

PART I

Law Reports and Reporting

Cambridge University Press
978-1-108-48306-3 — English Legal History and its Sources
Edited by David Ibbetson , Neil Jones , Nigel Ramsay
Excerpt
[More Information](#)

1

Year Book Men

DAVID J. SEIPP

If Professor Sir John Baker didn't exist, we certainly wouldn't have predicted him. He has surveyed the entire terrain of a long span of late medieval and early modern English law as no one has ever dared before. No one has produced more extraordinary, painstaking, revelatory scholarship on the early stages of English common law. The astonishing, improbable fact of his very existence puts one in mind of the improbability of another landmark of legal history, Anthony Fitzherbert's *La Graunde Abridgement*. No one would have predicted that in 1514 to 1516, early in the reign of a young King Henry VIII, a thirty-something-year-old lawyer recently made serjeant-at-law would publish his compilation of 14,837 excerpts of Year Book cases under 263 headings from 'Abbe' to 'Withernam' in 1,212 pages. I calculate that Fitzherbert's abridgement presented about two and a quarter million words in all, excerpting cases from 1217 down to 1505.

In homage to the improbable Sir John Baker, I want to tell the story of this improbable Tudor lawyer Anthony Fitzherbert and the other compilers and organisers of the large body of early English case reports before him and since. To do this, I should begin by describing an even earlier development, also improbable in its own way.

It is remarkable that those who practised in England's courts of common law created the Year Books in the first place, and that they recopied them over and over again, and thus preserved them for us to read. These reports of courtroom arguments about pleading, procedural notes, and occasional pronouncements of judges were produced by lawyers for lawyers, in their peculiar law French jargon. Year Books were not needed for the functioning of courts, and were unrelated to the official rolls maintained by the courts in Latin. Year Books were not what judges, court clerks, or lawyers meant when they spoke of 'precedents'. As Sir John Baker has observed, when the Year Books began, they were not like anything that any other European legal system had been

producing.¹ They were created and preserved to remind and inform successive generations of lawyers about arguments and procedures that had or had not worked in the king's courts of common law. Year Books were the unofficial, artificial memory of the legal profession.

From the very start, Year Books usually recorded the names of lawyers and judges whose spoken words were represented. By tradition, however, Year Books did not mention the name of the reporter who wrote them down, though the lawyers and judges who were quoted must have known at the time which of their fellows had performed this role. After an initial profusion of differing reports of the same cases, there were long stretches of time when it appears that just one stream of reports was being created. A succession of anonymous reporters spanning more than two centuries served their colleagues in this way, often adding apologetically that a particular point had been very well argued in court one day, 'but I was not present' ('sed non interfui'). Sir John Baker has done more than any other scholar to bring to light the identities of as many of these shadowy Year Book reporters as can be traced.

Lawyers continued to consult and copy older reports while they added new ones from successive terms of the courts. For the most part, they retained and recopied these reports in chronological order, grouped within each year by the four terms during which royal courts sat. By the 1380s, the time of Chaucer's *Man of Law*, a century of Year Book reporting had accumulated more than ten thousand cases, and it was high praise to say of any lawyer that he knew them all.² Many cases were reported in some years, and few or none in others. By no means every case argued or decided in the king's courts of common law generated a Year Book report. Only what lawyers at the time thought particularly striking or worthy of remembering for its usefulness in future practice got reported. It was very rare for a particular Year Book report to be mentioned in a later report, but lawyers and judges would refer generally to what was in 'books of terms' or simply 'our books'. By the time of Henry VIII, when the series of Year Books ended, there were well over 20,000 such cases. This chapter considers how lawyers from the late fifteenth century onwards made this enormous mass of case reporting more accessible, how they organised their knowledge of the cases, and

¹ J. H. Baker, 'Case-Law in England and Continental Europe', in Baker, *Collected Papers*, I. 605.

² J. H. Baker, 'The Books of the Common Law, 1400–1557', in Baker, *Collected Papers*, II. 611.

how they thereby preserved the Year Books for later centuries in a series of works that came to be known as abridgements.

Six works – six books or sets of books – all printed between 1490 and 1668, excerpted or indexed large numbers of Year Book cases. The first of these was the untitled, anonymous abridgement attributed to Nicholas Statham (hereafter the ‘*Statham* abridgement’), which was published only once – in Rouen, Normandy – in about 1490. Second was another, much shorter abridgement, also anonymous, printed first without any title probably between 1499 and 1510, then reprinted twice in 1555 with the title *Abridgement of the Book of Assizes*, though it contained many more excerpts from other Year Books than from the *Liber Assisarum*. Third, in 1514 to 1516, Anthony Fitzherbert, then a serjeant-at-law, published a compilation of year book excerpts that was both larger and greater in many respects. It was titled *La Graunde Abridgement* in its 1565 and 1577 editions. The fourth work, a compilation with the same title by Robert Brooke, a chief justice of the Common Pleas in the time of Queen Mary, was published in 1573 – fifteen years after his death – and reprinted in 1576 and 1586. Fifth was a work of a different type, a large two-volume index of Year Book cases titled *Promptuarie, ou Repertory Generall*, published in 1614 by Thomas Ashe, an unsuccessful barrister of Gray’s Inn. Sixth and last was another abridgement entitled *Un Abridgment des Plusieurs Cases*, this one by Henry Rolle, a chief justice of England in Cromwell’s time, published in 1668, a dozen years after his death, and, like the *Statham* abridgement, never reprinted. Further abridgements and digests followed, but they did not emphasise Year Book cases.

These six works differed greatly in size, scope, ambition, and popularity. Considered together, they tell a story about continuing efforts to give English lawyers easier access to the learning in Year Book cases, to preserve that learning, and to enhance the authority of Year Book cases as evidence of English common law. They began within a tradition among many English lawyers of composing personal commonplace books during their careers.³ With Fitzherbert’s *Graunde Abridgement*, however, these works attained a size and scale that far surpassed what had come before.

The abridgement attributed to Nicholas Statham, the first to be printed, contained 3,623 entries under 251 headings from ‘Accompt’

³ E. W. Ives, ‘The Purpose and Making of the Later Year Books’, *Law Quarterly Review*, 89 (1973), 64–86, at 81–82.

to ‘Utlary’, in roughly alphabetical order. The entries are excerpts or summaries of Year Book cases, nearly all with citations in the margin to the term and regnal year from which they were taken, and some queries and cross references. Like other works printed in or about 1490, this abridgement names no author, contains no title, has no page or folio numbers and does not number the entries under its headings. The printer, Richard Pynson, included extra space under most of the headings, after his printed entries, for purchasers to add handwritten material of their own. This abridgement extends to 188 folios (375 pages) but only 14,801 lines. I estimate 350,000 to 400,000 words in the *Statham* abridgement.

The work known since 1555 as the *Abridgement of the Book of Assizes* was next to be printed, probably between 1499 and 1510, also by Richard Pynson. This first printing, like that of the *Statham* abridgement, left room for purchasers to add their own handwritten entries at the end of the printed ones. Pynson did number the folios in this *Abridgement of the Book of Assizes*, but again the entries were not numbered. Citations to regnal year are in the text, not in the margin. This work was reprinted twice in 1555, both times by Richard Tottell, with some additional content, though still much smaller than the *Statham* book. The 1555 editions contained just 1,060 entries under seventy-eight headings from ‘Attachement’ to ‘Voucher’, in a small octavo format. Despite the title that Tottell gave the work, only about a quarter of the excerpts came from the *Liber Assisarum*, and most ranged from the reigns of Edward II to Henry VI, including 101 entries that excerpted or summarised statutes. It included excerpts that did not appear in any other abridgement or in the printed Year Books, and one very long report of a 1458 case in Exchequer Chamber, *Babilon Granteford v. John Finche*, which was nowhere else reported in such great detail. By my count, there are fewer than 90,000 words in this smallest of printed abridgements.

The *Statham* abridgement and the *Abridgement of the Book of Assizes* are printed examples of a broader tradition of manuscript commonplace books and abridgements from the second half of the fifteenth century. Diligent law students and lawyers in that century compiled, under alphabetical headings, notes of cases which they encountered when they borrowed Year Book manuscripts or attended court. This practice had been followed since antiquity by students and scholars of oratory and rhetoric. In the first century CE, Quintilian had warned such students

that quotations from commonplaces, wrenched out of context, dwelt at the very marrow of lawsuits.⁴

Percy Winfield in 1923 and Brian Simpson in 1971 pointed out two different manuscripts that each closely resembled the *Statham* abridgement.⁵ These manuscripts shared many headings and excerpts with the *Statham* book, often in the same order, though they also added to and deleted material found in *Statham*. Sir John Baker has described two more manuscripts that also showed marked similarities to, and divergences from, the *Statham* abridgement.⁶ He also lists a dozen other surviving fifteenth-century manuscripts that collected Year Book material under alphabetical headings, without noticeable similarities to the core shared by *Statham* and these four manuscripts. The 1487 will of a justice of the Common Pleas, William Callow, suggests that a manuscript in his possession was a collective effort of members of one of the Inns of Court. It is safe to assume that there were both collective and individual efforts to put Year Book excerpts under alphabetical headings in fifteenth century England. The most ambitious of these seemed to gather a few thousand excerpts under a few hundred headings.

To judge from printed books and surviving manuscripts, this was the extent of organisation of year book materials in 1514, when Anthony Fitzherbert published the first volume of his *Graunde Abridgement*. Manuscripts and the two printed abridgements up to this time do not prepare us for Fitzherbert's work. It was of a size and scale, of an ambition and comprehensiveness that dwarfed all previous efforts. If it was remarkable that English lawyers invented a tradition of reporting of courtroom dialogue in the thirteenth century, it was still more remarkable that in the early sixteenth century Fitzherbert sorted 14,837 excerpts of Year Book cases under 263 headings in 1,212 pages.

Fitzherbert's abridgement's roughly two and a quarter million words made it five or six times the length of the *Statham* abridgement, and it had four times as many excerpts. If someone wanted to borrow the Fitzherbert abridgement to make a personal handwritten copy of it, and if the borrower copied fifteen words a minute in every hour of daylight starting in January, it would have taken more than six months

⁴ *Institutio oratoria*, 2.1.11–12 (c. 95 CE).

⁵ P. H. Winfield, 'Abridgements of the Year Books', *Harvard Law Review*, 37 (1923) 227–8 and n. 50 (on CUL, MS Kk.5.1); A. W. B. Simpson, 'The Source and Function of the Later Year Books', *Law Quarterly Review*, 87 (1971), 94–118 at 116 (on Guildhall MS 208).

⁶ CUL MS Ll.1.3 and BL MS Add. 16168.

to copy the entire work. The price of the three volumes, £2 in all, would have represented a month's income for a successful lawyer of the time, double the annual retainer that a large religious house might have paid its lawyer in the common law courts.

In terms of the total number of words, Fitzherbert's work was longer than any of the other five works considered here, the later Brooke's *Graunde Abridgement*, Ashe's *Promptuarie* and Rolle's *Abridgment* as well as the two earlier printed abridgements. Brooke distributed shorter year book excerpts under more headings, and Ashe and Rolle provided subheadings that gave lawyers better access to Year Book cases, but for sheer mass of legal information packaged in one place, none of these other works matched Fitzherbert's achievement.

The first printing of Fitzherbert's *Graunde Abridgement* was said to have required 200,000 sheets of paper, for a print run estimated between 750 and 1,000 copies. The printer John Rastell was the prime mover in this effort. In his 1513 preface to the first printing of *Liber Assisarum*, Rastell advertised his plan to publish 'a great book of abridgements of argued cases ruled in many years of divers and sundry kings . . . ordered and numbered with figures of algorism [that is, arabic rather than roman numerals] for the great expedition and furtherance of the students of this law'. Rastell numbered the excerpts under each heading, as he had done with the cases in the *Liber Assisarum*, an improvement over the *Statham* abridgement. But Rastell alone could not complete so large a project. It required the collaboration of two other early legal publishers, Wynken de Worde and Richard Pynson, on volumes two and three.

Fitzherbert included far more cases under his headings than compilers of the *Statham* abridgement had found. As one would expect, Fitzherbert incorporated more recent cases, down to 1505 (Mich. 21 Hen. VII). But Fitzherbert also included much older cases than any that *Statham* had cited. The *Statham* abridgement had excerpted only a handful of cases dated from the reign of Edward I, and nothing earlier. Fitzherbert, by contrast, included nearly 200 excerpts of very early cases, of Henry III's reign, from the manuscript now known as *Bracton's Notebook*, extending his reach back to the year 1217 (Mich. 2 Hen. III). He also incorporated far more cases of Edward I and Edward II than the *Statham* abridgement had included.

Fitzherbert's excursions into manuscripts of the reign of Henry III for cases from the early thirteenth century probably went beyond what any ordinary practitioner would encounter in a lifetime of legal practice. This was more than the casual reading of a studious lawyer. Fitzherbert's

seems to have been a salvage operation, an effort to search through every available manuscript for any interesting passage of possible use in some future circumstance. He selected some Year Book cases and omitted others. From the cases that he did select, he stripped out much of the text and excerpted only details that would be of interest to future lawyers. This winnowing process was much as Year Book reporters had done centuries earlier to produce the sources from which Fitzherbert compiled his abridgement.

His abridgement told modern scholars that there were many more Year Books to be found in manuscript, interesting material that did not appear in the printed series down to 1700. He showed us many cases from *Bracton's Notebook* and from eyres of Henry III, from Year Books of the reigns of Edward I and of Richard II, and of the years 11 to 16 and 31 to 37 Edward III, plus 330 cases from the fifteenth century that are not anywhere found in the printed Year Books, and undoubtedly many in the fourteenth century that remain to be identified. Here were sources that would later be edited and translated in scholarly volumes, and some that still have not been plumbed.

So this *Graunde Abridgement* was not just an extension of the individual lawyer's commonplace book, preserving recollection of manuscripts that the compiler happened to come across. Fitzherbert was, I am tempted to say, a fanatic, an insatiably curious mind always on the lookout for the next rare or unusual manuscript yet to be examined. That curious mind seemed to combine with abundant energy, an ability to sort his discoveries under useful topics, and a willingness to share them with the rest of the legal profession. This description fits, of course, the scholar and teacher to whom these essays are dedicated, at least as closely as it fits Anthony Fitzherbert.

But if Fitzherbert was obsessed with gathering in more manuscript sources than any previous compiler of abridgements, his three volumes did not order his excerpts in any way that helped his readers see developments or find particular points of law under his headings. Under each heading, the excerpts were not strictly chronological and were not grouped by topic. Other scholars have attempted to find some overall pattern in Fitzherbert's ordering of excerpts, which usually began with cases of Henry VI and ended with cases of the *Liber Assisarum*.⁷ But this may, of course, have simply been by happenstance when various manuscript sources came into Fitzherbert's possession at different times.

⁷ See F. L. Boersma, 'Sir Antony Fitzherbert and La Graunde Abridgement', unpublished Ph.D. dissertation, University of Michigan (1977).

Departures from this overall pattern, of which there were many, may have happened because Fitzherbert added new material into his compilation in the margins of his pages or from manuscript sources that were themselves abridgements excerpting cases of various regnal years. Having searched out his sources and selected his excerpts, Fitzherbert seemed to have no concern beyond choosing which of his 263 headings was best for each excerpt.

Fitzherbert was, I think, the first lawyer to attach his name during his lifetime to a printed book on English common law. Authorship had been ascribed to manuscript treatises already centuries old – Glanvill said this, Bracton said that, Hengham said something else – but today most or all of these ascriptions of authorship are discounted or disputed, leaving the early treatise literature almost as anonymous as the Year Books. Thomas Littleton's *New Tenures*, the first law book printed in England and the most often reprinted, was first printed soon after his death in 1481, without any title and without its author's name. It was an update of an older, anonymous treatise on tenures. He said that he had written it for the instruction of one of his sons, and it does not seem to have circulated beyond his family during his lifetime.⁸ Sir John Fortescue's political tracts circulated in manuscript before he died, but were not printed until about six decades later.

Of the six printed works surveyed here, Nicholas Statham nowhere claimed authorship of the abridgement attributed to him, though John Port in his notebook copied out excerpts from this abridgement, probably within a decade or so after it was printed, with the abbreviation 'S',⁹ and the abridgement was known among lawyers as 'Statham' in the sixteenth century. The best textual hint of Statham's authorship is a joke inserted near the end of the printed abridgement, the last entry under the heading 'Tolle'. The town miller, it was said, charged a double toll because the rector said on Palm Sunday, 'tolle, tolle'. This Latin pun on John 19:15 was a familiar joke a century before the abridgement was printed in 1490, but here it was a miller 'of Matlock' who charged the double toll, and Matlock was only 18 miles – a day's walk – northwest of Morley in Derbyshire, where Statham was born and raised. Matlock also happened to be the same distance in another direction from Anthony Fitzherbert's birthplace in Derbyshire.

⁸ J. H. Baker, 'Littleton (Lyttleton), Sir Thomas (b. before 1417, d. 1481), justice and legal writer', in *ODNB*.

⁹ *The Notebook of Sir John Port*, ed. J. H. Baker (102 Selden Society) (London, 1986) xxxi, 142, 166.