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Borris M. Komar

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Text-Books As Authority in Anglo-American Law

SIR EDWARD COKE admonishes his brother lawyers to pay respectful attention to legal writers. "Observe reader your old books, for they are the fountains out of which these resolutions issue."¹ Since Coke's time judicial precedent as an authoritative source of English common law has occupied a commanding position in the Anglo-American legal system. The beginning of the twentieth century brought us, however, some signs of approaching rebellion. Thus Professor Gray wrote in 1909: "The enormous number of judicial decisions, and the rapidity in their rate of increase, has been so great as to indicate that the function of the jurist will rise more and more in importance in the Common Law, from the mere fact that the mass of material will become too great for anyone to cope with it all, and that it can be dealt with only by systematic study directed to particular parts."² Sir John Salmond, who twenty years ago expressed the view that "Professional opinion—the opinion of lawyers—is merely an historical, not a legal source of English law,"³ today is responsible for the following utterance: "It seems to me not improbable that the growing and intolerable burden of the mass of more or less discordant case law may result in some change in our practice. A time may be coming when the courts will look for their law in the authentic and constructive writings of great lawyers rather than in that wilderness of precedents to which they now resort."⁴ Such being the tendency of modern legal thought, an examination of the status of extra-judicial legal opinion in Anglo-American law, whether it be written or oral, expressed singly or by a body of lawyers, seems to be opportune.

FORMATION OF AUTHORITY

There is no rule whatever as to how and in what manner a law book becomes an authority. Lord Eldon, L.C., a hundred years ago, made what may be termed an attempt to formulate such a rule by laying down that "One who had held no judicial situation could not regularly be mentioned as an authority."⁵ When such writers as St. Germain, Serjeant Hawkins, Serjeant Williams, Dalton, Per-

¹ Spencer's Case (1583) 5 Co. Rep. 16 a, 17 b, 77 Eng. Rep. R. 72.

² Gray, *Nature and Sources of the Law*, 264.

³ Salmond, *Jurisprudence*, 104.

⁴ 22 *Columbia Law Review*, 207.

⁵ *Johnes v. Johnes* (1814) 3 Dow, 1, 15, 3 Eng. Rep. R. 969.

kins, Selden and many others are recalled whose authority has always been recognized by the courts though none of them ever held a "judicial situation," Lord Eldon's dictum must be rejected as unsupportable. It may be that when Lord Eldon uttered these words a passage of a judgment by one of his illustrious predecessors lingered in his mind. Lord Ellesmere, L.C., more than two hundred years earlier, said this:

"But if examples and arguments *a simili* doe faile, then it remaineth *recurrere ad rationem*; and what reason that ought to be and how to be understood, is to be considered: for it is said that *lex est ratio summa iubens ea quae facienda sunt et prohibens contraria*. So it must be the depth of reason not the light and shallow distempered reasons of common discourses walking in Powles, or at ordinaries in their feasting and drinking, drowned with drinke or blown away with a whiffe of tobacco. . . . And therefore it is not without cause that one of the greatest and best learned lawyers of our age (Hopperus, *De vera jurisprudentia*, at p. 118) and a private counsellor to one of the greatest monarchs of Europe, describeth those that should be interpreters of lawes by four special qualities, that is: (1) *Aetate graves*; (2) *Eruditione praestantes*; (3) *Usu rerum prudentes*; (4) *Publica auctoritate constituti*; so there must be gravitie, there must be learning, there must be experience and there must be authoritie: and if any one of these want they are not to be allowed to be interpreters of the lawe."⁶

We know of no instance where these rigid requirements were enforced or even demanded of a work or of an author prior to the admission into the shrine of legal authority. The first three are tacitly assumed⁷ and the fourth is sufficiently refuted above even if supposed to be supported by the weight of Lord Eldon's opinion. However, the probable origin of the latter idea may be traced historically to another source. The early works on the law of England were written by the judges. Some of these works we are certain were written by them; the others, truthfully or not, are attributed to them by legal tradition.⁸ They were written by persons

⁶ Case of Postnati (1608) 2 How. St. Tr. 659, 685, 686.

⁷ "For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana* (1900) 175 U. S. 677, 700, 44 L. Ed. 320, 20 Sup. Ct. Rep. 290.

⁸ Y. B. 35 Henry VI. 42, per Prisot, J.: "*C'est Statut fuit fait al' tepts le Roy E(dward) le premier, le q(ue)l Roy fuit appurpos dau mis tout en certain, et en escriptur, et comence de c(eo) faire livrs de et p(ar) plus sages hoës de Ley deins le Railme, s. Juges et auxy fist un livr deux ans, p(ro)ch ap(re)s le fesance de ce' statut en q(ue)l est reherce tout c(e') statut.*"

who were not only skilled in law, but were probably also the most educated men of their time, since nearly all of them were ecclesiastics—Hubert Walter, Bracton, Hengham, for example. Their works became authority in the English courts soon after they were written, for the reason given by Prisot, C.J., that they were written by "*plus sages homes de Ley deins le Realme s. Judges.*"⁹ Two or three opinions of this kind expressed by the subsequent judges might have given rise to the general professional belief that everything written by the judges is of authority. And, indeed, we see that Bracton, Hengham, Thornton, Fleta, Britton—all are in the course of time authorities. But more than that—they were practically the only works on law. Consequently, we could get a step further in tracing the origin of Lord Eldon's generalization, e.g., speaking for mediaeval times he might have correctly said that every work on law can be quoted as authority. Thus, such a book as *Doctor and Student* edged its way into notoriety. The Renaissance which began in England in the early sixteenth century, with its great antiquarian activity, might have brought to the front stage even so obscure a book as the *Mirror of Justices*.

However, all this can do no more than explain Eldon's statement. It will not help us to discover how books really became authorities. Two factors must be considered: First, the usage and opinion of the profession; and, second, the judicial approval of that opinion expressed from the Bench.

The influence of professional opinion in making a book an authority is shown in the following passage by Plunier, M.R., who, speaking of Lord Redesdale, said: ". . . whose knowledge and experience enabled him, fifty years ago, to reduce the whole subject to a system, with such universally acknowledged learning, accuracy, and discrimination, as to have been ever since received by the whole profession as an authoritative standard and guide."¹⁰ And it is borne out by the words attributed to Gibbs, C.J.: "He is inclined to grant a rule nisi, because two books of high estimation in the profession, but not at present to be cited as authority, state . . ."¹¹ And Shaw, C.J.: "As this is an unwritten law, we must seek for the evidence of it in judicial records, precedents and decisions, and those digests, treatises and commentaries, of learned and experienced

⁹ Y. B. 35 Henry VI. 42, *supra*, n. 8.

¹⁰ *Cholmondeley v. Clinton* (1820) 2 Jac. & W. 1, 151, 37 Eng. Rep. R. 527.

¹¹ *Taylor v. Curtis* (1816) 6 Taunt. 608, 610, 128 Eng. Rep. R. 1172.

men, which have acquired respect and confidence by long usage and general consent"¹²

Doubtless judicial confirmation was a very important step in the ladder of authority. Lawrence, J., referring to *Doctrina Placitandi* as a book of great authority, adds by way of explanation for so calling it: "which was often quoted by Lord Chief Justice Willes."¹³

Yet of still greater importance is the personal esteem and the fame of legal learning and ability possessed by the author of a work: "I am afraid we should get rid of a good deal of what is considered law in Westminster Hall if what Lord Coke says without authority is not law. He was one of the most eminent lawyers that ever presided as a judge in any court of justice, and what is said by such a person is good evidence of what the law is"¹⁴ Another illustration of this element is supplied by the words of Lord Kenyon, C.J.: "He [Comyns, C.B.] has not, indeed, cited any authority for this opinion; but his opinion alone is of great authority; since he was considered by his contemporaries as the most able lawyer in Westminster Hall."¹⁵

The necessity of the judicial approval as a final stage prior to the recognition of the work's authority is demonstrated by these two excerpts: "We have seen that the evidences of the unwritten laws of England and Rome were the decisions of their courts and the opinions of men learned in the laws, in the language of the civil lawyers, *responsa prudentum*. The opinions of such men, says Mr. Butler (*Horae Juridicae Subseivae*, p. 43) were highly respected, but till they were ratified by a judicial decision, they had no other weight, than what they derived from the degree of public estimation in which the persons who delivered them were held, the weakest evidence of the law hitherto recognized by law writers"¹⁶ And per Eustis, C.J.: "As no adjudged case has been adduced pertinent to the subject and as the true rule in this case which a court of equity in Mississippi would be guided by, rests entirely on doctrine, we are bound to notice what we found laid down in approved works and which is applicable in principle to the case under consideration."¹⁷

¹² Commonwealth v. York (1845) 9 Met. (Mass.) 93, 110, 43 Am. Dec. 373.

¹³ Lee v. Clarke (1802) 2 East, 333, 340, 102 Eng. Rep. R. 396.

¹⁴ Garland v. Jekyll (1824) 2 Bing. 273, 296, 130 Eng. Rep. R. 311.

¹⁵ Pasley v. Freeman (1789) 3 Durnf. & E. 51, 63, 3 Term Rep. 51, 1 Revised Rep. 634.

¹⁶ Marguerite v. Chouteau (1834) 3 Mo. 540, 562, per Tompkins, J.

¹⁷ Young v. Templeton (1849) 4 La. An. 254, 257, 22 La. Ann. 219.

The usual course a work has to take in its progress to the goal of authority seems to be this: first of all the work is recognized as correct in its statement of law, skillful in the exposition of legal principles, exact in quotation of precedents; then in time it becomes generally recognized as a practical and reliable guide by lawyers—finally through judicial commission or omission it becomes an authority. Thus Mr. Hawkins, a member of the English Bar, published in 1863 a book on Interpretation of Wills. Three years later it is referred to in this wise: "I do not think that any of the cases contained in the valuable repertory of Mr. Hawkins would help us very much."¹⁸ From "valuable" the work becomes "well known": "I am now going to read a few words from Mr. Hawkins' well known book on Wills, where he states the results of the cases with his usual accuracy. . . ."¹⁹ We notice that ten years' usage also proves it to be accurate. Then the views expressed by so valuable and well known a book are alluded to with respect. "Then I find the rule is laid down in Mr. Hawkins' well known and valuable book, where he says . . ."²⁰ So he obviously takes the same views as have been taken by the authorities. And at the death of the author, thirty years later, the book becomes an authority: "I disposed of most of the questions arising in this case before the last vacation. Upon the remaining one I took time to consider, out of deference to the argument of Mr. Vaughan Hawkins, in whose lamented decease, pending my judgment, we all deplore the loss of a most accurate writer and pre-eminent authority upon that branch of the law with which his name in the minds of the profession will always be specially associated by the title of that model text-book, Hawkins on the Construction of Wills."²¹

Another interesting though again somewhat modern illustration is derived from the history of the rise to authority of the works of Lord St. Leonards. In 1808 Mr. Sugden has published a Treatise on Powers. In 1811 Manners, L.C., refers to it in the course of the judgment thus: "Mr. Sugden, whose Treatise on Powers is a very intelligent and useful publication, states the principle, in my opinion, very correctly."²² This is endorsed by the court across the Atlantic a little later: "The most accurate writers who have discussed this

¹⁸ *Gaskin v. Rogers* (1866) L. R. 2 Eq. 284, 291.

¹⁹ *Newman v. Piercy* (1876) 4 Ch. D. 41, 47, 48, 46 L. J. Ch. 36, 35 L. T. R. (N. S.) 461.

²⁰ *Rogers v. Mutch* (1878) 10 Ch. D. 25, 27, 48 L. J. Ch. 133.

²¹ *In re Herring* [1908] 2 Ch. 493, 495, 77 L. J. Ch. 665, 99 L. T. R. 144, 24 T. L. R. 747.

²² *Palmer v. Wheeler* (1811) 2 Ball. & B. 18, 30, 12 Revised Rep. 60.

subject, such as Sugden"²³ Another work of Mr. Sugden is also praised in America: " And Mr. Sugden in his *Law of Vendors*, a work of deep research and accurate discrimination"²⁴ While Park, J., ten years later chose to refer to the former treatise in somewhat different words: "But I am staggered by what is said in a book of great authority [Sugden on Powers], and to which I think the professional public are much indebted, that if this objection were to prevail, it would invalidate nine-tenths of all leases in the kingdom granted under powers."²⁵ Now, Mr. Sugden then held no judicial office. Next year he became a bencher of Lincoln's Inn; he took the Great Seal of Ireland in 1834 for the first time and again in 1845. It was not until 1852 that he became Lord Chancellor of England. However, such rapid success and recognition of a book's authority are exceptional.

There was said to be a rule that no book is to be cited as authority if the author of it is alive. An automatic period, though of somewhat uncertain duration, is therefore provided fixing when a book, if at all, could become an authority. Gibbs, C.J., referring at about the same period to the books on marine insurance written by Park, Abbott (both being then judges on the Bench) and Serjeant Marshall, is reported to have expressed this opinion: " (I am) inclined to grant a rule nisi, because two books of high estimation in the profession, but not at present to be cited as authority, state, that damage is general average. They cite no authority. Another treatise also by an author of high character, observes"²⁶ And in *Regina v. Ion*²⁷ the following passage occurred: "Metcalf: In the 11th edition of a work, formerly edited by one of your Lordships (Jervis, C.J.) Archbald's *Criminal Pleadings* by Welsby, Mr. Welsby, who may be cited as an authority, comments on the words utter or publish. Pollock, C.B.: Not yet an authority. Metcalfe: It is no doubt a rule that a writer of law is not to be considered an authority in his lifetime. The only exception to the rule, perhaps, is the case of Justice Story. Coleridge, J.: Story is dead." And many years earlier the House of Lords expressed a similar view per Lord Lyndhurst, L.C.: "However eminent a living author may be, we cannot act on his opinions, but we attend to the authorities to

²³ *Bradish v. Gibbs* (1818) 3 Johns. Ch. 523, 547, 1 N. Y. Ch. 704.

²⁴ *Richter v. Selin* (1822) 8 Serg. & Raw. (Penn.) 425, 440, per Duncan, J.

²⁵ *Smith v. Doe dem. Earl of Jersey* (1821) 2 Brod. & B. 473, 535, 129 Eng. Rep. R. 1048.

²⁶ *Taylor v. Curtis* (1816) 6 Taunt. 608, 610, 123 Eng. Rep. R. 1172.

²⁷ (1852) 2 Den. C. C. 475, 488.

which he refers us."²⁸ The rule received a full recognition in the second half of the last century in the judgment of Kekewich, J.,²⁹ and finally it has been definitely approved in the Court of Appeal only a few years ago by Vaughan Williams, L.J., in *Greenlands v. Wilmshurst*:³⁰ "No doubt Mr. Odgers's book is a most admirable work which we all use, but I think, we ought in this court still to maintain the old idea that counsel are not entitled to quote living authors as authorities for a proposition they are putting forward, but they may adopt the authors' statements as part of their argument."

Though the rule as thus laid down is clear and unequivocal, though it is as ancient as any rule of the law of England, though it had never been disallowed or doubted, yet in practice it was many times forgotten and works were recognized or at least spoken of as authorities while their authors lived. This practice has grown up since the commencement of the last century and, we regret to state, continues into our own day. The rule is certainly not without value. It is a safeguard against hasty recognition of a work's authority and as such is most salutary and praiseworthy. Besides, a work cannot be a better authority than its writer. Suppose the latter has changed his mind upon some points. What, then, are we to take as authority—the opinion expressed in a work or the later one of its author? What is the position of the judge upon whom a living authority is pressed? He, a judge, must base his opinion as a rule upon an authority, but a living person often not in a judicial situation need not. This state of things is full of dangers and difficulties and must be discouraged at all costs.

The earliest and most obnoxious of references to living writers as authorities is that of Plumer, M.R., to Lord Redesdale (died 1830) in 1820. It commences with a complete disregard of the rule by blending together writers living and dead: "To no authority living or dead," and ends up with this eulogy "*Viventi tibi praesentes largimur honores.*"³¹ Next comes the reference to Sugden on Powers quoted above.³² Abbott, C.J., regarded Sellon's (died 1835) *Practice* as authority in 1824.³³ Alexander, L.C.B., so termed Mit-

²⁸ *Knight v. Boughton* (1844) 11 Cl. & Fin. 513, 539, 8 Eng. Rep. R. 1195.

²⁹ *Union Bank v. Munster* (1887) 37 Ch. D. 51, 54, 57 L. J. Ch. 124, 57 L. T. R. 877.

³⁰ (1913) 29 T. L. R. 685, 687.

³¹ *Cholmondeley v. Clinton* (1820) 2 Jac. & W. 1, 151, 37 Eng. Rep. R. 527.

³² See p. 401. Sugden died in 1875.

³³ *Patterson v. Eades* (1824) 3 B. & C. 550, 551, 107 Eng. Rep. R. 838.

ford's (died 1830) Pleadings in 1827.³⁴ Vaughan, B., Tidd's (died 1847) Practice in 1828;³⁵ Walker, J., Redfield (died 1876) on Wills in 1867;³⁶ Martin, B., Tomlin's (died 1870) Law Dictionary in 1869;³⁷ Byles, J., Gray (died 1875) on Costs in 1872;³⁸ Lord Campbell, F. Walter (died 1879) on Canon Law in 1844;³⁹ Brett, M.R., Blackburn (died 1896) on Sale in 1883;⁴⁰ Brinker, J., Cooley (died 1898) on Constitutional Limitations in 1886;⁴¹ Alverstone, C.J., Sir Edward Clarke on Extradition in 1908;⁴² and finally, Darling, J., cited Dicey on Conflict of Laws in 1915.⁴³ Are these works to be deemed of authority? Most of them certainly are now. The rule as to citation is not a rule of the substantive law but a mere rule of procedure. To cite again Vaughan Williams, L.J., "counsel are not entitled to quote living authors as authorities."⁴⁴ However undesirable such premature glorification may be, it does not impair the right of the work to be recognized as an authority in its proper time, as Cicero said *suo anno*, and that is after its author's death.

The manner in which Lord Justice Vaughan Williams refers to this rule leaves no room for doubt that though protesting against declaring any living writer as being of authority he readily contemplates a possibility of such a work becoming an authority at some future time. Yet as recently as the second half of the nineteenth century a doctrine has grown up to the effect that no book, even if written by a person holding a "judicial situation," is capable of becoming an authority. Criticisms by Bentham of the works of Blackstone⁴⁵ were not the least important factor in its appearance. If we couple with this the effect of the growing number of reports, offering as they do a store of judicially considered and solemnly declared opinions and the full development and recognition of the doctrine of judicial precedent,⁴⁶ we shall probably not be far from

³⁴ Atty. Gen. v. Brooksbank (1827) 2 Y. & J. 37, 41, 148 Eng. Rep. R. 821.

³⁵ Blakewey v. Edwards (1828) 2 Y. & J. 559, 562, 148 Eng. Rep. R. 1040.

³⁶ Waldo v. Cummings (1867) 45 Ill. 421, 428.

³⁷ Reg. v. Ritson (1869) L. R. 1 C. C. R. 200, 203.

³⁸ Republic of Peru v. Weguelin (1872) L. R. 7 C. P. 352, 355.

³⁹ Reg. v. Millis (1843) 10 Cl. & Fin. 534, 752, 8 Eng. Rep. R. 844.

⁴⁰ Cassaboglou v. Gibb (1883) 11 Q. B. D. 797, 803, 52 L. J. Q. B. 538, 48 L. T. R. 850.

⁴¹ Browning v. Estate of Browning (1886) 3 N. M. 659, 672, 673.

⁴² Rex v. Daye [1908] 2 K. B. 333, 338, 77 L. J. K. B. 659, 21 Cox C. C. 659.

⁴³ Rex v. Albany [1915] 3 K. B. 716, 726.

⁴⁴ Greenlands v. Wilmhurst (1913) 29 T. L. R. 685, 687.

⁴⁵ Blackstone, Fragment on Government, Preface.

⁴⁶ Compare: "On the subject of domicile there is so little to be found in our law, that we are obliged to resort to the writings of foreign jurists for the decision of most of the questions that arise concerning it." Pottinger v. Whightman (1842) 3 Mer. 67, 79, 36 Eng. Rep. R. 26.

the right causes that we have contributed to the attempt to dry up what has been and still is an additional well out of which was drawn so much of the present law of England. Sir Frederick Pollock thinks that the last work of authority is that of Michael Foster on Crown Law published in 1762, but does not think that Blackstone's work is an authority.⁴⁷ However, we venture to differ from him and think that we have sufficient proof that Blackstone's Commentaries are authority⁴⁸ and that the latest work recognized as authority is Hawkins on Interpretation of Wills.⁴⁹

However, apart from these considerations, a sentiment against recognition of modern text-books as authorities has been apparently growing up among the judges in England, until it has been expressed somewhat forcibly and conclusively by Lord Justice Fry in the preface to the second edition of his *Treatise on Specific Performance* published in 1881. Six years afterwards this opinion has been referred to by Kekewich, J., thus:

"The argument, however, has been almost entirely rested upon one passage in the work of Lord Justice Fry on *Specific Performance*. It is to my mind much to be regretted, and it is a regret which I believe every judge on the bench shares that text books are more and more quoted in court—I mean of course text books of living authors—and some judges have gone so far as to say that they shall not be quoted. In the preface to this very book we have a warning against it by the learned author himself. I cannot forbear from quoting the words: 'There is one notion often expressed with regard to works written or revised by authors on the bench, which seems to me in part at least erroneous, the notion, I mean, that they possess a quasi-judicial authority,' and then he gives a reason which must commend itself to all students why that notion is erroneous."⁵⁰

The reason alluded to is: "It is hardly enough remembered how different are the circumstances under which a book is written and a judgment pronounced, or how much the weight and value of the latter are due to the discussions at the bar which precede the judgment."

The manner in which Mr. Justice Kekewich states his opinion is most unsatisfactory. If he meant to confine his observations to the works of living authors only, then he need not have quoted Lord Justice Fry's words—they are undoubtedly of much wider

⁴⁷ Pollock, *Jurisprudence*, 236.

⁴⁸ *Atty. Gen. v. Eardley* (1820) Dan. 271, 292, 8 Price, 39, 146 Eng. Rep. R. 1129; *State v. Chandler* (1837) 2 Harr. (Del.) 553, 556.

⁴⁹ *In re Herring* [1908] 2 Ch. 493, 495.

⁵⁰ *Union Bank v. Munster* (1887) 37 Ch. D. 51, 54.

scope and include modern works written by judges whether they be living or not. Nor do we think that it is possible that Mr. Justice Kekewich meant to imply that the mere fact that a work is cited or permitted to be cited is an evidence of its authority. It should have been clear to him that Fry spoke of the doctrine of the text-book's authority while Justice Kekewich evidently had in his mind the rule about citation. Again, if we would take the words of Kekewich, J., as relating to two separate matters—the doctrine of authority and the rule of citation—we cannot explain away the reference in the second half of the passage: "In the preface to this very book we have a warning against it"—"it" evidently standing for "the citation."

That being the case, we find the opinion of Lord Justice Fry is not completely supported by any judicial authority. When Mr. Justice Kekewich cited that opinion, it is abundantly clear that he meant to restrict it to the works of living authors and no further. So that on the evidence thus far supplied we cannot but arrive at the conclusion that an attempt to put a stop to this source of the law of England failed.

But looking upon the words of Fry, L.J., from a wider point of view we must admit that though extra-judicial, they raise a very important issue. Is it true that the discussion at the Bar is such an important factor of the judgment as to make the judgment more authoritative than the words of the same person expressed in a book? That seems doubtful. After all, what is the nature of discussion at the Bar? At its best, an elucidation of legal principles by means of mutual interchange of agreeing or more usually conflicting opinions. At its worst, a perversion of facts and law to suit the particular case of a particular client. The latter instance calls for no comment. The former has a great drawback because the expression of opinion and the interchange of ideas is by words of mouth heated by dispute, tainted by professional interest in the issue at stake, prompted often by an oratorical repartee or suggested by a case wrongly decided. Can this be favorably compared with an opinion expressed in a written form after full and mature consideration of the matter in the solitude of one's working-room? This opinion when published stands forth before the entire world-wide body of professional experts, may be criticised by them as to its substance, its form, its scope, correctness, the advisability of following it in future on proper occasions—finally, its scientific or practical value. The opinion of these critics would not be expressed in a

haphazard or previously prejudiced manner, but similarly in a written form after due deliberation. We are at a loss to see why the opinion of the two members of the Bar, tainted by partiality about the matter they are defending in a court, should be preferred to the criticism of the whole profession, not so tainted, or why the opinion of a judge expressed under the influence of these two legal advisers should be better than the one expressed after hearing the criticisms of the most or at least the best representatives of the profession.

Again, the circumstances in which judgment is pronounced are said to be different from those in which a book is written, and so they are. We suppose that Fry, L.J., wished to point out the grave responsibility and the solemn duty that lie on a judge when he is discharging publicly his judicial functions. But it is forgotten that a judge, however experienced, painstaking and cautious he may be, is still a human being and as such equally, though probably not so readily, influenced by the surrounding circumstances. Take into consideration the behavior of the witnesses and the impression produced by them upon the judge; take the facts of a case—some may excite pity in the breast of a judge, some revulsion—will these pass without effect upon his mind? Take the often hardly noticeable, but undeniable charm and influence exercised by counsel's manners, speeches and conduct of his case. All these causes tend to diminish the exactness and accuracy of the judge's decision, and perhaps dull his sense of responsibility and duty.⁵¹ In the tranquillity of his chamber, a writer is free from these influences. We submit that Sir E. Fry's opinion of the favorable effect on the judgment of the circumstances in which it is given is much exaggerated. Granted that the ability of authors is equal, an opinion in a book should be preferred to a judicial one. To quote Lord Stowell: "These, therefore, are opinions which it would be highly desirable to obtain for those who give them were persons who have delivered their doctrines on general principles, without looking to particular cases, and without influence of any personal nature."⁵² "I should cite Foxcroft's and Del Heith's cases to shew that the law upon such a

⁵¹ Compare: "They then cited and relied on *Baker v. Bolton* on which I have commented. They then cite a case in which the contrary was assumed to be the law by all parties and the Court, but supposed it may have passed *sub silentio*. I cannot be satisfied with this decision. The reasoning seems wrong, and the authority relied on insufficient." *Osborn v. Gillett* (1875) L. R. 8 Ex. 88, 98, per Bramwell, B.

⁵² *Lindo v. Belisario* (1795) 1 Hag. Con. 216, 239, 161 Eng. Rep. R. 530.

question may be best learned from text writers of authority, calmly and deliberately and impartially speaking the general opinion of the legal profession at the time when they were published."⁵³

However, we might say in justice to Fry, L.J., that he probably did not mean to go so far as to say that no work shall acquire an authority in the future, but that a work at the very outset should not be taken as quasi-judicial, especially if it is by a living author. Such interpretation would be both in conformity with the known rules of the law, the remarks of Kekewich, J., and the historical development of the doctrine we are now considering.

After all that has been said, it may not be impertinent to ask what is the future of text-books as a source of Anglo-American law? Will the text-writers continue to earn the respect and esteem of the legal profession in its both branches—on the Bench and at the Bar—in such degree as to make it possible for them to arrive finally at the state when they shall be deemed an authority? Are modern conditions conducive to the favorable and affirmative answer? We venture to suggest that they are. And this opinion is mainly based upon a firm belief that it is an utter impossibility to expect a modern law practitioner to keep in touch with all the chances of judicial opinion and to let him try to wade unguided through the maze of our ever-increasing multitude of reports on court decisions. Some additional reasons are supplied by Senator Spencer of New York in the following extract: "The experience of ages demonstrates that the law can never be rendered clear, intelligible and permanent, without the reasons for its rules are understood, its leading principles settled, and the cases which arise under it, founded upon those principles. In many of the branches of the law, we are indebted for the advances towards certainty which have been made, to the efforts of individuals to reduce the confused mass of cases into system, and extract from them the principles which can alone guide us in the decision of new questions as they arise."⁵⁴ And we will conclude this chapter with a quotation out of the judgment by Porter, J., of Louisiana:

"This jurisprudence, or common law, in some nations, is found in the decrees of their courts; in others, it is furnished by private individuals, eminent for their learning and integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating,

⁵³ Reg. v. Millis (1843) 10 Cl. & Fin. 534, 761, 8 Eng. Rep. R. 844.

⁵⁴ Rensselaer Glass Factory v. Reid (1825) 5 Cow. (N. Y. Com. L.) 587, 608.

as it were, for their country, and enforcing their legislation by the most noble of all means: that of reason alone. After a long series of years, it is sometimes difficult to say, whether these opinions and judgments were originally the effect of principles previously existing in society, or whether they were the cause of the doctrines, which all men at last recognize. But whether the one, or the other, when acquiesced in for ages, their force and effect cannot be distinguished from statutory law. No civilized nation has been without such a system. None, it is believed, can do without it; and every attempt to expel it, only causes it to return with increased strength on those, who are so sanguine as to think it may be dispensed with."⁵⁵

NATURE OF AUTHORITY

The nature of the authority enjoyed by a legal work is better understood when considered in connection with the purposes for which that authority is invoked. In nine cases out of ten that authority is invoked for the purpose of showing what the common law, the law-merchant, and other branches of the law, was at some particular period, or what was the opinion of lawyers with regard to some statute at that period. In other words, the purpose of reference is mostly evidential. As a consequence there is a natural desire that the witness be as reliable as possible. As a further consequence the authority becomes, not that of a work taken on its merits, but that of the author—in a word, it becomes a personal authority, an authority attached to an individual, but not to his work. It is very seldom indeed that we get a direct reference to a work as an authority.⁵⁶ Generally we find an exalted panegyric to the author of it and a declaration that his opinion is not to be disputed. As a rule, we do not get a discussion of a work based on the merits or demerits of the book, but a dissertation on the author's greatness as an authority—in other words, his respectability as a witness with regard to the matter he is speaking of.

Thus, in *Cock v. Ilnours*⁵⁷ the question in issue was whether the release to one trespasser should or should not be available to his companion. "Sir Henry Hobart, that honourable judge and great sage of the law, and those reverend and learned judges, Warburton, Winch, and Nichols, his companions, gave judgment according to the opinion of our author, and openly said, that they owed so great

⁵⁵ *Saul v. His Creditors* (1827) 1 La. 302, 5 Mart. (N. S.) 569, 582, 16 Am. Dec. 212.

⁵⁶ *Smith v. Doe* (1821) 2 Brod. & B. 473, 535, 129 Eng. Rep. R. 1048.

⁵⁷ (1605) Co. Litt., Coke's Preface, p. XXXVII. *Semble, Cocke v. Jennor* (1724) Hob. 66, 80 Eng. Rep. R. 214.

reverence to Littleton, as they would not have his case disputed or questioned."

And a hundred and fifty years later we find Willes, C.J., speaking thus: "I have collected these rules and maxims from Littleton, Plowden, Coke, Hobart, and Finch, persons of the greatest authority."⁵⁸ And: ". . . they are all founded on Co. Lit. 10 a., where he says peremptorily that a fine is a feoffment of record. He was so very great a man that unfortunately all his dicta (though some of them when they come to be thoroughly examined by those who are *nullius addicti jurare in verba magistri* will be found not to be right) have passed for law ever since."⁵⁹ And about a hundred years thence Best, C.J., declared that: "Bracton wrote on the law of England, and the situation which he filled, namely, that of Chief Justice in the reign of Henry the Third, gives great authority to his writings."⁶⁰

Three years later Lord Wynford has chosen to express his opinion thus: "We have been referred to a book which is a high authority on these matters, I mean Mr. Justice Doddridge's book on the Peerage. . . . As far as the opinion of Mr. Doddridge goes with respect to the present case it is conclusive."⁶¹

And in our own day Lord Shaw of Dunfermline has declared with regard to the report of the Commissioners appointed to inquire into the practice and jurisdiction of the ecclesiastical courts in 1832 that: "The personnel of the Commission gives this unanimous report the highest authority."⁶²

American judges expressed themselves on similar occasions to the same effect: "I will, in the first instance, cite the rule as laid down by Sir Michael Foster, an eminent judge of the highest court of criminal jurisdiction, many years before our revolution, when the people of Massachusetts were under English jurisdiction. He was also a most acute, discriminating, and most exact writer, whose chapter on the law of homicide has been a work of standard authority on that subject for a century."⁶³ And another: "To the lawyer and scholar the names of Sir William Blackstone and Sir William Jones, on the one side of the ocean, and Chancellor Kent

⁵⁸ *Parkhurst v. Smith* (1741) Willes, 327, 332, 125 Eng. Rep. R. 1197.

⁵⁹ *Parkhurst v. Smith* (1741) Willes, 327, 341.

⁶⁰ *Gifford v. Yarborough* (1828) 5 Bing. 163, 167, 2 Bli. (N. S.) 147, 1 Dow & Cl. 178, 130 Eng. Rep. R. 1023.

⁶¹ *Earl of Devon's Case* (1831) 2 Dow & Cl. 200, 207, 5 Bli. (N. S.) 220, 6 Eng. Rep. R. 703.

⁶² *Scott v. Scott* [1913] A. C. 417, 471, 82 L. J. P. 74.

⁶³ *Commonwealth v. York* (1845) 9 Met. (Mass.) 93, 111, 43 Am. Dec. 373.

and Justice Story on this, will be sufficient for my purpose in this case, until some author, or some case is cited, showing clearly that a contrary doctrine should obtain"⁶⁴

Again, the legal maxims and extra-judicial opinions of judges point to the same conclusion. And first let it be that of Sir Edward Coke: "*Novitatem, eo quod id maxime laborandum arbitror ut novas quascunque interpretatiunculas et privatas opiniones (quae si ad amussim nostrorum librorum et antiquorum exempla applicentur nequaquam quadrant) periculosissimas et studiis nostris indignissimas evitem: nam periculosum existimo quod bonorum virorum non comprobatur exemplo.*"⁶⁵ The Earl of Hardwicke has practically repeated the same thing: "I think, therefore, that things from reverend hands deserve to be treated with reverence."⁶⁶

The opinion of the Bar evidently does not differ in this respect from that of the Bench. Serjeant Lens is reported to have said *arguendo* when speaking of the rule as to the citation of works of living authors: "*Laudari nihil est nisi ab laudato vivo.*"⁶⁷

Again, if the authority pertains not to a work, but to a particular person, and he has expressed several different views on the same point we can take any of them as our authority. This may not be done at random. The rejection of the opposed view must be based on some substantial ground, e.g., the fact that one of his works has an inherent defect, for example, is unrevised or not intended for publication. Thus Foster, J., rejected a rule in Hale's Summary of the Pleas of the Crown in favor of another in his History of these Pleas. "The same rule is laid down in Hale's Summary of the Pleas of the Crown; a very faulty incorrect piece, never revised by him, nor intended for the press. But as his lordship in his History of the Pleas of the Crown justifieth the contrary practice, his authority is clearly on the other side of the question."⁶⁸

This personal authority is very great and its nature becomes more apparent when we see it extended to such things as marginal notes and references—surely, writings that, generally speaking, are absolutely incapable of any scientific value per se. We think that in this respect the following passage out of Lord Hardwicke's judgment is so instructive that we offer no apology for inserting it *in toto*:

⁶⁴ Wilkins v. Earle (1865) 26 N. Y. Sup. Ct. Rep. 352, 385, per McCunn, J.

⁶⁵ 7 Co. "To the reader."

⁶⁶ Buckinghamshire v. Drury (1761) 2 Eden. 60, 64, 3 Bro. P. C. 492, 28 Eng. Rep. R. 818.

⁶⁷ Taylor v. Curtis (1816) 6 Taunt. 608, 610, 2 Marsh. 309, 128 Eng. Rep. R. 1172.

⁶⁸ Rex v. Kinlochs (1746) Foster, 16, 32.

"I rather think they [authorities] are lights upon the statute. One of those lights was what is mentioned by Hale in the margin of the 1st Inst. which was treated with great disregard [here his Lordship pronounced a high encomium on Lord Hale, and said he had always been looked upon as one of the greatest luminaries of the law], and though it was called a private note, his MS authority has been always highly esteemed; the original was given by Lord Hale to the brother . . . of Phillips Gybbon . . . who lent it to me when I was young at the bar; and, in the original book, cases are cited in the margin under Lord Hale's own hand, written in his strongest time, when he was judge of the Common Pleas, before the Restoration. Lord Chief Justice Holt, who was as great and able a judge as ever sat in the King's Bench (except Hale), when he doubted of points of law has borrowed manuscripts of Hale's family to decide his opinion."⁶⁹

And he concludes here with the expression of opinion quoted above.⁷⁰

A wonder may be expressed how Fleta and Britton, works of undoubtedly obscure origin, obtained that distinction. The answer is that they may have not been anonymous works to their contemporaries, or to the judges that followed them. We have quoted already Prisot, C.J., to show that he positively asserted that the works written in Edward I's time were "*par et de Judges*,"⁷¹ and probably their names were so known that the reporter did not think it necessary to put them down or the Chief Justice to enumerate. An illustration may be taken from a time much nearer to us. To many of us the "Equity Cases Abridged" is an anonymous publication. It was not so to Willes, C.J., nor was the case which he quotes without proper parentage.⁷²

Opinions are sometimes expressed that modern authorities (Blackstone, Dalton, Hawkins) are not authorities in a sense in which Bracton, Littleton and "even Coke" are.⁷³ The authors below

⁶⁹ *Buckinghamshire v. Drury* (1761) 2 Eden. 60, 63, 3 Bro. P. C. 492, 28 Eng. Rep. R. 818.

⁷⁰ *Supra*, at p. 411.

⁷¹ Y. B. 35 Henry VI. 40.

⁷² ". . . and it is directly contrary to the case of *Amos v. Horner*, Eq. Cas. Abr. 112, Mich. 1699. . . . Upon this I inquired of the author of the book, who told me that he had this case from a person of a very good credit, who told him that he had it from a person of indisputable skill and veracity who took it himself in the Court of Chancery; so I think that this authority seems pretty well established." *Hervey v. Aston* (1738) Willes, 83, 96, 1 Atk. 361, 125 Eng. Rep. R. 1067.

⁷³ "Doubtless such works as Blackstone's Commentaries, Dalton's Country Justice, Hawkins' Pleas of the Crown, may be fairly treated by the historian [sic! Why not judges?] as statements, prima facie correct of the law at the time when they were written. . . . But it cannot seriously be contended that these works are authorities in the sense in which Bracton, Littleton, and even

give nothing in support of their opinions and we might add that so far as our reading went we could not discover anything to support them. English law knows of no degree or distinction between lesser and greater authorities—proper works on law are either authoritative or they have no authority at all. Contrary to the opinion of these authors, we find that Blackstone's statement of the law is preferred to that of Lords Coke and Hale in an Irish case.⁷⁴ Of course, in the latter case there were cited some judicial precedents that tended the same way, but nowhere had the proposition been so clearly and definitely enunciated and so broadly expressed as in Blackstone.

Nor did the opinions of Coke and Hale stand alone. Dalton is referred to in modern times in terms that Bratton himself might have envied. Chief Justice Campbell in *Regina v. Day*⁷⁵ said: "We have the high authority of Dalton, that common in gross gives no vote for a knight of the shire." With regard to Serjeant Hawkins, let us call forth the evidence of Dallas, C.J.: "Now if the authority of Lord Hale, and that of Mr. Serjeant Hawkins, are to be treated lightly, we may be without any authority whatever."⁷⁶

We think that "even Coke" can be best answered in words of the Master of the Rolls, Lord Justice Cozens-Hardy: "And the opinion of Lord Coke on the question of what is or what is not the common law is one which requires no sanction from anybody else."⁷⁷ We suppose not even from Littleton.

And as a pretty comparison between the ancient and modern authorities we venture to give the following opinion of Chief Baron Richards: "When, however, I say that no authority for a different construction has been produced I mean to except a chapter in the book called *Doctor & Student*; the authorities, however, which I have cited (*Sir Simon Degge's Parson's Counsel* and *Sir William Blackstone's Commentaries*) appear to me entitled to greater weight

Coke, are authorities for the law of their respective periods." E. Jenks, *Short History of the English Law*, 199. "Judges are now more ready than they were formerly to scrutinize his [Sir Edward Coke's] law. It is less true than it used to be that his works have an 'intrinsic authority in this court of Justice.' But in days when his intrinsic authority had a real existence . . ." 11 *Dict. Nat. Biog.* 241, per G. P. Macdonnell.

⁷⁴ *Conway and Lynch v. Reg.* (1845) 7 *Ir. L. R.* 149.

⁷⁵ (1854) 3 *E. & B.* 859, 867, 23 *L. J. Q. B.* 317, 1 *Jur. (N. S.)* 107, 2 *W. R.* 515, 118 *Eng. Rep. R.* 1363.

⁷⁶ *Butt v. Conant* (1820) 1 *Brod. & B.* 548, 570, 129 *Eng. Rep. R.* 834. *Approved, Rex v. Casement* [1917] 1 *K. B.* 98, 140, 86 *L. J. K. B.* 467, 115 *L. T. R.* 277, 25 *Cox C.C.* 480, 60 *S.J.* 656, 32 *T. L. R.* 667.

⁷⁷ *Bebb v. Law Society* [1914] 1 *Ch.* 286, 294, 110 *L. T. R.* 353, 83 *L. J. Ch.* 363.

than the Doctor & Student.”⁷⁸ And this reverence of the old authorities must be of very modern date, indeed, for only two hundred years ago judges evidently thought it necessary to excuse themselves, when they had to refer to even the most illustrious of these ancient legal lights, Bracton: “I cite this author, though I confess he is an old one, because his opinion is reasonable, and very much to my present purpose, and there is no authority in the law to the contrary.”⁷⁹

Works of legal authorities do not require judicial precedents or any other authority to support the opinions therein expressed, but are simply to be taken as they stand upon their own weight. This distinctive feature has been noticed already by Sir William Blackstone: “Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvill and Bracton, Britton and Fleta, Hengham and Littleton, Stratham, Brooke, Fitzherbert, and Staunforde, with some others of ancient date, whose treatises are cited as authority; . . . One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their quotations from older authors, is the same learned judge we have just mentioned, Sir Edward Coke.”⁸⁰ It will be noticed that “and do not entirely depend on the strength of their quotations” is a mere tautological addition to “any intrinsic authority,” explaining and not qualifying the latter. Chancellor Kent is not less explicit upon this point: “These works acquire by time, and their intrinsic value, the weight of authority; and the earlier text-books are cited and relied upon as such, in the discussions at the bar and upon the bench, in cases where judicial authority is wanting.”⁸¹ And especially clear is Judge Cowen: “The course I propose in this note, is to give the mere text of 4 chapters in this first part (Hale’s *De jure Maris et Brachiorum ejusdem*), verbatim, generally omitting the author’s quotations; which are mostly of MSS, or of old treatises, entries and reports; all of which are, *quoad hoc*, superseded by the high authority of Hale.”⁸² Clayton, C.J., of Delaware, apparently held the same view: “But, independent of Lord Coke or

⁷⁸ Atty. Gen. v. Lord Eardley (1820) 1 Dan. 271, 292, 8 Price, 39, 22 Revised Rep. 697.

⁷⁹ Coggs v. Bernard (1703) 2 Ld. Raym. 909, 916, 3 Salk. 11, 92 Eng. Rep. R. 107, per Holt, C.J.

⁸⁰ Blackstone’s Commentaries, 72.

⁸¹ 1 Kent’s Commentaries on American Law (12th ed.) 499.

⁸² Note to *Ex parte Jennings* (1826) 6 Cowen (N. Y.) 518, 537.

any other judge, Sir Matthew Hale was an authority of himself, and is considered as a sufficient authority for a common law principle in every case when there is no contrary authority. What sources of legal knowledge his great erudition may have consulted on this subject, we have no means of certainly knowing, nor is it necessary to inquire."⁸³

To give judicial dicta *in extenso* supporting the above conclusions of Blackstone is unnecessary. Here, as everywhere in the common law and in respect to nearly every one of its rules, we do not get a general statement of principles, but rather an application to isolated cases of what is accepted on all sides to be the principle. Thus, to give a latest instance—per Cozens-Hardy, M.R.: “. . . the reference to the Mirror, and seeing what antiquity has said, does not in the least, in my view, take away from the opinion of Lord Coke, and the opinion of Lord Coke on the question of what is or what is not the common law is one which requires no sanction from anybody else; therefore I think that that alone is evidence of what the common law was . . .”⁸⁴ Another Master of the Rolls also held similar views: “Whether the case, referred to by Lord Coke does, or does not, fully warrant the rule, laid down by him, yet his own great authority, and the adoption of it by Lord Macclesfield, are sufficient to induce me to adhere to it.”⁸⁵ Of course, the superfluous allusion to Lord Macclesfield is disposed of entirely by the opinion of Cozens-Hardy just cited. Certainly Sir Edward Coke is not an exception: “He [Comyns, C.B.] has not, indeed, cited any authority for this opinion, but his opinion alone is of great authority.”⁸⁶

Once a work is an authority, it possesses that intrinsic weight though it may enjoy a reputation of questionable accuracy: “Emerigon was against him, but then he objected to the authority of Emerigon. It is true that Emerigon is not always an authority to be followed; but nevertheless, he is always quoted as an authority with regard to Insurance law, and his language is certainly to be carefully considered before it is rejected.”⁸⁷

⁸³ State v. Chandler (1837) 2 Harr. (Del.) 553, 562.

⁸⁴ Bebb v. Law Society [1914] 1 Ch. 286, 293, 110 L. T. R. 353, 83 L. J. Ch. 363.

⁸⁵ Earle v. Wilson (1811) 17 Ves. Jun. 528, 531, 34 Eng. Rep. R. 205, 11 Revised Rep. 130, per Grant, M. R.

⁸⁶ Pasley v. Freeman (1789) 3 Term Rep. 51, 64, 100 Eng. Rep. R. 450, 1 Revised Rep. 634.

⁸⁷ Bradford v. Symondson (1881) 7 Q. B. D. 456, 463, 50 L. J. Q. B. 583, 45 T. L. R. 364.

Clear as the above doctrine is, having never been directly questioned, there are some stray judicial dicta impairing its validity. The first was given above. The next is by Fry, L.J.: "In Jenkins's Centuries, (3rd Century Cas. ix), it is said: We know of no other authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision."⁸⁸ The reference to the judicial decision in no way suggests that it is necessary to lend the authority to Jenkins' statement. It only suggests, we submit, that Jenkins' statement stands alone and consequently we are to take his opinion for all it is worth in comparison with other authorities. That another authority, whether a judicial decision or some other work of jurisprudence, is not necessary to support any legal authority, whether of judicial origin or not, is evident from the following quotation: "In *Mortimer v. Mortimer*, Lord Stowell mentioned Oughton as an authority of no mean consideration in matters of practice in that court; from which limited praise I infer, that equal attention has not been paid to his statements of the law in other respects, unless he refers to some other authority."⁸⁹

That we are right in thinking that judicial authority is unnecessary to support the opinion of a legal writer of recognized authority is proved by the citations given below. Consequently if we can show that decisions of the judges are sometimes in need of support of opinions expressed by writers, we need not take any exception to the fact that the order is sometimes reversed. Besides, the opinion of Grant, M.R.,⁹⁰ as qualified by Cozens-Hardy, need not be altogether disregarded. Let the citations speak: "But no such authority belongs to this case, for this case is quoted but once during all the period of time since Fitzherbert, and that quotation destroys its authority, and is not confirmed by the authority of any learned author who has since written on the law. Instead, therefore, of being an ancient case entitled to weight, it is entitled to none at all; the authority of it is destroyed; and it is impossible but that the diligent professors of the law who have written on the subject, would have admitted it, or that it should have been quoted by Kitchen (*On Courts*) as he has quoted it, if up to the extent of Fitzherbert it had been entitled to be considered as any authority."⁹¹

⁸⁸ *Cochrane v. Moore* (1890) 25 Q. B. D. 57, 71, 54 L. J. Q. B. 377, 63 L. T. R. 153, 38 W. R. 588.

⁸⁹ *Hope v. Hope* (1858) 1 Sw. & Tr. 94, 104, 4 Jur. (N. S.) 515, 6 W. R. 585.

⁹⁰ *Supra*, at p. 415.

⁹¹ *Garland v. Jekyll* (1824) 2 Bing. 273, 302, 9 Moore C. P. 502, 130 Eng. Rep. R. 311, 27 Revised Rep. 63.

"A decision of your Lordships in the last resort, assisted here by the then Chief Justice of the Common Pleas, in *Lloyd v. Carew* settled the rule; for the whole question was there gone into. Some doubt has been expressed as to whether this principle was adopted as the uniform opinion of conveyancers."⁹² And this is an American view: "To the lawyer and scholar the name of Sir William Blackstone and Sir William Jones, on the one side of the ocean and Chancellor Kent and Justice Story on this, will be sufficient for my purpose in this case, until some author, or some case is cited, showing clearly that a contrary doctrine should obtain."⁹³ Another instance: "No text-writer has approved of it (*Thorogood v. Bryan*), and the comments in *Smith's Leading Cases* are adverse to it (vol. 1, p. 266, 6th ed.)."⁹⁴

Another limitation was suggested by Best, C.J.: "The fact is, Lord Coke had no authority for what he states, but I am afraid we should get rid of a good deal of what is considered law in Westminster Hall, if what Lord Coke says without authority is not law, . . . particularly when it is in conformity with justice and common sense."⁹⁵ It is evident that the words from "particularly" to the end are a superstructure and, of course, not of a kind to be insisted upon as a necessary condition to an authority of a *juris prudens* before its recognition. However, its superfluity is well known by Bramwell, B., in the following passage: ". . . the defendant, to establish an anomalous exception to this rule, for which exception he can give no reason, should shew a clear and binding authority, either by express decision, or a long course of uniform opinion deliberately formed and expressed by English lawyers or experts in the English law. I find neither."⁹⁶ An "anomalous exception" is surely not common sense and unreasonableness is hardly justice. Bramwell, B., also answers in part, namely, as to the reasonableness, the dicta below. The insistence upon the absence of authority to the contrary was due to the feeling of Holt, C.J., in the opinion already quoted, that his authority was much out of date—the feeling that would not, we submit, be appreciated by any modern judge, except in cases when the question of extent of authority is to be considered. "I don't find this word in any other author of our law, besides in

⁹² *Cadell v. Palmer* (1833) 1 Cl. & Fin. 372, 422, 7 Bligh (N. S.) 202, 10 Bing. 140, 3 M. & Sc. 57, 6 Eng. Rep. R. 956.

⁹³ *Wilkins v. Earle*, supra, n. 64.

⁹⁴ *The Bernina* (1887) 12 P. D. 58, 94, 56 L. T. R. 450.

⁹⁵ *Garland v. Jekyll* (1824) 2 Bing. 273, 296, 9 Moore C. P. 502, 130 Eng. Rep. R. 311, 27 Revised Rep. 63.

⁹⁶ *Osborn v. Gillett* (1873) L. R. 8 Ex. 88, 99, 28 L. T. R. 197.

this place in Bracton, which is full authority, if it be not thought too old. But it is supported by good reason and authority."⁹⁷

We will now pass to consider works of no authority in Anglo-American law.

LEGAL WORKS OF NO AUTHORITY

Works on law of living authors cannot as a rule be cited as authorities in an Anglo-American court, but the counsel can adopt as a part of his argument any proposition stated or advocated by the writer of them.⁹⁸ Another distinction is that pointed out by Sir William Blackstone in his Commentaries, who, writing about the works of authority, said: "These methodical writers whose works are of any intrinsic authority in courts of justice and do not entirely depend on the strength of their quotations from other authors."⁹⁹ The works of living authors depend entirely on the quotation of authorities, whether books or judicial precedents. Their opinion is considered in this light by the judges—taken individually, it is of no value at all. The same two distinctive differences apply to the works of no authority, though not by living authors. Thus, per Lord Alvanley, C.J.: "My brother Marshall, in his treatise, p. 437, says: '. . . when we find an opinion in a text writer upon any particular point, we must consider it not merely as the private opinion of the author, but as the supposed result of the authorities to which he refers'."¹⁰⁰ And Sir Edward Coke expressed a similar view: "Vide for this point . . . Plowden's Commentaries 515 and many other books. And upon good consideration of this judgment and the said books, you shall understand and observe good difference, and which opinions in the books are according to law, and which not."¹⁰¹ We have just affirmed that the works of dead authors may be and often are quoted by the judges not as authority. If we remember the existence of a rule that no work is to be referred to as authority during the lifetime of its author the point becomes important. Does a work referred to by a judge when its author is no more, become *eo ipso* a work of authority? We cannot quote any judicial saying directly to this effect, yet we have plenty of examples supplied by judicial practice which, to refer again to Sir Edward

⁹⁷ *Coggs v. Bernard* (1703) 2 Ld. Raym. 909, 919, 92 Eng. Rep. R. 107.

⁹⁸ *Greenlands, Ltd. v. Wilmhurst* [1913] 3 K. B. 507, 509, 29 T. L. R. 685.

⁹⁹ Blackstone's Commentaries, 72 (1756).

¹⁰⁰ *Touteng v. Hubbard* (1802) 3 Bos. & P. 291, 301, 127 Eng. Rep. R. 161.

¹⁰¹ *Rawlyn's Case* (1618) 4 Co. Rep. 52 a, 76 Eng. Rep. R. 1007, 1010.

Coke, "makes law."¹⁰² Thus none of the following works or authors is referred to as authority either in the report of the case cited or so far as our reading goes in any other report, though none of the writers of these works or these authors was alive at the time of reference: Sir Henry Spelman's *Glossary*¹⁰³ (1564?-1641);¹⁰⁴ (Edmund) Plowden¹⁰⁵ (1518-1585);¹⁰⁶ (William) Rastell's *Entries*¹⁰⁷ and *Termes de la Ley*¹⁰⁸ (1488-1565);¹⁰⁹ (Thomas) Madox's *History of the Exchequer*¹¹⁰ (1666-1727);¹¹¹ (John) Kitchen on Courts¹¹² (lived in first half of 17th century);¹¹³ (Sir Edward) West's *Treatise on Extents*¹¹⁴ (1782-1828);¹¹⁵ Gale on *Easements*¹¹⁶ (died about 1848);¹¹⁷ (John Williams) *Smith's Mercantile Law*¹¹⁸ (2nd ed.), (1809-1845);¹¹⁹ (Joseph) Chitty on *Pleadings*¹²⁰ (1844 ed.), (1776-1841);¹²¹ (Sir James) Wigram on *Discovery*¹²² (1793-1866);¹²³ (Sir Robert) Lush's *Practice*¹²⁴ (1807-1881).¹²⁵ A countenance to our view is given, it seems, by the following words of Lord Blackburn: "Very little weight should, in my opinion, be given to treatises so modern as not to have yet

¹⁰² 2 Co. Rep. 16 b.

¹⁰³ *Burgess v. Wheate* (1759) 1 W. Bl. 121, 133, 1 Eden. 177, 28 Eng. Rep. R. 652; *Doe v. Vardill* (1840) West, 500, 544, 2 Scott (N. R.) 828, 6 Bing. (N. C.) 385, 9 Bligh (N. S.) 32, 7 Cl. & F. 895, 9 Eng. Rep. R. 578.

¹⁰⁴ 53 Dict. Nat. Biog. 328.

¹⁰⁵ *Garland v. Jekyll* (1824) 2 Bing. 273, 299, 130 Eng. Rep. R. 311.

¹⁰⁶ 45 Dict. Nat. Biog. 428.

¹⁰⁷ *Coggs v. Bernard* (1703) 2 Ld. Raym. 909, 910, 92 Eng. Rep. R. 107; *Giles v. Grover* (1832) 9 Bing. 128, 215, 2 M. & Sc. 197, 1 Cl. & F. 72, 6 Bligh (N. S.) 277, 131 Eng. Rep. R. 563.

¹⁰⁸ *Mounsey v. Ismay* (1865) 3 H. & C. 486, 497, 34 L. J. Ex. 52, 12 L. T. R. 27, 13 W. R. 521.

¹⁰⁹ 47 Dict. Nat. Biog. 305.

¹¹⁰ *Giles v. Grover* (1832) 9 Bing. 128, 155, 2 M. & Sc. 197, 1 Cl. & F. 72, 6 Bligh (N. S.) 277, 131 Eng. Rep. R. 563.

¹¹¹ 35 Dict. Nat. Biog. 305.

¹¹² *Garland v. Jekyll* (1824) 2 Bing. 273, 302, 130 Eng. Rep. R. 311.

¹¹³ A fifth edition of this book appeared in 1675.

¹¹⁴ *Giles v. Grover* (1832) 9 Bing. 128, 193, 194, 220, 2 M. & Sc. 197, 1 Cl.

¹¹⁵ 60 Dict. Nat. Biog. 329.

¹¹⁶ *Mounsey v. Ismay*, supra, n. 108, 3 H. & C. 486, 497.

¹¹⁷ [This seems to be an error, since, according to Library of Congress catalogue, Gale died in 1876.—Editor.]

¹¹⁸ *Kitson v. Hardwick* (1872) L. R. 7 C. P. 473, 479, 26 L. T. R. 846.

¹¹⁹ 53 Dict. Nat. Biog. 92.

¹²⁰ *Hollins v. Fowler* (1875) L. R. 7 H. L. 757, 783, 44 L. J. Q. B. 169, 33 L. T. R. 73.

¹²¹ 10 Dict. Nat. Biog. 266.

¹²² *Leitch v. Abott* (1886) 31 Ch. D. 374, 377, 55 L. J. Ch. 460, 54 L. T. R. 258, 34 W. R. 506.

¹²³ 31 Dict. Nat. Biog. 266.

¹²⁴ *Porter v. Freudenberg* [1915] 1 K. B. 857, 881, [1915] W. N. 43.

¹²⁵ 34 Dict. Nat. Biog. 289.

been sanctioned by the judges of the Ecclesiastical Courts."¹²⁶ His Lordship refers to the treatises on Ecclesiastical law, but there is no reason why the principle enunciated by him should not also be extended to the other branches of the Anglo-American law. Furthermore, it will be noticed that Lord Selborne mentions "modern treatises," and, of course, those of the living authors would be included, for what can be more modern than their works? But his words are not confined to the works just mentioned, and would naturally include a modern treatise whose author is already dead. We have not come across any judicial opinion contrary to the doctrine laid down above. Thus, all works of living authors and some works by writers already deceased may be of no authority. Which of the latter are of authority and which are not is, as we have seen, mostly a matter of judicial usage. But the use of these works by the judges is very large and we shall now proceed to investigate the various ways in which they are judicially employed.

In the first place, these works of no authority are used as compilations of authorities on some legal question, accompanied or not, as the case may be, by a correct statement of some legal doctrine. To state a doctrine correctly or to make a register of all or at least the leading authorities on some point requires both time and labor which a busy modern judge cannot often spare. The works of no authority supply judges with a ready account of a doctrine and a ready store of authorities—hence their frequent use by the courts in this sense. Thus per Gray, J.: "For the reasons stated at the outset of this opinion, we have not thought it important to state the conflicting theories of continental commentators and essayists as to what each may think the law ought to be; but have referred to their works only for evidence of authoritative declarations, legislative or judicial, of what the law is."¹²⁷

Secondly, a book can well state a principle embodied in some decision or concisely give the substance of the latter and thus relieve a judge from re-reading the case each time he has need to refer to it. Such was the use made of a book by Vaughan Williams, L. J.: "I have quoted that from Mr. Odgers's book because, having read the case of *Macintosh v. Dun*, I think it correctly states what the decision was."¹²⁸ Again a similar reference may be made to a book

¹²⁶ *Mackonochie v. Penzance* (1881) 6 A. C. 424, 446, 50 L. J. Q. B. 611, 44 L. T. R. 479, 29 W. R. 633.

¹²⁷ *Hilton v. Guyot* (1895) 159 U. S. 113, 214, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139.

¹²⁸ *Greenlands, Ltd. v. Wilmhurst* [1913] 3 K. B. 507, 522, 29 T. L. R. 685; *Tattersall v. Grootte* (1800) 2 Nos. P. 253, 256, 126 Eng. Rep. R. 1266.

containing precedents of writs or conveyancing precedents. "The Practical Register is not a book of authority but it is better collected than most of the kind. *Vide* Title Sequestration, page 328 and 330."¹²⁹ "The established form of procedure, as given in 2 Swift's Digest, p. 439, is as follows . . ."¹³⁰

Thirdly, a book may be referred to by a judge as an indication of what the professional opinion of the time is on some legal question. Thus per Best, C. J.: "In Phillipps's treatise on evidence, which I refer to, not as authority, but as proof of the understanding of Westminster Hall on the subject, the same conclusion is drawn from the decision of Lord Kenyon, as I drew from it at the trial; but the true principle to follow on such occasions is that which is stated in Starkie."¹³¹

Fourthly, a judge can read a portion out of the book because the statement there contained would agree with a judge's view of the law or because it would conveniently sum up the principle of law, not yet judicially enunciated in clear language and in a ready form for him. Thus per Chitty, J.: "Mr. Kerr in his book [on Receivers] states that . . .; and, in my opinion, that is a correct general statement of the principle on which the Court proceeds."¹³² This manner of using books of no authority or by living authors appears still more clearly from the following passages: "Perhaps as clear and compact a statement of the commonwealth's contention as can be given is to be found in an extract from the article by Mr. Robert Desty on Criminal Conspiracies in the American and English Encyclopedia of Law."¹³³ And per Bigham, J., after referring to Lowndes' General Average and Ulrich's *Grosse-Haverei*: "These two passages seem to me to express accurately the principles upon which the damages to be made good in general average are to be ascertained."¹³⁴

Fifthly, a work is used to show that a certain decision or rule

¹²⁹ Hardwicke, L. C., in *Davis v. Davis* (1739) 2 Atk. 21, 22, 26 Eng. Rep. R. 410.

¹³⁰ Loomis, J., in *State v. Hoyt* (1880) 47 Conn. 518, 533, 36 Am. Rep. 89.

¹³¹ *Bathews v. Galindo* (1828) 4 Bing. 610, 614, 1 M. & P. 565, 130 Eng. Rep. R. 904.

¹³² *In re Graham* [1895] 1 Ch. D. 66, 70; and see *Partridge v. Bank of England* (1846) L. R. 9 Q. B. 396, 15 L. J. Q. B. 395; *The Kim* [1915] P. 215, 285, [1915] W. N. 323.

¹³³ *Du Relle, J.*, in *Aetna Insurance Co. v. Commonwealth* (1899) 106 Ky. 864, 877, 51 S. W. 624; and see *In re Heaton's Estate* (1915) 89 Vt. 550, 96 Atl. 21, 26, 27.

¹³⁴ *Anglo etc. Agency v. Temperly Shipping Co.* [1899] 2 Q. B. 403, 410, 68 L. J. Q. B. 900, 81 L. T. R. 296, 48 W. R. 64, 15 T. L. R. 472; and see *Neill v. Duke of Devonshire* (1882) 8 A. C. 135, 147, 31 W. R. 622.

was regarded as wrong and not law. Of course, an opinion expressed in a book of no authority cannot go the length of impairing a decision, but it does go so far as to state what the profession thought concerning a certain decision or rule, and thus indirectly to help the judge in deciding a similar question in a manner different to the case treated as wrong. For example, Sargant, J., nine years ago, said this:

"... unfortunately—and this is the only reason why I reserved judgment in the case—there is authority to the contrary of the above view in the decision of Malins, V.C., in *Greenwood v. Wadsworth* (L.R. 16 Eq. 288) When, however, the report is carefully examined, it appears that the decision is a most unsatisfactory one And further, the decision has been treated as wrong in the only or principal textbook on the subject, namely, Mr. Brooke Little's *Law of Burials*, and in the article on the subject in Halsbury's *Laws of England*. I think, therefore, that I should not be bound to follow the decision of Malins, V.C., even if I were dealing with the exceptional case of such a burial ground as was dealt with by the learned Vice-Chancellor."¹³⁵

There is an American case: "Mr. Thompson in his work on *Corporations*, says in criticism of this rule . . ."¹³⁶ And again: "The result may be summarized thus: 'The learned editors of *Smith's Leading Cases*, Willes, and Keating, JJ., strongly questioned the propriety of the decision.'¹³⁷

Sixthly, and lastly, a work of no authority may be referred to by the Bench as an opinion of a specialist learned or experienced in a particular branch of law, thus affording a guide to a decision on a point upon which the law is not settled. After citing Lowndes on *General Average* and Ulrich's *Grosse-Haverei*, Bailhache, J., in a recent case said: "I cite them again because they seem admirable guides to me in the decision of this case."¹³⁸ And again: "The learned judge who presided at the trial seems to have followed the rule laid down by Mr. Phillips, in his work upon evidence . . ."¹³⁹

Borris M. Komar.

New York City.

¹³⁵ *Clegg v. Metcalfe* [1914] 1 Ch. 808, 820, [1914] W. N. 145; and see *Garland v. Jekyll*, *supra* n. 112.

¹³⁶ *In re Heaton's Estate* (1915) 89 Vt. 550, 96 Atl. 21, 26, per Taylor, J.

¹³⁷ *Mills v. Armstrong*, *The Bernina* (1888) 13 A. C. 1, 9, 57 L. J. P. 65, 58 L. T. R. 423, 36 W. R. 870, per Lord Herschell.

¹³⁸ *Austin etc. Co., Ltd. v. Spillers & Bakers, Ltd.* [1915] 1 K. B. 833, 836, [1915] W. N. 275.

¹³⁹ *Halsey v. Sinsebaugh* (1857) 15 N. Y. 485, 487, per Selden, J.