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# **John Vincent's Reading at Gray's Inn, 1668/9, on the Merchants' Assurances Act 1601**

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## **Abstract**

In Lent Term 1668/9, John Vincent, a bencher of Gray's Inn, gave a reading on the Merchants' Assurances Act 1601 (43 Eliz. I, c.12). The notes of the law reporter, Joseph Keble, record this observance of the centuries-old tradition of readings, which was destined to expire within the next two decades. This paper situates Vincent's reading within the changing tradition of readings in the seventeenth century. It highlights the role readings continued to play in disseminating sophisticated legal learning, particularly in relation to newer areas of practice such as marine insurance, which were largely uninformed by statute, common law precedent or reference works, and would have been difficult to master through book-study alone. It examines a selection of issues discussed during the reading, focussing on legal outcomes grounded in the 'customs', usages, practices and understandings of merchants, and illustrating how these were perceived as exceptional by comparison to the ordinary rules of the common law. The nature and jurisdiction of London's court of assurances, reconstituted and empowered by the 1601 Act, are also discussed. More generally, this paper demonstrates the value of post-Restoration readings for historians of English law in the late seventeenth century.

## **Keywords**

Readings, legal education, barristers, insurance or assurances, merchants, seventeenth century, merchant customs, lex mercatoria, law merchant, John Vincent, Joseph Keble, Merchants' Assurances Act 1601, statute 43 Eliz. I, c.12, court of assurances, court of commissioners, assurance chamber.



## I. INTRODUCTION

By the second half of the seventeenth century, barristers and students of the common law at the inns of court and of chancery in London would have acquired much of their legal learning by reading. Printed legal works had become more numerous and accessible than in previous periods,<sup>1</sup> and by around the turn of the seventeenth century had come to be seen as authoritative repositories of learning for the legal profession.<sup>2</sup> Matthew Hale's advice to students of the common law illustrates this emphasis on solitary reading:

It is necessary for him to observe a Method in his Reading and Study; for, let him assure himself, though his Memory be never so good, he shall never be able to carry on a distinct serviceable Memory of all, or the greatest part he reads, to the end of seven yeares [viz a student's period of residence in his Inn], nor a much shorter time, without helps of Use or Method; ...I shall therefore propound that which by some experience hath been found to be very usefull in this kinde, which is this: First, it is convenient for a Student to spend about two or three years in the diligent reading of *Littleton*, *Perkins*, *Doctor and Student*, *Fitzherbert's Natura Brevium*, and especially my Lord *Cokes Commentaries*, and possibly his *Reports*; this will fit him for Exercise,

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<sup>1</sup> David J. Ibbetson, 'Common Lawyers and the Law Before the Civil War', 8 *Oxford Journal of Legal Studies* (1988), 142, at 150–151; Richard J. Ross, 'The Commoning of the Common Law: the Renaissance Debate Over Printing English Law, 1520–1640', 146 *University of Pennsylvania Law Review* (1998) 323, at 324–325, 391–403, 430–445. See also John P. Dawson, *The Oracles of the Law*, Ann Arbor, 1968, 68–76.

<sup>2</sup> Ian Williams, "'He Creditted More the Printed Booke": Common Lawyers' Receptivity to Print, c.1550–1640', 28 *Law and History Review* (2010), 39, at 47–70. Cf. Dawson, *Oracles*, 78.

and enable him to improve himself by Conversation and Discourse with others, and enable him profitably to attend the Courts of *Westminster*. ...Afterwards it might be fit to begin to read the Year-Books; ...and so come down in order and succession of time to the latter Law, viz. *Plowden, Dyer, Cokes Reports* the second time, and those other Reports lately Printed: As he reades, it is fit to compare Case with Case, and to compare the Pleadings of Cases with the Books of Entryes, especially *Rastals*, which is the best...<sup>3</sup>

Despite the legal profession's shift towards print, the spoken word remained important at that time for the transmission of legal knowledge. Oral advocacy was the mainstay of the barrister's profession. As Hale indicated, two to three initial years of book study were intended to prepare the seventeenth-century law student for participation in the oral tradition of the bar: for 'Exercise', engaging in 'Conversation and Discourse', and attending the central courts at Westminster. In this regard, readings continued to constitute a prominent element in that oral tradition, in a student's legal education and in the life of the inns more generally, until the cessation of that tradition around 1684.<sup>4</sup>

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<sup>3</sup> Henry Rolle, *Un Abridgment des Plusieurs Cases et Resolutions des Common Ley*, London, 1668, 8–9. The attribution of this preface to Hale is in Joseph Story, 'Review of a course of legal study respectfully addressed to the students of law in the United States, by David Hoffman, Professor of Law in the University of Maryland', in *The Miscellaneous Writings, Literary, Critical, Juridical, and Political, of Joseph Story, LL.D.*, Boston, 1835, 223, at 229.

<sup>4</sup> J.H. Baker, *Readers and Readings in the Inns of Court and Chancery* (Selden Society Supplementary Series 13), London, 2000, 61, 102–103, 183, 263 and 335, notes the last known readings at each of the inns of court: Lincoln's Inn, c.1667–69; Gray's Inn, 1678; Inner Temple, 1678; Middle Temple, 1684. On the decline of readings and other learning exercises at the inns: Wilfred R. Prest, *The Inns of Court under Elizabeth I and the Early Stuarts 1590–*

This article examines the reading given by John Vincent at Gray's Inn during Lent vacation, 1668/9, on the statute 43 Eliz. I, c.12 (the Merchants' Assurances Act 1601). Evidence of Vincent's *Reading* survives in the form of contemporaneous notes taken by the law reporter, Joseph Keble.<sup>5</sup> The *Reading* is worthy of attention: first, as an example of a reading from the end-days of the tradition; and second, because of its topic. The Merchants' Assurances Act 1601 was the first English legislation relating to insurance, giving statutory authority to a court of commissioners, the court of assurances, to determine insurance disputes.<sup>6</sup> Neither the 1601 Act, nor the Policies of Assurance Act 1662 which amended it,<sup>7</sup> provided any substantive insurance law rules. At the time of Vincent's *Reading*, and for decades thereafter, the substantive English law of insurance was to be found in a handful of court judgments and in the 'customs', usages, practices and understandings of merchants.<sup>8</sup>

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1640, London, 1972, 131–136; J.H. Baker, 'Readings in Gray's Inn, their Decline and Disappearance', in *The Legal Profession and the Common Law*, London, 1986, 31, at 35–37; Baker, *Readers and Readings*, 7–8; David Ibbetson, 'Common Law and *Ius Commune*' (Selden Society Lectures), London, 2001, 21–22; Williams, 'Receptivity to Print', 43 n.11.

<sup>5</sup> Bodleian Library (Bodl.) MS Rawlinson C 824 ('Keble's notebook'), accessible in J.H. Baker, ed., *English Legal Manuscripts*, Stages III–IV [Microfiche], L119–L130: the *Reading* is in L125 Bodl. Rawl.C.824, pp.374–401 H-1795-mf 86 ('Notes').

<sup>6</sup> On the background to the 1601 Act, see: David Ibbetson, 'Law and Custom: Insurance in Sixteenth-Century England', 29 *Journal of Legal History* (2008), 291, at 305–307; Guido Rossi, *Insurance in Elizabethan England: The London Code*, Cambridge, 2016, 75–88.

<sup>7</sup> 13 & 14 Car. II, c. 23.

<sup>8</sup> J.M. Pardessus, *Collection de lois maritimes antérieures au XVIIIe siècle*, 6 vols., Paris, 1837, vol.4, 198, 201, concluded that the 1601 and 1662 Acts presupposed the existence of an underlying 'droit commun', not to be found in legislation: he speculated that, in matters of

Contemporary barristers could draw on very little authoritative, printed material relating to the law and practice of merchant affairs, such as insurance. Vincent's *Reading* probably represented a valuable opportunity to acquire and exchange learning on the topic.<sup>9</sup> Equally, for present-day legal historians, the relative scarcity of known evidence regarding seventeenth-century insurance law and practice means that the *Notes* of Vincent's *Reading*—a record, by a barrister and law reporter, of the speeches of practising barristers delivered to an audience of professionals and students—constitute a particularly valuable source.

This paper first considers John Vincent himself, his *Reading* as an example of a latter-day reading, and his reporter Joseph Keble. It then employs examples from the *Reading* to illustrate how it would have served to disseminate knowledge, which otherwise may have been difficult to access, on the topics of insurance law and practice and the court of assurances in the seventeenth century.

## II. THE READER JOHN VINCENT

Relatively little is known about John Vincent. He was admitted to Gray's Inn either in 1633/4 or 1636.<sup>10</sup> He was called to the bar in 1648, and to the bench in 1668.<sup>11</sup> His contributions

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insurance law, the English must have followed foreign 'usages'. The terms 'custom', 'usage', 'practice' and 'law merchant' are discussed in J.H. Baker, 'Custom and Usage', *Halsbury's Laws of England*, 2012, vol.32, paras.1–2, 5, 50–52, 62–64, 83–85.

<sup>9</sup> Baker, 'Readings in Gray's Inn', 32, notes that 'a reader could choose a text which enabled him in effect to lecture on the common law'.

<sup>10</sup> Joseph Foster, *The Register of Admissions to Gray's Inn, 1521–1889*, London, 1889, 203 (entry for 21 Feb. 1633/4 refers to John Vincent, 'son and heir of Thomas V., late of Wooton, Kent, gent'), 211 (entry for 27 May 1636 refers to John Vincent, 'son of Thomas C., of the

during his *Reading* suggest that he was knowledgeable about the law and practice of merchant affairs, including insurance, but the nature of his legal practice is otherwise obscure.

The *Gray's Inn Pension Book* notes a decision on 29 October 1668 that Vincent should read in the following Lent vacation.<sup>12</sup> While in the fifteenth century, a barrister could probably not become a bencher without reading, by the early sixteenth century benchers were elected on condition that they should read in future.<sup>13</sup> Some such benchers would avoid ever reading.<sup>14</sup> Indeed, by Vincent's time, reading had become less important for a barrister's career progression than previously.<sup>15</sup> For example, whereas in the early sixteenth century it was 'irregular' for serjeants or king's counsel to be made without reading,<sup>16</sup> in 1623 two barristers who had not read were made serjeants.<sup>17</sup>

There is no evidence, however, that Vincent attempted to avoid his academic duties. One special privilege accruing to readers may have provided some inducement to him. A

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city of London, gent.'). See also Baker, *Readers and Readings*, 60; cf. Reginald J. Fletcher, *The Pension Book of Gray's Inn (Records of the Honourable Society) 1569–1669*, London, 1901, 458 (entry for 29 Oct. 1668) n.2.

<sup>11</sup> Fletcher, *Pension Book 1569–1669*, 457 (entry for 17 April 1668), 458 n.2; Baker, *Readers and Readings*, 60.

<sup>12</sup> Fletcher, *Pension Book 1569–1669*, 458.

<sup>13</sup> Baker, *Readers and Readings*, 5.

<sup>14</sup> *Ibid.*

<sup>15</sup> Prest, *Inns of Court 1590–1640*, 128, refers to the 'diminishing professional advantages of performing a reading' in the period he covers; Baker, 'Readings at Gray's Inn', 36.

<sup>16</sup> Baker, *Readers and Readings*, 6.

<sup>17</sup> *Ibid.*, 7.

reader was permitted to select a small number of persons to be called to the bar of his inn.<sup>18</sup> Vincent employed this right in granting his son Thomas a ‘degree’, by having him called to the bar of Gray’s Inn.<sup>19</sup> This may have been important to the elder Vincent, as Thomas Vincent was apparently reluctant to obey his father’s wish that he should pursue a career at the bar. John Vincent’s will, dated 4 May 1669, recites:

Whereas my sonne Thomas Vincent to whome I intended a greate part of that small Estate which I have left in this world, hath without anie cause that I knowe of gone away without my consent or his Mothers, soe that I cannot now in prudence leave the care of his Mother and my youngest Children unto him, and fearing he is seduced by evill companie, soe that sometime (notwithstanding what he hath taken with him) he may be reduced to miserie: I would desire his Mother with mee to forgive him thus farr as to use all meanes by her selfe and Friends to reclaime him from his badd Companions: And if retourne or send some good accompt, where he is, and hath beene with in two yeares and give good assurance of his honest deportment and dutifull behaviour for the time to come, and betake himselfe to the studdie of the Lawe (he having already received a Degree at my Reading[)], Then I intend him my Chambers at Grayes Inne now in the possession of Master Price to enter thereupon when his Lease expireth, and in the meane time the Rent towards his encouragement which is Twentie

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<sup>18</sup> *Ibid.*, 6.

<sup>19</sup> Foster, *Register of Admissions*, 306. Reginald J. Fletcher, *The Pension Book of Gray’s Inn (Records of the Honourable Society) 1669–1800*, London, 1910, 1 n.1, notes: ‘The Reader had at this time the privilege of calling three men to the Bar at his Reading’. Segar (Harl. MS., 1912) gives the following list for the years 1663–9: ‘27th February, 1668–9, ...Thomas Vincent’. *Ibid.*, 98 (entry of 25 June 1688), includes a Thomas Vincent amongst those ‘Called to be Ancients’ of Gray’s Inn.

pounds per Annum, and I doe alsoe intend him upon the condicons aforesaid Twentie pounds per Annum more during the continuance of Mr Price his Lease, and after the said Terme to Master Price be ended Provided his Mother and my Overseers of this my will be satisfied of his good deoportment I would still continue and make good his Annuitie to him, over and besides the Chambers aforesaid. But if he retourne not in Two yeares and give such Accompt and soe deport himselfe as is above expected, then I give the said Chambers to my Overseers in trust to sell, and...doe hereby forgive pardon and release him of the moneys he hath without my leave taken with him, but give him not Annuitie, nor think fit for his sake further to lessen my Estate to his Mother and Sisters...<sup>20</sup>

The *Gray's Inn Pension Book* records John Vincent's presence at pensions on 19 May and 29 June 1669, but not afterwards.<sup>21</sup> Barbara Vincent, John Vincent's widow, would be granted administration of his estate on 21 October 1669, for want of executors.<sup>22</sup> He would seem to have died in possession of a substantial estate.<sup>23</sup>

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<sup>20</sup> The National Archives: Public Record Office PROB 11/331/203. In this and other quotes, original spelling is retained, and contractions or suspensions have been expanded without indication.

<sup>21</sup> Fletcher, *Pension Book 1669–1800*, 1–3.

<sup>22</sup> A Barbara Vincent is referred to as 'widow of John Vincent of Grays Inn' in a conveyance dated 15 Dec. 1698: East Sussex Record Office AMS3197 <[http://www.thekeep.info/collections/getrecord/GB179\\_AMS3163\\_9\\_3197](http://www.thekeep.info/collections/getrecord/GB179_AMS3163_9_3197)> accessed 21 Feb. 2017.

<sup>23</sup> Centre for Metropolitan History, 'Hearth Tax: Middlesex 1666, St Andrews Holborn (1 of 2)' in *London Hearth Tax: City of London and Middlesex, 1666*, 2011, <<http://www.british-history.ac.uk/london-hearth-tax/london-mddx/1666/st-andrew-holborn-1>> accessed 24 Jan.

### III. VINCENT'S LATTER-DAY READING, AND ITS REPORTER JOSEPH KEBLE

By the time of Vincent's *Reading*, the tradition of readings had existed for at least two hundred years.<sup>24</sup> The 'classical system' of readings in the inns of court had been established by the middle of the fifteenth century.<sup>25</sup> Readings were given in the 'learning' or 'grand' vacations during Lent and in the autumn, when the Westminster courts were not sitting.<sup>26</sup> The topic of a reading was generally a statute: until Tudor times, thirteenth-century legislation was invariably selected. Later, more modern statutes were admitted.<sup>27</sup> The intellectual content of a reading consisted of the reader's lectures, accompanied by numerous hypothetical cases

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2017, and MarineLives, <[http://www.marinelives.org/wiki/MRP:\\_John\\_Vincent\\_will](http://www.marinelives.org/wiki/MRP:_John_Vincent_will)> accessed 24 Jan. 2017, indicate that in 1666 Vincent owed tax for a twelve-hearth house in St Andrew's, Holborn, Middlesex.

<sup>24</sup> Baker, *Readers and Readings*, 3–4: there is evidence of reading-like exercises going back to the fourteenth century. Regarding readings generally, see: Samuel E. Thorne, ed., *Readings and Moots at the Inns of Court in the Fifteenth Century* (Selden Society 71), 2 vols., London, 1954, vol.1, introduction; Prest, *Inns of Court 1590–1640*, ch.6; M.C. Mirow, 'The Ascent of the Readings: Some Evidence from Readings on Wills', in Jonathan A. Bush and Alain Wijffels, eds., *Learning the Law: Teaching and Transmission of Law in England, 1150–1900*, London, 1999, 227; Baker, *Readers and Readings*, 3–9, 187–190, 227–239.

<sup>25</sup> *Ibid.*, 4.

<sup>26</sup> *Ibid.*

<sup>27</sup> Thorne, *Readings and Moots*, xvii; Prest, *Inns of Court 1590–1640*, 119–120; Baker, 'Readings in Gray's Inn', 32; Baker, *Readers and Readings*, 3; Ibbetson, 'Common Law and *Ius Commune*', 22.

which were argued before the audience by the reader and by pre-selected, senior attendees. Students, barristers, and benchers of the inn would attend, as might judges and serjeants who formerly had been members.<sup>28</sup>

After Vincent's *Reading*, the practice of readings would survive for around another fifteen years.<sup>29</sup> By his time, second or 'double' readings, and the pre-eminence attendant upon those who had delivered them, had disappeared.<sup>30</sup> The lessened importance of reading for a seventeenth-century barrister's career has been alluded to. The prestige of readership within the profession had also declined. By 1668, the readers' tufted gowns had been adopted by king's counsel, whether they had read or not.<sup>31</sup> Various factors have been invoked to explain the death of the tradition: the cost of entertainment to the reader;<sup>32</sup> the increasing availability of sophisticated, printed legal materials;<sup>33</sup> the competing demands of legal practice;<sup>34</sup> the introduction of written pleadings in the courts;<sup>35</sup> and the English civil wars. The last factor, notably, sapped the vitality of the tradition. Most directly, the civil wars and interregnum interrupted it altogether: there were, for example, no readings at Gray's Inn between 1643 and 1660.<sup>36</sup> It was then difficult to reinstate them after the Restoration. Those next-in-line to read,

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<sup>28</sup> Baker, *Readers and Readings*, 5.

<sup>29</sup> See n.4 above.

<sup>30</sup> Prest, *Inns of Court 1590–1640*, 128; Baker, *Readers and Readings*, 4–5, 7 n.35.

<sup>31</sup> Baker, 'Readings in Gray's Inn', 36; Baker, *Readers and Readings*, 8 n.43.

<sup>32</sup> Prest, *Inns of Court 1590–1640*, 128–129, 135; Baker, *Readers and Readings*, 7.

<sup>33</sup> Prest, *Inns of Court 1590–1640*, 124, 132–135; Ibbetson, 'Common Law and *Ius Commune*', 22; Williams, 'Receptivity to Print', 68 n.123.

<sup>34</sup> Prest, *Inns of Court 1590–1640*, 135.

<sup>35</sup> *Ibid.*

<sup>36</sup> Baker, 'Readings in Gray's Inn', 35; Baker, *Readers and Readings*, 7–8, 58.

having avoided the task for so long, were generally loathe to undertake it, partly because they considered themselves to be too senior.<sup>37</sup> Indirectly, the prejudicial effects of the civil war on the inns' membership and finances meant that the inns valued the fines paid by recalcitrant readers, to commute their obligation to read, more than the missed readings.<sup>38</sup>

The growing expense of the readings, and the increased availability and importance of printed sources, have also been called upon to explain the diminishing duration of readings over the course of the sixteenth and seventeenth centuries.<sup>39</sup> In the early sixteenth century, readings were expected to last over three weeks; by the late sixteenth and early seventeenth century they had shrunk to one to two weeks.<sup>40</sup> Vincent's *Reading* is consistent with this tendency. Vincent presented only three main 'divisions' and a final 'repetition' or

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<sup>37</sup> Baker, 'Readings in Gray's Inn', 36. The preamble to John Sicklemore's reading illustrates this attitude: '...I cannot say it doth not now surprise me & seeing your masters might have made a more worthy & able choice out of my Auncients I hoped your masters well knowing my Infirmityes would not have forced me hither pro saltum neverthelesse assoone as I received your masters commands herein I set aside all excuses of Age Infirmitie long retirement to Country practice & whatever could pretend to dissability & most cherfully submitted my utmost endeavors to your service...' (Keble's notebook, 365–366). Sicklemore (admitted to Gray's Inn, 1633; called to the bar, 1640; called to the 'grand company of Ancients', 1658) was called to the bench in 1664, having agreed 'to read in his turn', and was granted a 'voice in Pension' in 1667. In May 1668 he was directed to read, to be assisted by John Vincent. Fletcher, *Pension Book 1569–1669*, 339, 422, 449, 453, 458.

<sup>38</sup> Prest, *Inns of Court 1590–1640*, 136; Baker, *Readers and Readings*, 7–8.

<sup>39</sup> Prest, *Inns of Court 1590–1640*, 126; Baker, *Readers and Readings*, 7, 228.

<sup>40</sup> Baker, 'Readings in Gray's Inn', 33; Baker, *Readers and Readings*, 7, 228–229.

recapitulation, occupying four days in March 1668/9.<sup>41</sup> The eleven other latter-day readings in Keble's notebook, dated between 1663 and 1669/70,<sup>42</sup> are generally of comparable length. Though admittedly a crude measure, the number of pages in the notebook occupied by these readings ranges from fourteen to 113, with a mean of around 43.5, as compared with Vincent's twenty-eight pages.<sup>43</sup> The number of days occupied by each reading ranged from three to six, with an average of around 4.3 days, as compared with Vincent's four days.<sup>44</sup>

In keeping with tradition, the *Reading's* titular statute was probably read out at or near the commencement of proceedings on the first day: a marginal reference opposite the heading

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<sup>41</sup> i.e. Monday 1, Wednesday 3, Friday 5 and Saturday 6 March.

<sup>42</sup> i.e. between Autumn 1663 and Lent 1669/70.

<sup>43</sup> The readings in Keble's notebook vary in length: Wm. Ellis, fifty-six pages; Hardres, forty-seven; Wilmot, fifty-two; Flint, fifty-six; Lehunt, thirty-five; Sicklemore, 113 (including a few blank pages); Jones, twenty-four; Amhurst, twenty-four; Skipwith, thirty; Lane, fourteen. Excluding the outlier, Sicklemore, the mean length of these readings (including Vincent's) is around 36.6 pages.

<sup>44</sup> In Keble's notebook, Hardres is recorded as presenting four divisions, the fourth being a lecture or repetition. Wilmot presented five, the last a repetition. Flint had five or six divisions, the last two being a repetition and a lecture. Lehunt presented four, the last a one-page conceit or opinion. Jones presented four divisions, the first including comments on his choice of statute and a lecture: his other divisions are cases and a repetition. Amhurst presented four divisions: three argued cases and a repetition. Skipwith presented four divisions: three argued cases and a repetition. Lane presented three divisions: two argued cases and a short repetition (which Keble notes 'was only of what had been before'). The exceptional reading in Keble's notebook is Sicklemore's, comprising a preamble speech followed by five substantial divisions.

on the first page of the *Notes* locates the 1601 Act in an abridgment.<sup>45</sup> A further marginal note refers to the Policies of Assurance Act 1662, which may also have been read out or referred to at the beginning of the *Reading*.

Thereafter, Vincent's *Reading* broke with the classical tradition in various ways. Whereas traditionally the first day of a reading began with an introductory 'preamble',<sup>46</sup> to which a pre-designated attendee would respond, Keble records no such exchange in Vincent's case. It may be that Vincent presented a preamble which Keble deemed to contain nothing of substance. However, on at least one other occasion Keble took extensive notes of a reader's preamble.<sup>47</sup> Vincent may thus, at most, have attended briefly to this ornamental aspect of the tradition. Following the preamble on the first day, and at the beginning of each subsequent division, tradition then indicated that the reader should present a lecture.<sup>48</sup> Baker, however, notes that 'in later times the cases seem to dominate the exercise' at the expense of the 'expository part of the reading'.<sup>49</sup> Vincent's *Reading* is consistent with this observation.

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<sup>45</sup> *Notes*, 373. Baker, *Readers and Readings*, 229, notes that 'the full texts of statutes rarely occur in the manuscripts'. The marginal reference is to 'Poult Abridgment'. See: Ferdinando Pulton, *A Kalendar or table, comprehending the effect of all the statutes that have been made and put in print*, 3rd ed., London, 1612, 310v–311r, paras.15–18 (paraphrasing the 1601 Act); Ferdinando Pulton, *A collection of sundry statutes, frequent in use*, London, 1661, 1150 (1601 Act in full), and the final 'Kalender' under heading 'Merchants, Merchandises', nos.14–15. On Pulton's abridgments, see John D. Cowley, *A Bibliography of Abridgments, Digests, Dictionaries and Indexes of English Law to the Year 1800*, London, 1932, xxxiv—xxxv.

<sup>46</sup> Baker, *Readers and Readings*, 229.

<sup>47</sup> John Sicklemore's: see n.37 above.

<sup>48</sup> Prest, *Inns of Court 1590–1640*, 121–122; Baker, *Readers and Readings*, 229–231.

<sup>49</sup> *Ibid.*, 231.

Keble's *Notes* suggest that Vincent delivered only one lecture, on the third day of the *Reading*. Given the several other instances in Keble's notebook where readers' speeches are recorded,<sup>50</sup> and others where Keble expressly refers to speeches or arguments which he chose not to record,<sup>51</sup> it seems likely that Vincent simply did not lecture on three of the four days of his *Reading*. In this regard, it is also notable that Master Bennet, speaking on the first day immediately after Vincent had presented his first case, began with a series of remarks intended to serve 'as præcognita'.<sup>52</sup> This tends to suggest that Vincent had delivered no introductory lecture himself.

Vincent may have been encouraged to adopt this course by the short, procedural character of the 1601 Act, which may not have lent itself to interesting, expository lectures articulated around its provisions. Instead, Vincent focussed on his cases: 'a series of imaginary factual instances, with the reader's legal conclusions on them, intended to show how the law applied to a range of particular sets of facts'.<sup>53</sup> With the advancing years, the typical number of cases per division in readings declined, in parallel with the number of

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<sup>50</sup> e.g. Keble's notebook at: 2 ff. and 50–56 (William Ellis); 97–104 (Hadres); 222–223 (Thomas Flint); 258 (William Lehunt); 259–275, 277–297, 301–316, 317–332, 365–372 (John Sicklemore).

<sup>51</sup> e.g. *ibid.*, at 458 (indicates omission of arguments by Hooker and Lane); 402–403 (indicates omission of speech by Jones on his choice of statute and on the government of Wales before Edw. I).

<sup>52</sup> *Notes*, 374.

<sup>53</sup> Baker, *Readers and Readings*, 230–231. Vincent's cases include details such as ship names ('Hopewell', 'Marrigold', 'Mayflower', 'Royal Oak') and place names, which may have been borrowed from contemporary incidents. But instances of any notable similarity to Vincent's cases have not been identified, so it seems plausible that the latter were of his invention.

divisions and the duration of readings. Whereas in the sixteenth century as many as thirty or more cases might be presented in a division, on a single day, by the 1660s the normal number of cases in a division is thought to have been ten or twelve.<sup>54</sup> By comparison, Vincent's *Reading*, and the other Gray's Inn readings in Keble's notebook, appear even more extreme. The first two divisions of Vincent's *Reading*, and most of the third, are each devoted to arguing one, relatively detailed case.<sup>55</sup> Most of the other readings in Keble's notebook also exhibit a one-case-per-division structure, with few lectures or speeches. Of the ten other readings recorded in Keble's notebook, only one included more than one case per division.<sup>56</sup>

Vincent's reporter merits brief mention, if for no other reason than to assess the reliability of his notebook. There can be little doubt that the *Notes* are Joseph Keble's.<sup>57</sup> Keble

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<sup>54</sup> *Ibid.*, 230. See also Prest, *Inns of Court 1590–1640*, 127–128.

<sup>55</sup> By the end of the sixteenth century the cases discussed at readings had become 'more and more complex and diverse', such that in 1594 the judges ordered readers to shorten their cases for discussion and to restrict them insofar as possible to the statute being read: Baker, *Readers and Readings*, 230 nn. 43–44. The final day of Vincent's *Reading* (*Notes*, 399–401) was taken up by his repetition, during which he touched briefly on some of the opinions he had expressed over the course of his divisions and presented a few further, short cases (none of which appear to have been argued). On repetitions, see Baker, *Readers and Readings*, 233–234.

<sup>56</sup> Sicklemore's reading, beginning on 3 Aug. 1668: Keble's notebook, 259–372. Sicklemore's reading included substantial lectures, multiple cases (long and short), a full preamble speech and a lengthy repetition.

<sup>57</sup> William D. Macray, *Catalogi Codicum Manuscriptorum Bibliothecæ Bodleianæ, partis 5, fasc.2*, Oxford, 1878, col.427; Baker, 'Readings in Gray's Inn', 35. The title page to Keble's notebook, 2, states: 'Joseph Keble 1670'. The notebook is also peppered with references in

was admitted to Gray's Inn in 1647, and called to the bar in 1653.<sup>58</sup> His industry as a note-taker and reporter is notorious:

a law writer of considerable note, and of almost incredible industry. Besides several folios, &c. published in his lifetime, he left above one hundred and fifty folios and quartos in MS. The disease of reporting was so strong upon him, that, although he was never known to have a brief, or make a motion, he reported all the cases in the King's Bench court from 1661 to 1710, the period of his death, and all the sermons preached at Gray's Inn chapel, amounting to above four thousand.<sup>59</sup>

It thus seems natural for Keble to have been present, taking notes, at Vincent's *Reading* during the Lent vacation, 1668/9.

There is reason to believe that the *Notes* are a relatively complete record of the *Reading*. Keble's notebook is fairly consistent in structure and presentation, and gives the impression of an effort made not to omit any matters of legal significance. With limited exceptions, references to legal authorities such as printed reports, year books, and statutes, are recorded in the main body of Keble's notes, appearing as if they had been read out in full and

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the form '6 Keble 241: pl.30' (*Notes*, 385): as Keble's three volumes of reports did not begin to appear in print until well after the *Reading*, such references were almost certainly to his manuscript reports. Keble's reports may have circulated in manuscript, of course, but it seems plausible that Keble himself would have cross-referenced his own reports in his own notebook.

<sup>58</sup> Stuart Handley, 'Keble, Joseph (1632–1710)', *Oxford Dictionary of National Biography* (online ed.), Oxford, Jan. 2008, <<http://www.oxforddnb.com/view/article/15232>> accessed 21 Feb. 2017.

<sup>59</sup> Alexander Chalmers, *A History of the Colleges, Halls and Public Buildings, attached to the University of Oxford, including the Lives of the Founders*, Oxford, 1810, 187–188.

written down contemporaneously. As has been mentioned, where Keble did not record certain matters in detail, he seems to have taken care to note the omissions.<sup>60</sup> While Keble enjoyed a mixed reputation as a law reporter, it has been commented that this may be ‘worse fame than he deserves’.<sup>61</sup> He has been described as a ‘tolerable historian of the law’, and ‘though very far from being accurate, a pretty good register’ of the cases he noted, with details sometimes appearing in Keble’s reports that do not in others.<sup>62</sup>

#### IV. VINCENT’S TOPIC: INSURANCE LAW AND PRACTICE IN THE SEVENTEENTH CENTURY

Knowledge of the law and practice of insurance may have been comparatively difficult to acquire for common law practitioners in the 1660s. Common law authority on the topic seems to have been thin. Only three English cases relating to insurance were cited during the *Reading*, and most of the authorities cited therein do not relate to merchant affairs at all. Printed English works dealing with insurance were few, and such as there were afforded only limited assistance. The works cited in the *Reading* reflect this. Malynes’ *Lex Mercatoria* contained a few chapters on insurance, which seems to have represented the best printed resource available at the time. However, that work was written from the perspective of a merchant, not a lawyer, and was never a proper legal reference.<sup>63</sup> Amongst works intended for

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<sup>60</sup> n.51, above.

<sup>61</sup> John William Wallace, *The Reporters, Arranged and Characterized: with Incidental Remarks Upon Their Respective Merits*, 4th ed., Boston, 1882, 316.

<sup>62</sup> *Ibid.*, 315, 317.

<sup>63</sup> Gerard Malynes, *Consuetudo, vel Lex Mercatoria, or The Antient Law-Merchant*, 2nd printing, London, 1629. Other merchant works of the period were overly practical in focus or

lawyers, West's *Simboleography* contained only a couple of precedent insurance policy wordings.<sup>64</sup> In a short paragraph, Sheppard's *Epitome of all the Common & Statute Laws* included but a broad definition of an insurance contract, and a brief reference to the registrar and court of assurances in London.<sup>65</sup> Beyond English sources, only Straccha, a sixteenth-century continental jurist who wrote about insurance, is cited by name in the *Reading*.<sup>66</sup>

The first printed English work deliberately addressing insurance from a legal perspective, in a manner intended to be relatively comprehensive, was Molloy's *De Jure*  


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 too brief to have been useful to lawyers, e.g.: Edward Misselden, *Free Trade. Or, the Meanes to Make Trade Flourish*, 2nd ed., London, 1622, 123–124; J.P., *The Merchant's Dayly Companion*, London, 1684, 349–357.

<sup>64</sup> William West, *The First Part of Simboleography. Which May be Termed the Art, or Description, of Instruments and Presidents*, 2nd ed., London, 1615, sections 663–664.

<sup>65</sup> Master Bennet referred to 'Shepherd' (*Notes*, p 374), by which he probably meant William Sheppard, *An Epitome of all the Common & Statute Laws of this Nation*, London, 1656, ch.108 (entitled 'Of Merchant and Merchandises, Trading and Traffique'), 718–719. Sheppard's entry, which may have been partially based on Malynes, refers provocatively to insurance contracts prepared at the Office of Assurances in London being recorded in 'a Charter-party': even in the seventeenth century, this term normally designated a species of contract of affreightment; e.g. West, *Simboleography*, sections 655–656; Malynes, *Lex Mercatoria*, 7, and part 1 ch.21; Charles Molloy, *De Jure Maritimo et Navali: or, a Treatise of Affaires Maritime, and of Commerce*, London, 1676, 218 para.III.

<sup>66</sup> Benvenuto Straccha, *Tractatus de mercatura, sev mercatore*, Lyon, 1556 (reprinted many times, e.g. Amsterdam, 1669); Benvenuto Straccha, *Tractatus Duo...De Assecurationibus; et Proxenetis atque Proxenetis*, Amsterdam, 1658. One participant may also have referred to Grotius: see n.77 below.

*Maritimo et Navali*, which appeared in 1676.<sup>67</sup> It would represent an incremental improvement on previous works, and notably suggests that a somewhat wider range of continental sources on insurance were available to common lawyers in the later seventeenth century. Grotius, Loccenius, Santerna, Rittershausen, Stypmannus and Cleirac, and Antwerp's insurance ordinances of 1563, amongst other sources, are referred to by Molloy.<sup>68</sup> But if such materials were available to the barrister-participants in Vincent's *Reading* in 1669, no reference was made thereto. Accordingly, the English bar may have been largely unaware of such foreign learning on insurance, until Molloy, through his industry, gave it greater prominence.<sup>69</sup> More complete, specialist works on English insurance law would await the late

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<sup>67</sup> Stuart Handley, 'Molloy, Charles (1645/6–1690)' *Oxford Dictionary of National Biography* (online ed.), Oxford, Jan. 2008, <<http://www.oxforddnb.com/view/article/18914>> accessed 31 Jan. 2017, notes: on 7 Aug. 1667, at the request of reader Thomas Powys, Molloy was admitted to Lincoln's Inn; on 28 June 1669, he was admitted to Gray's Inn; and '[t]here is some evidence that he was called to the bar on 31 July 1669 at the request of the reader of the inn'. Fletcher, *Pension Book 1669–1800*, 2 (entry for 29 June 1669), regarding a pension at which John Vincent was present: 'Ordered that Mr. Molloy bee admitted of this Society paying halfe fees and bee allowed his time shewing his admittance in Lincolnes Inne'; *ibid.* n.1: 'According to Segar (Harl. MS., 1912) the summer Reader (E. Jones) called to the Bar on 31st July, ...Charles Molloy...'

<sup>68</sup> Molloy, *De Jure Maritimo*, A8v (preface), book 2, ch.7.

<sup>69</sup> *Ibid.*, A7r (preface), Molloy explains his reasons for writing his 'Tract': 'though I believe many have wish't that such a thing might be, yet none that I can find have ever yet attempted the same'. Handley, 'Molloy, Charles', notes that *De Jure Maritimo* 'was a popular work because it catered for the needs of lawyers, and went through many editions'.

eighteenth century.<sup>70</sup> Vincent's *Reading* may thus have been a truly useful opportunity for those assembled to share their knowledge regarding the court of assurances and the law and practice of insurance.<sup>71</sup>

In order to convey some sense of the substantive content of the *Reading*, this article now examines a selection of the issues which were discussed and debated. As will be seen, the arguments on many of these issues turned on the identification of relevant merchant 'customs'. It may be wrong to infer from the nature of the arguments deployed *per se* that common lawyers of the time were unaware of merchant practices. At least some participants in the *Reading* would have been expected to challenge Vincent's conclusions on his cases, so as to 'initiate the debate',<sup>72</sup> and in defending particular positions it may have been convenient

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<sup>70</sup> e.g. Nicolas Magens, *An Essay on Insurances, explaining the Nature of the various Kinds of Insurance practiced by the different Commercial States of Europe, and shewing their Consistency or Inconsistency with Equity and the Public Good*, 2 vols., London, 1755; John Weskett, *A Complete Digest of the Theory, Laws, and Practice of Insurance*, London, 1781; and James Allan Park, *A System of the Law of Marine Insurances, With Three Chapters on Bottomry; on Insurance on Lives; and on Insurances Against Fire*, London, 1787.

<sup>71</sup> In fact, Vincent's cases ranged at times well beyond the topic of insurance law. Vincent's second division, for example, also dealt with competing claims to a term of years by a lessor's executor, his creditors and the former members of a dissolved corporate lessee.

<sup>72</sup> Baker, *Readers and Readings*, 2000, 232. See also Edward Waterhouse, *Fortescue illustratus, or, A commentary on that nervous treatise, De laudibus legum Angliæ, written by Sir John Fortescue, Knight*, London, 1663, 544–545 (excerpt from a report to Hen. VIII 'of the Corporation and Election, and of Exercises of Learning' in the inns of court, by Tho. Denton, Nic. Bacon and Robert Cary): cited in W.C. Richardson, *A History of the Inns of Court*, Baton Rouge, LA, [1978?], 101–102.

to adopt ‘ordinary’ common law arguments if relevant merchant practices were unhelpful. The arguments examined highlight how different the outcome of an issue might be, depending on whether a traditional common law position were adopted or whether account were taken of merchant practices.

### *1. Insurance ‘with blanke’*

Vincent’s first case provoked a debate concerning the validity of a policy of insurance on ship and goods, ‘by way of Bargain & Sale with blanke’. Such terminology now seems obscure. ‘Bargain & Sale’ suggests that the value of the insured property would be agreed and fixed at the time the policy was concluded, and would not subsequently be adjusted: ‘...this...policy...being with Blanke is by way of Bargain & Sale & not on account in which Case the usage is to answer for that value that is subscribed whatever the losse be...’<sup>73</sup> ‘With blanke’ apparently meant that the names of the persons for whose use and benefit, or on whose account the insurance was made, were not specified.<sup>74</sup>

The policy in the first case covered a ship and its cargo for a voyage from Alicante to London. It was arranged by a merchant’s factor, at Alicante,<sup>75</sup> on behalf of the merchant-owner of the vessel and cargo in London. Before the policy was subscribed by the insurers, and unbeknownst to the factor, the merchant sold his interest in the ship. During the voyage, the ship was damaged and part of the cargo was jettisoned. The question which arose was

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<sup>73</sup> *Notes*, 380 (Ellis). Accordingly, the extent of the assured’s interest did not need to be examined, in assessing the indemnity due.

<sup>74</sup> *Park, A System*, 17.

<sup>75</sup> *Notes*, 375 (Bennet).

whether the ‘with blanke’ insurance was effective to cover the party newly interested in the insured vessel, the vendee.

Several points were argued against the validity of the insurance. It was submitted that the vendee was not a party to the policy, and that the merchant’s factor could have had no authority to insure for the vendee, that the merchant could not claim in respect of the ship in which he no longer had an interest, and that there had been a failure of consideration.<sup>76</sup> Raymond went further, attacking the practice of insuring ‘in blank’ directly by arguing that there could have been no sufficient agreement between factor and underwriters:

its void in respect of the thing contracted for what ever as in the other case the Custome be that cannot be taken notice of here being matter of fact yet here is not *actus Contra actum nullus erit contractus evertendi pericula* [an act against an act, a contract for securing against risk shall be null and void<sup>77</sup>] unlesse there be reciprocall knowledge of the thing contracted for...<sup>78</sup>

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<sup>76</sup> i.e. because the merchant had sent no ship, in which he had an interest, on the insured voyage: *ibid.*, 376–378 (Raymond), 375 (Bennet) and 381 (Ellis). Ellis considered the policy void in respect of the cargo also, arguing that the insurance was one, entire contract. Cf. *ibid.*, 379 (Weston).

<sup>77</sup> The first part of the Latin phrase may be from *Wiseman v Cole* (1585) 2 Co. Rep. 15a, or Co. Litt. 47b, cited in David Ibbetson, *A Historical Introduction to the Law of Obligations*, Oxford, 2001, 141 n.63, and in Peter Benson, ‘The Idea of Consideration’, 61 *University of Toronto Law Journal* (2011), 241, at 272 n.71. The second part may originate from Hugo Grotius, *De Jure Belli ac Pacis*, book 2, ch.12, section 23, cited in John Duer, *The Law and Practice of Marine Insurance*, 2 vols., New York, 1846, vol.2, 384 n.(a); translation adapted from Stephen C. Deff, ed., *Hugo Grotius on the Law of War and Peace*, Cambridge, 213.

<sup>78</sup> *Notes*, 377.

But the validity of the insurance was defended by reference to merchant-specific rules, reflecting the realities of long-distance commerce in the late seventeenth century. Weston opined that the merchant's factor retained authority to insure for whoever was interested, despite the sale, drawing an analogy with the authority of shipmasters to borrow on bottomry:

...in Case of factor is as Incident to act for the master to Judge of times of sale of fit ports & means to bring the adventure safe & this being for his masters benefit the factor having no notice of the sale so his authority remains unrepealed...thus the master may pawn the ship for tackle &c which binds the interest notwithstanding sale by the master until notice<sup>79</sup>

Masters agreed, noting that a merchant's factor needed to be able to insure 'without much scruple',<sup>80</sup> that is, without specifying the identities of interested parties located far away, overseas. Sufficient contractual certainty was achieved by identifying the ship: 'the assurans...is of the ship & whither it were the ship of [the merchant] or not there is convenient certainty of the thing...'<sup>81</sup>

The only other requirement for the policy 'with blanke' to be valid was the absence of fraud. As, in the present case, 'no collusion or inconvenience appears', Masters concluded:

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<sup>79</sup> Ibid., 379. See *Scarreborrow v Lyrius* (c.1624–28) Noy 95 pl.399, *Scarborough v Justus Lyrius* Latch 252, KB, holding it 'a good and necessary custome' for a factor or master to have authority to pawn a ship on bottomry for the vessel's necessities, binding the shipowner. Weston also advanced an analogy with the authority of sheriffs: see Charles Viner, *A General Abridgment of Law and Equity*, 23 vols., Aldershot, 1744, vol.19, 451 section (B.a.) no.3: a sheriff's acts were good in law 'till he has received his Discharge, or has perfect Notice of the new Sheriff'.

<sup>80</sup> *Notes*, 375–376.

<sup>81</sup> Ibid., 376.

‘this being the Common practice is good in regard the merchant can be but in one place...’<sup>82</sup>

Vincent took up this point in his repetition, on the final day of the *Reading*: the policy ‘with a blanke’ was valid ‘because there can be no fraud intended therefore albeit the Contract be Intire yet the assurors stand in the place of the assured...’<sup>83</sup>

## 2. *Enforcement of the policy by third parties*

Vincent’s second case raised an issue concerning the enforcement of a policy of marine insurance by third parties. In that case, a merchant insured his ship and cargo for a voyage to New England and back. He declared in the policy that it was made for the purpose of securing his creditors, in the event that he died during the voyage. The merchant did, in fact, die during the voyage, and the ship and cargo were lost. Vincent concluded that, by virtue of the declaration in the policy, the merchant’s creditors could claim thereunder.

Holt<sup>84</sup> disagreed. He argued that, under the 1601 Act, the commissioners of the court of assurances had no discretion to apply rules inconsistent with the common law.<sup>85</sup> At common law, a policy of insurance had to be supported by mutual consideration: here, no consideration had moved from the merchant’s creditors, and it was not sufficient that the

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<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*, 399.

<sup>84</sup> This was not John Holt, the future chief justice. It may have been his father, Thomas Holt (admitted 1634; call to the Bar, 1648; ancient, 1662; bencher, 1671; elected reader, 1674): Foster, *Register of Admissions*, 204; Fletcher, *Pension Book 1569–1669*, 368, 444; Fletcher, *Pension Book 1669–1800*, 14, 33.

<sup>85</sup> *Notes*, 385.

indemnity would benefit them as such. As authority, Holt cited *Bourn v Mason*.<sup>86</sup> He also referred to the jurist Straccha, who had classified insurance as a civil law innominate contract, under which the insurer offered the performance of bearing the risk in exchange for the premium.<sup>87</sup> Further, he argued, the declaration in the policy, for the benefit of the creditors, ‘coming after a perfect assurans made’, was ‘repugnant’ and thus ‘void’: just as in the case of a conditional obligation to pay £100 unless £50 were paid by a certain date, a further declaration at the end of the bond requiring payment of a further £20 would be void.<sup>88</sup>

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<sup>86</sup> *Bourn v Mason and Robinson* (1667–68) 2 Keb 454, 457, 527, KB. The need for *quid pro quo* between the parties, in the *sixteenth* century, is discussed in J.H. Baker, ‘Origins of the “doctrine” of consideration 1535–1585’, in *Collected Papers on English Legal History*, 3 vols., Oxford, 2013, vol.3, 1190–92, 1197. Cf. esp. J.H. Baker, ‘Privity of contract in the common law before 1680’, *ibid.*, 1204, 1209–23: in the mid-seventeenth century, if a debtor contracted for another's promise to pay his creditor—as the merchant in Vincent's case did, contracting with underwriters to pay his creditors—the creditor-beneficiary could bring *assumpsit* against the promisor; *Bourn v Mason* appears inconsistent with other seventeenth-century authorities in this regard. See also Vernon V. Palmer, ‘The History of Privity—The Formative Period (1500–1680)’, 33 *American Journal of Legal History* (1989), 3, 38–45.

<sup>87</sup> See n.66 above, and discussion in J.P. van Niekerk, *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800*, Kenwyn, 1998, 182–188. It has been doubted whether civilian treatises on insurance reflected actual merchant practice: Rossi, *The London Code*, 4–5.

<sup>88</sup> *Notes*, 386. See William Sheppard, *The Touch-Stone of Common Assurances*, London, 1651, 88: where there are ‘two causes or parts of [a] deed repugnant the one to the other, the first part shall be received and the latter rejected...’

Aylofffe also contended that the creditors could have no benefit under the policy: they were not concerned with the policy or the adventure, had advanced nothing to the insurers, and had not requested that it be made. Moreover, the declaration in their favour was not ‘any Essential part of the Policy’, and should not cause them to be preferred in the distribution of the merchant’s estate to other creditors, some of whom, if claiming under statutes or judgments, would normally enjoy priority.<sup>89</sup>

But such arguments ignored the obvious utility to merchants of being able to insure effectively for the benefit of third parties. Vincent emphasized that it was ‘part of the Policy’ that if the merchant died payment was intended to be made ‘to any persons assigned’.<sup>90</sup> Skipwith suggested that the creditors’ rights might be effective in equity, perhaps as a declaration of trust, or in the alternative as the declaration of a legacy.<sup>91</sup> And Tournier appears to have argued that, if necessary, special rules should apply to merchants here, as they did in other matters: ‘the law of merchants is parcell of ours & merchants may assign debts which others Cannot do...[and] that master may pawn a ship is by that law also’.<sup>92</sup>

### 3. Policies ‘on account’

In his lecture on the third day of the *Reading*, Vincent addressed the question of policies ‘on account’. The expression and practice of insuring ‘on account’ appear to have fallen into disuse since the seventeenth century. Vincent described ‘on account’ policies as ‘the

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<sup>89</sup> *Notes*, 389.

<sup>90</sup> *Ibid.*, 390.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*, 386, citing 1 Inst. 11 (where Coke notes, under the title ‘*In law*’, no.12, that the ‘divers lawes within the realme of England’ include ‘Lex mercatoria, merchant, &c.’), *Scarborough v Justus Lyrus* (n.79 above), and *Bridgeman’s Case* (1614) Hob. 11, CP.

ancientest & most beneficiall way of assurans for the assurors'.<sup>93</sup> As he explained, the liability of the various underwriters attached chronologically in order of their subscriptions: 'the partyes must make out what the Goodes Cost at first' (i.e. their prime cost),<sup>94</sup> and if it emerged that there had been over-insurance, 'they who first subscribe answer the whole & the latter is discharged'.

Instances of over- (or under-) insurance being identified retrospectively were probably not rare. A policy would often be made at a place far distant from that where the insured cargo had been or would be acquired, and the nature and value of the cargo to be insured might not be known.<sup>95</sup> Each underwriter subscribing the policy was treated as concluding a separate contract with the assured. In the event of over-subscription—where the cargo shipped on the assured's behalf was of less value than the total amount subscribed—the insurers subscribing last-in-time were released from their contract, because they had run no risk. In such cases, the last-subscribing insurers would thus be relieved from liability for claims.<sup>96</sup>

At the time of Vincent's lecture, written material regarding 'on account' policies existed, though it differed from Vincent's presentation in some respects. The manuscript London insurance code of the 1580s contained provisions suggestive of 'on account'

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<sup>93</sup> *Notes*, 393.

<sup>94</sup> See also Vincent in arguing his third case (*ibid.*, p 398): '...this being a policy on account & not as in the former Cases by Bargain & Sale the persons ensured must strictly shew what the Goodes Cost...'

<sup>95</sup> e.g. *Bayning v Holder* (1602–03) PRO C 2/Eliz/B22/48: the policy was underwritten in London in around 1580, in the amount of around £1533; the cargo was apparently acquired and shipped later, at Lisbon, and had a value of around £1645.

<sup>96</sup> See discussion in Rossi, *The London Code*, 246–248.

insurance, though the expression as such was not employed.<sup>97</sup> However, there is no mention of the London code in the *Reading*.<sup>98</sup> Malynes did not employ the expression ‘on account’ either, but he recorded the practice of releasing the last-in-time underwriters in the event of over-insurance on a homeward voyage, describing this as ‘the Custome’:

To this purpose doth appertaine another propertie of Assurances, which happeneth, when Merchants cause a greater summe to be assured than the goods are worth or amount unto when they are laden into any ship which is expected home wards, making account that their Factors will send them greater returnes than they do: in this case the Custome is, that those Assurors that have last subscribed to the policie of Assurance, beare not any adventure at all, and must make restitution of the *Premium* by them received, abating one halfe in the hundreth for their subscription...and this is duely observed; and so a Law not observed is inferior to a Custome well observed.<sup>99</sup>

The ‘Law’ referred to by Malynes was the Roman civil law, under which, he suggested, underwriters were proportionate liable in the event of over-insurance:

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<sup>97</sup> *Ibid.*, 200, 530–532.

<sup>98</sup> Nor is the London code mentioned in Malynes’ *Lex Mercatoria*, as noted in J.S. Kepler, ‘The Operating Potential of London Marine Insurance in the 1570’s: Some evidence from “A Booke of Orders of Assurances within the Royall Exchange”’, 17 *Business History* (1975), 44, at 48. Guido Rossi, ‘The *Booke of Orders of Assurances*: a Civil law code in 16th century London’, 19 *Maastricht Journal of European and Comparative Law* (2012), 240, at 249–252, notes that the London code was confirmed by the Council, but probably only served as a guideline, to be departed from if merchant practice had diverged over time. Otherwise, it is not known how or for how long the London code was employed.

<sup>99</sup> Malynes, *Lex Mercatoria*, 156; see also 161.

...if part of the goods were laden, then the Assurors are liable for so much as that part of goods did cost or amount unto: albeit that in this (as I have touched before) custome is preferred above law; for the civile law (if there be many Assurors in a ship upon the goods laden therein) maketh all the Assurors liable *pro rata*, as they have assured according to the said part of goods laden, if a losse do happen: or if there be cause to restore the *Premio* or sallarie of assurance in part. But the custome of Assurances doth impose the later underwriters of the Assurors do not beare any part of the losse, but must make restitution of the *Premio*, and reserve onely one halfe upon the hundredth pounds, or 10ß for their underwriting in the policie of Assurance, as is observed. The Civilians therefore have noted, That in Assurances the customes of the sealawes, and use amongst Merchants is chiefly to be regarded and observed.<sup>100</sup>

A seventeenth-century common lawyer, reading Malynes, might have been forgiven for questioning which solution to adopt, the merchant usage or the civil law rule. Adding to the potential confusion, in other instances, Malynes explained that underwriters should contribute to indemnities payable under policies *pro rata* according to the amount they had respectively subscribed.<sup>101</sup> Neither the policy wordings, nor other contextual factors, would have indicated that a different approach should apply to cases of over-insurance.<sup>102</sup>

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<sup>100</sup> Ibid., 166.

<sup>101</sup> Ibid., 147, 154.

<sup>102</sup> Molloy, *De Jure Maritimo*, 243, recorded both the ‘civil law’ *pro rata* liability rule and the ‘customary’ chronological rule, without indicating which represented the position in English law. Citing Grotius, Molloy states: ‘If a man Ensures 5000l. worth of Goods, and he hath but 2000l. remitted, now he having ensured the real Adventure, by the Law Maritime all the Assurors must answer *pro rata*’. Molloy then continues: ‘But by the opinion of some, onely those first Subscribers who underwrit so much as the real Adventure amounted to, are to be

Vincent and his contemporaries would have been aware of the two competing approaches on this issue.<sup>103</sup> Vincent's contribution is notable as an instance where common law barristers adopted the merchant practice as representing the common law.<sup>104</sup> Still later in the seventeenth century, one reported case would confirm Vincent's view, suggesting that in the absence of wording to the contrary in the policy (e.g. an expressly agreed 'value certain',<sup>105</sup> or an agreed 'value blank' to be filled in after subscription<sup>106</sup>), the 'custom' was

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made lyable, and the rest remitting their *Premio*...are to be discharged'; adding in the margin: 'And indeed is more the Custome of Merchants then Law'. But in his *Inleidinge tot de Hollandsche Rechts-geleerdheid*, Haarlem, 1631, trans. as *The Introduction to Dutch Jurisprudence, of Hugo Grotius*, trans. Charles Herbert, London, 1845, book 3, ch.24, pl.17, Grotius stated the position under Dutch (rather than Roman civil) law: '[t]he last insurer has the same proportion in profit and loss as the first'. The proposition is referable to various sixteenth-century ordinances, e.g.: ordinance of Phillippe II of 1563, title VII, article 2, in Pardessus, *Collection*, vol.4, 94; ordinance of Philippe II of 1570, article 13, *ibid.*, 109; ordinance of Amsterdam of 31 Jan. 1598, article 23, *ibid.*, 131.

<sup>103</sup> Malynes' *Lex Mercatoria* was cited during the *Reading*: e.g. *Notes*, 374, 375.

<sup>104</sup> The practice (and law) would change later: the chronology of subscriptions would be disregarded; each underwriter would bear a share of the loss proportionate to their line. This is now the default rule in London: Marine Insurance Act 1906, s.67(2). In case of over-subscription, it is now 'a recognised and binding custom of the London marine and non-marine markets that all lines are to be proportionately "written down" to 100 per cent upon the ultimate closing of the risk': John Birds et al, *MacGillivray on Insurance Law*, 13th ed., London, 2015, para.36-017.

<sup>105</sup> Mentioned by Vincent in his repetition: *Notes*, 400.

that a policy on any kind of goods in any ship returning homeward from abroad should be treated as being ‘on account’.<sup>107</sup> Vincent’s lecture would have constituted valuable guidance to common lawyers on this otherwise ambiguous point of construction and merchant practice.

#### *4. Presumption of loss in the absence of news*

In Vincent’s third hypothetical case, a merchant intended to depart on a trading voyage to Surat, India, in 1665. His creditors insured the merchant’s ship and his life, for the voyage out and back, for fear that if the voyage failed they would not be repaid. The policy was subscribed and the merchant sailed. Thereafter, no news was ever received of the merchant or of his ship. Thus, by the time of Vincent’s *Reading*, the merchant and ship had been missing for three or four years. The case raised the issue of whether, as a matter of law or practice, the merchant and ship could be presumed dead or lost, respectively.

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<sup>106</sup> Weskett, *Complete Digest*, 569 (title ‘Valuation’) no.10: ‘...it is not unusual to see a policy, completed with subscriptions to a large amount, on ship, freight, or goods, or on *all* of them, wherein has been inserted a clause that one or more of those interests conjointly or each respectively, as it may be, are and shall be “valued at ...;” leaving the sums in *blank*: so that the assured has been at liberty, at any time *afterwards*, to fill up such blanks with such valuations, in *figures*, as he should find, according to events, might suit his own particular views of benefit; or according to the greater or less sums which have been insured on *each* interest or article respectively, or otherwise; and without applying for the consent of the insurers; who have entirely disregarded such blanks...’

<sup>107</sup> *The African Company v Bull* (1690) 1 Show. K.B. 132; *African Comp: & Bull* (1687, Hill. 3-4 Jac. II) Harvard Law School (HLS) MS 4071, 73–74, accessible in J.H. Baker, ed., *English Legal Manuscripts*, Stage I [Microfiche], R 90 HLS MS 4071, vol.I, H-1776-mf.678–680, 73–74.

Several participants argued against allowing any such presumption. Buroughs submitted that the Bigamy Act 1603,<sup>108</sup> in providing that the death of one's spouse should be presumed following their absence without tidings for seven years, indicated that there could be no such presumption at common law following any shorter period.<sup>109</sup> Moreover, as the insurance policy covered a voyage out and back, with no 'Circumscription of time' by which the ship was to return, it would be inappropriate to apply a presumption of loss: there was no stipulated starting time from which the presumptive period could run. Finally, he warned that allowing an assured to rely on a presumption, instead of obliging him to prove his loss, would invite fraud.

Luttrell added that the policy, construed *contra proferentem*, obliged the assured to adduce positive proof of their loss: 'Every mans agreement is strongest against himselfe'.<sup>110</sup> Further, it would be arbitrary to presume that the merchant and ship had perished: as arbitrary as the presumption that if a man is 'within the 4 seas' when his wife gives birth, the child is his.<sup>111</sup>

Burton rejected any reliance on merchant usage or practice, in this regard. While customs of the city of London, he argued, could be proven with certainty, and would bind, if 'Certified by the mouth of the recorder' of London,<sup>112</sup> the practices of merchant underwriters could not be so certified, and would not found a cause of action.

Powell, Hooker and Vincent disagreed. Arguing from a common-law standpoint, Powell suggested that the lack of any fixed term for the voyage posed no difficulty: a

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<sup>108</sup> 1 Jac. I, c.11.

<sup>109</sup> *Notes*, 394.

<sup>110</sup> *Ibid.*, 396.

<sup>111</sup> Citing *Co. Litt.* 373a (Coke commenting that this presumption was irrebuttable).

<sup>112</sup> *Notes*, 395.

provisional judgment could be entered for the assured,<sup>113</sup> as was allowed in other types of actions.<sup>114</sup> Moreover, the voyage to Surat could be made in thirteen months, so there was clearly scope for the court to exercise its discretion ‘accordant to the distans of places & parts’, and to infer that the vessel had foundered. Thus, ‘allowing [the possibility] of all Generall accidents’, the burden now lay on insurers to ‘prove the ship in being’.<sup>115</sup>

Hooker argued on the basis of the law merchant, asserting that the ‘Custom of merchants’ prescribed a period of a year and a day without news, following which the assured was entitled to ‘renounce’, or abandon, the insured property to the underwriters and claim a total loss.<sup>116</sup> This was subject to the assured providing security in case the ship reappeared.<sup>117</sup> The London insurance code of the 1580s, though not referred to,<sup>118</sup> provided for similar presumptions: if there was no news of a ship for a year and a day, the assured could abandon the insured cargo and claim, subject to providing sureties; for voyages to the Indies, due to their longer expected duration, the presumptive period was two years without news.<sup>119</sup>

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<sup>113</sup> *Ibid.*, 394.

<sup>114</sup> e.g. in an action in debt against an heir or executor, in a writ of mesne, or in a writ of *warrantia chartæ*, as discussed in the case cited by Powell: *Brickhead v Archbishop of York* (1616) Hob. 197, at 199 (where a writ of *quare impedit* was issued before the alleged refusal to admit).

<sup>115</sup> *Notes*, 395.

<sup>116</sup> *Ibid.*, 396.

<sup>117</sup> *Ibid.*

<sup>118</sup> See n.98 above.

<sup>119</sup> Rossi, *The London Code*, 320–324, 394–396. There were similar presumptive rules in the Netherlands in the sixteenth and seventeenth centuries. See: Dave De ruyscher, ‘From Usages of Merchants to Default Rules: Practices of Trade, *Ius Commune* and Urban Law in

Equally, a presumption of death applied, in the case of insurance on the life of a debtor undertaking a long journey, where no news had been received for three years after the expiration of the policy.<sup>120</sup> Hooker's reference to a precise presumptive period is notable evidence of the survival of the 'custom', in London, in 1669.

Vincent reinforced the point that it was legitimate to look to merchant usages and practices as a source of law, in such cases. They were binding, he explained, even if not part of 'the Custom of London': the practice of insurance took place 'among merchants few whereof are free of the City', yet 'its agreed...by all the law of merchants is part of the law of the land'.<sup>121</sup> Vincent illustrated this with two examples of merchant practices that the common

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Early Modern Antwerp', 33 *Journal of Legal History* (2012) 3, 13–14 (presumption applicable in Antwerp in 1544); ordinance of Philippe II of 1563, title VII, article 5 (rule applicable at the Bourse of Antwerp, that insurer obliged to pay in the absence of news for a year and a day), in Pardessus, *Collection*, vol.4, 95–96; ordinance of Amsterdam of 31 Jan. 1598, article 4 (presumption of loss if no news for a year and a day following the departure of a vessel for places in Europe, Barbary or neighbouring places; for places further away, the presumption to apply after two years), *ibid.*, 124; Grotius, *Inleidinge*, book 3, ch.24, pl.10. Similarly, for France, see the *Ordonnance de la Marine* of 1681, title 'Assurances', article 58, in René-Josué Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine Du Mois d'Août 1681*, 2 vols., La Rochelle, 1760, vol.2, 130–131.

<sup>120</sup> Rossi, *The London Code*, 417–420.

<sup>121</sup> *Notes*, 397. Vincent refers to 2 Inst. 58, where Coke comments on Magna Carta, c.30, providing for the freedom of alien merchants to travel and trade freely, 'without any manner of evil tolts, by the old and rightful customs': 'That is, by auncient and right duties, due by auncient and lawfull custome, which hath been the auncient policy of the realme to encourage

law had recognized: the assignability by merchants of licences to import wine by parol,<sup>122</sup> and the exclusion of survivorship between merchants trading for common profit.<sup>123</sup> He also cited *Vanheath v Turner*,<sup>124</sup> where it was stated that: ‘the custome of merchants is part of the common law of this kingdome, of which the Judges ought to take notice: and if any doubt arise to them about there custome, they may send for the merchants to know there custome, as they may send for the civillians to know there law...’<sup>125</sup> Vincent re-emphasized that the judges were to ‘take notice’ of merchant ‘customs’ by ‘sending for merchants as they do for  


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 merchants strangers, they have a speedy recovery for their debts and other duties, &c *per legem mercator.*; which is a part of the common law’.

<sup>122</sup> *Notes*, 397, citing *The King v Peter Richards* (1542) 1 Dyer 54a, Exch.

<sup>123</sup> *Notes*, 397, where the reference to ‘FNB’ was intended to refer to Fitzherbert’s *Natura Brevium*, i.e. Anthony Fitz-herbert, *The New Natura Brevium...Corrected and Revised*, London, 1666: probably to original page 117 pl.D–E (under heading ‘Writ of Account’), which deals with accounting and survivorship between merchants. Vincent also probably intended to refer to 1 Inst. 182 (not ‘82’, an error in the *Notes*). Vincent also cited 2 Inst. 404, where in commenting on the statute Westminster II, c.23, Coke noted that while at common law (prior to that statute) executors had no action of account, because ‘account rested in privity’, the rule was different for merchants: ‘*per legem mercatoriam* an action of account did lye for executors’.

<sup>124</sup> (1621) Winch 24, CP, in which the merchant ‘custome’ permitting members of the same company to be ‘substituted’ for one another, as debtors to a bill of exchange subscribed by one of them, was considered.

<sup>125</sup> Per Hobart CJCP. See also *Anonymous* (1668–69) Hardr. 485, Exch, at 486; *Pickering v Barkley* (1648) 2 Rolle Abr. 248, pl.10 (‘divers marchants fueront oie en Court pur le interpretation del parolls & le practise del Marchants en le Court del policie d’assurer...’)

Civilians’.<sup>126</sup> He concluded that ‘this accions lyeth purely on the Custom’, which allowed the claim to be brought ‘before Certayne knowledge of any losse’.<sup>127</sup>

Notably, Vincent also deployed policy arguments, grounded in the practical needs and realities of maritime commerce, to justify the presumption of loss. Any other solution, he stated, would be ‘perillous to all merchants that Ensure on long voyages’:<sup>128</sup> this seems a cogent assertion, given the risk of financial ruin borne by merchants who engaged capital and credit in such voyages, if a return (or an indemnity) could not be guaranteed within a reasonable period of time.<sup>129</sup> Moreover, merchants took care to record where ships were bound, and every ‘factory’, or overseas trading post, maintained correspondence with their merchant-principals in London, ‘wherfore if there be no news in a Competent time the presumption is stronger that the ship is Cast away by Hurrigan & no person saved’.<sup>130</sup> Not to apply a presumption, and to require the assureds to prove the loss of their missing ships,

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<sup>126</sup> *Notes*, 399.

<sup>127</sup> *Ibid.*, 397. See also *ibid.*, 400–401: ‘the 3rd Policy on account was grounded on the Custom of merchants who hold ship to be lost if she be not heard of in reasonable time Else none Could Come to have the benefit of their assurans’.

<sup>128</sup> *Ibid.*, 397–398.

<sup>129</sup> As to the capital requirements, and risks, involved in overseas trade in the seventeenth century, see Richard Grassby, *The Business Community of Seventeenth-century England*, Cambridge, 2002, 82–83, 91–98: ‘Providence was always on the lips of merchants, because fortunes gyrated wildly and bad luck could ruin the ablest and richest’; ‘Merchants had no control over unpredictable events and most were not cushioned by abundant resources against disasters’.

<sup>130</sup> *Notes*, 398. Vincent conceded that this reasoning might not hold as firmly in relation to the life insurance, as ‘particular men’ might be saved without this being known: *ibid.*, 399.

would in effect be ‘to give their mony away’.<sup>131</sup> Thus, while at common law the assured would bear the burden of proof, or ‘the presumption of law’, in relation to their losses, ‘among merchants’, ‘the Grave persons in the statute’, meaning the merchant-commissioners of the court of assurances, there were sound reasons for applying a presumption. Finally, Vincent observed, merchants insured to ‘prevent tryall by Jury’, by which he meant, presumably, to avoid the delays, formalities, expenses and uncertainties of common law trials<sup>132</sup> by proceeding in the court of assurances. Accordingly, insureds ought to be indemnified quickly, against the provision of security, in accordance with merchant ‘custom’. Thus: ‘the rule and practice which is the law of the Court [of assurances] is Constantly thus on Great reason & a year & day after the place last heard on is Convenient time also...the persons ensured...must renounce his property to the Ensurers & give security to return the mony within a time’.<sup>133</sup>

##### *5. The court of assurances*

Throughout the *Reading*, Vincent’s audience heard arguments on the nature and jurisdiction of the court of assurances. The court arose from an arbitral tribunal established in the late sixteenth century under the auspices of the lord mayor of London.<sup>134</sup> The 1601 Act gave statutory authority to an enlarged court of commissioners, to determine disputes between

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<sup>131</sup> *Ibid.*, 398.

<sup>132</sup> See the preamble to the 1601 Act.

<sup>133</sup> *Notes*, 398.

<sup>134</sup> Rossi, *The London Code*, 75–88. Adrian Leonard, ‘The origins and development of London marine insurance, 1547–1824’, thesis submitted for the degree of Doctor of Philosophy, University of Cambridge, Cambridge, 2013, 92–93, 104.

merchants arising from policies registered in the office of assurances in London. The aim of the Act was to strengthen English maritime commerce, by establishing a compulsory jurisdiction where assureds could obtain quick, summary determinations against all subscribers of a policy simultaneously, thereby ending the practice of some recalcitrant underwriters who had ‘soughte to drawe the parties assured to seeke their moneys of everie severall Assurer, by Suites commenced in her Majesties Courtes, to their greate charges and delays...’<sup>135</sup>

The court was composed of the admiralty judge, the recorder of London, two doctors of civil law, two common lawyers, and eight ‘grave and discrete Merchantes’, whose commissions were to be issued annually, if not more frequently, by the lord chancellor. The court was to meet in the office of assurances, in the Royal Exchange, in formations of at least five.<sup>136</sup> By the 1601 and 1662 Acts, the court was given powers to imprison parties in contempt, to direct the examination of witnesses beyond the seas, to take evidence on oath, to pass sentences of execution against a party’s body or goods, and to award costs.

The court of assurances has been described as having become, by 1657, a ‘landmark institution’ for London merchants, a convenient forum for all sorts of merchant disputes.<sup>137</sup> While active, it is said to have met weekly ‘at the Office of Assurances on the west side of the Royal Exchange’.<sup>138</sup> Beyond this, details regarding the activities of the court in the seventeenth century, and of its fate, are obscure. The office of assurances and its records were

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<sup>135</sup> 1601 Act, preamble.

<sup>136</sup> Post-1662 Act, of at least three.

<sup>137</sup> Leonard, ‘London marine insurance’, 105–107.

<sup>138</sup> Francis Boyer Relton, *An Account of the Fire Insurance Companies Associations Institutions Projects and Schemes Established and Projected in Great Britain and Ireland during the 17th and 18th Centuries*, London, 1893, 4.

apparently destroyed in the great fire of London in 1666.<sup>139</sup> Sir Christopher Wren's plans for rebuilding the city included a new building for the 'Office for Insurance', 'to be situated at the [south-west] corner of his proposed Royal Exchange Square', a building which was 'doubtless intended for the "Chamber of Insurance" or "Policies of Insurance Court"'.<sup>140</sup> The 1667 Act which legislated for the rebuilding of the city, indicates that in the meantime the activities of the office of assurances continued from Gresham House.<sup>141</sup>

In 1676, Molloy noted what had by then become quite clear, that the 1601 and 1662 Acts did not remove the jurisdiction of the courts of Westminster to hear actions on policies, but the court of assurances was given only 'a concurrent Jurisdiction with those at the Common Law'.<sup>142</sup> The last known evidence of any activity by the court of assurances arose when, in 1693, an assured sought prohibition against that court's proceedings in the king's bench.<sup>143</sup> By the beginning of the eighteenth century, Alexander Justice would observe: 'As to what relates to Trials on Insurances, the Court of *Admiralty* has claim'd Jurisdiction in them; but all Causes of that Nature are now try'd in the *Queen's Bench and Common Pleas*

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<sup>139</sup> *Ibid.*, 5.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*, referring to 18 & 19 Car. II, c.8 ('An Act for rebuilding the City of London'), s.XXVIII.

<sup>142</sup> Molloy, *De Jure Maritimo*, 248 para.XVIII. At common law, an action could be brought on a policy based on 'the Assumpsit'. The admiralty, Molloy noted, despite its efforts, had acquired no jurisdiction over insurance cases.

<sup>143</sup> *Delbye v Proudfoot* (1693) 1 Show. KB 396; Leonard, 'London marine insurance', 110–111.

*Courts*’;<sup>144</sup> and, regarding the court of assurances, ‘now there is no such Court in being, but such Causes are tried in the ordinary Courts’.<sup>145</sup>

In 1669, however, the court of assurances appears to have been a going concern. The nature and extent of its jurisdiction, and the encroachments on the latter by the courts of common law, were topics of real interest. The discussion at Vincent’s *Reading* touched on each of these topics.

First, the jurisdiction of the court of assurances was explained. It extended only to what Molloy would refer to as ‘publique’ insurances,<sup>146</sup> meaning policies ‘entred within the office of Assurances within the Citie of London’.<sup>147</sup> though such policies might be made anywhere, at any time.<sup>148</sup> The court’s jurisdiction was further restricted to policies made by merchants, for the insurance of their ‘Goodes Merchandizes Ships and Things adventured’.<sup>149</sup> This led to a question as to whether a policy made by a merchant’s factor, or by his creditors, would qualify: the reader thought it would.<sup>150</sup> A further question was whether insurance on a

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<sup>144</sup> Alexander Justice, *A General Treatise of the Dominion of the Sea. And a Compleat Body of the Sea-Laws*, 2nd ed., London, 1709, preface.

<sup>145</sup> Justice, *Dominion of the Sea*, 663. The demise of the court has been ascribed, broadly, to competition from the common law courts, and to merchants’ preference for arbitration: Leonard, ‘London marine insurance’, 107, 111–113, 115, 138.

<sup>146</sup> Molloy, *De Jure Maritimo*, 240 para.II.

<sup>147</sup> *Notes*, 375 (Bennet); and see also 375 (Masters), 380 (Ellis), 382 (Vincent).

<sup>148</sup> *Notes*, 379 (Weston).

<sup>149</sup> 1601 Act, preamble.

<sup>150</sup> On the first case, Raymond argued that a policy concluded by a factor overseas was not concluded by a merchant (*Notes*, 376); cf. *ibid.*, 380 (Ellis). On the third case, Buroughs argued that creditors were not ‘merchants’ (*ibid.*, 394). Powell denied that either party before

life fell within the Act.<sup>151</sup> On this point, Masters argued against any hard distinction between insurance on merchandise and on lives, for: ‘Spanish slaves of Giney are as goods which shall be answered’.<sup>152</sup> Notwithstanding these restrictions, as an arbitral tribunal the court could rule on any dispute submitted to it voluntarily.<sup>153</sup> In the absence of such consent, it was at best

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the court had to be a merchant (*ibid.*, 394), while Vincent contended that creditors had to be considered merchants (*ibid.*, 397). Vincent’s argument recalls that accepted in relation to bills of exchange in *Sarsfield v Witherly* (1689) 1 Show. 125, 2 Vent. 292, Holt 112, Carth. 82, Comb. 45, 152. See James Steven Rogers, *The Early History of the Law of Bills and Notes*, Cambridge, 1995, 140.

<sup>151</sup> *Denoyr v Oyle* (1649) Style 166, KB, was cited, in which prohibition was granted against proceedings in the court of assurances on a life insurance policy covering a ship’s captain for a voyage. On the first case, arguments favouring the jurisdiction of court over life insurance on a supercargo are at *Notes*, 374, 382–383 (Vincent), 376 (Masters), and 380 (Weston); cf. *ibid.*, 375 (Bennet), and 381–382 (Ellis). On the third case, Powell argued that the court had jurisdiction over life insurance on a merchant (*ibid.*, 395), as did Hooker (*ibid.*, 396); cf. *ibid.*, 397 (Luttrell).

<sup>152</sup> *Ibid.*, 376; and see also 396: ‘other things adventured Extends...to...the soul of a man’ (Luttrell).

<sup>153</sup> *Ibid.*, 378 (Weston). Though James A. Jaffe, ‘Industrial Arbitration, Equity, and Authority in England, 1800–1850’ 18 *Law & History Review* (2000), 525, at 532 n.25, notes that in the eighteenth century, neither an arbitration clause in an insurance policy, nor an arbitral award, would prevent assureds from pursuing claims in common law courts, in parallel or subsequently.

arguable whether the court could exercise jurisdiction as of right over non-insurance questions incidental to an insurance dispute.<sup>154</sup>

Second, the nature of proceedings in the court of assurances was described as ‘*de plano*’, plain and summary, without formal pleadings or jury, and proceeding by ‘examination as in the admiralty’.<sup>155</sup> Notices of claims on policies, or ‘Intimations’, notices of abandonment of insured property, or ‘renunciations’, and past judgments of the court of assurances, were all kept in the office of assurances, and copies could be ‘easily had’.<sup>156</sup>

Third, the jurisdiction of the court of assurances, it was clearly understood, did not exclude that of the common law courts. This was so even if the court of assurances had already finally determined a claim: for it was ‘but a Court of equity & a Bill in Chancery might as well be pleaded’ as the court’s sentences, in response to proceedings at common law.<sup>157</sup> The common law courts had adopted the same attitude towards the court of assurances as they had towards the admiralty and ecclesiastical courts, granting prohibitions even after

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<sup>154</sup> On the second case, arguing against the jurisdiction of the court over a dispute relating to a lease, were Holt (*Notes*, 386), Skipwith (*ibid.*, 390), and Aylofffe (*ibid.*, 389); cf. Tournier (*ibid.*, 386–388) and Vincent (*ibid.*, 392).

<sup>155</sup> *Ibid.*, 379 (Weston).

<sup>156</sup> *Ibid.*, 393 (Vincent).

<sup>157</sup> Raymond (*ibid.*, 377), citing *Came v Moye* (1658) 2 Sid. 121, KB, which held that the court of assurances was a court of equity, acting only *in personam*, and that decrees of a court of equity could not bar an action at common law. Park, *A System*, xxxviii, described this case as having ‘struck a more severe blow at the existence of this court’ than *Denoyr v Oyle* (1649) Style 166, 172, KB, *Oyles v Marshall* (1654) Style 418, KB, or *Delbye v Proudfoot* (1693) 1 Show. KB.

the latter had delivered sentences.<sup>158</sup> Indeed, the court of assurances was in a worse position than those other courts, for it had no exclusive jurisdiction, that of the common law courts

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<sup>158</sup> Regarding the attitude of the common-law courts to the court of admiralty: George F. Steckley, ‘Merchants and the Admiralty Court During the English Revolution’, 22 *American Journal of Legal History* (1978), 137, at 143 n.14, 149; George F. Steckley, ‘Instance cases at admiralty in 1657: A court “packed up with sutors”’, 7 *Journal of Legal History* (1986), 68, 80–81; J.P. van Niekerk, ‘Marine Insurance Claims in the Admiralty Court: An Historical Conspectus’ 6 *South African Mercantile Law Journal* (1994), 26, 36–38, 44–45; *Mallory v Marriot* (1599) Cro. Eliz. 667, CP. Regarding the relationship between the common-law courts and the ecclesiastical courts, see e.g. *Bagnall v Stokes* (1588) Cro. Eliz. 88, where a consultation was granted to allow the ecclesiastical court to consider the issue of the release of a legacy; this was said to do ‘no mischief’ to the plaintiff, ‘for he may have a prohibition after sentence given in that Court’. Cf. *Somerset v Markham* (1597) Cro. Eliz. 595, CP, where prohibition was sought against the admiralty court, and it was held that ‘if one answers to a suit in the Spiritual Court, and suffers sentence to pass against him, he never shall have a prohibition: and if he brings an appeal, the defendant in the appeal shall not have a prohibition. And this was the principal case here, and ruled accordingly’. And see 2 Inst. 601 ff., where Coke sets out the responses of ‘all the judges of England, and the barons of the exchequer’, to articles regarding abuses in the granting of prohibitions exhibited by the archbishop of Canterbury in 1605. See esp.: article 3 (prohibitions after defendant had pleaded, after sentence or execution); article 10 (prohibitions after several sentences); article 12 (prohibitions because two witnesses not available); and article 19, complaining that prohibitions had prevented church courts from dealing with ‘every incident plea or matter alledged there in barre, or by way of exception, the principall cause being undoubtedly of ecclesiasticall cognizance’ (to which the judges responded, simply: ‘Matters incident that fall

having grown to include all insurance disputes. This was so even for policies concluded overseas. While in the sixteenth century, where a contract such as a policy of insurance was concluded and performed beyond the seas, no action would lie at common law: at least ‘the promise...which is the ground and foundation of the action’ had to be made within the realm.<sup>159</sup> But by the seventeenth century the position had changed, in particular by the use of those fictional pleadings condemned so forcefully by Prynne,<sup>160</sup> such that ‘at Common law whatever was done on land beyond sea may be layed here’.<sup>161</sup>

## V. CONCLUSION

Despite the short duration of the tradition’s renaissance following the Restoration, there are good reasons not to neglect the latter-day readings. Vincent’s *Reading* suggests that, up to their very end, they remained a valuable forum for sharing sophisticated legal learning, which may otherwise have been difficult for English common lawyers to acquire.

As a corollary, where there are records of readings, such as Keble’s notebook, they may represent a generous source of concentrated evidence regarding the state of legal doctrine

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out to be meere temporall, are to be dealt withall in the temporall, and not in the ecclesiasticall court’). See further R.H. Helmholz, *The Oxford History of the Laws of England: The Canon Law and Ecclesiastical Jurisdiction from 597 to the 1640s*, Oxford, 2004, 252, 303, 387–388, 398, 417.

<sup>159</sup> *Notes*, 374: Master Bennet, citing *Dowdale’s Case* (1605) 6 Co. Rep. 46b.

<sup>160</sup> William Prynne, *Brief animadversions on the fourth part of the Institutes*, London, 1669, 95–133.

<sup>161</sup> *Notes*, 381 (Ellis). There are many examples, e.g. *Barton v Sadock* (1611) 1 Bulstrode 103, KB, cited in argument during the *Reading*: ‘Barbary may here be laid to be in Kent, and so the same may well be tried...’

on specific issues and areas of practice. Especially when considering the history of English law in the seventeenth century, a period marked by a general absence of practitioners' treatises and by printed law reports of uneven quality, readings such as Vincent's can be invaluable. This is particularly so in relation to early-modern statutes and early-modern phenomena, such as the 1601 Act and the 'customs', usages, practices and understandings relating to merchant assurances. The exposition of other post-Restoration readings—which are known to have addressed, amongst others, statutes such as 21 Hen. VIII, c.13 (clergy, leases to spiritual persons, plurality of benefits, etc.), 27 Hen. VIII, c.10 (of uses), 31 Hen. VIII, c.1 (joint tenants and tenants in common), 32 Hen. VIII, c.29 (mispleading, jeofails), 32 Hen. VIII, c.34 (grantees of reversions), 27 Eliz. I, c.4 (covenous and fraudulent conveyances), 31 Eliz. I, c.6 (abuses in the election of scholars and presentations to benefices), 43 Eliz. I, c.4 (charitable uses), 3 Jac. I, c.4 (execution of statutes against recusants), 3 Car. I, c.1 (the Petition of Right), and 12 Car. II, c.13 (usury)<sup>162</sup>—may serve to fill further gaps in the printed records of the seventeenth century.

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### **Disclosure Statement**

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<sup>162</sup> Baker, *Readers and Readings*, 58–60, 141, 182, 183.

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