DAVID YALE

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David Eryl Corbet Yale, QC (Hon.), Reader in English Legal History and Fellow of Christ's College, Cambridge, specialised in the history of the 17th-century Chancery and Admiralty jurisdictions. His principal publications were editions, with book-length introductions, to the Chancery reports of Lord Nottingham, Nottingham's two treatises on Chancery jurisdiction, two treatises by Sir Matthew Hale on the prerogatives of the king and on the Admiralty jurisdiction, and the Elizabethan treatise by William Fleetwood on the Court of Admiralty.

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David E. Lyle

When David Yale was interviewed in 1946 for admission at Queens' College, Cambridge, and was asked – in the manner of those days – whether any of his family had attended the College, he was able to answer: 'Not since the time of Elizabeth I.' There had been two Civilian lawyers in the family, Dr Thomas Yale (d. 1577), dean of the Arches, and his nephew Dr David Yale (d. 1626), both of Queens' College. The Yales had possessed Plas-yn-Yale, Denbighshire, and Madryn Castle, Carnarvonshire, since the 15th century. The estate came to William Corbet Jones-Parry (d. 1909), who assumed the additional surname of Yale. David Yale's father, Lt-Col. John Corbet Love Yale (1897–1941), was William's grandson, the oldest of six siblings, but little or nothing came to him by way of inheritance. He was commissioned as an artillery officer in 1915. At the time of David's birth in 1928 (at Southsea in Hampshire) he was stationed in Portsmouth, and subsequently he served in India. David had vivid memories of India, but received little or no formal education before the age of eight and saw little of his parents thereafter. On 20 December 1941, when Colonel Yale was commanding the 1st Hong Kong Regiment of the Hong Kong and Singapore Royal Artillery, he was killed by Japanese forces while valiantly attempting to hold the Wong Nei Chung Gap five days before the fateful surrender. David's mother, Beatrice (née Breese)[1] had sailed home in May of that year and lived until 1971. She was left with only a war-widow's pension and debts to be paid off. David later recollected the financial worries of the years which followed.[2]

After his return to England, Yale was sent to Arnold House at Llanddulas, near Colwyn Bay,[3] an eccentric preparatory school where he 'learnt little except the art of beagling', and then to a more conventional school in Shrewsbury. In January 1942 he proceeded to Malvern College, though a few months later the college buildings were requisitioned by the Admiralty and the college was relocated in Harrow School until 1946. Yale was inspired by his history master, identifiable from school records as R.T. Colthurst, to apply to Cambridge to read History. This required funding, and he studied hard to obtain a Major Scholarship at Queens' College, though in the event he read Law. When he arrived at Queens' all but two of the freshmen were ex-servicemen and he was the only lawyer, though in 1947 he was joined by K.W. Wedderburn (later Lord Wedderburn FBA, d. 2012), a year his senior, who had started as a classicist.[4] The clash of cultures between the returning warriors and the school-leavers left him isolated, and although he joined the boat club he recalled being driven in upon himself and into his books. Each year he was placed in the first class of the Law Tripos. In the year following

[1] Daughter of Charles Edward Breese (1867–1932), MP for Carnarvon, solicitor and antiquary. David was invited to join the family firm, Messrs Breese, Jones & Casson (now Breese Gwyndaf) of Portmadoc, before setting his sights on Cambridge.

[2] First interview (2019), q. 42.

[3] Portrayed in *Decline and Fall* (1928) by Evelyn Waugh, after spending a miserable time as a master there.

[4] Yale recollected that he did not know Wedderburn at all well.

graduation in 1949 he stayed on to read for the LLB,[5] and in the course of the year, through the influence of Arthur Armitage,[6] he was elected a research fellow of Christ's College. This gave him further financial support for the time being, though the college expected a return – not in the job description – by way of teaching and the direction of undergraduate law studies. Conscious of the need to justify his election, he obtained a starred first in the LLB examination and was awarded the Chancellor's Medal for the best performance. No one suggested proceeding to a PhD, which was not then considered necessary for law dons. He remained a fellow of Christ's for the rest of his life, serving over time as tutor, praelector and vice-master, and retiring with a life fellowship.

As a would-be historian, it was perhaps inevitable that Yale would be drawn to legal history. However, although some acquaintance with legal history was necessary for any academic common lawyer, it was not treated very seriously by the Law Faculty. It was taught to undergraduates in Yale's time by H.A. Hollond (d. 1974), the Rouse Ball professor.[7] Hollond had heard Maitland lecture; but he was himself a mediocre scholar who published nothing, and an uninspiring lecturer, as a consequence of which the subject had (in Yale's words) become 'rather a lost cause'.[8] The subject began to revive during Yale's LLB year. Together with M.J. (Michael) Prichard, who had come from London to read for the LLB, Yale attended the first lectures given on legal history by S.F.C. Milsom (later Professor Milsom QC, FBA, d. 2016). There were also a few lectures by Professor Harold Potter (1896–1951) of King's College London, who lived near Cambridge and was author of a student textbook on legal history. Prichard recalls that when everyone else left the Squire Law Library for lunch, Yale would stay on to work. Bar examinations also required attention: in those days, and into the 1960s, a professional qualification was considered more valuable for a law don than a PhD. After his call to the Bar in 1951, Yale served a pupillage in Chancery chambers,[9] but his family's straitened circumstances made it imprudent to take the risk of entering practice. In any case, it was clear where his true interests lay, and he later admitted that on his visits to London during pupillage he would divert his footsteps to the British Museum library to look at manuscripts. He was appointed to a university assistant lectureship in 1952 and to a full (tenured) lectureship in 1955, from which he was promoted in 1969 to a readership, with the *ad hominem* title

[5] The LLB at Cambridge (since renamed LLM) followed a one-year postgraduate course.

[6] Arthur Llewellyn Armitage (1916–84) returned to Queens', following war service, the year after Yale arrived. Yale described him as his 'mentor'. He was later president of Queens' (1958–70), vice-chancellor of Cambridge and of Manchester.

[7] Roman law was taught by Patrick Duff (d. 1991) as Regius Professor, whom Yale recalled as 'quite dependable but not particularly outstanding in the literary side of things': first interview (2019), q. 28.

[8] First interview (2019), q. 5.

[9] With Hector Hillaby of 13 Old Square, Lincoln's Inn, a specialist in conveyancing: first interview (2019), q. 38. Yale was admitted to the Inner Temple in 1948 and was called after keeping the requisite twelve terms.

Reader in English Legal History. Teaching in the subject was now assured, and in 1962 the Law Faculty approved the reinstatement of the undergraduate course, to be taught by Yale and Prichard.[10] Yale also taught contract, tort, and of course – following the Yale Civilians of past centuries – Roman law. In 1959 he married Ann (Elizabeth Ann Brett), who hailed from Belfast, with whom he had two sons. After a sabbatical year in America at the invitation of Yale Law School in 1961–62, they settled in the village of Fulbourn, near Cambridge.

Lord Nottingham[11]

It was in conversation with Potter – on a Saturday afternoon in an otherwise deserted Squire Law Library – that Yale developed the idea of conducting original research on equity in the time of Lord Nottingham,[12] and he made a start on the subject while a research fellow. Potter died in 1951 and was therefore unable to provide any guidance, but Yale did receive some invaluable general assistance in his early work from Milsom. Around the same time, at the suggestion of Professor S.E. Thorne, then of Yale Law School, Yale undertook an edition from the manuscript of Edward Hake's *Epieikeia: A Dialogue on Equity in Three Parts*,[13] written late in the time of Elizabeth I and presented at the opening of the new reign to James I. Having assured his readers that he would explain the jurisdiction of the Chancery, Hake's treatment of the Chancery was 'perhaps the least satisfying'[14] part of the work, Hake's main focus being upon equitable principles operating at common law. Seeing the book into print was an introduction to the process of editing, but Nottingham's work turned out to be far more important to the history of equity. Sir Heneage Finch (1620–82), Lord Nottingham, was between 1673 and 1682 successively lord keeper of the great seal and lord chancellor.[15] Yale's major editorial work on his writings was prefaced by an article published in 1957 in the *Cambridge Law Journal*, entitled 'The Revival of Equitable Estates in the Seventeenth Century: An Explanation by Lord Nottingham'.[16] When Finch took custody of the great

[10] Yale wrote to Prichard from New Haven, 7 June 1962, about preparing the new course.

[11] This section is by Professor N.G. Jones of Magdalene College, Cambridge.

[12] Potter had drawn attention to the importance of Nottingham's manuscript reports and treatise in his *History of Equity* (1931), p. 63.

[13] D.E.C. Yale (ed.), *Epieikeia: A Dialogue on Equity in Three Parts by Edward Hake* (New Haven, 1953). The only known manuscript (now British Library [BL], MS. Add. 35326, formerly Phillipps MS. 9704) was one of those which Yale began reading during pupillage in 1951.

[14] Ibid., p. xviii.

[15] Lord keeper of the great seal 1673–75, lord chancellor 1675–82, created earl of Nottingham 1681.

[16] D.E.C Yale, 'The Revival of Equitable Estates in the Seventeenth Century: An Explanation by Lord Nottingham', *Cambridge Law Journal*, 15 (1957), 72–86.

seal in the early 1670s, the Court of Chancery – by this date firmly understood as a court of equity – had emerged essentially unscathed, if almost entirely unreformed, from the tumult of the civil war and interregnum. It had, in Yale's view, 'done well to survive the storm',[17] which had swept away, among broadly cognate jurisdictions, the Court of Star Chamber, the Court of Wards and the Court of Requests, leaving the Chancery indisputably supreme among the courts not of common law. Building upon the work of his predecessors, notable among them Thomas Egerton, Lord Ellesmere,[18] and the movement which had already begun in Chancery towards reliance upon precedent and the development of substantive rules and principles,[19] Nottingham, a 'great equity judge',[20] 'endued with a pervading genius' that allowed him to build in Chancery 'a system of jurisprudence upon wide and rational foundations',[21] began the work of 'organizing and systematizing the principles upon which the court acted'.[22]

Yale's 1957 article drew upon Nottingham's *Prolegomena of Chancery and Equity*, as yet unpublished, to set out an explanation by Nottingham of the scope of the Statute of Uses 1536,[23] turning upon the view that trusts after 1536 were not the same as the uses which had preceded them, and that the scope of the Statute of Uses had been determined by that of a statute of 1484[24] which, while seeking to resolve conveyancing difficulties arising from the practice of creating uses, had created new difficulties of its own. Yale's expressed object was 'to present Lord Nottingham's explanation to the reader rather than to attempt to prove the validity of that explanation'.[25] A full exploration of Nottingham's approach to the scope of the Statute of Uses remains to be undertaken, but the topic has played its part in subsequent work.[26]

Yale was to return to Nottingham's *Prolegomena*, but his attention first passed – in a sense in the 'wrong' order[27] – to the manuscript reports which Nottingham compiled during his tenure of the great seal. Before the Restoration, reporting of cases in Chancery

[17] D.E.C. Yale ed., *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity*' (Cambridge, 1965), p. 7.

[18] Sir Thomas Egerton, created Baron Ellesmere 1603, lord keeper of the great seal 1596–1603, lord chancellor 1603–17.

[19] See generally Sir John Baker, *An Introduction to English Legal History*, 5th edn (Oxford, 2019), pp. 118–19.

[20] W.S. Holdsworth, *History of English Law*, vol. 6 (London, 1924), p. 541.

[21] W. Blackstone, *Commentaries on the Laws of England*, 4 vols, vol. 3 (Oxford, 1768), p. 55.

[22] Holdsworth, *History of English Law*, vol. 6, p. 548.

[23] 27 Hen. VIII, c. 10.

[24] 1 Ric. III, c. 1.

[25] Yale, 'The Revival of Equitable Estates', p. 86.

[26] See, for example, N.G. Jones, 'Uses, Trusts and a Path to Privity', *Cambridge Law Journal*, 56 (1997), 175–200, at p. 177.

[27] Yale was to point out that in historical sequence the *Prolegomena*, and Nottingham's *Manual of Chancery Practice*, should be read before his cases: second interview (2019), q. 93.

was slight and patchy. Some limited pre–1660 material made its way into print before modern times,[28] with additional material surviving in manuscript.[29] Reporting in Chancery expanded significantly after 1660 and more reports came into print, but the 1,170 cases reported by Nottingham – covering almost the whole period of his tenure of the great seal – remained largely unprinted until Yale edited them for the Selden Society as *Lord Nottingham's Chancery Cases*, in two volumes appearing respectively in 1957 and 1961,[30] the Society's first venture into post-Elizabethan material, and its first edition of a text written wholly in English.[31] The edition was from a manuscript in the British Library[32] which Yale took to be 'the most authentic text yet surviving',[33] while concluding that it was not Nottingham's autograph, but a copy by his son, the Hon. William Finch, the autograph probably having been destroyed by fire at Burley on the Hill, Rutland, in 1908.[34] As the edition's title suggested, the cases were very largely, though not entirely,[35] heard in Chancery by Nottingham, and it had long been clear that they deserved publication in their entirety.[36]

The text of the edition comprised a transcription of Nottingham's cases, supported by references to relevant printed reports and entries in the manuscript Chancery record. An appendix provided Nottingham's notes on an early draft bill for the Habeas Corpus Act

[28] For the reports for this period in print before modern times see M. Macnair, 'The Nature and Function of the Early Chancery Reports', in C. Stebbings (ed.), *Law Reporting in Britain* (1993), pp. 123–32, at pp. 123–4. There are 'several collections of "What Egerton said" from the 1590s and 1600s; then silence until the appointment of Coventry as lord keeper in 1625', ibid., p. 125.

[29] Much of the pre–1660 manuscript material has now been printed in W.H. Bryson (ed.), *Cases Concerning Equity and the Courts of Equity 1550–1660*, 2 vols (Selden Soc. 117 and 118, 2001).

[30] D.E.C. Yale (ed.), *Lord Nottingham's Chancery Cases*, 2 vols (Selden Soc. vols 73 and 79, 1957 and 1961). The edition first appears in the annual reports of the Selden Society for the year 1954, as having been accepted during that year for inclusion in the Society's series. At this stage a single volume may have been envisaged, though by the following year it was clearly expected that the edition would comprise more than one volume.

[31] In 1960, between Yale's two volumes, the Society published Sir Cecil Carr (ed.), *Pension Book of Clement's Inn* (Selden Soc. vol. 78), the text of which dated from the first half of the 18th century.

[32] BL MS. Add. 29800 (then in the British Museum).

[33] Yale, *Nottingham's Chancery Cases*, vol. 1, p. cxxvi.

[34] Ibid., vol. 1, pp. cxxvi-cxxvii. After the publication of Yale's edition, two further manuscripts of Nottingham's Chancery cases came to light: Lord Eldon's copy, from which Swanston's extracts had been taken, which was presented to the British Museum in 1975 (now BL MS. Add. 58434), and a copy which had belonged to Nottingham's second surviving son, Heneage Finch, first earl of Aylesford (Middle Temple MS. 117). The latter copy, though presented to the Middle Temple in 1835, had not been catalogued in print when Yale wrote. He regretted having been unaware of it, thinking (given its provenance) that it would have been a better text to use. But it seems unlikely that collation of the texts would have been a particularly fruitful exercise.

[35] For exceptions see Yale (ed.), *Lord Nottingham's Chancery Cases*, vol. 1, p. cxxvii.

[36] Holdsworth, *History of English Law*, vol. 6, p. 542.

1679,[37] and those of Nottingham's speeches in Parliament which had legal interest. Not all in Yale's edition was previously unknown,[38] and the Chancery record of Nottingham's time remains to a large extent unexplored, but the publication of Nottingham's cases made a major contribution to the study and understanding of equity in 'the vital years in which the language, so to speak, of equity finally changed'.[39]

Beyond the cases themselves, the edition included introductions to each of the two volumes, comprising between them over 320 pages, little short of a monograph on selected aspects of the Chancery jurisdiction in Nottingham's time and before, 'a major work in itself, the most important since Turner's *Equity of Redemption* [of 1931]'.[40] Yale had been awarded the Yorke Prize by the University of Cambridge for the typescript version.[41] After a biographical sketch, the introduction to the first volume, the shorter of the two, provided a consideration of precedent in equity, including substantial discussion of Nottingham's handling of precedent in *Howard* v. *Duke of Norfolk* (1682–85),[42] to show Nottingham's view that it is 'the course of the court that is the law of the court' and that 'in Chancery a single authority, even an Exchequer Chamber decision, is not beyond recall',[43] and gathering in discussion of the jurisdiction against fraud and inequitable conduct savouring of fraud, and of the relationship between the Chancery and lesser equity jurisdictions and the court's role in relation to bankruptcy.

The introduction to the second volume, entitled 'An Essay on Mortgages and Trusts and Allied Topics in Equity' focused on two of the 'pillars' of the classic equity jurisdiction, while bringing into consideration some other matters, including aspects of the treatment of testamentary executors, the *bona fide* purchaser defence, and the broader jurisdiction to relieve against penalties and forfeitures. Running through Yale's analysis

[37] 31 Car. II, c. 2.

[38] Some forty cases from Nottingham's reports had been printed by Swanston between 1821 and 1827 to illustrate his three volumes of Chancery reports, from a manuscript copy provided by Lord Eldon (now BL MS. Add. 58434): *Lord Nottingham's Chancery Cases* (vol. 1), p. cxxvi, Holdsworth, *History of English Law*, vol. 6, p. 542. These cases, including, for example, *Howard* v. *Duke of Norfolk*, had been readily available for well over a century when Yale began work.

[39] W.J. Jones, review of Yale, *Lord Nottingham's Chancery Cases* (vol. 2), *American Journal of Legal History*, 7 (1963), 272–6, at p. 272.

[40] Ibid., p. 274, referring to R.W. Turner, *The Equity of Redemption: Its Nature, History and Connection with Equitable Estates Generally* (Cambridge, 1931).

[41] *The Historical Register of the University of Cambridge, Supplement 1951–55* (Cambridge, 1956), p. 103, the prize for 1953.

[42] Yale, *Lord Nottingham's Chancery Cases*, vol. 2, pp. 904–915; 2 Swanston 454, 3 Ch. Cas. 1–54, Pollexfen 223, 2 Freeman 72, 80, 2 Ch. Rep. 229, 1 Vern. 163.

[43] Yale, *Lord Nottingham's Chancery Cases*, vol. 1, p. xc. Compare Simpson's view that the rule against remoteness of vesting enunciated by Nottingham in *The Duke of Norfolk's Case*, 'was an innovation, and only the barest shreds of authority for the doctrine could be dragged out of the earlier cases which [Nottingham] reviewed, though many could be explained retrospectively as illustrating it', A.W.B. Simpson, *A History of the Land Law*, 2nd edn (Oxford, 1986), pp. 227–8.

was the question of the treatment of the legal estate in equity, which he saw as a matter not of jurisprudence but of jurisdiction, eschewing the 'difference between rights *in rem* and rights *in personam*, unfortunately borrowed from the Roman law of actions',[44] and emphasising that 'it is the difference based on legal and equitable interests that is historically vital'.[45] Yale's treatment of the *bona fide* purchaser defence illustrates the point: 'the possession of a legal interest in the hands of the defendant raised a point of jurisdiction. In the absence of an equity strong enough to give the court jurisdiction the legal estate was a bar to the plaintiff's suit.'[46]

Interspersing his discussion with detailed consideration of salient cases from Nottingham's notes, Yale demonstrated his mastery of the principles of equity in Nottingham's time and a 'singular grasp of seventeenth century legal complexities'.[47] As A.W.B. Simpson put it, 'the accuracy and scholarship displayed are of the first class; indeed it would be hard to overestimate the contribution which Mr. Yale has made to the history of English equity, and to the general history of English law in the seventeenth century',[48] albeit Yale wrote without the benefit of subsequent research on the Chancery before Nottingham's time, perforce relying upon the limited extant scholarship, not all of it wholly reliable.[49]

A reviewer had observed of Yale's introductions to *Lord Nottingham's Chancery Cases* that 'the court of Chancery is never placed in context and its procedures are left to be assumed by the reader'.[50] Yale was not unaware of the significance of procedure: '[p]rocedural development is the real impulse behind the development of substantive rights',[51] and the publication of Nottingham's Chancery cases was followed by an edition of two texts – frequently referred to in Yale's edition of the Chancery cases – prepared by Nottingham for his private use and preparation: his 'Manual of Chancery Practice', drawing heavily on the court's existing general orders with Nottingham's own observations upon their practical operation, and his 'Prolegomena of Chancery and Equity', in effect a (somewhat

[44] Yale, *Lord Nottingham's Chancery Cases*, vol. 2, p. 30 n. 2.
[45] Ibid., pp. *30–1*.
[46] Yale, *Lord Nottingham's Chancery Cases*, vol. 2, p. 68.
[47] Jones, review of Yale, *Lord Nottingham's Chancery Cases*, at p. 275.
[48] A.W.B. Simpson, review of Yale, *Lord Nottingham's Chancery Cases* (vol. 2), *English Historical Review*, 79 (1964), 179–80.
[49] It has since become clear, for example, that Turner's *The Equity of Redemption* (1931) requires very substantial revision in light of the evidence of the Chancery record: see D.P. Waddilove, '*Emmanuel College v. Evans* (1626) and the History of Mortgages', *Cambridge Law Journal*, 73 (2014), 142–68, at pp. 146–8. And Yale tended to assume that trusts had been 'revived', following the Statute of Uses 1536, rather later than subsequent work on the Chancery record has shown to have been the case: see, e.g., N. Jones, 'Trusts in England after the Statute of Uses: A View from the Sixteenth Century', in R. Helmholz and R. Zimmermann eds., *Itinera Fiduciae: Trust and Treuhand in Historical Perspective* (Berlin, 1998), pp. 173–206.
[50] Jones, review of Yale, *Lord Nottingham's Chancery Cases*, at p. 274.
[51] Yale, *Lord Nottingham's Chancery Cases*, vol. 2, p. *91*.

disorganised) commonplace book. Yale again provided an introduction, which focused on the 'Manual of Chancery Practice', including discussion of the rise of sequestration of property alongside the traditional personal coercion as a means of enforcing Chancery orders, equity pleadings and evidence, and the role of the masters of Chancery. This edition completed Yale's published works on Lord Nottingham, as a result of which, as J.P. Dawson observed, 'we now know more about the workings of Chancery in the late 1600's than was to be known about the Chancery for a century to come'.[52]

Sir Matthew Hale

While sometimes venturing into other periods,[53] and occasionally into the present,[54] Yale settled most comfortably in the 17th century, an age which seemed to influence his distinctive style of handwriting and occasionally his figures of speech. It is hardly surprising that after Lord Nottingham he became interested in the work and writings of Nottingham's equally important near-contemporary Sir Matthew Hale (1609–76). In later life, Yale considered that his concentration on the work of these two important figures constituted a fundamentally different approach to legal history from that of Milsom. Milsom did not concern himself with biography, and was more inclined to attribute legal changes to the workings of forensic tactics and the sometimes unforeseen consequences of legal logic, whereas Yale was (as he put it) 'prepared to allow for much greater personal influence of certain individuals'.[55] But any such difference arose more from chronology than from ideology. Milsom did accord weight to the 12th-century treatise called *Glanvill*, but the influence of individual judges and lawyers on legal change is not visible in the earliest period of the common law in the way that it was by the 17th century, and the challenge for the historian was to find the unspoken assumptions behind the bare documents. The only medieval work in any way comparable with Hale's was *Bracton*, but that unfinished and idiosyncratic treatise is an unreliable guide to the 13th century and had little enduring influence until its partial revival in the 16th century, a topic on which Yale wrote a substantial essay.[56] Unlike *Glanvill* and *Bracton*, which

[52] J.P. Dawson, review of Yale, *Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity'*, *American Journal of Legal History*, 10 (1966), 82–4, at p. 84.

[53] E.g. 'A Year and a Day in Homicide', *Cambridge Law Journal*, 48 (1989), 202–13, in which he traced the origin of the rule that one could not be convicted of murder or manslaughter if the death occurred more than a year and a day after the deed. Yale considered this his favourite essay, and it led to the abolition of the rule.

[54] Arthur Armitage, as general editor, recruited him as a contributor to *Clerk and Lindsell on Torts* (12th edn, 1961), and he contributed chapters to five successive editions from 1961 to 1989.

[55] He said that this difference 'made for certain awkwardnesses in later times': first interview (2019), q. 53.

[56] '"Of No Mean Authority": Some Later Uses of Bracton', in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, ed. M.S. Arnold and others (Chapel Hill, 1981), pp. 383–96.

circulated widely for a time, the writings by Nottingham and Hale were essentially private and went unpublished until long after their deaths: Hale, indeed, forbade publication. Their contemporary influence was rather as judges and must be ascertained from the reports of their decisions. In Nottingham's case the reports were his own. Hale was not a reporter, though reports by others show that his judgments were comprehensive and lucid. He was a Common Pleas judge during the Interregnum (1654–59), and served after the Restoration as chief baron of the Exchequer (1660–71) and lord chief justice of the King's Bench (1671–76). However, he did not carry on to the bench his law reforming instincts from the 1650s[57] and is not remembered for ground-breaking decisions or dissents. His reputation as a jurist of the front rank rests chiefly on the deeply reflective and fully researched books and papers which he left unpublished. A few of these were printed long ago, most notably the *History of the Pleas of the Crown* (1736), but Yale became aware of several more which were of comparable importance. The treatise on the Admiralty jurisdiction will be mentioned below. There was also a treatise 'On the Nature of Laws' in the Hargrave collection, which Yale copied and spent some time studying; but he abandoned any intention of publishing it after concluding that it was probably not by Hale.[58]

The most generally interesting of Hale's other works was that on the prerogatives of the crown, and it was this which Yale decided to edit first. Earlier works on the prerogative had been concerned with the feudal property rights of the crown rather than public law. Hale's was the first significant treatise on English constitutional law, and some of its historical parts have not been entirely superseded today. By 1970 Yale had completed a transcription, and the edition was published with a full introduction in 1976. The publication coincided (deliberately) with the tercentenary of Hale's death, which the Selden Society marked with a lecture by Yale and an exhibition in Lincoln's Inn hall. On that occasion much excitement was caused by the appearance of a Mr James Fairhurst[59] bearing a plastic carrier bag full of manuscripts connected with Hale and Selden. Fairhurst had acquired the manuscripts from the Hale family of Alderley Grange, Gloucestershire, in about 1939; but he was more interested in Hale's religious views than legal history and even claimed to have some kind of psychic rapport with him. Repeated attempts by Yale to discover what exactly there was in Fairhurst's collection relating to Hale met

[57] He chaired a law commission during the Cromwellian period. Yale took an interest in that project, but work on the surviving papers was undertaken by someone else and never finished.

[58] Letter from Yale to Baker, 10 October 2002. The manuscript was BL MS. Hargrave 485, and Hargrave himself had doubts about its authorship. There are other copies in MS. Harley 7159 and MS. Add. 18235. It has since been edited in *On the Law of Nature, Reason and Common Law: Selected Jurisprudential Writings [of] Matthew Hale*, ed. G. Postema (Oxford, 2017).

[59] Of Oldham, Lancashire, electrical engineer, later of Oxford; died 1999.

with little success, though it has since emerged – contrary to the high hopes which had built up[60] – that there was little which would have been of relevance to his work.[61]

Yale's edition of the treatise on the prerogative, which he entitled *The Prerogatives of the King*, was necessarily a composite construction. Hale never completed the work but left three related texts, all now preserved in Lincoln's Inn. The first was a notebook containing, amongst other things, 'Incepta de Juribus Coronae'; secondly there was a more developed text of fourteen consecutive chapters with the same title in English, 'Preparatory Notes touching the Rights of the Crown'; and finally there was a more detailed but partial version entitled 'Prerogativa Regis'. Yale gave reasons for thinking that the second of these belonged to the 1640s and the third to the 1650s, with some revisions in the early 1660s. But Hale's final version, though also of fourteen (different) chapters, was less extensive in scope than the 'Preparatory Notes'. Part of the explanation is that some of the missing chapters had in the meantime been worked up into separate treatises.[62] It is also evident that Hale abandoned some of his original intentions. A series of elaborate tables, showing how he originally conceived the work and how much remained to be done, is prefaced to Yale's edition. It had been an immensely ambitious project, covering the whole range of public law in fifty-one chapters, and Hale's failure to complete it does not diminish the value of what he did leave behind.

Yale's edition was based primarily on the fourteen chapters of 'Prerogativa Regis', adding the seven further chapters from the 'Preparatory Notes', and inserting full annotations throughout. The editorial introduction began by providing the first full scholarly account of the dispersal and survival of Hale's significant collection of manuscripts. But its core was a discussion of Hale's method, and in particular his approach to history.[63] As in the *History of the Pleas of the Crown*, the content was predominantly historical, and indeed – because of the paucity of reported cases – there was far more reliance on medieval record material than in the book on criminal law. Much use was made of the Chancery and Parliament rolls, and of the King's Bench plea rolls up to Edward III,

[60] The collection was acquired by Lambeth Palace Library in 1988. On 20 February 1989 Yale wrote to Victor Tunkel (copy to Baker): 'Lambeth Library have acquired the Hale collection from James Fairhurst. As the consideration was in the order of a quarter of a million I suppose they purchased by the sackful or cwt. The stuff is now at Lambeth and I hope to pay a visit before long. The opening of this hoard is a great event as no one has seen more than bits and pieces and there are likely to be some large revelations.'

[61] Several of Hale's legal manuscripts were acquired by Charles Kay Ogden (d. 1957) and then, after Ogden's death, by the Clark Library, Los Angeles. It seems probable that these legal manuscripts had been sold off by Fairhurst. They have as yet received no scholarly attention. Some Selden manuscripts were sold by Fairhurst to the Bodleian Library in the 1940s; others were sold at Sotheby's.

[62] Francis Hargrave edited and published the tripartite treatise on the law of the sea, ports and customs in 1787 and another on the jurisdiction of the House of Lords in 1796. These seem to have been offshoots of the prerogative project.

[63] D.E.C. Yale (ed.), *The Prerogatives of the King* (Selden Soc. vol. 92, 1976). This was also the topic of Yale's Selden Society lecture on the tercentenary of Hale's death, *Hale as a Legal Historian* (1976).

which Hale had painstakingly collected. No use was made of modern manuscript law reports, though Hale was well equipped with them. This raised obvious questions about Hale's purposes in writing. There is no indication in the manuscripts that Hale ever thought of bringing the treatment closer to his own time. Yet this was not because Hale was a legal historian in the modern, academical sense. As Yale pointed out, 'the present-day reader who turns these pages seeking information or express discussion of seventeenth-century constitutional problems is likely to find himself at a loss'.[64] Like his contemporary John Selden, Hale saw the history of the common law and its institutions as essential to an understanding of the present, not merely as interesting antecedents to what came later. It was the story of an evolving organism in which the older sources were still of evidential authority:

> Hale did not believe that the common law was changeless; on the contrary, he believed strongly in a process of continual change, of custom both created and creative, and since he held that view of the common law, it follows that he held it for the king's prerogatives as part and parcel of that changing law. The Argonauts' ship was subject to constant renewals, but its identity remained. Hale used this figure of speech to convey one of his essential ideas about the effect of time and change on the fabric of the law.[65]

If legal history was part of the law, however, there was a danger of reinterpreting historical facts to accord with received legal principle. Of the Norman 'conquest', for example, Hale shared the traditional view of Coke and Selden that English law – though very much in its infancy before 1066 – was not fundamentally changed by the accession of William I, who was not so much an absolute conqueror as the legitimate successor to Edward the Confessor. There is some contemporary evidence that this was how William saw himself, though Hale's interpretation of the Conquest was 'not in terms of history but of political theory':

> This is not the same thing as seeking for the legal history of the thirteenth century in the pages of Coke rather than those of Bracton. It does amount to placing an interpretation upon the eleventh century which enabled Hale to satisfy himself in his own age that his model of the English constitution could be based on a theory of consent, not conquest, also affording him a model of commonwealth which could reject the alarming figure of *Leviathan* and the Hobbesian sovereign.[66]

More generally, the history was arranged analytically. Thus, in treating of prerogative powers,

[64] *The Prerogatives of the King*, p. xxxi.
[65] *The Prerogatives of the King*, p. xl.
[66] *The Prerogatives of the King*, pp. xlii–xliii. On this see also D.E.C. Yale, 'Hobbes and Hale on Law, Legislation, and the Sovereign', *Cambridge Law Journal*, 31 (1972), 121–56.

> Hale was more disposed to description than definition, and so we find him categorising those powers and describing them chapter by chapter ... Though replete with historical information, the arrangement is that of textbook turned into treatise ... Within the different chapters there is frequently a chronological progression, but the whole scheme is dominated by the initial analysis. Probably such a method was regarded by Hale as a necessary device to control the enormous quantity of material he wished to employ and deploy.[67]

In that respect the book was closer in method to the *History of the Pleas of the Crown*, which was really a textbook on current criminal law, than to Hale's *History of the Common Law* (1713), which was a short treatise on legal history. Yale completed his introduction to *Prerogatives* with an analysis of Hale's views on the subject, appropriately ending with Lord Nottingham's assessment of him as 'an absolute master of the whole science of the common law'. That was reason enough for bringing his work into the light of day.

The Court of Admiralty

In June 1960 the Probate, Divorce and Admiralty Division of the High Court celebrated what was deemed to be the sexcentenary of the Court of Admiralty,[68] with lectures and a service in St Paul's cathedral. Soon afterwards the registrar of the court, Kenneth C. McGuffie (d. 1972), suggested to Yale that it would be desirable to produce a proper history of the court from the archives. Yale agreed, but said he would need assistance and persuaded Prichard to join him in what became a long collaboration. They set about acquiring photocopies and microfilm of material in the Public Record Office, All Souls College (the Wynne manuscripts) and elsewhere, funded initially by the Pilgrim Trust.[69] This store of source material is housed in filing cabinets in the Squire Law Library, with numerous notes, transcripts and drafts written on the reverses of examination scripts from the 1960s. As a preliminary exercise, while on sabbatical in 1962, Yale produced a working translation of Francis Clerke's late-Elizabethan treatise on admiralty practice.[70]

[67] *The Prerogatives of the King*, p. xlvii.

[68] The date is debatable. As it happened, 1960 was also the eighth centenary of the laws of Oléron, considered to be the foundation of admiralty jurisprudence.

[69] The grant was obtained through the good offices of Lord Simon of Glaisdale, appointed President of the Probate, Divorce and Admiralty Division in 1962, and Lord Evershed MR.

[70] *Praxis Curiae Admiralitatis Angliae* (printed in 1667). Yale concluded that the published translation of 1809 by the American lawyer John E. Hall was 'not a work of scholarship'. Yale's translation was for his own information and was not published. He also immersed himself in R.G. Marsden's *Select Pleas in the Court of Admiralty* (Selden Soc. vols 6 and 11, London, 1894, 1897), as 'the obvious point of departure for research in the earlier centuries': letter to Prichard from New Haven, 7 June 1962.

Although Yale and Prichard attracted a determined PhD student in 1965, and ran a postgraduate course on the history of the Court of Admiralty from 1971 to 1974, the task of writing the history seemed fated to be theirs alone. By the 1970s they had come to realise that the unexpected quantity of material, potentially covering six centuries, rendered the original object unattainable. Moreover, while records are full of interesting details, they do not in themselves tell a coherent story about a court or its jurisprudence.

In the 1970s a more manageable solution suggested itself. Of all periods before the 19th century, the most critical for the Admiralty was that between 1650 and 1700, when the court was embroiled in a struggle for jurisdiction with the courts of common law. The issue was whether the commercial law of England should be in the hands of the common lawyers or the Civilians. Yale's interest in the period, and in Sir Matthew Hale, had already led him to Hale's lengthy treatise on admiralty jurisdiction.[71] As a first step, there seemed to be more historical value in presenting and assessing the fruits of Hale's meticulous research than in analysing mountains of pleadings in individual cases. Hale's treatise, written when he was lord chief justice, also brought home the unfortunate lesson that much of the history of the Admiralty lay outside the records of that court, in the records of the common law. In a paper at the first British Legal History Conference in 1972, Yale offered an elegant and detailed assessment of the two sides in the debate and concluded that the Admiralty – though effectively the losing side – had a stronger case than Hale admitted. A footnote to the published version of the lecture in 1975 announced that an edition of Hale's treatise had been completed.[72] It was decided that it would be helpful to include with it an edition of the Elizabethan collection by William Fleetwood on the same topic, a less polished work which Yale described as 'a strange mixture of alphabet and treatise'.[73]

Yale was working on the Fleetwood text by 1975,[74] but it was another eighteen years before the edition of Hale and Fleetwood appeared in print.[75] The principal reason for the delay was that Yale felt it necessary, given the origin of the project, to work jointly with

[71] BL MS. Hargrave 137 (transcribed for publication in MS. Hargrave 93). Hargrave's intended edition was not forthcoming. Nor was that which Potter undertook for the Selden Society in the 1930s.

[72] D.E.C. Yale, 'A View of the Admiral Jurisdiction: Sir Matthew Hale and the Civilians', in D. Jenkins (ed.), *Legal History Studies 1972* (Cardiff, 1975), pp. 87–109, at p. 109 n. 45. He credited Prichard as co-editor, though the work was characteristically Yale's.

[73] Yale to Baker, 17 January 1992. He admitted that 'a treatise by a civilian would have been preferable if one had been able to get such a piece': same to same, 15 April 1988.

[74] Yale to Baker, 22 May 1975: 'I'm slogging away with an extensive treatise by William Fleetwood on Admiralty jurisdiction.'

[75] M.J. Prichard & D.E.C. Yale (eds), *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Soc. vol. 108, London, 1993). Contrary to the precedents of volumes 73, 79 and 92, and contrary to Yale's instincts, the Fleetwood treatise was printed (at Prichard's urging) in the original spelling.

Prichard; but it was not the kind of volume for which collaboration, especially on the introduction, was conducive to productiveness.[76] The lengthy introduction which Yale completed in 1992 was in itself an illuminating treatise on the Admiralty jurisdiction and its vicissitudes, fully annotated with references to materials garnered from the archives. Yale stated that its object was not 'to add to Admiralty history in a descriptive or analytical way', but rather to present an argument: 'That argument is not ours; it is the argument of contemporary lawyers both of the civil and common law traditions as it developed in practical terms into a clash of courts in competition for maritime jurisdiction.'[77] Whether or not that implied a limitation, the book is now the principal recourse for the early-modern history of the Court of Admiralty. The 1960 research expedition had set out into fathomless depths without charts, but the decision to concentrate on the jurisdictional conflict, and on the contemporary writings of Hale and Fleetwood, had produced more historical insight than the bare analysis of a few thousand records could have done. It provides a stable anchorage for all further work on the court. Scholarly editing involves much more than mere transcription. Yale's editions of the two previously unpublished texts by Hale, on the prerogative and the admiralty, are not only significant additions to Hale's printed oeuvre but contributions of major importance to the study of English law and constitutional thinking in the 17th century.

Other work and retirement

In 1982 Yale was persuaded to stand for election as master of Christ's College, where he had served for five years as vice-master.[78] In the event the fellows chose Sir Hans Kornberg, and although Yale later regarded the turn of events as a blessing in disguise, the consequence was a change in his college position. He was no longer elected to the college's council or given any role other than teaching. Instead he began to serve the university on the Council of the Senate, the General Board of the Faculties, and their various committees. He reflected latterly that he had given too much of his time to administration, which did not then earn recognition for the purposes of promotion.

[76] He was hoping to finish the work on his sabbatical in 1987: Yale to Baker, 5 August 1986. Four years later, 'The introduction is in bits and pieces ... MJP is helpful on the physical production, but ... I now feel the introduction, for better or worse, on my lap ... I think this old albatross will fly, but the launch is heavy work': Yale to Baker, 3 May 1991. The preface merely said that 'other duties and academic distractions have intervened': *Hale and Fleetwood on Admiralty Jurisdiction*, p. v.

[77] *Hale and Fleetwood on Admiralty Jurisdiction*, p. v.

[78] Yale recounted the story in his memoir of 1993. There were initially three candidates, Yale, Kornberg and Sir Oliver Wright, who all obtained equal support on the first straw vote. Yale dropped out after the second vote and Wright was pre-elected, but Wright was appointed ambassador to the United States before taking up the position and Kornberg replaced him.

Besides the usual university and college duties, he also committed himself heavily to promoting the scholarship of others. From 1970 to 1993 he edited the Cambridge Studies in English Legal History, at one stage rescuing it from extinction in an economy drive; from 1974 to 1981 he was editor of the *Cambridge Law Journal*, a position calling for a wide understanding of the many branches of legal scholarship; and from 1976 to 1991 he was joint literary editor of the Selden Society.[79] Such tasks involve a considerable scholarly input of a kind which does not lend itself to measurement or public acknowledgment. Yale's final administrative contribution was to chair the body charged with converting into legal form the changes in Cambridge University governance proposed by Sir Douglas Wass's syndicate in 1989, a body on which he had himself served.[80] Although he became dispirited by the mixed reaction which major changes in Cambridge inevitably received,[81] the principal reforms were achieved.[82]

Yale took early retirement in 1993 at the age of 65, partly, as he later said, 'for personal reasons (in Welsh *hiraeth*)' – it enabled a return to the family home, 'Saethon', in Portmadoc (now Porthmadog, Gwynedd) – and partly because he had been advocating a slight reduction in the retirement age for everyone. But he was also conscious that he was (in his own words) 'the most senior unadvanced reader in the University'. Professorships were still distributed sparingly at that time, and the skill and learning involved in editing texts was not widely appreciated by those in other fields. The Law Faculty proposed his name more than once for a personal chair, but it was not forthcoming.[83] A man of immense modesty, Yale claimed not to regard his work in legal history as his principal achievement, saying he preferred to think of college teaching as the best memorial – even if the memory would not endure as long as books on the shelves.[84]

[79] With Milsom 1976–80 and with Baker 1980–91. The two collaborations were of a different order. He wrote to Baker on 5 November 1990: 'Our joint directorship has been very well, I think; and nowadays the job is much heavier than it used to be. On the other hand, a joint arrangement can involve risks of disharmony. All previous joint appointments have been pretty nominal … I would say that ours has been the first working arrangement of co-directorship, and the fact that it has gone well may be due to personalities and circumstances not easily repeatable.' He indicated in his letter of resignation to the president of the Society, Sir Irvine Goulding, that it was already his intention to retire from Cambridge.

[80] He was keenly committed to the reforms and would have gone further. On 28 November 1989 he wrote to Baker: 'I tried to get the Syndicate to propose total abolition of the Senate. But they would not swallow that!'

[81] E.g. Yale to Baker, 25 November 1991: 'The recent Regent House votes are, to me, depressing. … I don't deny that the R. H. has the right to decide these matters, but it is sad that a plan is turned down in preference for a miscellany of amendments – a sort of recipe for a dog's dinner, and in effect no reform but the status quo. I think the Council has behaved badly in having Wass messed about and mucked up.'

[82] Yale chaired the Statutes and Ordinances Revision Syndicate from 1990 to 1993. Some work still outstanding was completed under Baker's chairmanship (1993 to 1995).

[83] He had also been, like Milsom, an unsuccessful candidate for the Downing chair in 1974, when Gareth Jones was elected.

[84] Second interview (2019), q. 120.

His many students, graduates as well as undergraduates, certainly remember him with affection and acknowledge his influence on them with gratitude. Reserved in manner,[85] and on first impression seemingly impassive, smoking (in the early days) a small cigar in supervisions, he was always ready to share his immense learning and his sense of humour, taking more than ordinary pains in getting to know his students. One former research student typically described him as a hard task-master who became a good friend. His lectures – mostly on English legal history and Roman law – likewise gave a misleading initial impression of insouciance for want of animation, but they more than repaid careful attention. Written by hand – like all his work, on the blank versos of examination scripts – they were meticulously revised every year, frequently incorporating solutions to questions posed by students the previous year. But teaching carried no more weight than administrative achievements for the purposes of academic promotion.

Upon retirement, Yale's scholarly work largely ended. He did find it congenial to become involved, with Prichard, in advising the Grosvenor Estates on their claim to minerals in the lordship of Bromfield and Yale,[86] a matter which had been litigious since the 17th century and was finally settled by consent in 2000.[87] He also agreed in 1998, somewhat reluctantly,[88] to contribute six entries – including a masterly brief life of Lord Nottingham – to the new edition of the *Oxford Dictionary of National Biography*. And he continued to attend the British Legal History conferences until 2013, meeting old friends and contributing to discussions. Visitors to Portmadoc were always welcomed with congenial hospitality. But visits to Cambridge and London in the last twenty years were rare.[89]

If the University proved ungrateful, Yale's scholarly distinction was recognised by his colleagues in 1980, when he was elected a Fellow of the British Academy. Other marks of recognition followed in retirement. From 1994 to 1997 he served as President of the Selden Society, and in 1998 the Society instituted a David Yale Prize in his

[85] Prichard said 'he would have made a good poker player. He was not given to immediate reactions, preferring to think at his own pace and to express himself in a considered way in writing': personal communication.

[86] The Denbighshire lordship included the medieval commote of Yale (near Wrexham), and the name was later attached to the house, Plas-yn-Yale (or Iâl), from which the family surname was taken.

[87] The claim turned on letters patent of 1631 and the historical puzzles which it generated were never wholly resolved. The present writer was engaged on the other side from 1994, in succession to J.L. Barton, but Prichard had begun earlier.

[88] Yale to Baker, 10 December 1998: 'I don't really know why I do these things for them, as it involves me in travel and some expense, but I suppose it gives me the illusion of keeping in touch.' In about 1998 Yale also wrote the entry on Hale for the *Encyclopaedia Britannica*.

[89] Yale to Baker, Christmas 2005: 'As for getting to Cambridge that seems more and more of a mirage as time passes … I should have visited Christ's (for 500th year) but did not.' His Cambridge friends treasured a final visit in 2020, when he entertained them to lunch in Christ's and offered some reflections on his career.

honour.[90] In 2000, during the lord chancellorship of his former Christ's pupil Lord Irvine of Lairg, he was appointed Queen's Counsel *honoris causa*. And in 2009 he was elected an academic bencher of the Inner Temple.

Acknowledgements
David Yale's personal reminiscences are contained in a manuscript account dated 23 May 2013, deposited with the British Academy, and in two interviews with Lesley Dingle on 26 November 2019, published online in Cambridge: Squire Law Library Eminent Scholars Archive, https://www.squire.law.cam.ac.uk/cambridge-law-eminent-scholars-archive, 'David Eryl Corbet Yale'. The latter also contains a bibliography. The materials collected for the History of the Court of Admiralty project, with related papers, are deposited in the Squire Law Library, Cambridge. Yale's professional papers are also at present deposited in the Squire Law Library, destined for the Centre for English Legal History. His letters to the writer are in the latter's possession but will be presented to the Centre. Information on various points was provided by Mrs Ann Yale.

Note on the authors: Sir John Baker is Emeritus Downing Professor of the Laws of England, University of Cambridge, and an Honorary Fellow of St Catharine's College; he was elected a Fellow of the British Academy in 1984. The section on Lord Nottingham is by Neil Jones, Professor of English Legal History at the University of Cambridge, and a Fellow of Magdalene College.

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[90] The prize is awarded every two years for 'an outstanding contribution to the history of the laws of England and Wales, from scholars who have been engaged in research on the subject for not longer than ten years'. Since 2017, separate prizes have been given for the best book and the best article published in the preceding two years.