal history, perhaps paradoxically, frees us from the past, allows us to make our own decisions by seeing that there is nothing inevitable or preordained in what we currently have; and [4] legal history exposes the presence of many variants of legal pluralism in both the past and the present.[3]

It would be easy to misunderstand these insights. When Phillips writes about the contingency of law, he's not saying that they arose at random or are necessarily arbitrary—just that every law arises in a historical context that limits and influences which of a myriad of possibilities are adopted.

[2] This collection arose out of a colloquium held by the University of Southern Queensland's Law, Religion, and Heritage Research Program Team in Toowoomba in May 2019.

[3] Jim Phillips, "Why Legal History Matters," *Victoria University Wellington Law Review* 41 (2010): 294–5.

Similarly, when he writes about legal history as a liberating force, these are not the words of a revolutionary hoping to cast off the past but are instead the words of a historian reminding us that once we understand why we have a particular law, we can make better decisions on whether to keep or change it. "Appreciating the message of contingency demystifies the law," writes Phillips, "removes history as authority in itself, and makes it possible for current students and practitioners to envisage other worlds, other ways of doing things."[4]

The present collection contains thirteen different ways of demonstrating that the past is but prologue when it comes to the law. The chapters that follow focus on England and Australia, two common law jurisdictions with obvious historical linkages to one another and show the diversity of methodologies that can fall under "legal history." Some zoom in to dissect a particular court opinion of great importance, some zoom out to show the sweeping changes in a particular area of law over the span of centuries, and others ask us to think about legal history in new ways—such as on television! For ease of reference, the editors have divided this book into four sections.

Section I looks at legal history in the context of England. Chapter 2 by Wilfrid Prest presents a fascinating exploration of the office of the Attorney General in England over the years 1689–1760. Karen Schultz in Chap. 3 jumps forward to 1940s wartime Great Britain in her analysis of Lord Atkin's dissent in *Liversidge v Anderson*. Chapter 4 by Michael Mulligan brings us up to the present with his analysis of changes to the English Constitution since 1979 and up through Brexit. Marcus, Meredith, and Barbara Harmes in Chap. 5 remind us that law isn't just for lawyers in their chapter on how English legal history is portrayed on the small screen.

Section II bridges the United Kingdom and Australia through two chapters on the development of the common law. First, Keith Thompson in Chap. 6 discusses the evolution of legal restrictions on lawyers' abilities to market their own services. Second, Anthony Gray in Chap. 7 traces how a general norm of strict liability for tort gradually gave way to the standard of negligence.

Section III focuses on the High Court of Australia. The Honourable Justice A. S. Bell and James Monaghan in Chap. 8 present the fascinating story of "the High Court judge who never sat." Jeremy Patrick in Chap. 9 speculates that the concept of "path dependency" is useful for understanding why some High Court decisions stand the test of time, and others are

[4] Ibid., 305. In this way, legal history holds some similarities to comparative law.

quickly uprooted. Warren Swain in Chap. 10 explores how English legal history has been used in High Court decision-making.

Section IV is about land and the peoples who have occupied it since time immemorial. Gavin Loughton in Chap. 11 writes a deeply researched and detailed examination of how the doctrine of *terra nullius* entered Australian law. Julie Copley in Chap. 12 discusses land in the context of Queensland's *Constitution Act 1867*. Noeleen McNamara in Chap. 13 concludes the section with a history of biodiversity regulation in the country. Jason Taliadoros in Chap. 14 discusses the Uluru Statement from the Heart in the context of the Australian Constitution and Magna Carta.

Taken together, these 14 chapters make an important contribution to showing how "what's past is prologue" when it comes to law. The importance of quality historical legal scholarship can hardly be overstated given how frequently legal history is invoked in everything from influential court decisions to the reports of law reform commissions and Parliamentary committees. Fortunately, there are signs that legal history is making a resurgence both in education and in scholarship. Law shapes the world around us, and the better we understand its past, the better we can decide on its future.

CHAPTER 2

Politics and Profession: Sir Dudley Ryder and the Office of Attorney General in England, 1689–1760

Wilfrid Prest

Introduction

While writing a chapter on the legal profession for the ninth (1689–1760) volume of the *Oxford History of the Laws of England* (*OHLE*), I was invited to deliver the 2019 Annual Plunkett lecture of the Francis Forbes Society for Australian Legal History. As a work of reference, the *OHLE* can only touch lightly on many topics. But since the Forbes Society lecture memorialises John Herbert Plunkett (1802–1869), a notable early Attorney General

Research for this chapter was supported in part by Australian Research Council Discovery Project DP160100265, "A New History of Law in Post-Revolutionary England, 1689–1760". I am grateful to Sabina Flanagan, Mark Neuendorf, and Larissa Reid for their kind assistance.

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of New South Wales, it seemed that comparison between the roles of eighteenth-century English attorneys-general and their later Australian counterparts might provide a theme for my talk.

In the event, that proved a bit too ambitious. The best I could do, then and in this chapter on which it is based, was to outline how the English office of Attorney General developed up to and beyond the Glorious Revolution of 1688, surveying both the nature of the post and those who filled it under William and Mary, Anne, and the first two Hanoverian monarchs. Following that introduction I discuss the working life of Sir Dudley Ryder, England's second longest-serving Attorney General, uniquely documented in a massive autobiographical archive. Finally, turning to the present day, a brief conclusion attempts to highlight some elements of both change and continuity between the original English Crown law office and its modern Australian derivatives.[1]

Attorneys General in General, 1689–1759

Crown law officers have a long history. Like their most powerful subjects, medieval English monarchs retained their own counsel and attorneys, appointed by letters patent to represent the interests of the crown in litigation, principally as officers of the court of Common Pleas. The first such recorded appointment was that of William Langley in 1315; more than a century later the same post came to be entitled "king's attorney general", and a little after that the first king's solicitor (later solicitor general) was appointed.[2] These personal legal representatives of the monarch received a token salary from the royal exchequer, but doubtless earned the bulk of their income from fees paid by litigants eager to retain the top legal talent of the day. For despite their titles, both the Attorney General and the solicitor general were invariably chosen from the ranks of the legal profession's "upper branch", which comprised both serjeants at law and *apprentici ad legum* (apprentices of the law), the benchers and utter-barristers of the four London inns of court. By the Tudor period these crown law posts provided a recognised fast-track to high judicial

[1] The history of attorneys-general from early modern England to colonial and post-Federation Australia is a very large subject, to which Hanlon's 2008 thesis provides a comprehensive introduction, drawing in part on the work of Edwards (1964 & 1984); other useful surveys are provided by Holdsworth (1937), Melikan (1997), Lurie (2013) and Appleby (2016).

[2] Sainty, *Law Officers,* 41–2, 59–60. Holdsworth, *History,* vi. 458–72.

preferment, as well as considerable wealth; in 1581 a future chief justice was prepared to abandon his theoretically superior rank as serjeant at law to accept appointment to the more influential and lucrative position of solicitor general to Queen Elizabeth.[3]

One main difference between early holders of the office of Attorney General and their later successors in both England and the British overseas empire was that during the fifteenth, sixteenth, and early seventeenth centuries they were summoned (along with the judges) to serve as advisors or assistants in attendance on the infrequent meetings of the House of Lords, rather than elected to sit in the equally occasional sessions of the House of Commons. Indeed, the crown's law officers were by no means universally welcomed in parliament's lower house. In part this may have reflected a conservative preference to maintain their traditional association with the House of Lords. More significantly, growing tensions between rulers and parliament aroused fears that the crown's legal representatives, once admitted to the Commons, would operate as agents of monarch, ministers, and the royal court, rather than independent advocates for the interests of their constituents and upholders of parliament's liberties and privileges. Hence election of the newly appointed Attorney General Francis Bacon for one of two seats recently attached to his alma mater Cambridge University was seriously questioned in the opening sessions of James I's 1614 parliament. The matter came to be resolved only by muddled compromise, which permitted Bacon to remain a member of that short-lived assembly, but determined that no future Attorney General might follow his example.[4] Despite the formal inability of any parliament to bind its successors, not until the appointment of the long-serving member for Oxford University, Sir Heneage Finch, a future Lord Chancellor, as Charles II's Attorney General in 1680 did another crown law officer take his place in the Commons.[5] Mutterings about Finch's successor Francis North, later Chief Justice of Common Pleas, who became Attorney General in 1673, on the grounds of "incapacity of sitting as a member of that House", were to no avail.[6] Yet none of the next four attorneys general between 1675 and 1689 were MPs.

[3] Baker, *Introduction* (2019), 175–6; Baker, *Serjeants* (1984), 531, *s.v.* Popham, John.
[4] Jansson, *Proceedings*, 30, 54, 55, 57, 58.
[5] Sainty, *Law Officers*, 46; Yale, "Finch, Heneage"; cf. Holdsworth, History, vi. 465.
[6] Ibid., n 7, quoting North, *Lives*, i. 113–14.

Even after the Dutch invasion of 1688 and James II's flight into exile ushered in the Glorious Revolution, it was not axiomatic that attorneys general should hold a seat in the lower house. Sir Edward Ward, whose two years in post from 1693 were concluded by promotion to the judicial bench as Chief Baron of the Exchequer, was never an MP. Nor was Sir Edward Northey during his first six-year term as Attorney General from 1701 to 1707, although he did sit for a Devonshire constituency after re-appointment to that office in 1710. But from now on the Attorney General was always an MP. If he did not already hold a parliamentary seat, he was either supplied with one from a pocket borough controlled by a friend of the ministry, or allocated Treasury funds with which to buy his own way into the unreformed House of Commons.

Why did this substantial change in policy and practice reverse the earlier parliamentary exclusion of attorneys-general? Before James II was replaced by his son-in-law William and daughter Mary in 1688–1689, parliaments had met infrequently, their summoning and dismissal entirely at the monarch's discretion. After November 1685 James II ruled without any parliament for four years, as had his elder brother Charles II from January 1681 until his death in February 1685. But there were parliamentary sessions every year from 1689 onwards, and these sessions extended significantly longer than ever before. So, parliament now became a predictably regular institution of government, not just an occasional political event. The novel frequency and duration of parliamentary sittings signified a resolution of the constitutional conflicts of the preceding century, a decisive shift of political advantage from monarch to parliament.

Yet even before 1688–1689, kings and their ministers had derived considerable benefit from enlisting the forensic skills and oratorical abilities of crown law officers in support of government men and measures—precisely the reason why leading members of James I's second parliament had sought to exclude future attorneys-general. But after the post-1688 shift in the constitutional centre of gravity, the active presence of attorneys and solicitors general no longer aroused the same level of mistrust and suspicion in the lower house, whose members soon enjoyed a greater sense of institutional self-confidence, much less fearful of ambitious monarchs than their predecessors had been. Nor were either ministers in place or politicians eager for power less appreciative of the assistance that crown law officers could provide, whether by way of expert response on legal issues raised in debate, or by clarifying the finer details of complex legislation. In 1756 William Pitt, angling to become prime minister, was plied with

advice by fellow MPs urging the claims of Charles Pratt, the future Lord Camden, Chief Justice of Common Pleas, as prospective Attorney General. One wrote that "If you have the lead in the House of Commons, 'tis fit you should have at your elbow a lawyer of your own". Another claimed that with Pratt as Attorney General and another favoured candidate as solicitor general, "we shall out-lawyer" the opposition.[7]

Seventeen individual barristers became attorneys general, some for more than one term, under William III, Queen Mary, and Queen Anne (1689–1714), the last Stuart monarchs, and their early Hanoverian successors, George I and II (1714–1760). Only two were not promoted to the judicial bench after their term in office, and all but one of those promotions was to the upper tier of the judiciary, as chief justice of king's bench or common pleas, chief baron of the exchequer, and lord keeper or lord chancellor.[8] The exception goes to prove the rule. For Sir Robert Raymond's embarrassed inability to manage the final stage of the parliamentary bill of pains and penalties against his "old and intimate friend" Bishop Atterbury in 1724 led to his "abandon[ing] politics for the bench at the cost of becoming temporarily a mere puisne judge, an unprecedented step for an attorney general". However Raymond had only a year to wait before becoming one of three commissioners of the great seal on the resignation of Lord Chancellor Macclesfield, and two months later was promoted lord chief justice of king's bench.[9] Since most attorneys-general were clearly destined for the heights of their profession, it is scarcely surprising to find among this cohort a trio of titans, men who wielded major political influence as well as high judicial authority: John Lord Somers (1651–1716), Philip Yorke, first earl of Hardwicke (1690–1746), and William Murray, first earl of Mansfield (1705–1796).[10] In the two to three decades after 1688, when the rage of party ran very high, some attorney

[7] Pitt, *Correspondence,* i. 167, 179.

[8] Sainty, *Law Officers,* 47–8. Neither Sir Edward Northey nor Nicholas Lechmere, who succeeded him in 1718, secured a judgeship. Northey was removed from office shortly after expressing a view unfavourable to the king's claims over his son, the prince of Wales, and granted a pension of £1,500 p.a., equivalent to a puisne judge's salary: Handley, "Northey, Sir Edward". Beattie, *English Court*, 271; Foss, *Judges*, viii. 10. Lechmere, promoted by the Whig grandee Sunderland, seems to have been a victim of Walpole's return to power in April 1720, although he obtained a peerage the following year: Hanham, "Lechmere, Nicholas"; Sedgwick, "Lechmere, Nicholas".

[9] Cruickshanks, "Raymond, Sir Robert"; Lemmings, "Raymond, Robert".

[10] The standard biographies—by Sachse, Yorke, and Poser—are generally less rewarding than the briefer *ODNB* memoirs, by Handley, Peter D. G. Thomas, and Oldham respectively.

general's terms in office were very brief: a matter of weeks in the case of Sir Henry Pollexfen, who served William and Mary in that role from March 4 to May 6, 1689, and less than a year for Somers, who after appointment in May 1692 was made lord keeper in March 1693. Greater political calm and stability following the Hanoverian accession eventually made for more secure official tenure; thus, Philip Yorke became Attorney General in 1724 near the end of George I's reign, was re-appointed at George II's accession in 1727, and left the post only when promoted chief justices of king's bench in 1733. The longest-serving crown law officer during our period—and indeed down to the present day—was Sir Dudley Ryder, who remained in office from January 1737 until April 1754, a term of over 17 years. But length of service is not Ryder's sole claim to our attention in this context.

Dudley Ryder as Attorney General

Born in 1691, the younger son of a well-to-do linen London draper and his wife, a barrister's daughter, Ryder was brought up a protestant nonconformist, attending a dissenting academy before going on to the universities of Edinburgh and Leyden (hence avoiding the religious tests which sought to restrict attendance at the two English universities to conformist Anglicans). But rather than following various relatives into the ministry, he was admitted in 1713 to the Middle Temple, and called to the bar six years later. We know little of his early legal career, although it may have been fostered by Peter King, another dissenting tradesman's son of an earlier generation and a former Leyden student, who became chief justice of common pleas and then lord chancellor in 1725, when Ryder migrated to Lincoln's Inn, where Chancery sat between law terms. King also possibly brought Ryder to the attention of Walpole's administration, which secured his election to parliament in 1733 for Tiverton, a government-controlled Cornish borough, shortly followed by appointment as solicitor general. He must have given overall satisfaction in that office, since he began his long service as Attorney General four years later.[11]

Although he ended his life and career as lord chief justice of king's bench, Ryder's standing as a lawyer and public figure do not place him on an equal footing with Somers, Hardwicke, and Mansfield. He has

[11] David Lemmings, "Ryder, Sir Dudley", *ODNB*. William Marshall, Ryder's maternal grandfather, was called to the bar in 1653: Baildon, *Black Books,* 426.

accordingly attracted little attention from biographers or historians.[12] Yet contemporaries held his legal skills in high regard. The aged Whig grandee John Hervey, first earl of Bristol, writing to his son about a potential law suit in 1748, emphasised that "I must recommend your taking the attorney general's opinion and advice in every step you make … [he] is justly and universally esteemed the oracle of our law".[13] Walpole himself recommended Ryder to his political successor Henry Pelham as "very able and very honest" while the prime minister's son thought Ryder "A man of singular goodness and integrity, of the highest reputation in his profession". After his sudden and unexpected death even King George II recorded his "very good opinion of Ryder (who had served me very long and very well)".[14] The king had indeed approved his chief justice's long-held wish to be elevated to the peerage, two years after his judicial promotion; but Ryder died the night before the process was complete, and it took a further 20 years for the honour to be extended to his only son.

Besides being a skilful lawyer and on occasion a powerful orator, Ryder was a prolific writer, even if very little of what he wrote appeared in print during his lifetime. Indeed, his first book only came out on the eve of World War II, nearly two centuries after his death, in the form of selections from a student diary he had kept between June 1715 and December 1716, while preparing for call to the bar. Since then some odd fragments of his legal and personal writings have also appeared in print, but the great bulk of his writing remain unpublished to this day. The reason is simple: Ryder's surviving case notes, copies of correspondence, journals, and memoranda are written in shorthand.

According to William Matthews, who transcribed and edited the earliest surviving diary, this 918-page manuscript uses a distinctive shorthand system, derived from one developed in the mid-seventeenth century by Jeremiah Rich, and similar to those favoured by other eighteenth-century diarists, including Lord Chancellor King. An early modern English invention, shorthand was used by pious church- and chapel-goers to record the text of sermons, and by legal practitioners and law students to capture the details of oral in-court proceedings. Besides improving the speed and accuracy with which the spoken word could be recorded, shorthand

[12] Thus one passing reference demotes Ryder to solicitor general in 1754: Harris, *Politics and the Nation*, 212.

[13] Hervey, *Letter Books*, iii. 351–2.

[14] Quoted Sedgwick, "Ryder, Dudley".

offered a concise method for capturing transient actions, emotions, and thoughts, together with a degree of privacy, excluding access by anyone other than the writer or someone familiar with the same shorthand system.[15]

But besides nosy contemporaries, shorthand can also deter later historians, who even if they possess the requisite key, might still hesitate before the effort required to decipher multiple shorthand manuscripts. Ryder's surviving shorthand archive constitutes an exceptionally large and revelatory historical source, containing the estimated equivalent of some four million words.[16] Thanks however to Arthur T. Vanderbilt (1888–1957), an American legal academic who ended his career as chief justice of New Jersey, a small part of this vast textual horde is now available to historians. Vanderbilt planned a biography of William Murray, the later Lord Mansfield, who before replacing Ryder as lord chief justice of king's bench had served alongside him as solicitor general. Alerted to the existence of Ryder's shorthand manuscripts by Matthews's edition of the student diary, Vanderbilt was fortunate enough to locate someone on the spot who could both read and transcribe material of potential interest for his proposed book. So far, these transcripts have been used mainly by North American scholars, although David Lemmings also consulted them for his monograph on eighteenth-century barristers and English legal culture, as well as Ryder's brief life for the *Oxford Dictionary of Biography*.[17]

The Ryder papers provide a unique first-person perspective on the working life of a long-serving crown law officer; nothing comparable seems to exist for any of his English predecessors or successors. Intended neither for publication nor perusal by anyone except himself (and possibly his son), they constitute a running score sheet of his thoughts and actions, or at least those he thought worth committing to paper. Although like

[15] Matthews, *Diary*, vii–viii. 6. Henderson, "*Swifte and Secrete*," 1–13.

[16] Perrin, "Shorthand Diaries," n. xix. The Harrowby Mss Trust, Sandon Hall, Stafford, ST18 0BZ, England, holds the original Ryder archive. Copies of typewritten transcripts from some of the shorthand originals are at Sandon Hall and in the libraries of the University of Chicago and Wesleyan University. I am indebted to Amanda Nelson, Wesleyan University archivist, David Lemmings, and James Oldham for facilitating access to this material, as also to Michael Bosson, the Sandon Hall archivist, for much helpful information about the Perrin transcripts.

[17] Hay, "Property, Authority," 28; Hay, "Death Penalty," 2, 41 n. 11; Langbein, "Shaping," 1–136; Oldham, "Ryder and Murray," 157–73; Lemmings, *Professors*; Lemmings, "Ryder, Sir Dudley".

others from Dissenting families he chose to conform outwardly to the established church to be called to the bar, Ryder's Nonconformist upbringing made him a prime candidate for keeping a personal journal or diary as a medium of self-examination and self-fashioning, a practice long advocated by humanist educators and zealous protestants. At the start of his first surviving diary, he noted his plan to follow the example of his friend Robert Whatley of the Inner Temple (a barrister later turned clergyman),

> who told me the other day of a method he had taken for some time of keeping a diary. And I now intend to begin the same method. … I intend particularly to observe my own temper and state of mind as to my fitness and disposition for study, or the easiness or satisfaction it finds within itself and the particular cause of that or of the contrary uneasiness that often disturbs my mind. … I intend also to observe my own acts as to their goodness or badness. … I shall be able then to review any parts of my life, have the pleasure of it if it be well spent, if otherwise know how to mend it.[18]

The conscientious desire for self-improvement manifest in this prologue seems to have remained with the diarist all his life. At the age of 57, after some ten years as Attorney General, an entry for December 28, 1746, begins as follows:

> My defects are want of memory and resolution, the latter being in great measure the effect of the former. The former has many bad effects, and it is surprising that I have been able to rise so high in a profession that is generally supposed to require the contrary excellency. But in truth the defect don't appear so much in my profession as it does in conversation; the reason is because I come prepared to the former, but can seldom be in the latter. I would endeavour to rectify it as to the latter, and will [get] a plan that by keeping in mind may supply it.[19]

He goes on to list under numbered headings "the three ends of conversation", and how these may be obtained, by "1. acquiring the materials of conversation" and "2. The manner of using these materials". Such detailed logical analysis of everyday matters or problems is typical of Ryder's approach to all aspects of his life, at least as manifested in the

[18] Matthews, *Diary*, 29.

[19] "Diary of Sir Dudley Ryder, 1746–56," 10. A later entry (31, 23 September 1748) suggests that Ryder may have employed the "theatre of memory" mnemonic technique discussed by Yates, *Art of Memory*, chs 6–7.

transcriptions. His memoranda are often as much concerned with personal or family matters, including his large and growing accumulation of landed property and his state of health, as with the formal business of his office.[20]

Ryder's Work as Attorney General

The first point to make about Ryder's attorney generalship is that it was not a full-time position, despite involving a multitude of tasks undertaken on behalf of George II and the ministry of the day. For Ryder, like earlier and later attorneys-general in England and indeed Australia until at least the late nineteenth century, was entirely free to accept briefs from private clients. A lucrative private practice was one reason why after Ryder's death the office of Attorney General was estimated to be worth no less than £7000 per annum, or well over £1m in today's money values, placing its holder among the top 200 families in terms of income in England and Wales at the end of George II's reign.[21]

That Ryder was accustomed to keep many balls in the air at any one time is demonstrated by an entry dated September 29, 1746, written at his home in Tooting, Surrey, south of London. He first notes having that day despatched "several cases" to London by post, and received four "G[uineas] relating to proceedings in Scotland", while reminding himself to acquire a new Testament in Greek with a Latin-Greek dictionary, and to ask "about the estate of the Duke of Chand[os]". The entry continues:

> To think whenever I send or go to London what I have to be done there under the following heads, vizt.: what relating to clothes; books to send or to be sent; relating to Nat. [Ryder's only son], his books, his clothes, playthings; to physic; relating to the Chancellor [Hardwicke], the Pelhams [Prime Minister Henry and his brother Thomas, duke of Newcastle], Sharp [possibly William Sharp, clerk of the privy council], others, and business in the North [aftermath of the '45 Jacobite rising]; to Solicitor General [William Murray]; to the rebels [Jacobite prisoners from the '45]; to provisions, wine, fish; to cases or briefs; to my houses in Hackney; to the horses,

[20] It is not clear how closely the arrangement and titles of the transcripts follow the original shorthand manuscripts at Sandon Hall, the former having been "separated into long documents and grouped into categories before being bound": email from Michael Bosson, September 19, 2019.

[21] Melikan, "Mr Attorney General," 44; Lindert and Williamson, "England's Social Tables," 396–8.

> their hay, corn, saddles, bridles, harness; to the coach or chariot; to my will; to purchase of estate Littleshall; Hab[eas] Corp[us] Act [which remained suspended following the '45].

Ryder's official and public business was notably diverse. In 1746–1747 he was particularly concerned with the legal aftermath of the recent Jacobite rebellion and Prince Charles Stuart's abortive invasion, including decisions as to whether sufficient evidence existed to warrant prosecution of Jacobite prisoners, arrangements for trials, warrants for the execution of those condemned as traitors, management of their forfeited estates, and the drafting of legislation intended to disarm and "pacify" Scotland's highlands, including the abolition of heritable jurisdictions. These matters were complicated by differences between Scots and English law on the composition of juries, the descent of lands, and powers to arrest suspected rebels.[22] Another tricky question referred to Ryder from his Scottish equivalent, the Lord Advocate, concerned Lord Pitsligo, attainted under the name of Alexander Lord Pitsligo for raising a Jacobite regiment in 1745 (as he had also done in 1715), although his correct title was Alexander Lord Forbes of Pitsligo. Ryder maintained at some length that this misnomer did not void the attainder and consequent forfeiture of the Pitsligo estates, a position eventually upheld by the House of Lords, despite a contrary finding by Scotland's Court of Session in 1749.[23]

Britain's burgeoning empire and Continental military involvements also contributed to the variety of Ryder's official workload. His opinion was sought on colonial disputes, for example a "Reference from the Commissioners of Trade to self and Solicitor General of a letter from Mr Wentworth, governor of New Hampshire" who was in conflict with his representative assembly, also on complaints from the neutral Danes and Dutch over ships searched by the royal navy and privateers for enemy (French or Spanish) goods, and from the Levant Company about alleged damage to their trade caused by English privateering in the eastern Mediterranean.[24] Another major issue growing out of the war of the Austrian Succession was the controversial addition of all 12 common law judges to the "Lords Commissioners of Prize Appeals", in order to expedite the hearing of cases appealed from admiralty court judgments. Ryder

[22] "Legal and Political Diary of Sir Douglas Ryder, 1746–49," 1–32 *passim*.
[23] "Legal and Political Diary," 42–44; Pittock, "Forbes, Alexander".
[24] "Legal and Political Diary," 9, 19–20, 24–5, 32–3, 47–8, 49–51, 52, 55–6, 71.

and Murray were tasked by Hardwicke with overcoming opposition from at least half the judiciary to this administrative expedient, and eventually to draft legislation "to declare this commission good".[25] Other miscellaneous domestic matters on which he advised included quarantine measures against the spread of cattle disease, the "audacious behaviour" of smugglers in Sussex, miscellaneous riots and escapes of prisoners, and how the death of an archbishop might affect the Church of England's convocation.[26]

Ryder's self-recorded behaviour and sentiments suggest that he regarded his official role as entirely subject to the aspirations and policies of his political masters, the great men and ministers of the crown with whom he was in frequent contact: Prime Minister Robert Walpole, Walpole's successor Henry Pelham, Henry's brother the duke of Newcastle, and Lord Chancellor Hardwicke.[27] Ryder recounts several wide-ranging discussions with Walpole and Pelham traversing both foreign and domestic politics in general, and legal appointments in particular. On December 21, 1748, he noted receipt of Pelham's letter, enclosing another from Scotland's lord advocate, about the crown's rights over a rebel's landowner's estate. This followed a claim lodged before the Edinburgh Court of Session under a statute of the previous reign (1 Geo. I, st. 2, c. 20), whereby the forfeited lands of attainted Scottish subjects passed to the lairds from whom they held those lands, rather than to the crown. The lord advocate wanted to know whether to lodge an appeal against the court's interim judgment, and "Mr P desires me to give my opinion on this whole case not as Attorney General but as a friend and servant of the Crown". What exactly did Pelham mean or Ryder understand by this distinction?

Ryder tells us (or himself) that in response he "accordingly called on" the prime minister, to tell him that the legislation in question reached beyond the Jacobite rising of 1715 which called it into being, and thus "the present determination of the court of sessions [*sic*] was right as to that question, though I said I knew the Chancellor seemed to think formerly otherwise". While Hardwicke LC and Ryder AG were close

[25] Oldham, "Ryder and Murray," 161–4.

[26] "Legal and Political Diary," 3, 6, 9, 10, 16, 19, 22, 28, 36, 49, 52, 68, 71, 74.

[27] "The Later Diaries of Sir Dudley Ryder, Selected Transcriptions," 41, 44–5; "Diary of Sir Dudley Ryder," Part 4A, 2–3 (February 27, 1754), 9–10 (March 22, 1754), 12–13 (March 15, 1754).