Martti Koskenniemi has recently argued that there was a transformation in thinking about international law, which dated from the late 1860s and early 1870s, the era of the establishment of the *Revue de Droit International et de Législation Comparée* and the formation of the *Institut de Droit International*.1 According to Koskenniemi, early nineteenth century continental jurists such as Georg Friedrich von Martens (1756–1822) and Johann Ludwig Klüber (1762–1837) took a highly rationalist view of international law, ‘compress[ing] European reality into an *a priori* system of political ideas with little attention to the special nature and history of the relations between European sovereigns and even less to the political consciousness of European societies.’2 By contrast, a new generation of jurists – Gustave Rolin-Jacquemyns (1835–1902), Tobias Asser (1838–1913) and Johann Caspar Bluntschli (1808–81) – having been raised in the era of Pandectism and the German historical school of Savigny, saw international law much more in terms of a common legal consciousness of a developing set of civilised nations, whose international *Volksgeist* was to be articulated by jurists. Law reflected the popular conscience of the people of Europe, but it was also a science. The norms derived from these sources were binding on states, for as Bluntschli put it, ‘it is not up to the arbitrary will of the state to follow or reject international law.’3

Where did English jurists fit in this development?4 Men such as Montague Bernard, John Westlake and T. E. Holland, certainly played prominent roles in the *Institut de Droit International*, which held its annual meeting in Oxford in 1880 and in Cambridge in 1895. Yet it was widely observed that the English approach to international law was distinctive from the continental one. Contrasts were often

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2 Ibid, 23.
3 Ibid, 50.
4 In what follows, I shall focus on English jurists exclusively, omitting discussion both of contemporary American and Scottish jurists. Though a jurist like James Lorimer (1818–1890) was a significant figure, I have omitted discussion of his work since my aim is to explore how common lawyers south of the border dealt with international law issues. English jurists like Holland and Pollock held that Lorimer’s conception of international law ‘*pêche par la base*’, (Holland, ‘The Literature of International Law in 1884’, *Law Quarterly Review* (1885) 100).
drawn between continental approaches which were ‘ethical and metaphysical’, and
‘L’école historico-pratique’ of the English which was ‘distasteful’ across the Channel.5
John Westlake noted that while both English and continental scholars saw interna-
tional law as rules, ‘the former would think primarily of the rules, and then of the
right as ordinarily measured by them, the latter primarily of the right, and then of
the rules as ordinarily embodying it.’6 In what follows, it will be suggested that
English approaches to international law after 1850 were indeed distinct from con-
tinental ones, and were shaped by two strong influences. The first was practical: in
the 1870s, in a number of high profile international disputes, English common
lawyers stressed the nature of international law as a matter of practical politics and
negotiation, rather than as a matter for jurists’ speculation. The second was theoret-
ical: any late nineteenth century writer on international law in England had to take
into account the writings of John Austin, and meet the challenge of showing how
international law could correctly be denominated law. While most international
lawyers sought to distance themselves from Austin’s definition of international law,
their visions were often closer to Austin’s than they admitted.

1. The Decline of Doctors Commons

Before turning to these questions, it is important to note a transformation in the pro-
fession, the result of which was that by the later nineteenth century, the mentality of
international lawyers in England was far more dominated by a common law approach
than had been the case before. In the early nineteenth century, international lawyers
in England formed part of a closed professional elite: civilian lawyers, who were
members of the College of Advocates and Doctors of Law, known as Doctors
Commons.7 Instead of practising in the courts of common law and equity, the civil-
ians practised in a number of non-common law jurisdictions. The main body of their
work was in the ecclesiastical courts, which until 1857 had an exclusive jurisdiction
in testamentary suits and marriage litigation; but they also practised in the Court of
Admiralty, which dealt with matters arising on the high seas, including prize

5 The quotations are taken from Lord Russell of Killowen, ‘International Law’, 12 Law Quarterly
Review (1896) 322, and T.E. Holland’s comment that W.E. Hall’s work ‘found success even among
continental jurists, to whom as a rule Hall’s adherence to what they called L’école historico-pratique was
National Biography (2004) 670. For discussions of the ‘rival’ approaches, see also Lauterpacht, ‘The
so-called Anglo-American and Continental Schools of Thought in International Law’, 12 British
Yearbook of International Law (1931) 46.
6 L. Oppenheim (ed.), The Collected Papers of John Westlake on Public International Law (1914) xxvi.
7 See G. D. Squibb, Doctors’ Commons: A History of the College of Advocates and Doctors of Law