

## **ABSTRACT: “THE INVENTION OF LEGAL RESEARCH”, JOSEPH L. GERKEN**

The past three decades have witnessed a revolution in legal research methodology. Law databases have transformed research from a print-based process to one dominated by on-line methods. Sources are available at the touch of a few key-strokes, and research is more effective than it ever was when it was confined to print sources.

One might surmise that this revolution in methodology is unprecedented in the history of legal research. However, one would be mistaken in thinking that. From 1870 to 1890, American legal research underwent a transformation comparable to the more recent one. This is the story of that earlier period, dubbed the “golden decades.”

The article focuses on three types of source: case reporters, digests and citators, culminating in each instance with a source that came to dominate the profession: the West National Reporter System, West Digests and Shepard’s citations. These sources were introduced within a relatively short period, from 1775 to 1789. What is equally striking is what happened next: nothing. Once the pieces were in place, there were virtually no significant developments in legal research methodology for almost a century. The article traces the reasons for this confluence of developments in such a short period. It is also the story of the years leading up to those decades, years which set the stage for this transformation.

The article also explores the relationship between this revolution in legal research methodology and two phenomena that occurred during the same period: courts’ adoption of the doctrine of *stare decisis* in deciding cases, and the implementation of the case method of instruction in law schools. Finally, the article describes a subtle but quite significant shift of emphasis in litigation-related research: from a search for legal principles, as defined in treatises, to a search for precedent, as expressed in case law.

While the article describes trends in publication and the development of research methodologies, it is most of all a narration of the stunning accomplishments of a remarkable generation of innovators.

## **THE INVENTION OF LEGAL RESEARCH**

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## INTRODUCTION

The past three decades have witnessed a revolution in legal research methodology. Beginning with the invention of Lexis,<sup>1</sup> legal research databases have transformed research from an entirely print-based process to one dominated by on-line methods. Lexis and Westlaw have justifiably garnered most of the attention; however, a host of other databases have contributed to this revolution. Sitting at one's desk, the researcher can access virtually every law review article written since 1918, using indexes to identify the articles,<sup>2</sup> and then retrieving their full text.<sup>3</sup> (S)he can search for and retrieve the text of virtually every Congressional committee hearing and report ever published,<sup>4</sup> as well as the text of the entire Congressional Record and its predecessors.<sup>5</sup> Even treatises, the last bastion of print sources, are now coming online in increasing numbers.<sup>6</sup> It is not simply that these sources are available at the touch of a few key-strokes. Research is more effective than it ever was when it was confined to print sources. Anyone who ever utilized *Shepard's Citations* in print will confirm that the main online citators, *Shepards* on Lexis-Nexis and Key Cite on Westlaw are not only easier to use but immeasurably more effective. Likewise, anyone who has had the opportunity to compare print looseleaf sources, such as those produced by the Bureau of National Affairs (BNA) in print and on-line<sup>7</sup> will confirm that research is more effective online.

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<sup>1</sup> Lexis originated as an online source for Ohio case law. By 1980, it was offered to the public as a source of Federal and state case law and statutory text for all U.S. jurisdictions. See William G. Harrington, "A Brief History of Computer-Assisted Legal Research", 77 *L. Library J.* 543, 552-53 (1984).

<sup>2</sup> Legaltrac, Index to Legal Periodicals and Index to Legal Periodicals Retrospective.

<sup>3</sup> Through Hein-on-Line.

<sup>4</sup> Through Proquest Congressional Historical Series, formerly Congressional Information Service (CIS) Historical Series.

<sup>5</sup> Through Hein-on-Line

<sup>6</sup> For example, Matthew Bender treatises are available on Lexis-Nexis.

<sup>7</sup> BNA is now available as a Bloomberg product.

One might say that this revolution in methodology is unprecedented in the history of legal research. However, one would be mistaken in saying that. From 1870 to 1890, American legal research underwent a transformation at least comparable to the more recent one. It is not a stretch to think that law practice was transformed during that earlier period as much as it has been the past thirty years. This is the story of that earlier period, dubbed the “golden decades.” It is also the story of the years leading up to those decades, years which set the stage for this remarkable transformation.

## **THE GOLDEN DECADES**

The 1870s and 1880s saw the creation of virtually every significant legal research technique that lawyers were to rely on in the modern era. A summary of the highlights suggests how productive those years were.

- 1867 - *Abbotts’ United States Digest*
- 1873 - *United States Revised Statutes* - first codification of Federal statutes
- 1875 - *Shepard’s Citators*
- 1879 - *West’s North Western Reporter* - first regional case reporter
- 1881 - *West’s Supreme Court Reporter* and *Federal Reporter*
- 1885 - West’s National Reporter System
- 1888 - *Lawyers’ Reports Annotated* - forerunner to *American Law Reports*
- 1889 - West’s National Digest System

This is a stunning sequence of publishing landmarks occurring over a 22 year period. As will be seen below, other equally significant developments also occurred during this period. Thus, Dean Christopher Columbus Langdell introduced the case study method into the classroom at Harvard Law School in 1870, and the doctrine of *stare decisis* became widely accepted at around this time.

What is equally striking is what happened next: nothing. Once these keystones of legal research were established, the well had apparently run dry. There were virtually no significant new case-finding methods

invented until the advent of computer-assisted research in the 1980s.<sup>8</sup> That is a nearly hundred year hiatus.

Why was this? What was there about the “golden decades” that brought about this virtual revolution in legal research? That is the central focus of this article. The article also examines a related question: how did these new research techniques affect the way lawyers went about their work? It is not an exaggeration to say that a researcher conducted his<sup>9</sup> research in the closing decade of the 19<sup>th</sup> century did so under dramatically different conditions, employed dramatically different methodology, and defined his research goals in a dramatically different way than a similar researcher working in the mid-19th century.

In order to keep this research manageable, the author has chosen to focus on arguably the three most significant developments: the National Reporter System, West’s Digests and *Shepard’s Citations*. This is not to minimize the importance of other methods, notably, annotated statutes, and annotated (selective) case reports. However, a pattern emerges vis-a-vis the reporters, digests and citators from which one may extrapolate some initial findings with regard to this remarkable period.

## THE HISTORICAL CONTEXT

Imagine a pot of water simmering on the stove. You come along and turn up the flame. Almost immediately, the water begins to boil. If you weren’t aware that the water had been simmering, you might think, “what a powerful flame to bring the water to a boil so quickly.” By the same token, one might attribute the remarkable developments of the 1870’s and ‘80’s to some unknown attribute of those decades. In reality, though, the explanation for these developments can largely be found in events “simmering” in the early to mid-nineteenth century.

It was in those earlier decades that the nature of case reporting changed dramatically, from a

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<sup>8</sup> Two exceptions were the first annotate statutes, *New York Consolidated Laws* in 1909 and the first looseleaf service, Commerce Clearinghouse’s *Tax* looseleaf in 1913.

<sup>9</sup> The male pronoun is employed when describing 19<sup>th</sup> century attorneys and legal scholars since these professions were disproportionately male during this period. See Jill Norgren, “Ladies of Legend: The First Generation of American Women Attorneys” 35 *J. Supreme Court History* 71, 73 (2010). “Law was an all-male profession” in the decades immediately following the Civil War.

labor-intensive, generally slow, potentially inaccurate process in which the reporter was responsible for recording everything that happened in the courtroom, to a more ministerial process in which the reporter collected and edited opinions drafted by the judges. It was also in those earlier decades that the sheer volume of reported cases made attorneys painfully aware of the need for a method of sorting cases, and identifying those that were truly relevant in any context. Hence, the invention of the digest, and the gradually more sophisticated methods for digesting holdings. That same volume of cases also necessitated a means of insuring that the holding in a particular case remained good law, hence the earliest citators.

Lawyers took these developments seriously, and a critical literature developed, particularly in law journals, reviewing the merits and shortcomings of new sources. The cumulative effect of these reviews was a consensus as to what a good case reporter, digests or citator would look like, and how it should function.

This is not to suggest that the historical characteristics of the “golden decade” ought to be ignored. Certainly the expansion of the country from coast to coast, the growth of population in the West, the continental railroad, and new means of communication all contributed to a growing awareness of the need for a national system of case reporting and case-finding. In particular, judges and lawmakers in the western territories, later states, were aware that they did not need to “reinvent the wheel” when developing case law and statutes for their respective states. Thus, they often looked to the law of the older states for guidance.

Still, it is to the preceding decades that we must first look, if we are to understand the remarkable transformation of legal research in the 1870's and '80s.

## **HOW ABE LINCOLN DID LEGAL RESEARCH**

To get a sense of how lawyers did legal research in the early and mid-nineteenth century, one can look at the law career of Abraham Lincoln. Many books and articles have been written about Abraham Lincoln's career as an attorney.<sup>10</sup> However, relatively little space is devoted in these works to describing how Lincoln

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<sup>10</sup> See, e.g. Albert A. Woldman, *Lawyer Lincoln* (N.Y. Houghton Mifflin Co. 1936); John J. Duff, *A. Lincoln Prairie Lawyer* (N.Y. Rinehart & Co. 1960); John P. Frank, *Lincoln as a Lawyer* (Urbana, Ill., University of Illinois Press 1961); Frederick Trevor Hill,



conducted legal research. The works that address this issue reach wildly divergent conclusions with regard to his research skills. A 1962 study asserted:

Lincoln had no ... scholarly impulse.... There is no record that Lincoln after his admission [to the bar] ever settled down to read a lawbook through and, when on rare occasions he put a volume in his saddlebag to carry about the circuit, it was overwhelmingly more likely to be Euclid on geometry than Story on notes.<sup>11</sup>

According to this study, the system of “riding circuit” among Illinois communities precluded the possibility of conducting serious legal research. “There was not only no room for legal refinement, but also there was no possibility of it.”<sup>12</sup> A 1960 work stated that “Lincoln had no encyclopedias of law, no digests to go by - only the maxims of the English common law as set forth in *Blackstone* and applied by a few adjudications of the older sister states.”<sup>13</sup>

However, more recent studies have painted a strikingly different picture. Such studies benefit from the publication of Lincoln’s legal writings: pleadings, briefs, legal correspondence, etc.<sup>14</sup> Most notably, an article by Mark Steiner<sup>15</sup> describes an accomplished attorney, with an impressive repertoire of research skills. Steiner

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*Lincoln the Lawyer* (Littleton, Colo. Fred B. Rothman Co. 1986); Allen D. Spiegel, *A. Lincoln, Esquire* (Macon Ga., Mercer University Press 2002); Norman Gross, Ed., *America’s Lawyer Presidents* 116-149 (Evanston, Ill. Northwestern University Press 2004); Mark E. Steiner, “Lawyers and Legal Change in Antebellum America: Learning from Lincoln” 74 *U. Detroit Mercy L.Rev.* 427 (1996) Paul D. Carrington, “A Tale of Two Lawyers” 91 *Northwestern U.L. Rev.* 615 (1997); Barry R. Vickrey, “Lessons in Leadership from Lincoln the Lawyer” 45 *San Diego L.Rev.* 334 (2000); Tara Renaud, “Lincoln the Lawyer” 33 *S. Illinois L.J.* 703 (2008); “Abe Lincoln, Esq.” 95 *ABA Journal* 38 (February 2009); Hon. Richard Mills, “Lincoln at the Bar and on the Bench” 3 *Experience* 20 (2009); Joseph A. Ranney, “In Praise of Whig Lawyering: A Commentary on Abraham Lincoln as a Lawyer - and Politician” 93 *Marquette L.Rev.* 1325 (2009); Mark E. Steiner, “‘The Sober Judgment of the Courts’: Lincoln, Lawyers and the Rule of Law” 36 *N. Kentucky L.Rev.* 279 (2009) Frank J. Williams, “Abraham Lincoln: Lessons for Lawyers” 36 *N. Kentucky L.Rev.* 295 (2009); Mark E. Steiner, “Abraham Lincoln and the Rule of Law Books” 93 *Marquette L.Rev.* 1283 (2009); Judith D. Fischer, “Abraham Lincoln as a Legal Writer” 11 *Nevada L.J.* 82 (2010);. See, also, Daniel W. Stowell, Ed., *The Papers of Abraham Lincoln: Legal Documents and Cases* (University of Virginia Press 2008) (4 vols.)

<sup>11</sup> John P. Frank, *Lincoln as Lawyer* 11 (University of Illinois Press 1961).

<sup>12</sup> *Id.*, at 23.

<sup>13</sup> John J. Duff, *A. Lincoln Prairie Lawyer* 242 (N.Y. Rinehart & Co. 1960).

<sup>14</sup> Daniel W. Stowell, ed., *The Papers of Abraham Lincoln: Legal Documents and Cases* (University of Virginia Press 2008) (4 vols.)

<sup>15</sup> Mark E. Steiner, “Abraham Lincoln and the Rule of Law Books” 93 *Marquette L.Rev.* 1283 (2009).

states that “Lincoln was an excellent appellate lawyer, and argued hundreds of cases to the Illinois Supreme Court, where he developed sophisticated (and technical) legal arguments.”<sup>16</sup> There is every reason to believe that this more recent assessment, based, as it is, on Lincoln’s own work product is the more accurate one.

In Lincoln’s time, very few prospective attorneys attended law school. “In 1850 the total law school enrollment was 400, in a nation with almost 24,000 lawyers.”<sup>17</sup> The most typical ways to prepare for a career in law were to apprentice with a practicing lawyer or to “read for the law.”<sup>18</sup> Lincoln took the latter course, borrowing law books and benefitting from the tutelage of two Illinois attorneys, John T. Stuart and Henry Dummer.<sup>19</sup> What did he read?

Lincoln undoubtedly read William Blackstone’s *Commentaries on English Law*, and he probably also read Joseph Story’s *Equity Jurisprudence*, Chitty’s *Pleadings*, and Kent’s *Commentaries on American Law*. These were the canonical works for antebellum lawyers.<sup>20</sup>

In having these sources at his disposal, Lincoln benefitted from a virtual “revolution in law books in the early nineteenth century.”<sup>21</sup> In the early decades of the 1800s, classic English works such as Blackstone’s *Commentaries* were made available to practitioners and scholars in the former colonies; it was also during these years that the first great generation of American legal scholars, such as James Kent and Joseph Story published their classic works.

Of all these sources, Blackstone seems to have been the most influential on Lincoln. It is probably

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<sup>16</sup> *Id.*, at 1321.

<sup>17</sup> *Id.*, at 1296.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*, at 1295-97.

<sup>20</sup> *Id.*, at 1298-99, citing William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press 1979 (1765-69) (4 vols.); Joseph Story, *Commentaries on Equity Jurisdiction as Administered in England and America* (Boston, Hilliard & Gray 1836) (2 vols); Joseph Chitty, *A Treatise on Pleading and Parties to Actions* (G & C Merriam 1844) (3 vols) and James Kent, *Commentaries on American Law* (N.Y. O. Halstead 1826-1830) (4 vols).

<sup>21</sup> Steiner, “Abraham Lincoln”, 93 *Marquette L.Rev.*, at 1298.

impossible to overstate Blackstone's influence on the American legal community at this time. A former student of Joseph Story wrote that, with the publication of Blackstone's *Commentaries*, "the scene all at once changed; and from a repulsive mass of disjointed fragments, the law suddenly became a connected and methodical science."<sup>22</sup> With Blackstone, the common law *made sense*. The study of the law became a study of principles and rules, as opposed to an esoteric, virtually incomprehensible morass of disjointed case precedents.

Story, Kent and others, in turn, described a system of *American* law. As eminent a scholar as Blackstone undoubtedly was, he was regarded in some circles, as an apologist for privilege and the old regime. Many American students of law saw the need to examine the time honored principles in Blackstone (as well as in Coke and others) to ascertain whether these principles were applicable to the new society, which was, after all, founded in rebellion against England.

In his practice, Lincoln often relied on these same sources. Many of Lincoln's briefs and appellate arguments cited to leading treatises as authority;<sup>23</sup> and he often constructed his arguments by reasoning from the general principles set forth in the treatises to more specific holdings.<sup>24</sup> While he cited case law to support his claims, the thrust of his logic typically was "these are the essential principles, and here are cases that express these principles."

So far the story conforms neatly with this author's thesis, if we take Abe Lincoln to be a prototype for a legal researcher of the mid-19th century. Lincoln, a self-taught lawyer, relied heavily on legal treatises - both subject-specific treatises, such as Greenleaf's *Evidence* and general law treatises such as Blackstone's *Commentaries*. These sources provided Lincoln with the general principles which underlay the various areas of

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<sup>22</sup> Timothy Walker, *An Introduction to American Law* 12 (De Capo Press 1972) (1837), quoted in Steiner, "Abraham Lincoln", 93 *Marquette L.Rev.*, at 1305.

<sup>23</sup> See, e.g. *Canaan v. Kenney* (Illinois S. Ct.), Report of Attorney's Argument, July 8, 1841, in 1 *Lincoln Legal Papers* 36, 36-37. (citing Chitty, *A Treatise on Pleading* and Thomas Starkie, *A Practice Treatise on the Law of Evidence*); *Illinois R.R. v. McLean Cy.* (Illinois S.Ct.) Brief, in 2 *Lincoln Legal Papers* 391, 393, citing James Kent, *Commentaries on American Law*;

<sup>24</sup> See, e.g. *Clark and Morrison v. Page* (S.D. Ill.) Attorney's Notes, c. February 1855, in 3 *Lincoln Legal Papers* 153-57.

law, and did not purport to give him access, in any detail, to the specific case law holdings that might be cited, in a particular jurisdiction, in support of these legal principles.

However, the evidence suggests that this would be a simplistic, and misleading picture. There is, for example, this interesting tidbit in the Steiner article: “Lincoln was called a ‘case lawyer’ by lawyers who practiced with him.”<sup>25</sup> A “case lawyer” in those days was an attorney with a particular approach to legal research and reasoning.

Case lawyers, according to legal historian William P. LaPlana, were “[i]n the view of critics ... a reprehensible subspecies of the profession who devoted themselves to the mindless collection of precedents in an attempt to win judgments for their clients based only on the assumed weight of the collected cases rather than by an appeal to the principles of the common law.”<sup>26</sup>

Also, it is clear that Lincoln occasionally relied on digests when searching for case law precedent.<sup>27</sup> Indeed, on at least one occasion, he cited to the *United States Digest* in an appellate brief.<sup>28</sup> Ask any first year legal research instructor and (s)he will tell you that citing a digest in a brief is a cardinal sin, to be avoided at all costs.<sup>29</sup> While principles of citation may have been looser in Lincoln’s time, there is no doubt that, even then, citing to specific cases was much preferred to citing to a section number in a digest. In this instance, however, Lincoln’s approach bore fruit, as the appellate court, in its decision relied on a number of the cases which that section of the digest had cited.<sup>30</sup>

How, then, should we describe Lincoln’s approach to legal research and analysis? Calling him a “case lawyer” clearly an oversimplification. He was capable of finding, and “string citing” copious case law to

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<sup>25</sup> Steiner, “Abraham Lincoln”, 93 *Marquette L.Rev.*, at 1310.

<sup>26</sup> *Id.*, quoting William P. LaPiana, *Logic and Experience: The origin of Modern Legal Education*, 132-33 (Oxford University Press, 1994)

<sup>27</sup> Steiner, “Abraham Lincoln”, 93 *Marquette L.Rev.*, at 1317.

<sup>28</sup> *Id.*, citing *Risinger v. Cheney*, 7 Ill. (2 Gilm.) 84 (1845).

<sup>29</sup> See, e.g., Steven M Barkan, et al., *Fundamentals of Legal Research*, 9<sup>th</sup> Ed., 78 (Foundation Press, 2009).

<sup>30</sup> Steiner, “Abraham Lincoln”, 93 *Marquette L.Rev.*, at 1318.

support his claims when the situation seemed to call for that approach;<sup>31</sup> but he was equally comfortable arguing from first principles, and looking to leading treatises for guidance. That he was eclectic enough to employ either approach, based on the exigencies of particular cases might diminish his status in the eyes of observers who despised “case lawyers”; however, it gave him a repertoire which much enhanced his effectiveness, particularly as an appellate lawyer.

While Lincoln engaged in case-finding and relied on digests to find relevant cases, his research methods clearly differed from those of a typical attorney in the years following the “golden decade.” There is no mention in the books or articles of Lincoln using a citator as an approach to case-finding. And he could not have used many of the research tools that lawyers of later generations took for granted - annotated statutes, ALRs, law reviews - because, for the most part, those tools did not exist when Lincoln practiced law.<sup>32</sup> Perhaps most importantly, Lincoln could not access the “world” of research encompassed by West’s National Reporter System, and West Digests. It is evident, then, that we cannot draw a bright line between legal research methods before and after the “golden decade.” However, in its broad strokes, the author’s thesis holds up. By the early 1890s, legal researchers had access to a unified, uniform, national system of case-finding sources, which enabled an attorney in Delaware or Virginia to approach a research issue in exactly same way, using the same set of sources as a researcher in Kansas or California. Regardless of location, that attorney had access to *Shepard’s*, the *National Reporter System*, *West’s Digests*, the earliest annotated statutes; and he used these sources the same way, no matter where he was. This “world” of legal research resources no doubt would have appeared, for the most part, strange and wonderful to an attorney from Lincoln’s era.

This system proved to be remarkably stable and resilient. Despite all of the developments in substantive

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<sup>31</sup> See, e.g., *Dorman et ux. v. Yost* (Illinois S.Ct.) Report of Attorneys’ Arguments January 3, 1845, in 1 *Lincoln Legal Papers* 274, 274-79; *McDaniel v. Correll* (Illinois S.Ct.) Brief c. November 1855, in 3 *Lincoln Legal papers* 103, 103-05,

<sup>32</sup> Again, generalization is perilous. For example, the *American Law Register*, predecessor to the *University of Pennsylvania Law Review* began publication in 1852, near the end of Lincoln’s legal career. It does not appear that he relied much, if at all on this publication in his research.

and procedural law - not to mention developments in the world around them - these sources and research methods were almost completely unchanged for almost a century. A lawyer using *Shepard's* or the West Digest in the 1970s would use virtually the same approach as a lawyer in the 1890s using these same sources. Indeed, if either lawyer could be transported into the other's era, (s)he no doubt could open the corresponding books and, with little instruction, begin doing research with them.

## **CASE REPORTERS**

In retrospect, the dominance of West publishing, and its National Reporter System may seem inevitable. Certainly, a uniform, national case reporting system is preferable to a hodge-podge set of competing reporters. However, the path to West's dominance was anything but straightforward. The following segment describes some of the highlights of this history.

### **Two Pioneers**

Alan Briceland, in his 1972 article, is unequivocal. "*Kirby's Reports* was the first published reports of American court decisions."<sup>33</sup> Wilfred Ritz, in his 1981 article, is equally unequivocal: "Francis Hopkinson was the first, the one who started it all. He was the first American judge to write judicial opinions with a view to their publication. Moreover, he was the first American law reporter who published judicial opinions."<sup>34</sup>

The competing arguments for the priority of these reports, which are summarized below, tend to devolve into pedantry. Suffice to say that 1789 saw the emergence of the first two volumes of American court decisions. The stories of their two editors are quite compelling.

### **Francis Hopkinson**

According to Ritz,

Francis Hopkinson was a man of many interests and accomplishments. He was interested in the arts, being a musician and composer, a painter and he wrote essays, poems, letters to the editor

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<sup>33</sup> Alan V. Briceland, "Ephraim Kirby: Pioneer of American Law Reporting, 1789" 16 *American J. Legal history* 297, 297 (1972),

<sup>34</sup> Wilfred J. Ritz, "The Francis Hopkinson Law Reports", 74 *L. Library J.* 298, 318 (1981).

and similar literary items for publication. For a brief period, he was editor of the *American Museum*. It is for these other activities that he is best remembered. Today, he is also called a “humorist” in the tradition of a Will Rogers or Art Buchwald.<sup>35</sup>

Hopkinson held many professional positions, most notably as the Pennsylvania Judge of Admiralty.<sup>36</sup> It was this position that enabled him to collect the opinions that comprised his 1789 volume.<sup>37</sup> According to Ritz, Hopkinson had an ulterior motive in publishing his Reports. The Federal government was in its nascent year under its new Constitution, in 1789. Hopkinson aspired to a judicial appointment in this new government. In March, 1789, he wrote to President George Washington, seeking such an appointment. He enclosed a set of the Admiralty opinions with his application, no doubt as a means of impressing the president with his judicial acumen.<sup>38</sup> Apparently, the ploy worked, as Washington appointed Hopkinson as the first district judge for the newly established Federal District of Pennsylvania.<sup>39</sup> Unfortunately, he died shortly thereafter.<sup>40</sup>

His death might have doomed Hopkinson to obscurity, but for the efforts of his son, Joseph. Distribution of the 1789 edition of the Admiralty reports appears to have been quite limited. However, Joseph Hopkinson undertook to have published all of his father’s writings including his case reports.<sup>41</sup> Publication took a variety of formats, including a 1792 freestanding edition of the Admiralty Reports, as well as a set of Francis Hopkinson’s collected writings. Editorial exigency led to some eccentric choices vis-a-vis the collected writings. Thus the admiralty decisions were put out in a volume that also contained Hopkinson’s poetry.<sup>42</sup>

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<sup>35</sup> *Id.*, at 301.

<sup>36</sup> *Id.*, at 303.

<sup>37</sup> Francis Hopkinson, *Judgments in the Admiralty of Pennsylvania* (1789)

<sup>38</sup> *Id.*, at 303, 305.

<sup>39</sup> *Id.*, at 303.

<sup>40</sup> *Id.*, at 305.

<sup>41</sup> *Id.*, at 305.

<sup>42</sup> *Id.*, at 309.

Ritz dryly notes:

This must be a unique arrangement in the history of publishing of either law reports or poetry. Was the ordinary eighteenth century person who bought books interested in reading judgments in admiralty for enjoyment and edification? Did the eighteenth century judge and lawyer find law and poetry to be of equal interest?<sup>43</sup>

Hopkinson was unique in being both an author of the admiralty decisions and their commercial publisher. This raises an interesting question. As it became apparent, in the early 19<sup>th</sup> century, that there was a market for judicial opinions, why didn't other judges take the initiative to publish their opinions? The unspoken premise throughout this period is that the "Reporter" of decisions is a person distinct from the judges who rendered the decisions. Why was that? The most obvious reason is that collecting, editing, printing and distributing decisions was a time consuming and often costly enterprise, and that judges must have had neither the time or inclination to do so. However, one cannot help but wonder what might have happened if, for example, John Marshall opted to put out a collection of his opinions.

### **Ephraim Kirby**

"In 1789, Ephraim Kirby [was] an obscure thirty-two year old country lawyer from Litchfield, Connecticut, who had taught himself law between enlistments in the revolutionary cause...."<sup>44</sup> Kirby had managed to eke out a livelihood, mainly by pursuing routine debt collection cases; however, his practice had suffered in the immediate post-war years.

What most troubled and discouraged him was his lack of formal education and formal legal training. Now that the Revolution was ending, the men of prominent background [and] formal legal education ... would be returning from military and government service to pursue the law. Kirby fear[ed] increasing competition for the available legal work<sup>45</sup>

Kirby's law practice convinced him of the vital need for native Connecticut case law. Independence

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<sup>43</sup> *Id.*, at 306-07.

<sup>44</sup> Briceland, "Ephraim Kirby", 16 *American J. Legal Studies*, at 297.

<sup>45</sup> *Id.*, at 298



had brought an awareness, in the Connecticut bench and bar, that a strict reliance on English common law precedent was neither desirable nor practicable.

But a lessening of dependence upon English common law precedents could be accomplished only after adequate precedents were available from American courts. Sympathetic with this mood, Kirby had come to the conclusion that the confusion existing in Connecticut jurisprudence resulted from too great a reliance on an English common law<sup>46</sup>

Like many of his contemporaries, Kirby had, for years, kept notes on the decisions of the higher Connecticut courts. These notes were not intended as precedent to be argued to the courts, so much as a means of charting the various judges “tendencies” in approaching various legal issues - a means of predicting how a judge would respond to a particular argument.<sup>47</sup> In themselves, the notes would not have sufficed to support a volume of court decisions. However, in 1785, the Connecticut legislature mandated that appellate courts render written reasons for their decisions.<sup>48</sup> There was no requirement that these decisions be published, or even that they be maintained at a publicly accessible place. Indeed, it was not unusual, over time, for decisions to be misplaced or lost. Also, the intended audience for written decisions was the parties to the case at hand; hence, they tended to be terse, limited to asserting the legal principles which decided the case.

Thus, Kirby saw his opportunity. He would collect the judges’ written decisions, and then provide a context for each decision, by interjecting enough of his own notes to make the decision intelligible.<sup>49</sup> Kirby appears to have had a very creative, and practical bent. He placed orders for a number of contemporary English law reports, in order to study their organization and format. Ultimately, he closely modeled his reports after *Cowper’s Reports*, the most recent set of English reports that he reviewed. Thus, he notes:

I have endeavored to throw the matter into as small a compass as was consistent with a right

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<sup>46</sup> *Id.*, at 303.

<sup>47</sup> *Id.*, at 306.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*, at 307.

understanding of the case; therefore, I have not stated the pleadings or arguments of council [sic] further than was necessary to bring up the points relied on.... As the work is intended for general use in this state, I have avoided technical terms and phrases as much as possible.<sup>50</sup>

Kirby's decision to forego a long-winded approach to describing the background to the decisions no doubt appealed to his readership, as did his avoidance of esoteric phraseology. Kirby included an alphabetical table of cases, as well as a rudimentary topical index to the decisions.<sup>51</sup>

Kirby was under no illusions that the publication of his opinions would bring in significant income. His early efforts to enlist subscriptions for the upcoming reports proved quite disappointing. His primary motivation, other than a disinterested intention to contribute to the quality of legal discourse, was to enhance his reputation. Since he did not have the education or connections of many of his competitors, publication of *Kirby's Reports* would help "establish a name for himself in a highly competitive profession."<sup>52</sup>

Kirby provided a rationale for the volume in his introduction to the *Reports*.

The uncertainty and contradiction attending the judicial decisions of this state have long been subjects of complaint. The source of this complaint is easily discovered. ... [Following the Revolution] our courts were ... in a state of embarrassment, sensible that the common law of England ... was not fully applicable to our situation; but no provision being made to preserve and publish proper histories of their adjudications.... For the principles of their decisions were soon forgot, or misunderstood, or erroneously reported from memory. Hence arose a confusion in the determinations of our courts; the rules of property became uncertain, and litigation proportionately [i]ncreased.<sup>53</sup>

Although *Kirby's Reports* was not a financial success, his law practice did, in fact, benefit from his enhanced reputation.<sup>54</sup> He also "dabbled in land speculation" and became active in the Jeffersonian party.<sup>55</sup> In

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<sup>50</sup> Kirby's *Reports*, at iv, quoted in Briceland, "Ephraim Kirby", 16 *American J. Legal History* at 312-13.

<sup>51</sup> Briceland, "Ephraim Kirby", 16 *American J. Legal History* at 312.

<sup>52</sup> *Id.*, at 301

<sup>53</sup> Ephraim Kirby, "Preface" to *Reports of Cases Adjudged in the Superior Court of the State of Connecticut from the year 1785 to May 1788*, v. (1789)

<sup>54</sup> Briceland, "Ephraim Kirby", 16 *American J. Legal History* at 318.

<sup>55</sup> *Id.*

1803, Kirby was appointed as a Federal Judge for part of the Mississippi territory, becoming “the first federal judge to reside and work in the area which would become the state of Alabama.”<sup>56</sup> Sadly, in a striking parallel to the career of Francis Hopkinson, Kirby passed away shortly after this appointment.<sup>57</sup>

### Who Came First?

We are left, then, with the question: which work was the first volume of native American case reports? Ritz’ argument for Hopkinson’s priority is premised mainly on a notice in a Pennsylvania newspaper, dated February 27, 1789, which refers to Hopkinson’s *Reports* as having been “just published.”<sup>58</sup> He contrasts that with a notice in a Connecticut newspaper dated six weeks later which refers to *Kirby’s Reports* as having been “just published.”<sup>59</sup> Briceland disputes this conclusion. He notes:

We know that Kirby’s volume was ready for the public in early April, 1789. Hopkinson’s preface [to his *Reports*] dated February, 1789 still had to be set to print, run off and bound into volumes. It does not seem likely that this would have been accomplished before early April when Kirby’s *Reports* were already in the hands of subscribers.<sup>60</sup>

We will give the last word to the *doyen* of historians of legal research, Erwin Surrency:

Whether Ephraim Kirby’s *Connecticut Reports* or Francie Hopkinson’s *Judgments in Admiralty in Pennsylvania*, both published in 1789, was the first volume of reports to be published in America, has been a source of academic debates for several generations and is yet to be resolved.<sup>61</sup>

Suffice to say that both Kirby and Hopkinson were pioneers.

### James Kent and William Johnson

James Kent is best known as the author of *Commentaries on American Law*, “the most influential law

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<sup>56</sup> *Id.*, at 319.

<sup>57</sup> *Id.*

<sup>58</sup> Ritz, “Francis Hopkinson”, 74 *L. Library J.*, at 299, quoting *Pennsylvania Packet and Daily Advertiser*, February 27, 1789.

<sup>59</sup> Ritz, “Francis Hopkinson”, 74 *L. Library J.*, at 299, quoting *Litchfield Weekly Monitor*, April 13, 1789.

<sup>60</sup> Briceland, “Ephraim Kirby”, 16 *American J. Legal History* at 315 n. 68..

<sup>61</sup> Erwin C. Surrency, *A History of American Law Publishing*, 40 (Oceana 1990).

book of the antebellum period.”<sup>62</sup> He was also one of the eminent jurists of his day. Kent “introduced to New York the custom of writing opinions on significant matters and collecting them in official state-sponsored reporters.”<sup>63</sup> Both components of that statement are significant. He once recalled, “[w]hen I came to the bench there [were] no reports or State precedents. The opinions from the bench were delivered [orally]” and went unrecorded.<sup>64</sup> Kent insisted in writing out his opinions.<sup>65</sup> And he insured that those decisions would be preserved for posterity, in official court reports.

New York was one of the first states to provide, by statute, for an official court reporter, doing so in 1804.<sup>66</sup> 1804 was also the year in which Kent was named Chief Justice of the New York Supreme Court of Judicature, the predecessor to the Court of Appeals, having served the previous six years as an associate judge on that court. One observer asserts that “[t]he historical record does not reveal Kent’s role, if any, in the passage of the 1804 statute.”<sup>67</sup> However, another states that “Kent was a moving force in establishing an official state reporter for New York.”<sup>68</sup> It is clear, in any event, that he had a profound appreciation of the importance of court reports and reporters. He was acutely aware that case reports, if timely and accurate, would help to insure the legacy of the bench, and of the judges who authored the opinions.

Kent also appreciated the literary aspects of case reports. He wrote:

[l]aw reports are dramatic in their plan and structure. They abound in pathetic incident, and

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<sup>62</sup> John H. Longbein, “Chancellor Kent and the History of Legal Literature”, 93 *Columbia L. Rev.* 547, 548 (1993).

<sup>63</sup> Hon. Judith Kaye, “Commentaries on Chancellor Kent” 74 *Chicago-Kent L. Rev.* 11, 17 (1998).

<sup>64</sup> James Kent, letter to Thomas Washington, October 6, 1928, quoted in Langbein, “Chancellor Kent”, 93 *Columbia L. Rev.*, at 571 (Bracketed text in Langbein).

<sup>65</sup> Langbein, “Chancellor Kent”, 93 *Columbia L. Rev.*, at 571.

<sup>66</sup> Gary D. Spivey, “Two Centuries of Law Reporting” 1 *Judicial Notice* 7, 7 (2004) Citing New York L. 1804, ch. 68.

<sup>67</sup> Spivy, “Two Centuries”, 1 *Judicial Notice*, at 7; cf. Langbein, “Chancellor Kent”, 93 *Columbia L. Rev.*, at 574 (“We are unable to say whether Kent had a hand in provoking the New York legislation.”)

<sup>68</sup> G. Edward White, “The Chancellor’s Ghost”, 74 *Chicago-Kent L. Rev.* 229, 236 (1998).

displays of deep feeling. They are faithful records of these “little competitions, factions, and debates of mankind” that fill up the principal drama of human life; and which are engendered by the love of power, the appetite for wealth, the allurements of pleasure, the delusions of self-interest, the melancholy perversion of talent and the machinations of fraud.<sup>69</sup>

Kent did not think highly of the first official reporter, George Caines; he “was highly critical of Caines as a reporter and as a person.”<sup>70</sup> Some of this antipathy may have had a political origin; Kent was a committed Federalist and Caines was a Jeffersonian. In any event, Kent lobbied successfully to have Caines replaced by William Johnson.

Kent and Johnson were to have a long, mutually supportive relationship. It has been observed that “the relationship between judges and reporters in the early nineteenth century was [often] symbiotic,”<sup>71</sup> and that adjective seems appropriate to describe Kent and Johnson. Kent gave Johnson ready access to all his written opinions, and was available to answer any questions Johnson might have regarding those opinions. For his part, Johnson had a well-earned reputation for the accuracy of his reports; and those reports had the cumulative effect of enhancing Kent’s reputation as one of the leading judicial minds of his era.

How much did Johnson contribute to the text of Kent’s decisions? We know that Kent insisted on writing out his opinions, and was quite possessive of that prerogative. He later claimed that he wrote the majority of the decisions during his final years on the Supreme Court, although many of them were labeled *per curiam*, “to avoid existing jealousy.”<sup>72</sup> However, early reporters often were called on to provide the factual and procedural background for decisions; even when the judge provided a written decision, this was often limited to the core holdings and the *ratio decidendi*.<sup>73</sup> Kent occasionally acknowledged Johnson’s contributions to his

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<sup>69</sup> James Kent, 1 *Commentaries on American Law*, 11<sup>th</sup> Ed., \* 496 (Little Brown 1867).

<sup>70</sup> Spivy, “Two Centuries”, 1 *Judicial Notice*, at 8.

<sup>71</sup> *Id.*, at 7.

<sup>72</sup> Kay, “Commentaries”, 74 *Chicago Kent L. Rev.*, at 19.

<sup>73</sup> Langbein, “Chancellor Kent”, 93 *Columbia L. Rev.*, at 578.

opinions. Thus, on one occasion, where Johnson proposed a change in a Kent decision, the latter responded, “I shall place more reliance on your judgment than my own.”<sup>74</sup>

In 1814, Kent was appointed Chancellor of New York’s Chancery Court.<sup>75</sup> “One of his first acts as Chancellor was to secure the passage of a statute providing for a Chancery Court reporter, and he installed William Johnson in that position.”<sup>76</sup> Kent’s years as Chancellor are generally regarded as the period in which New York equity law came of age; Chancery was transformed from a court in which judges based decisions on untrammelled personal discretion to one where that discretion was subject to the constraints of precedent.<sup>77</sup> Clearly, a system of timely, accurate case reports was a *sine qua non* to that transformation.

What distinguished William Johnson from predecessors such as Ephraim Kirby and Francis Hopkinson was his longevity and the consistently high quality of his work. Johnson served as official reporter for the Supreme Court of Judicature and then the Chancery Court for 17 years, from 1806 to 1823.<sup>78</sup> “Johnson’s reports were noted for their thoroughness and accuracy, and he is credited with setting the high standard of the official reports.”<sup>79</sup> Joseph Story once wrote to him, “you have conferred the highest honor on [New York] state; and its [ ] judicial character abroad has been greatly elevated by your excellent Reports.”<sup>80</sup> Indeed, Johnson’s reports came to be seen as a “gold standard” in case reporting for many years.

## **SUPREME COURT REPORTERS**

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<sup>74</sup> James Kent, Letter to William Johnson, April 8, 1815, quoted in Langbein, “Chancellor Kent”, 93 *Columbia L. Rev.*, at 583.

<sup>75</sup> Kaye, “Commentaries”, 74 *Chicago-Kent L. Rev.*, at 22.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> White, “Chancellor’s Ghost”, 74 *Chicago Kent L. Rev.*, at 236

<sup>79</sup> Spivy, “Two Centuries”, 1 *Judicial Notice*, at 8.

<sup>80</sup> Letter, Joseph Story to William Johnson, November 11, 1821, quoted in Langbein, “Chancellor Kent”, 93 *Columbia L. Rev.*, at 580 n. 155.

Craig Joyce, in his article “The Rise of the Supreme Court Reporter” stresses “the indispensable role played by the Court’s early Reporters in its rise to preeminence among lawgivers of the new nation.”<sup>81</sup> According to Joyce, “the development of a dynamic official reporter system” facilitated “the progress of the Court from its status as an almost faceless onlooker during the nation’s first decade to a position of judicial hegemony in the federal system by the close of Marshall’s tenure.”<sup>82</sup>

Reporting of Supreme Court cases got off to an inauspicious start, to put it mildly. Its early years have been described as “an unofficial system of private enterprise reporting whose hallmarks were delay, omission, inaccuracy, and unmanageable expense.”<sup>83</sup> These flaws are attributable less to any shortcomings of the individuals who reported the decisions than to the conditions under which they labored, notably the discrepancy between the means available for accurately reporting the decisions and readers’ expectations.

The first 90 volumes of the United States Reports first saw the light of day as nominative reports, carrying the name of the court reporters. These reports, especially in the earliest years, were a reflection of the initiative of the individual reporters. The 1789 Judiciary Act,<sup>84</sup> which set out a “blueprint” for the Federal judiciary, including the Supreme Court, omitted any reference to court reporters.<sup>85</sup> Indeed “the position did not become official until 1817 when Congress authorized the Court to appoint a reporter with an annual salary.”<sup>86</sup>

Where Ephraim Kriby had the advantage of a Connecticut statute which required that judges render written decisions, Supreme Court justices were under no such obligation, and in its early terms most decisions

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<sup>81</sup> Craig Joyce, “The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy”, 83 *Michigan L. Rev.* 1291, 1293 (1984).

<sup>82</sup> *Id.*, at 1292-93.

<sup>83</sup> *Id.*, at 1293.

<sup>84</sup> *Judiciary Act of 1789*, 1 Stat. 73 (1789).

<sup>85</sup> Joyce, “Rise of Supreme Court Reporter”, 83 *Michigan L. Rev.* At 1294. (The term ‘blueprint’ is Joyce’s.)

<sup>86</sup> Morris L. Cohen and Sharon H. O’Connor, *A Guide to the Early Reports of the Supreme Court of the United States*, 2 (Rothman 1995)

were rendered orally.<sup>87</sup> Occasionally, reporters had access to the Justices' notes; otherwise they had to rely on their own observation of the proceedings as well as notes of fellow practitioners.<sup>88</sup>

As in *Kirby's Reports*, the early Supreme Court case reports included both the "text" of the Court's decision and a summary of the points made by counsel.

The report begins with a statement of the facts of the case. The reporter, not the judge, supplied this statement - based on what the reporter heard in court and what he read in the pleadings. Next comes the reporter's account of the arguments of counsel - something we have ceased to care about in our modern American reports....

Finally, after the facts and arguments comes the opinion. Because judges were still rendering their opinions orally, the reporter quite literally wrote the report. Accordingly, the reporter needed shorthand or other note-taking skills to capture accurately what the judges said, as well as considerable legal knowledge in order to decide which of the judges' observations to preserve.<sup>89</sup>

The extent that counsel's arguments were summarized varied from reporter to reporter. Given that "[t]he duration of an argument [before the Supreme Court] was then measured in days instead of hours" and that counsel often strayed from the core points raised in their briefs,<sup>90</sup> a good degree of discretion was required in order to keep the argument summaries at a readable length.

These reports read very much as an account of the entire proceeding, in which the Court's *ratio decidendi* was only one element. It is clear, in any event, that compiling the case reports was a labor intensive process, requiring the reporters' regular attendance at virtually all Court sessions. The early Supreme Court reporters appear to have been, for the most part, quite capable.

They were very different individuals who nevertheless shared some common characteristics. All were trained in the law, all had more than adequate intellect for the work, and all suffered serious professional disappointments. Most, however, had distinguished careers in some area of the law or public service, in addition to their work as Supreme Court reporter. Two or three were

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<sup>87</sup> *Id.*, at 7, citing 5 Maeva Marcus, ed., *Documentary History of the Supreme Court of the United States 1789-1800* xxiv-xxv (Columbia U. Press 1994).

<sup>88</sup> Cohen, *Guide to Early Reports*, at 7-8.

<sup>89</sup> John H. Langbein, "Chancellor Kent and the History of Legal Literature", 93 *Columbia L. Rev.* 547, 577 (1993)

<sup>90</sup> Charles Warren, "The First Decade of the Supreme Court of the United States", 7 *U. Chicago L. Rev.* 631, 638 (1939).



considered for appointment to the Supreme Court and four held lesser judicial offices.<sup>91</sup>

There were, in all, seven nominative reporters, Alexander Dallas, William Cranch, Henry Wheaton, Richard Peters, Benjamin Howard, Jeremiah Black and John Wallace.<sup>92</sup> The first four reporters - Dallas, Cranch, Wheaton and Peters - hold particular interest vis-a-vis the present history.

### **Alexander Dallas**

A 1943 book length biography of Alexander Dallas includes a brief description of Dallas' Pennsylvania court reports.<sup>93</sup> However, there is virtually no mention of his Supreme Court reports.<sup>94</sup> This omission seems odd to a contemporary reader, given the historical significance of Dallas' reports of Supreme Court decisions.

Dallas was "born on the British island of Jamaica during the French and Indian War, [and] educated at Kensington school and by private tutors."<sup>95</sup> He migrated to the United States in 1783, settling in Philadelphia. Since he did not have the qualifications required to practice law, he engaged in a variety of occupations, notably as a reporter for a variety of Philadelphia newspapers.<sup>96</sup> Dallas' news reports of local court cases were well received, and he "became convinced there was need for the systematic collection and publication of Pennsylvania court decisions in book form."<sup>97</sup> With admirable industry and skill, he achieved this goal, publishing a case report volume which is generally acknowledged to have been the third such volume in the

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<sup>91</sup> Cohen, *Guide to Early Reports*, at 6.

<sup>92</sup> *Id.*, at 6.

<sup>93</sup> Raymond Walters, Jr., *Alexander James Dallas*, 22 (U. Pennsylvania Press 1943).

<sup>94</sup> The word "virtually" in the above sentence is concededly a "fudge" word, as this author did not have an opportunity to read *Alexander James Dallas* line-for-line. However, based on careful scrutiny of the text, it is safe to say that there is no extended discussion of the Supreme Court reports.

<sup>95</sup> Walters, *Alexander James Dallas*, at v.

<sup>96</sup> *Ib.*, at 14-21

<sup>97</sup> *Id.*, at 22.

United States, after Kirby and Hopkinson.<sup>98</sup>

Thus, “quite inadvertently, Dallas had positioned himself perfectly to become the first Reporter of Philadelphia’s newest court, the fledgling Supreme Court of the United States.”<sup>99</sup> The original terms of the Supreme Court were held in Philadelphia. No other court reporter was then publishing case reports in that city. Dallas reasoned that there certainly would be a market for these Supreme Court decisions. Hence, it was a simple matter of adding the Supreme Court sessions to his rounds of Pennsylvania appellate courts.

When the *United States Reports* was issued in 1876, the editors re-issued all 90 volumes published by the nominative reporters, including Dallas’ four volumes. Thus, ironically volume 1 of the *United States Reports* includes *no* Supreme Court decisions, since it is made up of Dallas’ first, Pennsylvania case reports.<sup>100</sup> The majority of cases in volume 2 are also Pennsylvania cases. It is only with volume 3 that Supreme Court decisions predominate.<sup>101</sup>

Numerous commentators have noted the chronic deficiencies that plagued these earliest Supreme Court reports. In addition to the cost of the volumes, the most prominent problems were that they were incomplete, omitting numerous cases, inaccurate, in the reporting of particular cases, and excruciatingly slow in being published.<sup>102</sup>

There have been varying estimates of the number of cases that Dallas’ Reports omitted. Since the Court kept no formal docket of cases in its earliest years,<sup>103</sup> a one-to-one comparison of cases decided to cases

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<sup>98</sup> Cohen, *Early Reports*, at 17. Dallas’ volume was titled *Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania before and since the Revolution*.

<sup>99</sup> Joyce, “Rise of the Supreme Court Reporter”, 83 *Michigan L. Rev.* At 1295.

<sup>100</sup> See 1 *United States Reports* (1 Dall.).

<sup>101</sup> See 2 *United States Reports* (2 Dall.) And 3 *United States Reports* (3 Dall.).

<sup>102</sup> Joyce, “Rise of the Supreme Court Reporter” 83 *Michigan L. Rev.*, at 1301-1305.

<sup>103</sup> Warren, “First Decade”, 7 *U. Chicago L. Rev.*, at 636.

reported is impossible. Charles Warren, in his authoritative history of the Court writes that Dallas' Reports included "only about sixty cases" and omitted numerous decisions, of which Warren cited eight.<sup>104</sup> A 1971 analysis estimated that "somewhat less than half of the dispositions made by the Supreme Court in the first decade of its existence are reported" although this percentage "probably" increases to 70 percent if only cases adjudicated on the merits are counted.<sup>105</sup> As Joyce puts it, "[t]he dispute ... concerns not *whether* but *to what extent* Dallas' three volumes of Supreme Court *Reports* are incomplete."<sup>106</sup>

The accuracy of particular case reports is also problematic. Some degree of inaccuracy is to be expected, given the way that the early reports were composed.

During the Court's first decade, the justices delivered their opinions orally from the bench, and evidence suggests that they generally spoke from notes, rather than reading from a polished manuscript. It appears that Dallas relied on these same notes, as well as notes taken by fellow members of the bar when he was not present for a session, and in a few instances, texts provided by the justices, to construct the opinions that he included in his *Reports*.<sup>107</sup>

Given this methodology, Dallas necessarily had to convert the Judges' notes into coherent, readable text. It seems logical to expect that he must, on occasion, have had to guess at the meaning of certain entries in the notes, and that he may occasionally have guessed wrong. In itself, this is simply an inherent limitation of the times. However, there are also indications that Dallas "improved" on the Justices' opinions, leading Joyce to ask "are the opinions in fact the handiwork of the Justices - or of Dallas himself?"<sup>108</sup>

Joyce compares Dallas' report of one case, *Ware v. Hylton*,<sup>109</sup> with notes taken by an attorney colleague.

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<sup>104</sup> 1 Charles Warren, *The Supreme Court in United States History*, 2<sup>nd</sup> ed., 158 n. 2 (Little, Brown 1935)

<sup>105</sup> Julius Goebel, Antecedents and Beginnings, vol. 1 of *History of the Supreme Court of the United States* (Oliver Wendell Holmes Devise), 799 n.22 (Macmillan 1971), discussed in Joyce "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.* at 1303.

<sup>106</sup> Joyce "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.* at 1303.

<sup>107</sup> 5 Marcus, *Documentary History*, at xxiv.

<sup>108</sup> Joyce, "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.* At 1304.

<sup>109</sup> 3 *U.S* (3 *Dall.*) 199 (1796).

Dallas had been absent from the Court the day *Ware* was decided, and acknowledged that he relied on the colleague's notes in composing the decision.<sup>110</sup> According to Joyce, a comparison of Dallas' version with the attorney's notes:

reveals that Dallas did more than merely transcribe his source. Among other liberties taken with Tilghman's notes, Dallas omitted whole paragraphs, while embroidering on, strengthening and shifting emphasis in what he retained. The arguments in *Ware v. Hylton*, then, appear to be a combination of counsel's remarks and Dallas' improvements on those remarks.<sup>111</sup>

It is important to stress that, here, Dallas was not "improving" on the words of the Justices, or even the words of the opposing counsel. Rather he was "improving" on an observer's notes. However, one observer, with access to much of the primary material that Dallas relied on, has stated flatly, "that Dallas exercised his own editorial judgment and made changes in the opinions is apparent."<sup>112</sup>

There is no evidence that Dallas ever made substantive changes to any holding, or to the core reasoning of any Supreme Court decision. The fact that early opinions were not written out by the judges makes it unlikely that hard evidence of tampering with the substance of the decisions would ever emerge. Suffice to say that Dallas necessarily adopted the raw materials with which he worked, and predictably made occasional mistakes in translating those materials into his finished product. Dallas' prose style was not always a "model of clarity",<sup>113</sup> and it is likely that legal points expressed by counsel or the court have been lost in translation, or rendered ambiguous by Dallas' style.

This concern with the accuracy of the text is to some degree a modern one, reflecting current attitudes as to the function and audience of appellate decisions. In the days of Dallas' reporting, opinions were rendered mainly for the sake of the litigants and their counsel, all of whom were familiar with the factual and procedural

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<sup>110</sup> *Rowe*, 3 *U.S.* (3 *Dall.*) At 207 n. \*.

<sup>111</sup> Joyce "Rise of the Supreme Court Reporter", 83 *Michigan L. Rev.* At 1305.

<sup>112</sup> 5 Marcus, *Documentary History* at xxv.

<sup>113</sup> Goebbel, *Antecedents and Beginnings*, at 718.

background of the case. Under those circumstances, the critical question was simply “who won?” and, to a lesser degree, “why?” Minor variation in the decisions’ summary of the facts or counsel’s arguments might more easily be tolerated. However, over time, judges came to view their task as setting out precedent for the sake of a general audience. Thus, a mis-statement or inaccuracy in the text could have wider repercussions.<sup>114</sup> Of course, with the Supreme Court, generating precedents - making law - has always been essential to the court’s role; hence the accuracy of that Court’s opinions was, from the beginning, of vital importance.

The third criticism of Dallas’ reports is that they were excruciatingly slow in coming to print. There was a five year delay between the date of the last decision decided in 2 *Dallas Reports* and the date of publication of that volume.<sup>115</sup> Volume 4 of *Dallas Reports*, which included decisions through the 1800 Term “did not reach the public until 1807, a lapse of almost seven years.”<sup>116</sup>

These extended delays in publishing the Court’s decision were more than a mere annoyance. “Dallas’ tardiness was a major hindrance to those hungry for information concerning the jurisprudence of the highest federal tribunal.”<sup>117</sup> Imagine litigating a case that was potentially impacted by a decision of the Supreme Court, and having no access to that decision for five years.

Delay in reporting decisions also threatened the institutional ascendancy of the Court. Today, the public and legal profession avidly await leading Supreme Court decisions, with the expectation that the Court will articulate the legal standards that will guide future decisions. In its early years, the role of the Supreme Court as interpreter of the law was by no means secured. The fact that early decisions could not be read by judges, lawyers or the public for years dramatically undercut both the legal impact of those decisions and the Court’s

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<sup>114</sup> Langbein, “Chancellor Kent”, 93 *Columbia L. Rev.* at 578.

<sup>115</sup> Joyce, “Rise of the Supreme Court Reporter”, 83 *Michigan L. Rev.* at 1301. The last case in this volume was *Chisholm v. Georgia*, 2 U.S. (2 *Dall.*) 419 (1793).

<sup>116</sup> Joyce, “Rise of the Supreme Court Reporter”, 83 *Michigan L. Rev.* at 1301.

<sup>117</sup> *Id.*, at 1302.

role as declarer of the law.

Dallas ultimately published four volumes of case reports, of which only the last two included predominantly Supreme Court decisions. In 1800, the Supreme Court moved to the new nation's capital in Washington D.C. Dallas opted to remain in Philadelphia, and to give up reporting of the Court's decisions. He "seemed almost to have rejoiced to have the yoke of reporting the Court's decisions lifted from his shoulders."<sup>118</sup> He had been "'the subject of ... much abuse' at the hands of his contemporaries."<sup>119</sup> He lamented to a friend, "I have found such miserable encouragement for my Reports, that I have determined to call them all in, and devote them to the rats in the State-House."<sup>120</sup> One hopes that this remark was made in jest. History has been more kind to Dallas' *Reports*, taking into account the extraordinary hardships he labored under in his efforts to record and publish the Supreme Court's earliest decisions. As Joyce notes, "[i]n the light of the difficulties that confronted him ... [an] accurate ... summation may be that 'Mr. Dallas was a very competent person [who] eventually left things better than he found them ...'"<sup>121</sup>

Dallas had a distinguished career in government and law, in addition to his role as court reporter. He argued a number of cases before the Supreme Court during the period when he served as reporter. He went on to serve as Secretary of the Treasury under President Madison, instituting reforms that brought the nation back from the brink of insolvency.<sup>122</sup> He also served as Secretary of War for five months.

Alexander Dallas was under no obligation to report the Supreme Court's decisions. Indeed, his

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<sup>118</sup> *Id.*, at 1306.

<sup>119</sup> *Id.*, quoting letter, Richard Rush to Henry Wheaton, October 17, 1816, in *Wheaton Papers*, the Pierpont Morgan Library, New York.

<sup>120</sup> Letter, Alexander Dallas to Jonathan Dayton, October 17, 1816, George Dallas Papers, Historical Society of Philadelphia, quoted in Joyce, "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.* at 1306.

<sup>121</sup> Joyce, "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.* at 1306, quoting B Hammond, *Banks and Politics in America*, 229 (Princeton 1957).

<sup>122</sup> Cohen, *Guide to the Early Reports*, at 16

appearance as reporter in the Supreme Court was quite fortuitous. One might reasonably query “what if he hadn’t shown up?” What if no one took down counsel’s arguments and the Court’s words during those critical early terms?

### **William Cranch**

In modern parlance, William Cranch was “connected.” His mother’s sister was Abigail Adams, wife of President John Adams. At Harvard, he was a classmate and good friend of John Quincy Adams.<sup>123</sup> Like Alexander Dallas, Cranch’s path to being Reporter for the Supreme Court had its fortuitous aspects. He moved from New England to Washington D.C. after taking a position as an agent for a real estate speculation syndicate. That enterprise “failed disastrously.”<sup>124</sup> His uncle, President Adams, then appointed Cranch commissioner of public buildings in the District, and, in 1800, named him as a Judge on the newly created Federal District of Columbia Circuit Court.<sup>125</sup> Thomas Jefferson, in 1805, named Cranch Chief Justice of that Court. Given Cranch’s unabashed Federalist sympathies, this appointment is seen as an indication of Jefferson’s respect for Cranch’s judicial abilities and integrity.<sup>126</sup> Cranch was to serve a remarkable 54 years on the Court.<sup>127</sup>

Cranch “probably” succeeded Dallas as Court Reporter “by self-appointment. The minutes of the Court show no entry of a formal appointment, and there is no evidence of how it came about. Although without an official sanction, the new reporter certainly acted with the Court’s approval.”<sup>128</sup> Cranch received no government compensation for his efforts as Reporter, relying on sales of his *Reports* for income.<sup>129</sup> He was, of course

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<sup>123</sup> Joyce, “Rise of the Supreme Court Reporter”, 83 *Michigan L. Rev.* at 1306; Cohen *Early Reports*, at 25.

<sup>124</sup> Gerald T. Dunne, “The Early Court Reporters”, 1976 *Yearbook of the Supreme Court Historical Society* 61, 63 (1976).

<sup>125</sup> *Id.*, at 64.

<sup>126</sup> Cohen, *Early Court Reporters*, at 26.

<sup>127</sup> Dunn, “Early Court Reporters”, at 64.

<sup>128</sup> Cohen, *Early Court Reporters*, at 29.

<sup>129</sup> *Id.*, at 29-30.

compensated for his service on the Court of Appeals.

In the “preface” to the first volume of his *Reports*, Cranch offered an earnest justification for this work.

In a government which is emphatically stiled (sic) a government of laws, the least possible range ought to be left for the discretion of the judge. Whatever tends to render the laws certain, equally tends to limit that discretion; and perhaps nothing conduces more to that object than the publication of reports. Every case decided is a check upon the judge. He cannot decide a different case differently, without strong reasons, which, for his own justification, he will wish to make public. The avenues to corruption are thus obstructed, and the sources of litigation closed.<sup>130</sup>

It is certainly laudable that a sitting judge would take such a conservative and humble position vis-a-vis judicial discretion. Cranch’s respect for precedent, and his overriding sense of obligation to follow that precedent were not merely rhetorical, as he demonstrated over his judicial career.

Cranch had one critical advantage over Dallas. “[T]he practice of delivering opinions in writing, which, in the beginning had been exceptional, had become the rule when Mr. Cranch was made reporter.”<sup>131</sup> One can presume that the accuracy of his case reports improved significantly, given Cranch’s access to the Justices’ own words. Generally Cranch’s *Reports* “met with favorable comment, even from political opponents.”<sup>132</sup> Charles Warren quotes the *National Intelligencer*, a respected newspaper that covered leading court cases: “these reports have been compiled with the utmost attention to accuracy.”<sup>133</sup> It also appears that Cranch’s *Reports* were more complete than Dallas’. There is no evidence that any Supreme Court decisions were omitted from the *Reports*.

This is not to say that Cranch’s *Reports* met with universal approval. The volumes were considered expensive. Cranch’s practices added to the expense to some degree. In his early volumes, he included a series of essays on various aspects of the law. These “perfunctory attempts at scholarship” were not generally well

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<sup>130</sup> “Preface”, 5 *U.S.* (1 *Cranch*)

<sup>131</sup> “Appendix”, 151 *U.S.* xi, xiv (1889).

<sup>132</sup> 1 Charles Warren, *The Supreme Court in United States History*, 288 (Little Brown 1935).

<sup>133</sup> *Id.*, at 288-89 n.1, quoting *National Intelligencer*, July 10, 1804.



received.<sup>134</sup> Cranch also apparently did not share Ephraim Kirby's devotion to economy in summarizing counsel's arguments. Hence, he was criticized for the "unprofitable and expensive prolixity" in setting forth these arguments.<sup>135</sup> The essays and the extended summaries of counsel's arguments contributed to "[t]he greater length of Cranch's *Reports* which ... contribut[ed] to their cost."<sup>136</sup>

"[T]he most serious of Cranch's deficiencies was his inability to render his reports in a timely fashion."<sup>137</sup> The first volume of his *Reports*, which included cases decided in the 1801 Term did not appear until June, 1804. Cranch's Volume 7 appeared only after a five year delay.<sup>138</sup> As with Dallas, these delays likely impacted the nascent Court's effort to establish itself as a credible arbiter of Federal law.

Delay of this magnitude in the reporting of the decisions of the nation's highest court necessarily diminished, in many instances to the breaking point, the immediate impact that the Court's actions might otherwise have been expected to have on the bar and the public at large.<sup>139</sup>

This concern was particularly pressing given that Cranch's term as Reporter covered the early years of John Marshall's term as Chief Justice, in which a number of landmark decisions were rendered.

Craig Joyce provides one example of the impact of this delay in reporting.

Certainly few, if any, of the Marshall Court's decisions ... exceed *Marbury v. Madison*<sup>140</sup> in importance. Yet contemporary newspaper accounts of Marshall's opinion, on which the country was forced to rely pending the publication of Cranch's *Reports*, left much to be desired.... "The first of Marshall's great Constitutional opinions ... received scant notice at the time of its delivery. The newspapers had little to say about it. Even the bench and bar of the country, at least in sections remote from Washington, appear not to have heard of it..."<sup>141</sup>

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<sup>134</sup> Joyce, "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.*, at 1308-09.

<sup>135</sup> *Id.*, at 1308, quoting letter, William Pinkney to Henry Wheaton, September 3, 1818, *Wheaton Papers*.

<sup>136</sup> Joyce, "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.*, at 1309.

<sup>137</sup> *Id.*, at 1310.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*, at 1310.

<sup>140</sup> 5 *U.S* (1 *Cranch*) 137 (1803).

<sup>141</sup> Joyce, "Rise of the Supreme Court Reporter" 83 *Michigan L. Rev.*, at 1311, quoting Albertridg[e], *Life of John Marshall* 153

Given that Cranch served a Chief Justice of the District of Columbia Circuit Court throughout his term as Supreme Court Reporter, one can understand why such delays occurred. However, the delays ultimately became more than the Supreme Court could tolerate. One likely turning point was the appointment of Joseph Story as Supreme Court Justice. Story was “keenly aware of the advantages of prompt, accurate reporting and deeply interested in the promotion of a national jurisdiction.”<sup>142</sup> His influence may have been decisive in replacing Cranch.<sup>143</sup>

### **Henry Wheaton**

As court reporter, Henry Wheaton dramatically reduced the lag between the time decisions were rendered and when they were reported. The accuracy of the case reports also improved significantly. This was fortuitous, in that the Court, under Chief Justice John Marshall, rendered many of its most important decisions during Wheaton’s term as reporter. At least one commentator contends that Wheaton’s reporting was a significant factor contributing to the Court’s ascendance.<sup>144</sup>

Wheaton was born in Providence, Rhode Island in 1785. He was a precocious youth, entering Rhode Island College (later Brown University) at age 13. At the age of 20, he translated the Napoleonic Code into English. After finishing his schooling Wheaton practiced law, worked as a newspaper editor, and served as a judge on the marine court of New York City.<sup>145</sup>

Upon moving to Washington D.C., Wheaton moved into a boarding house where the Supreme Court

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(Houghton Mifflin 1919).

<sup>142</sup> *Id.*, at 1312.

<sup>143</sup> *Id.*

<sup>144</sup> See Joyce, “Rise of the Supreme Court Reporter” 83 *Michigan L. Rev.*, at 1290.

<sup>145</sup> 20 *Dictionary of American Biography* 39, 39 (Scribner’s 1936).

Justices lived. He became “chums” or roommates with Justice Joseph Story.<sup>146</sup> They became “close both personally and professionally”, with Story serving as Wheaton’s mentor.<sup>147</sup> When the Court finally lost patience with Cranch, the Justices cast about for a new court reporter. They did not have far to look. Aware of the egregious delays in publishing Cranch’s *Reports*, Wheaton promised “regular, annual publication of the decisions.”<sup>148</sup> For their part, the Justices promised “to furnish [Wheaton] alone ... all such writings and memoranda as they might make of their decisions.”<sup>149</sup>

Wheaton made good on his promise. Despite delays occasioned by the inclusion of numerous annotations authored by Wheaton, and difficulty in securing a printer, Wheaton’s first volume came out within a year. Thus, “the bench and the bar of the Supreme Court had in hand, for the first time, in history, a published set of cases from the preceding term.”<sup>150</sup> Indeed, every one of Wheaton’s 12 volumes was published by the time the succeeding Supreme Court term had begun.<sup>151</sup>

The accuracy of the case reports also improved dramatically. Wheaton was, by all accounts, “fanatical” in his pursuit of accuracy.<sup>152</sup> He had two distinct advantages: access to the text of the Justices’ opinions, and personal access to the Justices when he needed to clarify a passage. That Wheaton enjoyed the confidence of the Justices is suggested by a comment of Justice Bushrod Washington. Turning over the text of an opinion,

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<sup>146</sup> Craig Joyce, “‘A Curious Chapter in the History of Judicature’”: *Wheaton v. Peters* and the Rest of the Story” 42 *Houston L. Rev.* 325, 350(2005)

<sup>147</sup> *Id.*

<sup>148</sup> Elizabeth F. Baker, *Henry Wheaton* 27 (U Pennsylvania Press 1937), quoting *Report of the Copyright Case of Wheaton v. Peters*, 6 (N.Y., Van Norden, 1834)

<sup>149</sup> Frederick C. Hicks, *Men and Books Famous in the Law*, 200 (Lawyers’ Co-op 1921), quoting *Report of the Copyright Case of Wheaton v. Peters*, 6.

<sup>150</sup> Joyce, “‘Wheaton v. Peters’”, 42 *Houston L.Rev.* at 351.

<sup>151</sup> *Id.*

<sup>152</sup> Joyce, “Rise of the Supreme Court Reporter”, at 1329.

Washington counseled Wheaton to “correct with freedom any errors of language” in the opinion.<sup>153</sup>

While Wheaton included most decisions in his reports, he did omit some decisions. Wheaton justified these omissions:

Discretion has been exercised in omitting to report cases turning on mere questions of fact, and from which no important principle, or general rule, could be extracted. Of these an unusual number has recently occurred on the admiralty side of the court, attended with an infinite variety of circumstances, but inapplicable, as precedents, to future cases.<sup>154</sup>

The decision to omit some decisions from his *Reports* does not seem to have been met with criticism or protest.

However, much criticism was lodged against the high cost of the *Reports*. “In his zeal for scholarly excellence and improvement of the law, Wheaton had inadvertently pushed the cost of the final product well beyond the reach of that critical market, the mass of ordinary practitioners.”<sup>155</sup> Printing costs had been rising generally; however, the main reason for the escalation of the price of *Wheaton’s Reports* was the inclusion of his annotations. These annotations generally were well received;<sup>156</sup> however, they significantly increased the bulk of the *Reports*. The length of the case reports also was increased by Wheaton’s summaries of counsels’ arguments. In the preface to the first volume of *Wheaton’s Reports*, he wrote, “[o]f the arguments of counsel nothing more has been attempted than to give a faithful outline....”<sup>157</sup> Unfortunately, Wheaton was not able to stick to his guns. Washington at the time was, in many respects, a small town, and the Supreme Court bar was quite close knit. No doubt, Wheaton was the recipient of numerous “suggestions” by counsel who had argued before the Court, seeking a more “faithful” rendition of their arguments. In any events, the length of counsel’s arguments in *Wheaton’s Reports* gradually grew, making each subsequent volume that much thicker.

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<sup>153</sup> Joyce, “Rise of the Supreme Court Reporter”, at 1324, quoting letter, Bushrod Washington to Henry Wheaton, May 24, 1817, *Wheaton Papers*.

<sup>154</sup> “Preface” 1 Wheaton (14 U.S.) iv. (1816).

<sup>155</sup> Joyce, “Rise of the Supreme Court Reporter”, at 1337-38.

<sup>156</sup> Hicks, *Men and Books*, 203.

<sup>157</sup> “Preface”, 14 U.S. (1 Wheaton) iii (1816).

Even Justice Story noted, “it is manifest that the profession at large cannot afford to buy” the Reports.<sup>158</sup> That this comment was contained in a letter from Justice Story to Richard Peters is significant. As will be discussed below, Peters ultimately succeeded Wheaton as court Reporter, and his plan to publish a low cost set of Supreme Court decisions was to spark the litigation leading to the landmark decision *Wheaton v. Peters*.<sup>159</sup>

It was not as if Wheaton was getting rich on proceeds from his *Reports*. “Mr. Wheaton commenced his labors as a reporter with no very flattering prospects, if we may judge by the demand for the volumes of his predecessor.”<sup>160</sup> Sales of *Wheaton’s Reports* chronically lagged throughout his time as Reporter. This may seem strange to contemporary readers, who are used to landmark Supreme Court decisions being avidly consumed the moment they are published. The lack of demand may have reflected a sense among practitioners that the decisions were of importance mainly to the few attorneys who comprised the Supreme Court bar.

Wheaton ultimately turned to Congress, complaining that he simply could not make a living from sales of his Reports. In 1817, Congress passed an Act that, for the first time authorized compensation to the Supreme Court Reporter, at \$1,000 per year.<sup>161</sup> “Wheaton thus became the first official Reporter in the history of the Court.”<sup>162</sup>

The stunted demand for *Wheaton’s Reports* is particularly ironic given that it was during his reportership that the Supreme Court first came to be recognized as a maker of law which affected the entire country. Wheaton “served as Reporter to the Supreme Court ... during the period in which were handed down some of

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<sup>158</sup> Letter, Joseph Story to Richard Peters, June 26, 1828, quoted in Joyce, “Rise of the Supreme Court Reporter”, at 1338.

<sup>159</sup> 33 U.S. (8 Peters) 591 (1834).

<sup>160</sup> 15 Daniel Webster, *Writings and Speeches*, 44 (Little Brown, 1903), quoted in Frederick C. Hicks, *Men and Books Famous in the Law*, 199 (Lawyers Co-op 1921).

<sup>161</sup> Act of March 3, 1817, Ch. 63, 3 Stat. 376.

<sup>162</sup> Craig Joyce, “*Wheaton v. Peters*”, 42 *Houston L. Rev.* At 351.

the most important of Chief Justice Marshall's opinions."<sup>163</sup>

In no period in our history have more important and far-reaching decisions been rendered by the Supreme Court than during that recorded by Wheaton. It was the Golden Age of the Supreme Court. The right of the court to take jurisdiction in constitutional questions was upheld, the doctrine of implied powers was developed, and a limitation put on the powers of the states.<sup>164</sup>

Craig Joyce has stressed the "indispensable role" that the court Reporters played in the Supreme Court's "rise to preeminence among the lawgivers of the new nation."<sup>165</sup> In this regard, Wheaton's timely and accurate reports of the Marshall Court's decisions was critical. Had those decisions moldered for three, four, five years or more before being published, their influence on American law, and the public's consciousness of the Court's influence would no doubt have been diminished.

During his time as Reporter, Henry Wheaton also maintained a significant law practice. He "was a prominent member of the Supreme Court bar ... appear[ing] as counsel in more than twenty-five Supreme Court cases between 1816 and 1827. In many of those cases, Wheaton argued either with or against Daniel Webster."<sup>166</sup> Wheaton was also, apparently, a bit of a *bon vivant*. As a contemporary noted, "everywhere in the social life of Washington, Wheaton was on the footing not of a received but of a welcomed guest."<sup>167</sup> He maintained cordial relations with all but one of the Supreme Court justices. Indeed "there was something in the character of the friendship [with the Justices] that no mere position explained."<sup>168</sup>

There was, however, one exception to Wheaton's popularity. It appears that he was on chronically bad

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<sup>163</sup> Elizabeth F. Baker, *Henry Wheaton*, vii (University of Pennsylvania Press 1937).

<sup>164</sup> Hicks, *Men and Books*, 202, citing, *inter alia*, *Martin v. Hunter's Lessee*, 1 Wheaton 304, *McCullough v. Maryland*, 4 Wheaton 316 and *Dartmouth College v. Woodward*, 4 Wheaton 518.

<sup>165</sup> Joyce, "Rise of the Supreme Court Reporter", at 1293.

<sup>166</sup> Cohen, *Guide to the Early Reports*, 39.

<sup>167</sup> Baker, *Henry Wheaton*, 34.

<sup>168</sup> *Id.*

terms with Justice William Johnson.<sup>169</sup> The roots of this dust-up appear to have been both an ideological and a personal component. Justice Story aggressively sought to extend the Supreme Court’s admiralty jurisdiction. As one reviewer put it, “[i]f a bucket of water were brought into [Story’s] court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it.”<sup>170</sup> Wheaton tended to concur with this approach.<sup>171</sup> Justice Johnson took a much more circumscribed view of the Court’s maritime jurisdiction, criticizing “this silent and stealing process of the Admiralty in acquiring jurisdiction to which it has no pretensions.”<sup>172</sup>

There was also a personal component. Wheaton and Justice Johnson simply did not like each other. Wheaton apparently made no secret of his dislike of (and even contempt for) Justice Johnson. Wheaton once wrote a note to Justice Story, referring to a volume of *Wheaton’s reports*.

I am sorry that there are so many of our friend’s crudities in this volume. There are some things quite above my comprehension & others in so bad a taste that I lament it very much. He has great strength of mind, but the defects of his early education predominate and he has unfortunately been most concert where he is most deficient. But what can’t be cured must be endured.<sup>173</sup>

This ill felling was to erupt, of all places, in the text of a Supreme Court opinion, *Ramsay v. Allegre*.<sup>174</sup> The dispute in *Allegre* focused on a prior Supreme Court opinion, or, more precisely on counsels’ arguments in

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<sup>169</sup> This was a different William Johnson than the reporter of New York state decisions.

<sup>170</sup> *Id.*, at 1316, quoting Note, “Extension of Federal Jurisdiction over State Canals” 37 *American L. Rev.* 911, 916 (1903).

<sup>171</sup> See, e.g., “Appendix, Note II: On the Practice in Prize Cases”. 14 U.S. (1 Wheaton) 494 (1816); “Appendix, Note I: “Additional Note on the Principles and Practice in Prize Cases” 15 U.S. (2 Wheaton) [429] (1817); “Appendix, Note III: On the Subject of Prize law” 18 U.S. (5 Wheaton) [A52] (1820).

<sup>172</sup> See *Ramsay v. Allegre*, 25 U.S. (12 Wheaton 611, 614 (1827) (Johnson J., concurring).

<sup>173</sup> Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* 201-202 (Simon & Schuster 1970), quoting letter, Henry Wheaton to Joseph Story, July 2, 1820, Wheaton papers. (Ellipsis in Dunne).

<sup>174</sup> 25 U.S. (12 Wheaton) 611 (1827).

that decision. In *The General Smith*<sup>175</sup> Wheaton stated that the appellants' counsel, William Pinkney, had conceded admiralty jurisdiction over the case, and based his arguments on the substantive claims involved<sup>176</sup> Eight years later, the Court decided *Ramsay*.<sup>177</sup> Chief Justice Marshall delivered the one-paragraph majority opinion, which affirmed the lower court opinion, based on the facts.<sup>178</sup> The court went on to note that it was "not ... necessary to consider the general question of jurisdiction."<sup>179</sup>

Justice Johnson filed a lengthy concurring opinion, focusing on the Court's lack of admiralty jurisdiction. He took issue with Wheaton's summary of counsel's arguments in *The General Smith*, asserting that Pinkney would never have conceded jurisdiction, and that "he must have been misunderstood" by Wheaton.<sup>180</sup> Justice Johnson went on to characterize "the rest of [Pinkney's] [reported] argument [as] clearly a mistake."<sup>181</sup> In other words, Justice Johnson accused Wheaton of having misrepresented Pinkney's arguments! The irony, of course, is that Wheaton, as Court Reporter was compelled to record this accusation as part of the *Ramsay* decision.

Wheaton duly recorded the *Ramsay* opinion, including Justice Johnson's concurrence in its entirety. However, at the end of the opinion, he added a footnote, which set forth a point-by-point refutation of Justice Johnson's arguments regarding the accuracy of *The General Smith*.<sup>182</sup> Wheaton concluded his footnote:

In making these remarks, the Editor has certainly not been influenced by any feelings of

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<sup>175</sup> 17 U.S. (4 Wheaton) 438 (1819).

<sup>176</sup> *The General Smith*, 17 U.S. (4 Wheaton) at 442.

<sup>177</sup> 25 U.S. (12 Wheaton) 611 (1827).

<sup>178</sup> *Id.*, at 613-14.

<sup>179</sup> *Id.*, at 614.

<sup>180</sup> *Id.*, at 636 (Johnson J., concurring).

<sup>181</sup> *Id.*, at 638 (Johnson J., concurring).

<sup>182</sup> *Id.*



disrespect towards the learned judge by whom the above opinion was delivered, nor even by a desire to controvert the peculiar doctrines maintained in that opinion. It is his own character for accuracy and integrity as the Reporter of the decisions of this Court which the Editor feels to be assailed, and, therefore, seeks to vindicate. It is a duty which he owes to the Court, to the profession, and to his own reputation, to maintain the fidelity of the Reports, which are received as authentic evidence of the proceedings and adjudications of this high tribunal. If they are not to be relied on in this respect, they are worthless.<sup>183</sup>

It is clear that Henry Wheaton was a person who cared passionately about the quality of his work, and his reputation for accuracy. Ironically, this footnote turned out to be the final words in the final decision in the final volume of *Wheaton's Reports*. It is safe to say that Wheaton's reputation for scrupulous accuracy has been sustained to the present day.

Eventually, Wheaton “tire[d] of the mechanical drudgery of reporting.”<sup>184</sup> He cast about for a judicial appointment, at one point expressing hope that he might be appointed to the Supreme Court.<sup>185</sup> Then, in 1827, President John Quincy Adams offered him a diplomatic post as Charge d'affaires to Denmark.<sup>186</sup> He later was posted to Berlin.<sup>187</sup> During his time with the foreign service, Wheaton solidified his reputation as a legal scholar, authoring a noted treatise, *Elements of International Law*.<sup>188</sup> “Wheaton received international fame upon the publication of this treatise.”<sup>189</sup> Wheaton thus enjoyed a successful career after resigning as Supreme Court Reporter. The one blemish on that career came in the course of his landmark litigation against his

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<sup>183</sup> *Ramsay*, 25 U.S. (12 Wheaton), at 642-43 n. a.

<sup>184</sup> Joyce, “Rise of the Supreme Court Reporter”, 83 *Michigan L. Rev.*, at 1349, quoting letter, Henry Wheaton to Edward Wheaton, January 11, 1825, *Wheaton Papers*.

<sup>185</sup> Joyce, “Rise of the Supreme Court Reporter”, 83 *Michigan L. Rev.*, at 1349

<sup>186</sup> Hicks, *Men and Books*, 204.

<sup>187</sup> Cohen, *Guide to the Early Reports*, 41.

<sup>188</sup> Henry Wheaton, *Elements of International Law B. Fellows 1836*).

<sup>189</sup> Cohen, *Guide to the Early Reports*, 41-42.

successor, *Wheaton v. Peters*.<sup>190</sup>

## **Richard Peters**

Richard Peters was born in Philadelphia in 1779. His father, Richard Peters Sr., was a member of the Continental Congress, who later became a Federal district judge.<sup>191</sup> As one observer has noted, “[t]he paucity of biographical information [about Peters] suggests an undistinguished professional career.”<sup>192</sup> Where Wheaton won renown as a legal scholar and appellate attorney, Peters was “apparently not burdened by the weight of an overpowering intellect.”<sup>193</sup> He seems to have been content with a career as a court reporter. He did, however, exhibit, through his career, a keen business acumen. He “saw court reporting as an entrepreneurial venture” and demonstrated a knack for economically publishing and promoting his law reports.<sup>194</sup>

In 1819, and in 1826-27, Peters published five volumes of decisions from the U.S. Circuit Court for the Third Circuit. He then set his sights on the position of Supreme Court Reporter. There are indications that he may have “worked to hasten Wheaton’s departure” from the post.<sup>195</sup> When Wheaton ultimately resigned, Peters was poised to take his place; he did so in January, 1828.

Peters came to the post with a well defined editorial approach. He eliminated the extended annotations that Wheaton had included, limiting his commentary to occasional, very brief, liner notes. He also dramatically reduced the length of his summaries of attorneys’ arguments to the court.<sup>196</sup> By all accounts, Peters’ *Reports*

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<sup>190</sup> 33 U.S. (8 Peters) 591 (1834).

<sup>191</sup> Cohen, *Guide to Early Reports*, 61.

<sup>192</sup> *Id.*

<sup>193</sup> Joyce, “Rise of the Supreme Court Reporter” 83 *Michigan L.Rev.*, at 1389.

<sup>194</sup> *Id.*, at 1351-52; Joyce, “‘A Curious Chapter in the History of Judicature’: *Wheaton v. Peters* and the Rest of the Story” 42 *Houston L.Rev.* 325, 354 (2005)

<sup>195</sup> Cohen, *Guide to Early Reports*, 64, citing Joyce, “Rise of Supreme Court Reporter” 83 *Michigan L.Rev.*, at 1352-53.

<sup>196</sup> Joyce, “Rise of Supreme Court Reporter”, 83 *Michigan L.Rev.*, 1359.

were “comparable to Wheaton’s” in terms of the “accuracy and completeness” of the opinions.<sup>197</sup> Peters set up a system under which the text of decisions went promptly to printers, who returned printed text for review by the justices in a matter of weeks. This system significantly improved both timeliness of the case reports.<sup>198</sup>

Despite these improvements, early reviews of Peters’ *Reports* were quite critical. The focus of the criticism was not the text of the opinions, but the synopses that Peters included at the beginning of each case.

Critics contended that Peters:

[h]eap[ed] into his abstracts incidental observations, reflections, and reasonings of the court.... The mass of matter thus thrown together serves to bewilder, rather than to assist the reader, so that it sometimes requires almost as great a labor to ascertain the points from the note as from the whole case.<sup>199</sup>

A common complaint was that he missed the *ratio decidendi* of decisions, focusing on peripheral issues, while ignoring the core holdings.<sup>200</sup> On at least one occasion, his summary of the holding was “directly the reverse of the opinion expressed by the court.”<sup>201</sup>

Peters appears to have had an irascible personality. He had a protracted dispute with the Court Clerk over the latter’s practice of distributing draft opinions to competing reporters.<sup>202</sup> He also seems to have had frequent disputes with “the press, private competitors, and various members of the bar.”<sup>203</sup> Most seriously, he was on chronic bad terms with a number of the Justices.

Peters had frequent conflicts with Justices Joseph Ingersoll, Henry Baldwin, John Catron, and Peter Daniel over errors, omissions, and delays in his reporting. Although some of the criticism

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<sup>197</sup> Joyce, “*Wheaton v. Peters*”, 42 *Houston L.Rev.*, at 354.

<sup>198</sup> *Id.*, at 1357.

<sup>199</sup> “Peters’s Reports” 1 *Am. Jurist* 177, 179 (1829).

<sup>200</sup> Joyce, “Rise of Supreme Court Reporter”, 83 *Michigan L.Rev.*, 1361..

<sup>201</sup> “Peters’s Reports” 3 *American Jurist* 101, 109 (1830)

<sup>202</sup> Cohen, *Guide to Early Reports*, at 68-69.

<sup>203</sup> *Id.*, at 69

was justified, a great deal of it emanated from personality conflicts between Peters and several of the justices, particularly Justices Baldwin and Catron.<sup>204</sup>

After one of the justices complained to a member of the House of Representatives, the House passed a resolution “instructing the Committee on the Judiciary to inquire whether the decisions of the Supreme Court are reported with accuracy and fidelity.”<sup>205</sup>

Despite these conflicts and controversies, Peters held on as Supreme Court Reporter until the end of the 1842 session.<sup>206</sup> And despite the cavils of individual justices, Peters’s *Reports* are generally held to have been quite accurate, particularly with respect to the actual text of the opinions.

### ***Wheaton v. Peters***

From the beginning, Peters had a master plan for profiting from his Reporter position. Publication of the official *Reports* was, of course, his foremost obligation. However, he had an additional publishing scheme, which promised much greater profits. Simply put, Peters proposed to publish a full set of all Supreme Court opinions, going back to the Court’s first session. Within six months of taking office as Reporter, Peters published a series of *Proposals* describing his project. The *Proposals* stressed the cost of purchasing the official Reports separately, estimating that cost to be more than one hundred thirty dollars. In contrast, he promised to deliver a full set of opinions in six volumes for a total cost of thirty-six dollars.<sup>207</sup>

How could he do this? He planned to use a somewhat smaller typeface, which would reduce the number of pages needed. He also planned to eliminate all scholarly Annotations and all summary of counsels’ arguments.<sup>208</sup> He also planned to eliminate concurring and dissenting opinions.<sup>209</sup> This latter proposal strikes

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<sup>204</sup> *Id.*, at 69-70.

<sup>205</sup> *Congressional Globe*, 24<sup>th</sup> Cong., 1st Sess., 321 (May 2, 1836)

<sup>206</sup> Cohen, *Guide to Early Reports*, at 6.

<sup>207</sup> Joyce, “*Wheaton v. Peters*”, 42 *Houston L.Rev.*, at 355, quoting Peters, *Proposal*, Exhibit A to court records for *Wheaton v. Peters* 33 U.S. (8 Peters) 591 (1843), in microformed Record at 9-11.

<sup>208</sup> Joyce, “*Wheaton v. Peters*”, 42 *Houston L.Rev.*, at 356.

the modern reader as controversial, given that virtually every significant contemporary decision includes extended concurrences and dissents. However, at the time the reasoning was that the legal researcher requires “the law” as expressed by the Supreme Court, and that law is expressed in the majority opinion.

Initial reaction to Peters’s proposal was generally quite positive. Justice Story called it “a most valuable present to the profession.”<sup>210</sup> Other justices were also supportive.<sup>211</sup> As might be expected, Peters’ predecessors as Supreme Court Reporter were less enthralled. Alexander Dalles had passed away in 1817.<sup>212</sup> William Cranch initially objected strenuously. However, he eventually withdrew his objection in return for fifty copies of the *Condensed Reports*.<sup>213</sup>

This left Henry Wheaton, who was stationed at the United States embassy in Denmark. Far from the scene, he apparently was slow to recognize the threat Peters’s scheme presented to future sales of Wheaton’s *Reports*. However, with the publication of volume three of Peters’s *Condensed Reports*, the first to include opinions from Wheaton, the latter took action. He authorized his publisher, Robert Donaldson, to litigate.

Donaldson filed a copyright action in the Eastern District of Pennsylvania, naming himself and Wheaton as plaintiffs, in May, 1831.<sup>214</sup> That court ultimately ruled in favor of Peters and his publisher.<sup>215</sup> The plaintiffs had raised claims under the Copyright Act as well as a common law copyright claim. The defendants argued that the passage of the Copyright Act eliminated any basis for common law copyright, and that Wheaton had no

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*, quoting Letter, Joseph Story to Richard Peters, June 26, 1828, in Peters Papers, on file with the Historical Society of Pennsylvania.

<sup>211</sup> Joyce, “*Wheaton v. Peters*”, 42 *Houston L.Rev.*, at 356.

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*, at 356-57.

<sup>214</sup> *Id.*, at 357-58.

<sup>215</sup> *Wheaton v. Peters*, 29 F. Cas. 862 (E.D. Pa. 1832)

complied with the formal requirements for obtaining statutory copyright protection. The district court adopted both of these arguments in dismissing the case. The defendants also raised a more basic argument, namely that there can be no copyright in the law. The lower court did not rule on this claim.

Donaldson and Wheaton then appealed to the Supreme Court. Wheaton, recognizing the importance of the issues involved, returned to the United States to participate more actively in the litigation.<sup>216</sup> He communicated frequently with his lead counsel, Daniel Webster, suggesting lines of argument to the latter. Predictably, the case drew a great deal of attention in the capital. It was to be one of the first decisions defining rights under the Copyright Act, and it was the very first case to address whether case law might be subject to copyright. The justices, who knew Peters, and most of whom knew Wheaton personally, were keenly aware of the likely impact of their decision on the participants. Justice Story, in particular was torn between his affection for Wheaton and his concern for the important issues to be decided.

The Court ultimately sided with the defendants. In a split decision, the court held that the Copyright Act preempted common law copyright claims, and that Wheaton had not demonstrated compliance with the procedural requirements of the Act.<sup>217</sup> Both of these holdings drew a stinging dissent by Justice Thompson.<sup>218</sup> However, on the core issue of the case, “the court are unanimously of [the] opinion that no reporter has or can have any copyright in the written opinions delivered by this court; and that the justices cannot confer on any reporter any such right.”<sup>219</sup>

One can imagine the glee with which Richard Peters recorded this landmark decision in his favor. Peters’s *Condensed Reports* went on to be a financial success, setting a precedent for other low cost, “bare

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<sup>216</sup> *Id.*, at 358.

<sup>217</sup> *Wheaton v. Peters*, 33 U.S. (8 Peters) 591, 659-665 (1834).

<sup>218</sup> *Wheaton v. Peters*, 33 U.S. (8 Peters), at 668.

<sup>219</sup> *Wheaton v. Peters*, 33 U.S. (8 Peters), at 668..

bones” case reports.

### Case Reporting at Mid-century

The middle decades of the nineteenth century saw a gradual transformation in the nature of case reports. The most significant change was in authorship. One by one, judges in various jurisdictions took to composing their decisions, in writing. Often this practice was pursuant to a statute mandating written decisions, at least for courts of last resort.<sup>220</sup> It also was a matter of custom, with judges opting to take the initiative for setting out the rationale for their decisions.<sup>221</sup>

The upshot was that the role of court reporter changed dramatically. No longer was the reporter obliged to sit in court, every session, taking down counsels’ arguments, the judges questions and the rendering of an oral opinion. Now he could simply collect the judges’ written opinions.<sup>222</sup> Reporters would still edit the opinions, but on a limited basis, looking mainly for mistakes in grammar and punctuation.

The content of the reports also changed. Reports were now comprised almost entirely of the court’s decision - its holding and rationale. Sometimes the reporter would need to provide a factual or procedural background to the decision. As time passed, judges came to include that background in the text of their decisions. Counsels’ arguments occupied less and less room in the reported decisions, eventually disappearing altogether in all but a handful of reports.<sup>223</sup> Many reports, however, added a new editorial feature, a summary of the decision, either as a one paragraph synopsis, or as a series of head notes summarizing the key holdings of the decisions.

As might be expected, the Supreme Court’s decision in *Wheaton v. Peters* had a significant impact on

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<sup>220</sup> Edwin C. Surrency, *A History of American law Publishing*, 42-43 (Oceana 1990); Frederick N Judson, “The procedure in Our American Judicial System” 46 *American Law Review* 865, 873 (1912)

<sup>221</sup> Surrency, *History of American Law Publishing*, at 42

<sup>222</sup> *Id.*, at 46-47.

<sup>223</sup> A Notable exception has been *United States Supreme Court Reports, Lawyers’ Edition* (Lawyers’ Co-op, Lexis-Nexis), which has consistently provided summaries of counsels’ arguments.

publication patterns. On the one hand, official court reporters, who had relied on public sale of their reports, faced a significant decline in revenue, given that these reports could not be copyrighted. State legislators, recognizing the importance of case reports, passed statutes authorizing payment of a regular salary to the reporters.<sup>224</sup> At the same time, private entrepreneurs capitalized on the *Wheaton* ruling, reproducing court reports, without permission of, or compensation to the official reporters.<sup>225</sup> These competing case reports were often sold at a significantly lower price than the official reports. The upshot was a plethora of competing case reports in many jurisdictions.

As time passed, and the demand for state case reports continued to grow, larger law publishers seized on the notion of publishing regional reporters, containing the decisions of the highest courts in a number of adjoining states. Bancroft-Whitney began publishing the *West Coast Reporter* in 1885; Gould began the *Eastern Reporter* in 1885; Lawyers Cooperative began the *New England Reporter* and *Western Reporter* both in 1885; the Southern Law Publishing Company published the *South Atlantic Reporter*.<sup>226</sup> For whatever reason, however, none of these publishers chose to “go national”, to publish a set of reports of the decisions from every state. None, that is, until John West.

### **John West and the National Reporter System**

There is little in John West’s early history to suggest that he would found the dominant legal publishing company in the history of this country. West was born in 1852 in Roxbury, Massachusetts. His father, William West, was a bookkeeper. Although John was an avid reader, he only got as far as eighth grade, leaving school to work in Boston as a grocery clerk.<sup>227</sup> In 1870, William West moved with his family to St. Paul

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<sup>224</sup> Surrency, *History of American Law Publishing*, at 41, 45-46.

<sup>225</sup> *Id.*, at 47-49.

<sup>226</sup> Thomas J. Young, “A Look at American Law Reporting in the 19<sup>th</sup> Century” 68 *L. Library J.* 294, 301 (1975); Surrency, *History of American Law Publishing*, at 50-51,

<sup>227</sup> Robert M. Jarvis, “John B. West: Founder of the West Publishing Company” 50 *American J. Legal History* 1, 3-4 (2008).



Minnesota, to take a job as paymaster for a railroad. John took a job as a traveling salesman for a book store. Many of his customers were lawyers, and John soon saw the potential market for law books. At the age of 20, he quit his job and started his own company, John B. West, Publisher and Book Seller.<sup>228</sup> From the start, West demonstrated a knack for identifying and meeting customers' demands. Thus, he arranged to have Minnesota's rules of practice translated into Swedish, "an effort that was much appreciated by the region's many Scandinavian-born lawyers and judges."<sup>229</sup>

As in many parts of the country, lawyers often complained about the availability of case reports, which were expensive, and often subject to long delays in publishing. West addressed this need in 1876 with a publication titled *The Syllabi*.<sup>230</sup> West realized that the role of court reporter had changed dramatically since Alexander Dallas transcribed the oral opinions of the U.S. Supreme Court. Judges now composed their own decisions, the reporter simply had to collect these decisions, review them for spelling and grammatical errors and distribute them. Consequently, he was able to dramatically reduce the turnaround time between the rendering of a decision and its publication, as well as the cost of his reports. From the beginning, West case reports were well known for their "uniform and high quality editing, fast publication [and] low cost."<sup>231</sup>

From this modest beginning the West reporting system grew with breathtaking speed. In 1879, West initiated the *North Western Reporter*, which included all cases from the highest courts in Minnesota, Wisconsin, Iowa, Michigan, Nebraska, Wisconsin and the Dakota territory.<sup>232</sup> Other regional reporters followed: the

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<sup>228</sup> *Id.*, at 4-5.

<sup>229</sup> *Id.*, at 5.

<sup>230</sup> *Id.*, at 6.

<sup>231</sup> *Id.* Thomas A. Woxland, "'Forever Associated with the Practice of Law': the Early Years of the West Publishing Company" 5(1) *Legal Reference Services Quarterly* 115, 118-19 (1985).

<sup>232</sup> Jarvis, "John West" 50 *American J. Legal history*, at 6.

*Pacific Reporter* in 1883, and the *Atlantic Reporter* and *Eastern Reporter*, both in 1885.<sup>233</sup> In 1885, he also made the historic decision to create a national system of case reports, covering the courts of last resort in every state, as well Federal appellate decisions.<sup>234</sup>

In retrospect, this decision seems obvious. Once he had set up such an efficient process for obtaining, reviewing, publishing and distributing court decisions, why wouldn't he want to make this a national enterprise? At the time, however, the plan seemed problematic to many observers. A number of well-established legal publishers had, in fact, initiated regional case reporters during this period. Each of these regional reporters included decisions from the highest courts in selected states; all purported to be comprehensive, publishing all such decisions. In other words, they provided the exact reporting service that West planned to provide, with slight variations as to the geographical reach of the regions covered. In the words of one recent historian, "the period of the 1880s was one long publishing war."<sup>235</sup>

Contemporary observers viewed the situation with concern. As one put it:

[t]his rivalry is really to be regretted. These enterprising houses have started out to do a very important work for the legal profession, and each [of] them ought to reap [a] profit .... But this competition will have the effect of dividing up the patronage among them so that it will prove a losing enterprise for all. The Wests ought to withdraw from the territory previously preempted and not occupied by the "Coops"<sup>236</sup>

Another commentator agreed with this diagnosis of the problem, but disagreed as to the solution. "The only present remedy seems to be .... the publication of one series to contain all the State reports, issued under responsible editorship." As the author noted, "[t]he first step in this direction was taken by the enterprising

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<sup>233</sup> Thomas J. Young, "A Look at American Law Reporting in the 19<sup>th</sup> Century" 68 *L. Library J.* 294, 301 (1975)

<sup>234</sup> Woxland, "Forever Associated", 5(1) *Legal Reference Services Quarterly*, at 118-19.

<sup>235</sup> Woxland, "Forever Associated", 5(1) *Legal Reference Services Quarterly*, at 116.

<sup>236</sup> "The New Reporters", 19 *American L. Rev.* 930, 932 (1885).

West Publishing Company.”<sup>237</sup>

One might ask, why was it that a neophyte publishing company from the Midwest took the daring step of initiating a national case reporting system at a time when other, more established, publishers balked at doing so? Certainly, one would think that Gould, Bancroft-Whitney and even Lawyers Co-op would be better placed in terms of capital resources to make such a move. There is no ready answer to this question. It is possible that their established position in the publishing world led them to be more “prudent” in assessing the situation, where West, as the “new kid” had less to lose by taking this admitted gamble.

In any event “the end came soon for most of the rivals.”<sup>238</sup> The *Eastern Reporter* and *South Atlantic Reporter* ceased publication in 1887, the *New England*, *Central* and *Western Reporters* went out of business in 1888, and the *West Coast Reporter* ceased publication in 1889.<sup>239</sup> How did West come to dominate the world of case reporters so quickly? One reason certainly was the quality of its reports. West followed through on its promise to deliver comprehensive, accurate case reports in a timely fashion. Also, West kept prices down. A subscription to the National Reporter system cost approximately \$40 a year.<sup>240</sup> By way of comparison, the four volumes which comprised the 1884 Indiana official court reports alone cost \$30.<sup>241</sup>

However, the most important factor likely was that West offered a true National Reporter System - all cases from the highest courts of every state, plus Federal appellate decisions. While an attorney in Maine might not particularly care about decisions from Iowa, he no doubt was comforted by the fact that he had, at his fingertips, all of the nation’s significant case law. This ready availability of all case law was a mixed blessing. Lawrence Friedman, in his authoritative *History of American Law* points to the explosive growth of domestic

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<sup>237</sup> “The Revolution in Law Reports” xx *Nation* 167, 167 (1885)

<sup>238</sup> Woxland, “Forever Associated”, 5(1) *Legal Reference Services Quarterly*, at 122.

<sup>239</sup> *Id.*

<sup>240</sup> Young, “A Look” 68 *L. Library J.*, at 303.

case law.

[L]awyers could hardly keep up with their own jurisdictions, let alone handle the others. Lawyers simply gave up any attempt to follow the whole of the law; they concentrated on problems at hand, and corners of law they habitually dealt with, and they grumbled about the expense and the confusion of the law reports. Yet basically, it was the lawyers' own hunger for precedent that kept the system alive.<sup>242</sup>

No one forced lawyers to subscribe to the National Reporter System. Lawyers could focus on the law of their respective jurisdictions. But they didn't. One author ascribes this to lawyers' "desperate search for precedent", which "had reached almost paranoid proportions."<sup>243</sup> Truly, the era of the "case lawyer", so disparaged in Lincoln's time, had arrived.

John West was not above playing on lawyers' insecurities over missed precedent. In 1888, when Lawyers' Co-op went out of the regional reporter business, the company began a new enterprise. *Lawyer's Reports Annotated* took a different approach, selectively publishing the cases that its editors deemed important.<sup>244</sup> This predictably prompted a debate in the law journals as to the relative merits of West's comprehensive versus Lawyers Co-op's selective approach. One observer noted "so far as blanket or waste basket reporting is concerned, the Wests now have the entire field to themselves, and those who have dabbled in that business no doubt feel that they are welcome to it."<sup>245</sup> The author contended that there was simply too much case law reported, most of it of little use to practitioners. "Too much of it serves only to distract the profession and multiply useless reports." By "giving" the lawyer "the best cases instead of proceeding on the waste-basket plan of printing everything", *L.R.A.* was performing a public service.<sup>246</sup> However, the author did concede that

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<sup>241</sup> "The Revolution in Law Reports" xx *Nation*, at 167 .

<sup>242</sup> Lawrence M. Friedman, *History of American Law*, 539 (Simon and Schuster 1973)

<sup>243</sup> Young, "A Look" 68 *L. Library J.*, at 302.

<sup>244</sup> *Id.*, at 301.

<sup>245</sup> "The Lawyer's Reports Annotated" 22 *American L. Rev.* 921, 921 (1888).

<sup>246</sup> *Id.*

“the disparity in price is much in favor of the Wests.”<sup>247</sup>

That criticism did not meet with universal approval, and the selective reporting approach never seriously threatened the National Reporter System’s comprehensive approach.

The big question was, would the American lawyer prefer to have someone else make his selection of cases, or would he prefer to do it himself? Would the fear of losing his case to a sharper attorney who had all the cases at his fingertips ... prevent the enterprising young practitioner from subscribing to the *Lawyers’ Reports Annotated*?<sup>248</sup>

The enterprising editors at *American Law Review* seized on this controversy to invite legal publishers to contribute to a “symposium.” Three publishers submitted comments, including John West, and James E. Briggs of Lawyers Co-op. Briggs pointed up the obvious fact that “no one, working industriously ten hours a day, could simply read all the published opinions.” He suggested that *Lawyers’ Reports Annotated* “will save” the lawyer “the time and labor of going over the same ground for himself, and will relieve him of great anxiety and the trouble and expense of piling up an office full of printed opinions.”<sup>249</sup>

West, for his part, played on lawyers’ fear of missing the one determinative case. He asserted that “[i]n comparatively few instances can [a legal] question be answered by direct reference to the abstract principles of law”, a nod to “case lawyers.” He then made the following declaration of faith. “I believe it is to be the principle business of American law publishers, to enable the legal profession to examine the American case law on any given subject, as easily, exhaustively, and economically as possible.”<sup>250</sup> Seizing on the “blanket” analogy used by some of his critics, West contended, “[n]o policy of insurance is so satisfactory to the insured as the blanket policy; and that is the sort of policy we issue for the lawyer seeking insurance against the loss of his case

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<sup>247</sup> *Id.*, at 23. The article noted that subscription to the selective *L.R.A.* cost \$25 a year, while for an additional \$15, the lawyer could get all cases in the West system. *Id.*

<sup>248</sup> Young, “A Look”, 68 *L. Library J.*, at 303.

<sup>249</sup> A Symposium of Law Publishers”, 23 *American L. Rev.* 396, 408 (1889).

<sup>250</sup> *Id.*, at 401.

through ignorance of the law as set forth in the decisions of the highest courts.<sup>251</sup>

That, in essence, was what the National Reporter System offered the legal profession. Insurance. A guarantee that the lawyer would never lose a case because of lack of access to the decisive precedent. This of course begs the question “what if I have the key case buried in the mass of all these case reports, but I fail to uncover it?” The ultimate answer to this question rested not with the reporters, but with the other component to the West dynasty, the digests.

## **DIGESTS**

### **The Inevitability of Digests**

It was probably inevitable that case digests, in some form, would be invented in the United States. Lawyers argue from precedent. Hence, the most common research task, particularly when preparing briefs and other argumentative papers, is to find cases in one’s favor on the issue being argued. The sheer volume of case reports and the explosive growth of those reports through the 19<sup>th</sup> century made it impossible for lawyers to browse through case reports looking for relevant cases. “In 1810, there were only a meager 18 volumes of American reports. By 1840, the number had grown to 545 volumes and less than ten years later, in 1848, there were nearly 800 volumes. By 1885, a comprehensive law library had 3,800 volumes of American reports.”<sup>252</sup>

Case reporters in this country have always followed a chronological publishing pattern. The decisions are put into the reporters in roughly the order in which they were decided, without regard to the issue being litigated. One might imagine a publishing pattern in which, say, all criminal cases were published in one volume, all torts cases in a second, all property cases in a third, etc; however, the logistical problems with such a system are immediately apparent. The editor would have to wait until there would be enough cases on the particular issue to publish. In some instances this would be a long wait. Also, merely sorting cases in broad

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<sup>251</sup> *Id.*, at 407.

<sup>252</sup> Thomas A. Woxland and Paul J. Ogden, *Landmarks in American Legal Publishing: An Exhibit Catalog* 37 (1990).

categories such as criminal or property would not solve the problem. There are a myriad of issues in any state's criminal law jurisdiction, and plowing through them would be an onerous task.

How then could cases be organized or indexed? In the first instance, it is apparent that the text of entire cases need not be sorted. It is possible to summarize the key holdings in a case quite succinctly in most instances. Thus, the "blurb" or short description of a case's holding was born. The blurb would need to be accompanied by the citation to the full text of the decision, so that the researcher could access this text. Last but not least, there needs to be a place where blurbs on the same or similar issues are slotted. A sequence of blurbs in no particular order would ill serve the researcher. As will be seen, the question of how to organize case notes preoccupied indexers for most of the 19<sup>th</sup> century, and was subject to much commentary in the law journal literature. Ultimately, a system dividing law into a few hundred topics, and dividing each of these topics into sub-topics and sections proved to be the best classification scheme.

### **Law Journal Case Notes**

Case notes first appeared as a feature in many law reviews and journals in the early 1800s. The case note would consist of a short paragraph summarizing the holding, as well as the deciding court. Sometimes case notes included a cite to the reporter in which the decision appeared; however, since journals sought to publicize decisions as quickly as possible, a case note often appeared before the decision was published. In those instances, no case cite was possible.

While law journal case notes functioned similarly to digests, there are important differences. Case notes would come out periodically, typically with each new issue of the law journal. Each case note typically had a one, two or three word "tag", to give the reader an idea of what the case was about. The "tags" were done on a case-by-case basis, based on the editor's judgment as to the main significance of the holding. There was no attempt to place all tags in any sort of categorical scheme, and the terminology used in them would change over time. In essence, these case notes functioned as a current awareness tool, alerting practitioners to the latest

significant decisions. In theory, an attorney could save all the issues of the journals, and peruse them, to find cases on an issue; however, the *ad hoc* nature of the “tags” and lack of consistency in using them likely inhibited the utility of these case notes as a research tool. Also, the simple fact that the attorney would need to read through dozens of issues to find cases must have slowed the process significantly.

Nevertheless, law journal case notes were a means by which attorneys and other researchers might discover cases on an issue, without plowing through entire case reporters.

### **Digests of Kentucky and Pennsylvania**

The pre-West history of digests has received a good deal of attention in recent years. In particular, two histories have been published, Kurt Metzmeier’s fascinating history of digests in Kentucky<sup>253</sup> and Joel Fishman’s equally authoritative history of Pennsylvania digests.<sup>254</sup> While digests were published in many states, Metzmeier’s and Fishman’s narratives suggest some of the commonalities in their development, as well as some significant differences.

#### **Kentucky**

“Kentucky’s strongly populist and anti-British nineteenth century lawmakers consciously nurtured the development of a distinctively Kentuckian common law tradition.”<sup>255</sup> Indeed, lawyers were prohibited from citing contemporary English cases.<sup>256</sup> Thus it was imperative that Kentucky cases be accurately reported, and that researchers have ready access to those cases. This made Kentucky a fertile ground for state digests and other case-finding tools.<sup>257</sup>

According to Metzmeier, the development of digests in Kentucky can be broken down into three stages.

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<sup>253</sup> Kurt Metzmeier, “Blazing Trails in a New Kentucky Wilderness: Early Kentucky Case Law digests” 93 *L. Library J.* 93(2001).

<sup>254</sup> Joel Fishman, “The Digests of Pennsylvania”, 90 *L. Library J.* 481 (1998).

<sup>255</sup> Metzmeier, “Blazing Trails”, 93 *L. Library J.*, at 94.

<sup>256</sup> The only English cases that could be cited were those decided prior to the founding of Virginia in 1640. “Blazing Trails” at 94.



During the first stage, digests were compiled by individuals, often prominent attorneys and legal scholars. In the middle period, digests-making was less of an individualized process, and became more systematized. The final stage was, and is dominated by West publishing, with all of the features that made West the gold standard for state law digests.<sup>258</sup>

In the early nineteenth century, Kentucky digests were typically edited by prominent legal scholars and practitioners.<sup>259</sup> From this fact, it can be surmised that digesting cases was perceived as an important and prestigious enterprise. William Littel in 1808 published his *Principles of Law and Equity*, a source described as “fall[ing] between an abridgement and a digest.”<sup>260</sup> Littell “was a remarkable legal scholar ... most known for publishing the first compilation of Kentucky laws.” He also edited six volumes of *Kentucky Reports*.<sup>261</sup> As with many early digest editors, he drew topic designations from the subject matter of the cases, and he did not employ a predetermined set of digest topics. Needless to say, this method often resulted in idiosyncratic categorization of cases. As with most of the early digests, Littel did not update his digest. Thus, as time passed, it became increasingly out of date.<sup>262</sup>

The next effort was a digest published in 1833 by Henry Pirtle, a successful Louisville attorney who served as a Kentucky circuit court judge.<sup>263</sup> Pirtle’s two volume digest ran about 1,100 pages. He employed 217 headings, with no sub-headings.<sup>264</sup> In other words, each heading averaged about five pages of case notes,

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<sup>257</sup> Metzmeier, “Blazing Trails”, 93 *L. Library J.*, at 94-95.

<sup>258</sup> Metzmeier, “Blazing Trails” 93 *L. Library J.*, at, 95.

<sup>259</sup> *Id.*, at 96-99.

<sup>260</sup> *Id.*, at 97.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*, at 97-98.

<sup>264</sup> *Id.*, at 98.

suggesting that researchers must have been challenged to find relevant cases from the large number of notes. Pirtle also did not update his digest.<sup>265</sup>

Twenty years later, in 1853, James Harlan and Benjamin Moore published their digest. Harlan is best known as the father of U.S. Supreme Court Justice John Marshall Harlan; he was an esteemed lawyer in his own right, serving as Kentucky's attorney general and as U.S. Congressman.<sup>266</sup> Moore was a successful attorney, law professor and editor of Kentucky case reports.<sup>267</sup> Harlan and Moore employed many more headings - over 400 - and subdivided them into sub-headings.<sup>268</sup> Thus, a researcher was confronted with significantly fewer case notes per heading. Their digest was updated in 1867 by Martin H. Cofer, who later served as chief justice of the state court of appeals.

Near the end of the nineteenth century, the face of Kentucky digest publishing changed dramatically. "The nominative digest, with its author-generated idiosyncracies and casual updating schedules would be replaced in the period by logically organized and regularly updated multi-volume digests, devised and directed by publishers not authors."<sup>269</sup> Where the nominative digests had been created by editors prominent in the Kentucky legal firmament, the editors of the next generation of digests worked much more anonymously. With anonymity came systemization in digesting practice. Digestors now worked from an *a priori* set of headings, that purported to encompass all areas of law; assignment of headings became much more predictable. Perhaps most importantly, when digests were updated, a consistent system of headings was employed, making the researcher's job much simpler.<sup>270</sup>

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.*, at 98.

<sup>267</sup> *Id.*, at 98-99.

<sup>268</sup> *Id.*, at 99.

<sup>269</sup> *Id.*, at 100.

<sup>270</sup> *Id.*, at 100-101.

Editors of the first such digest, *New Digest of the Decisions of the Court of Appeals of Kentucky*, touted the “great advances ... in England and in this country, in the method of making digests”, which “make it in all respects, thorough, systematic and convenient.”<sup>271</sup> The digest comprised more than 900 headings, and subheadings were utilized.<sup>272</sup> One might expect this new digest would hold the field in Kentucky for many years, particularly since it was regularly updated. However, a mere two years later, a competitor emerged, with the prepossessing title, *Kentucky Digest Embracing All the Reported Cases decided by the Court of Appeals from its Organization to the Year 1878*. Its editor, Joseph Barbour stressed the completeness of this digest, claiming that he did not “feel at liberty to omit a single case.”<sup>273</sup> This digest employed over 700 headings, with sub-headings. According to Metzmeier, the entries in this digest were concise and accurate, although “few facts of the digested cases are given.”<sup>274</sup>

The third stage in Metzmeier’s chronology was the ascendancy of West’s digests. Before discussing that stage, we will examine the genesis of digests in Pennsylvania.

## **Pennsylvania**

While nationalism and anti-British sentiment drove the demand for digests in Kentucky, the sheer volume of cases made digests essential in Pennsylvania. “With publication of cases dating back to the colonial period, the case law for Pennsylvania ... constitutes one of the largest collections in American law.”<sup>275</sup> Thus, an advertisement for the earliest state digest asserted that “the number of volumes containing cases decided in Pennsylvania has increased so considerably ... that a work that should contain a systematic compilation of

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<sup>271</sup> *New Digest of the Decisions of the Court of Appeals of Kentucky* (1976), at iv., quoted in “Blazing Trails” at 100.

<sup>272</sup> Metzmeier “Blazing Trails” 93 *L. Library J.*, at 101.

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*, at 102.

<sup>275</sup> Joel Fishman, “The Digests of Pennsylvania”, 90 *L. Library J.* 481, 481 (1998)

adjudged points seems [to be] a useful addition.”<sup>276</sup>

In contrast to Kentucky, many of the early Pennsylvania digests were subject to fairly regular updates; thus they did not go out of date so quickly. The earliest work, *Wharton’s Digest*, was initially published in 1822, with additions published in 1829, 1835 1842, 1850 and 1853, plus a *Supplement* in 1865.<sup>277</sup>

Given the frequency of new editions and the fact that *Wharton’s Digest* was generally regarded as authoritative, it is perhaps not surprising that the it was not until 1877 that a competitor came on the scene. That year saw the publication of Frederick Charles Brightly’s *Digest of the Decisions of the Courts of the State of Pennsylvania*.<sup>278</sup> Brightly characterized *Wharton’s Digest* as “a most excellent abridgment of the law” in its heyday, but asserted that its “arrangement has become obsolete.”<sup>279</sup> Brightly also stressed that “he has in no instance relied on the headnotes of the reporter”, basing all headnotes on his own scrutiny of the text.<sup>280</sup> The work was marked by a large proportion of pages (1,199) to topics (245), suggesting that large numbers of case notes comprised each topic.<sup>281</sup> The digest was supplemented 1882, 1889, 1895 and 1903.<sup>282</sup>

In 1884, Arthur Baker published the optimistically titled *Annual Digest of the Decisions of the Courts of Pennsylvania*.<sup>283</sup> Only one other annual volume was published, in 1885, before Baker “gave up the law to

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<sup>276</sup> *Advertisement to the First Edition of Wharton’s Digest of the Reported Cases [of] Pennsylvania* [1822], quoted in Fishman, “Digests of Pennsylvania”, 90 *L. Library J.*, at 482.

<sup>277</sup> Fishman, “Digests of Pennsylvania”, 90 *L. Library J.*, at 483-84.

<sup>278</sup> *Id.*, 485.

<sup>279</sup> Frederick Brightly, *Digest of the Decisions of the Courts of the State of Pennsylvania*, Philadelphia, George T. Bissel Co. 1877), iii., quoted in Fishman, “Digests of Pennsylvania”, 90 *L. Library J.*, at 485.

<sup>280</sup> Brightly, *Digest*, iii, quoted in Fishman, “Digests of Pennsylvania”, 90 *L. Library J.*, at 485.

<sup>281</sup> Fishman, “Digests of Pennsylvania”, 90 *L. Library J.*, at 485.

<sup>282</sup> *Id.*, 485-87.

<sup>283</sup> *Id.*, 487-88.

pursue a career as a mathematician.”<sup>284</sup> A number of other Pennsylvania digests had short-lived careers in the late 19<sup>th</sup> century;<sup>285</sup> however the only one with staying power was Pepper and Lewis’s *Digest*, published in 23 volumes between 1898 and 1906.<sup>286</sup> George Wharton Pepper was “a famous lawyer, jurist and [state] senator.” William Draper Lewis was a University of Pennsylvania law professor.<sup>287</sup> Their digest sought to give the researcher more information in each case note, to make evaluation of cases more effective.

Each paragraph, therefore, enables the reader to form an accurate conception of the precise point which the court was called upon to decide, and tells him in favor of which party the court decided; while the proposition of law ... shows the ground on which the court bases its decision.<sup>288</sup>

Their massive digest constituted a significant step forward as a case-finder; however, the effort proved quite costly to the editors, nearly bankrupting Pepper.<sup>289</sup>

### Critiques of Digests

One striking aspect of the period in which early digests were published is the frequency in which those digests were reviewed in the journal literature. Fishman cites numerous reviews of digests, and even of new editions or volumes of digests.<sup>290</sup> Pennsylvania’s digests were certainly not the only ones to receive critical attention in the journals. The Abbott brothers’ various digests were reviewed numerous times,<sup>291</sup> as were many

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<sup>284</sup> *Id.*, 488.

<sup>285</sup> *Id.*, 488-91.

<sup>286</sup> *Id.*, 491.

<sup>287</sup> *Id.*, 491-92.

<sup>288</sup> 1 Pepper and Lewis, *Digest of the Decisions and Encyclopedia of Pennsylvania Law 1754-1898* (1898-1906), iii, quoted in Fishman, “Digests of Pennsylvania”, 90 *L. Library J.*, at 492.

<sup>289</sup> George Wharton Pepper, *Philadelphia Lawyer: An Autobiography* (1944), 65-66, quoted in “Digests of Pennsylvania”, 492.

<sup>290</sup> See Fishman, “Digests of Pennsylvania”, 90 *L. Library J.*, at 483 n. 12, 488 n. 40, 489 n. 46, 490 n. 51, 493 n. 67, 494 nn 69-76, 495 n. 79.

<sup>291</sup> See, e.g. 1 *American L. Rev.*, 732, 732-33 (1867), reviewing the Abbotts’ *Digest of the Reports of the United States Courts* (1867) and 1 *American L. Rev.* 733, 733-34 (1867), reviewing Abbotts’ *New York Digest* (1867).

other state digests.<sup>292</sup>

These reviews often read much like a review of literature, critiquing style, organization and accuracy. However, there is a sharp focus on functionality. As one reviewer observed, “[t]he only satisfactory test of a digest is its constant use in practice.” Reviewers focused on the “clearness and brevity” of the case notes,<sup>293</sup> the average length of the case notes,<sup>294</sup> the utility of the titles employed,<sup>295</sup> and the consistency with which cases were assigned to the various categories.<sup>296</sup>

Most reviews from the period were positive; however, reviewers could be critical. Thus, a reviewer characterized the *Pennsylvania Supreme Court Digest* as “an undigested array ... of abstracts,”<sup>297</sup> and another reviewer criticized the Abbott brothers’ “undue haste and carelessness in the execution” of their *United States Digest*, noting that it “abounds in typographical blunders.”<sup>298</sup> Perhaps the most caustic digest review assessed *Barbour’s New York Review*. The review merits quoting at length both for its content and its scathing sarcasm.

We had fondly hoped that we had heard the last of Mr. Barbour as a reporter, and of his reports, except in the sense in which we hear of a graveyard and peruse its inscriptions. His reports, with Howard’s have long been the bugbear of the legal profession in our state, and an object of satire among the profession elsewhere....

We have so often dwelt on the annoying blunders and deficiencies of Mr. Barbour as a reporter, especially in his later volumes, that we do not now purpose to spend time on the unpleasant subject [of his digest]. The question now is, what is the necessity for a digest of a particular series of old reports of an inferior court, during an unsettled and formative period, to extend to

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<sup>292</sup> See, e.g. 21 *American L. Rev.* 629, 629, reviewing *Index to Maryland Decisions*; 22 *Albany L.J.* 179, 179 (1880), reviewing *Barbour’s New York Digest* (1880); and 1 *American L.Rev.* 733, 733 (1867), reviewing Battle’s *North Carolina Digest* (1866)

<sup>293</sup> Review, 21 *American L. Rev.* 628 (1887)

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> Review, 1 *Pennsylvania L. Rev.* 381, 381 (1842).

<sup>297</sup> Review, 21 *American L. Rev.*, at 628.

<sup>298</sup> Review, 1 *American L. Rev.* 732, 732 (1867).

three volumes and to cost the purchaser \$16.50?<sup>299</sup>

In addition to the journal reviews, the critical literature was sometimes enhanced when a new digest editor explained why his digest was needed, often in terms of the perceived deficiencies of its predecessor.

Thus, Pepper and Lewis explained the rationale for their digest as follows:

It has become customary with the compilers of digests ... to blend the statement of law and the statement of fact in a single paragraph, in a way that is often misleading and always unsatisfactory. It is also a common experience ... to find statements of fact omitted altogether, and to find in their [place] the statement of an elementary proposition of law, followed by a citation of half a dozen cases without a word of suggestion as to the way in which the proposition was applied in those cases. Under such circumstances, the so-called digest becomes a mere index, and an unsatisfactory index at that; for this method of treatment indicates a superficial examination of the authorities and prepares the reader for the unpleasant discovery that many of the cases have little or no connection with the proposition under which they are cited.<sup>300</sup>

While any particular review may have had little effect on the quality of the digest reviewed, there is an evident collective impact from all of these digest reviews. Over time, a consensus emerged, both as to the criteria by which a digest should be judged and the specific qualities that defined an ideal digest. Currency is universally viewed as essential to a useful digest. Reviewers also agreed - explicitly or implicitly - that a digest is best served when it maintains consistent categories or topics under which similar case notes can be filed. A digest that regularly changes its topics loses utility. Coverage is essential. A key question, in reviewing any of the early digests is “which cases does it digest?” And “are all cases from the subject jurisdictions digested?”

There was also a consensus that other factors mattered, even when there was disagreement as to the ideal parameters. Two related issues are the number of topics employed and the length of the entries. A digest that employed too few topics forced the researcher to plow through hundreds of case notes in order to find the handful of relevant holdings. Contrarily a digest with a huge number of topics might subdivide the holdings so finely that the researcher was compelled to review numerous topics in order to be sure that he had found all the

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<sup>299</sup> Review, 22 *Albany L.J.* 179, 179 (1880).

<sup>300</sup> 1 Pepper and Lewis, *Digest of Decisions and Encyclopedia of Pennsylvania Law* (1898), iii.

relevant cases.

The amount of detail in case notes also was of paramount importance. Excessively lengthy case notes dramatically increased the amount of time it took to review the digests, without any corresponding improvement in the quality of the research. However, case notes were deemed too short when the reviewer could not tell from reviewing them which cases were most promising. In particular, reviewers tended to agree that a good case note should have at least some factual information, to enable the reader to gauge the context of the holdings. Virtually all reviewers agreed that the digest should not passively copy the synopsis from the original text of the opinion. A good digest necessarily required that the editor make his own decisions as to the holdings of the case, and the wording of the case notes.

One issue that received little attention, but which proved decisive involved the question “how does the researcher get to relevant topics and sub-topics?” This issue is implicated indirectly in the debate over the ideal number of topics that a digest should have. (E.g. a digest with a very large number of topics may make it hard for the researcher to identify the proper topic.) It was only with the advent of West digests that this issue was resolved. Once West began putting head notes at the beginning of each case, and giving each head note a discrete topic and key number, the researcher could go from any “one good case” immediately to a relevant location in any digest. This eliminated the need to scan a digest’s table of topics and sub-topics to identify relevant ones.

### **Benjamin and Austin Abbott**

Although the Abbotts are known these days mainly for the role they played in developing case digests, both brothers had prominent legal careers. Austin Abbott was admitted to New York Bar in 1851. Benjamin Vaughn Abbott was admitted to the bar in 1852.<sup>301</sup> For a number of years, they practiced law together in

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<sup>301</sup> “Benjamin Vaughan Abbott (Obituary), 1 *Green Bag* 1 (January, 1891). Hereinafter “Obituary.”



Albany, together with their younger brother, Lyman.<sup>302</sup>

Benjamin served as secretary to the New York Code Commission, which drew up the state's Penal Code in 1864.<sup>303</sup> In 1870, he was appointed by President Grant as one of three commissioners charged with compiling a codification of the United States Statutes. The work product of this commission, the Revised Statutes,<sup>304</sup> is a landmark in the history of statutory publications.

Austin Abbott distinguished himself as both a litigator and a scholar. He was a prosecuting attorney in the criminal trial of Charles J. Guiteau, who was convicted of assassinating President James Garfield.<sup>305</sup> He also represented Henry Ward Beecher, in a famous adultery lawsuit brought by Theodore Tilton.<sup>306</sup> He later became dean of the New York University Law School, teaching courses in pleading, equity and evidence.<sup>307</sup>

The Abbotts' first venture into legal publishing was a reporter of New York state cases.<sup>308</sup> The financial success of this reporter enabled them to embark on their most famous venture. The brothers took the unprecedented step of devoting almost two years to a study of legal treatises, on every subject. They were less concerned with the text of these treatises than with their topical structure, as reflected in the tables of contents and subject headings within the books. Based on their analysis, they composed an exhaustive, detailed outline of American law. They employed a two-tiered system, consisting of a few hundred topics, each of which was broken down into sections. The number of sections for a given topic varied greatly, some having only a few and others having more than a hundred. In the words of a noted historian of legal research, "[n]o other digest

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<sup>302</sup> *Id.*

<sup>303</sup> Wikipedia, "Benjamin Vaughn Abbott, [http://en.wikipedia.org/wiki/Benjamin\\_Vaughan\\_Abbott](http://en.wikipedia.org/wiki/Benjamin_Vaughan_Abbott) (reviewed November 16, 2012).

<sup>304</sup> *Revised Statutes of the United States* (Washington D.C., Government Printing Office 1875).

<sup>305</sup> John F. Tucker, "Law School of the University of the City of New York", 1 *Intercollegiate L.J.* 43, 44 (1891)

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*, at 43-45

<sup>308</sup> *Abbott's Reports of Practice Cases in the Courts of the State of New York*

author had undertaken such an extensive analysis of the law to determine appropriate analytical topics.”<sup>309</sup>

This was a significant departure from the way topics were previously assigned to case notes. Most prior digesters applied an *ad hoc* method, reading each case, and assigning a topic based on their judgment as to the key issue(s). There was no attempt to fit case notes into a “total system” accounting for every legal issue. This necessarily implicated judgment calls as to where a case “fit”, and also virtually assured that editors would be compelled to tinker with their schema over time. Abbott digests were marked by consistency in assigning similar cases to the same place in the scheme. Also, since each topic was broken down into inter-related sections, it was much easier for a researcher to browse related sections to look for relevant precedent.

The Abbots also differed from their predecessors in taking a much more active role in assigning holdings to their topic and sections.

To that date, the contents of digests consisted chiefly of cryptic statements, taken from the headnotes [in the case reports] with little editorial modification. The Abbots, however, undertook to read every New York reported case and carefully entered each case under the appropriate topic. Their objective was to give the point decided and the reason assigned by the court under each heading.<sup>310</sup>

Critical to the Abbots’ approach was the notion that they were digesting *holdings* and not *cases*. Thus, a case might have numerous holdings on a variety of topics. Rather than agonizing over where such a case “fit”, the Abbots simply distributed each holding under its proper topic and section.<sup>311</sup>

The Abbots’ first digest was the *Digest of New York Statutes and Reports*, published in 1860. Their *Supreme Court Digest* was published in 1863, followed by their ultimate product, the *United States Digest* in 1867.<sup>312</sup>

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<sup>309</sup> Surrency, *History of American Law Publishing*, at 116.

<sup>310</sup> *Id.*

<sup>311</sup> Benjamin V. Abbott, “Letter to the Editor”, 22 *Albany L.J.* 179, 180 (1880).

<sup>312</sup> Metzmeier, “Blazing Trails” 93 *L. Library J.*, at 96, notes 16, 17 and 18.

## West Digests

By 1885, the National Reporter System was well on its way to becoming the dominant publisher of case reports in the United States. Ever on the alert for new publishing opportunities, John West was no doubt aware of the potential synergies (to use a modern term) that could be brought to bear if he published a set of digests and linked them to the West reporters.

West actually had two key advantages. The company already published all of the cases that would be digested. Thus, they did not have to expend time and effort in accumulating these cases, as competing editors would. Also, West included head notes at the beginning of its cases. Thus, editors already had read the cases, highlighted the key holdings and summarized them - all steps that competing editors would need to do in the course of preparing their digests.

The ability of West Publishing Company to offer such a publication at a much lower price became obvious to Little, Brown and Company.... It was not long before Little Brown ... and Mr. Abbott “saw the handwriting on the wall” and in 1889 negotiated the sale to West Publishing Company of the U.S. Digest.<sup>313</sup>

The acquisition of the Abbott digests was a “game changer.” West acquired the text of the U.S. Digests, “the editorial quality of [which] was exceptionally high.”<sup>314</sup> He also acquired the rights to the classification scheme that the Abbott brothers had worked so hard to perfect.<sup>315</sup>

In 1889, West made another significant purchase. The company bought a publication called the *Complete Digest*. More importantly, West hired the editor of this digest, John A. Mallory.<sup>316</sup> As it turned out, Mallory was a brilliant editor. Using the Abbotts’ classification scheme as his starting point, he devised the system known, to this day as the West Key Number System.

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<sup>313</sup> William W. Marvin, *West Publishing Co.: Origin, Growth, Leadership*, 69 (West 1969)

<sup>314</sup> *Id.*, at 70.

<sup>315</sup> Metzmeier, “Blazing Trails”, 93 *L. Library J.* at 102.

<sup>316</sup> Marvin, *West Publishing Co.*, at 70.

West's *American Digest* was an immediate hit. However, the turning point in West's ascendancy came with the publication of the *Century Digest*. The *Century Digest* was presented as a complete digest of all cases decided in the United States from Colonial times until 1896. Thus, a researcher would no longer need to consult a series of digests, put out by various publishers, each with its own classification schemes, in order to do thorough historical case law research. All cases up to 1896 would be digested in one source with a comprehensive scheme of classification.

The timing of the *Century Digest* was key to its success. West targeted the annual meeting of the American Bar Association, to be held in August, 1897, for the roll-out of the *Century Digest*. He “was desperately anxious to exhibit a completed volume at this convention, to gain expected approval and publicity, but the chances seemed remote that they could meet the deadline.” However, due to the herculean efforts of West's editorial and production staff, the goal was accomplished. Attendees at the ABA conference were able to peruse the first volume of the *Century Digest*, which met with universal acclaim.<sup>317</sup> The following year, the Bar Association recommended the West classification plan as the best model for digesting.<sup>318</sup>

Ever the vigilant salesman, West was acutely aware that endorsement by the ABA would insure the long term success, and even dominance of his digests. Thus, he assiduously cultivated his relations with Bar members, and in particular with its Committee on Law Reporting and Digesting. That committee had been concerned for years with the ever increasing quantity of published decisions, and the consequent difficulty of researching this deluge of case law. Over time, West convinced committee members that the solution to this problem was a universal digesting system, in particular the system that he published. Thus, in its 1908 Annual Report, the Committee asserted:

An important step towards uniformity in digesting has been taken in the adoption in several states of the classification scheme that has become familiar to the lawyers of all parts of the country in

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<sup>317</sup> *Id.*, at 73-74

<sup>318</sup> *Id.*, at 74.

the American Digest. This plan of securing uniformity was suggested by your committee some years ago. The scheme has lately been adopted in the digests of California, Massachusetts, New Jersey, Oklahoma, Virginia and West Virginia ..... It is no doubt necessary that each state or small group of states should have a digest of its own, but surely one such digest is enough and there would seem to be no need of two digests published at the same time for Ohio or two for Virginia and West Virginia.<sup>319</sup>

### Who Invented the West Digest Classification System?

For decades historians have debated the question: who invented the classification system used in the West digests, which eventually became known as West's "Key Number System"? Was it West's editor, John A. Mallory? Or was it the Abbott brothers?

On the one hand, West's own historian asserted, categorically that Mallory "was the guiding hand and, in fact, the creator of the American Digest Classification System."<sup>320</sup> However, a more disinterested observer qualified this assertion:

John A. Mallory was the original designer of the West Key Number System. Mallory did not, of course, make the system up out of whole cloth. He was working in a long tradition of legal indexing. His most direct influences were probably brothers Benjamin Vaughan Abbott and Austin Abbott, whose name lives on in the title of *Abbott's New York Digest*.<sup>321</sup>

According to another author,

[t]he Abbott classification scheme, first articulated in the *New York Digest*, and subsequently developed in the *United States Digest* was ... closely followed in the *American Digest* annuals that succeeded the *United States Digests*. John A. Mallory, who was responsible for the "greatly elaborated" classification scheme that became available in [West's] *Century Digest*, founded his work on the basis of the categories described by the Abbotts. The Abbott scheme thus formed the core of what became the topic and key number structure of the *American Digest* system.<sup>322</sup>

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<sup>319</sup> American Bar Association, Committee on Law Reporting and Digesting, "Annual Report", 33 *American L. Rev.* 518, 518-19 (1908)

<sup>320</sup> Marvin, *West Publishing Co.*, at 70.

<sup>321</sup> Daniel Dabney, "The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System", 99 *L. Library J.* 229, 240 (2007) (Paragraph numbering omitted).

<sup>322</sup> John Doyle, "Westlaw and the American Digest Classification Scheme", 84 *L. Library J.*, 229, 232 (1992). The phrase "greatly elaborated" here is a quotation from 1 *Decennial Edition of the American Digest* vii (West 1908), and thus may be taken as an early foray by West into the dispute over authorship of the West digest classification system.

Yet another observer put it this way: “West Publishing Company had purchased [Abbotts’] American Digest Classification System in 1889 from Little, Brown and Company, which had developed it for the *United States Digest*. West enhanced it by wedding it to the topic-key number system used in its National Reporter System.”<sup>323</sup>

Despite the varied assessment as to the relative contributions of Mallory and the Abbott brothers, there are some points of consensus here. Virtually all commentators agree that the Abbotts’ system was the starting point for West’s system, and that Mallory used the Abbotts’ scheme as a point of departure. Indeed, Mallory himself acknowledged this, writing, in a 1902 article, “[t]he plan of classification [used by West] was originally adopted by Benjamin Vaughn Abbott in recompiling the volumes of the *United States Digest*.”<sup>324</sup> Mallory goes on to describe the organization principles that drove the *United States Digest*, including the ten general categories under which all topics were located.<sup>325</sup> Mallory reduced the Abbotts’ ten categories to seven, by merging some of them.<sup>326</sup>

Clearly, the Abbotts made a significant contribute to the classification scheme. Simply deciding that there should be a single, universal, stable system in which all holdings on every issue might be slotted was an enormous step towards the ultimate scheme. The Abbotts’ efforts in reviewing texts on all subjects for over two years, to discern the logical patters that underlie the various areas of law was another large step forward. As mentioned above, the use of ten broad categories, reduced by Mallory to seven, greatly enhanced the over-all logic of the scheme.

This is not to understate Mallory’s contributions. By all accounts, Mallory was a brilliant editor,

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<sup>323</sup> Metzmeier, “Blazing Trails”, 93 *L. Library J.*, at 102.

<sup>324</sup> John A. Mallory, “The Theory of the American Digest Classification System”, 1 *American L. School Rev.*, 184, 187 (1902).

<sup>325</sup> *Id.*, quoting Benjamin Vaughn Abbott, “Letter to the Editors”, 22 *Albany L.J.* 179, 179-80 (1880). The Abbotts’ ten categories were: Persons, Corporations, Property, Conveyances, Contracts, Wrongs, Crimes, Remedies, Evidence and Government.

<sup>326</sup> Mallory, “Theory of Digest System”, 1 *American L. School Rev.*, at 187-88. Mallory merged Evidence with Remedies, Corporations with Persons and Conveyance with Property. He also changed Wrongs to Torts.

capable of discerning the underlying logic that holds together entire areas of law, and the dynamics that define how the parts make up a whole. To this day the Key Number System reflects an elegant view of how law is organized. More importantly, it still works.

Certainly, West historian William Marvin, may be forgiven a bit of hyperbole, when he describes the West digests as, “what many believe to be the most outstanding achievement in modern legal literature, and second only perhaps to the great work of Justinian.”<sup>327</sup> By any account, the West system has been an outstanding success, both commercially, and as a contribution to the literature of legal research. And certainly, there is enough prestige that the Abbott brothers and Mallory can share credit for its invention.

## CITATORS

Any study of the history of legal citators must necessarily rely on Patti Ogden’s 1993 article.<sup>328</sup> While others have written capably on the subject,<sup>329</sup> Ogden is recognized as a definitive source, particularly with regard to the critical period when a multitude of citators competed for predominance. Thus, the following segment will draw from Ogden’s work.

In retrospect, it seems obvious that legal citators would have to have been developed. Virtually every first year law student hears the horror story of the attorney who confidently cited an appellate decision, only to learn that that decision had been negated - reversed or overruled. From the time of the earliest reported decisions, practitioners had to have been wary of citing overruled cases. The other obvious benefit of citators - the ability to find new cases citing to a leading case on an issue - must also have been apparent from early on. The real question is: why did it take so long for citators to take hold? And, secondarily, what was there about Shepard’s citators that led to their virtual dominance of the field for over a century?

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<sup>327</sup> Marvin, *West Publishing Co.*, at 79.

<sup>328</sup> Patti Ogden, “‘Mastering the Lawless Science of Our Law’: A History of Legal Citation Indexes”, 85 *L. Library J.* 1 (1993).

<sup>329</sup> See, e.g. Michael J. Lynch, “Citators in the Early Twentieth Century - Not Just Shepard’s” 16(3) *Legal Reference Services Q.* 5 (1998); Laura C. Dabney, “Citators: Past, Present and Future” 27(2-3) *Legal Reference Services Q.* 165 (2008).

## Early Years

Before the advent of citators, attorneys would annotate their own case reporters, noting in the margins of leading cases, subsequent decisions, particularly decisions undermining the authority of the case.<sup>330</sup> Numerous older case reporters in the University at Buffalo Law Library have handwritten entries, in “librarian hand” noting the volume and page in which a later case cites the one in the reporter. Indeed, a popular introduction to legal studies written in 1835 encouraged the young practitioner to

set himself down resolutely to the task of reading, with the utmost care, each new number of the [case] Reports ... [n]oting up every decision, i.e. minuting it on the margin of some previous case in the Reports.<sup>331</sup>

Such an ambitious enterprise was possible at a time when case reports were published at a relatively slow rate. However, the explosion of cases through the mid- and late 19<sup>th</sup> century made such an approach impracticable. Thus, an 1895 report estimated that “a lawyer who devotes three hundred days in the year to the reading of the reports published in the United States must read two hundred pages every day to complete the work.”<sup>332</sup>

Ogden mentions two additional factors which made the advent of citators virtually inevitable. In the early years of the Republic, the most common way for a holding in a case to be invalidated was when the court that issued it later overruled its prior holding. Thus, the title of the most influential early citator was *A Collection of Cases Overruled, Doubted or Limited*.<sup>333</sup> It is significant that there is no mention of cases “reversed” in the title. In the early 19<sup>th</sup> century, virtually every state employed a two-tiered court system, with a variety of trial courts and one appellate court of last resort, most often deemed the state’s Supreme Court. Since trial level cases were not typically reported, instances of reported decisions being reversed on appeal were

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<sup>330</sup> Ogden, “Mastering”, 86 L. Library J., at 3..

<sup>331</sup> Samuel Warren, *A Popular and Practical Introduction to Law Studies*, 413-14 (London, Maxwell, 1835), quoted in Ogden, “Mastering”, 86 L. Library J., at, 17.

<sup>332</sup> J. Newton Fiero, *Report of Committee on Law Reporting*, 343-45 (A.B.A., 1895), quoted in Ogden, at 18.

<sup>333</sup> Simon Greenleaf, *A Collection of Cases Overruled, Doubted or Limited* (Portland, Shirley 1821).



rare. Certainly, some decisions of a state's highest court were appealed to, and reversed by the United States Supreme Court; however, those cases were few and far between.

During the last quarter of the 19<sup>th</sup> century, likely in response to increased caseload demands on the highest court, numerous states initiated a three-tiered court system, with an intermediate appellate court situated between trial courts and the court of last resort.<sup>334</sup> Roscoe Pound, in his definitive work on the history of American courts,<sup>335</sup> provides a chronology for this development. New York has had an intermediate appellate court since 1870; Illinois since 1877; Texas since 1876; Ohio since 1883; Missouri since 1865; Louisiana since 1897; Kansas since 1895; California since 1904; Kentucky since 1882; Pennsylvania since 1895; Georgia since 1906 and Alabama since 1911.<sup>336</sup> The decisions of these intermediate courts were not always reported, but often they were. A litigant could, and often would, seek to appeal a decision from the intermediate court to the state's highest court. Thus, for the first time, it was likely that some reported cases (from the intermediate courts) would be reversed on appeal. Hence, the number of reported decisions whose authority was undermined increased dramatically.<sup>337</sup>

A final factor mentioned by Ogden was the increased formalization of the briefing process. In the early years of the republic, appeals typically were premised on oral argument.<sup>338</sup> Over time, courts initiated a requirement that litigants submit a written summary of their arguments, including cites to cases deemed to be authority. Thus, “[a]s early as 1795, the U.S. Supreme Court notified [the bar] ‘that the court will hereafter expect to be furnished with a statement of the material points of the Case.’”<sup>339</sup> As time passed, courts offered

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<sup>334</sup> See Ogden, “Mastering”, 86 L. Library J., at 24.

<sup>335</sup> Roscoe Pound, *Organization of Courts* (Greenwood, 1940).

<sup>336</sup> *Id.*, at 225-240.

<sup>337</sup> See Ogden “Mastering”, 86 L. Library J., at 24.

<sup>338</sup> *Id.*, at 14.

<sup>339</sup> *Id.*, citing U.S. Sup. Ct. R. 4, 3 U.S. (3 Dallas) 120 (1795).

more specific instructions as to the contents of appellate briefs. In particular, courts discouraged “string citing” of innumerable cases in support of a particular point of law, and directed that counsel cite to the most authoritative cases on any point.<sup>340</sup>

It became incumbent, therefore, for attorneys to ascertain the relative “weight” that different cases might have, in support of their claims. One simple way of assessing a case was, of course to determine how often it had been cited by later cases, and specifically, how often it had been cited with approval. Any decent citator would provide this information.

### **An Early Prototype**

In 1821, Simon Greenleaf published *A Collection of Cases Overruled, Doubted or Limited in their Application. Taken from American and English Reports*.<sup>341</sup> This is the first known legal citator in the United States.<sup>342</sup> The work was immediately hailed as an invaluable source “which should present at a glance... the means of rapidly ascertaining what [cases] ha[ve] been repudiated, denied, doubted or limited in [their] application.” As the title indicates, Greenleaf’s [was] an ambitious work, encompassing both English and American case law,” although the reviewer noted that the list of cases was “by no means complete.”<sup>343</sup> It included over 600 cited cases, each of which had at least some subsequent negative history.<sup>344</sup> Most entries included a short phrase alerting the reader to the issue in the cited case which was addressed in subsequent cases; as well as a phrase indicating how the later case treated the cited case. This verbal format anticipates many of the early citators. It has the advantage of providing researchers with important information. However, as the rate at which later cases commented on earlier cases continued to increase, it became

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<sup>340</sup> Ogden, at 15, citing Hon. Samuel Miller, “The Use and Value of Authorities”, 23 *Am. L.Rev.* 165, 175 (1889).

<sup>341</sup> (Portland, Shirley, 1821).

<sup>342</sup> Ogden, “Mastering”, 86 *L. Library J.*, at 2-3.

<sup>343</sup> “Review”, 15 *North American Rev.*, 65, 75 (1822).

imperative for citators to employ a more terse format for entries.

Greenleaf was a protégée of Supreme Court Justice Joseph Story, who encouraged him to prepare his citator, and actually provided Greenleaf with a copious list of overruled cases which he had compiled.<sup>345</sup> Greenleaf went on to a distinguished career, serving as the first reporter of cases for Maine, authoring an authoritative treatise on the law of evidence, and serving for fifteen years, together with Story, as professors of law at Harvard University.<sup>346</sup>

It is not surprising, therefore that, having completed his exhaustive and exhausting citator, he left the task of editing later editions to others.<sup>347</sup> A second edition appeared in 1838; a third in 1840 and a final, fourth edition was published in 1856.<sup>348</sup> These dates suggest a chronic problem that publishers of citators encountered in the 19<sup>th</sup> century. The initial edition was often greeted with enthusiasm; however, years would pass before an updated edition would be published (17 years between the first and second edition of Greenleaf's work); and it was by no means uncommon for a source to simply "peter out", leaving researchers with no updated information after a certain date. A citator is a very functional type of work; its value depends on providing readers with reasonably accurate and up-to-date information as to the status of cited cases. Hence, a long gap in which no updates are forthcoming would dramatically undercut the value of the source.

Why were citators updated so sporadically? Editors typically did not offer explanations for delays to their readers, and we must necessarily speculate. The most likely reason is that preparing (and updating) a legal citator was tedious, time consuming work. One suspects that having completed such a work, an editor would

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<sup>344</sup> *Id.*

<sup>345</sup> Ogden, "Mastering", 86 L. Library J., at 3-4.

<sup>346</sup> Theophilus Parsons, "Commemorative Address: Simon Greenleaf" 16 *Monthly L. Rep.* 413, 413-15 (1853); *See, also*, Ogden, at 6-7.

<sup>347</sup> Ogden, "Mastering", 86 L. Library J., at 6.

<sup>348</sup> *A Collection of Cases Overruled, Doubted or Limited in their Application*, 2<sup>nd</sup> Ed. (N.Y. Gould, 1838); 3<sup>rd</sup> Ed. (N.Y. Halsted and Voorhiis, 1840); 4<sup>th</sup> Ed. (N.Y. Voorhiis, 1856).

breath a sigh of relief, bask in the plaudits for his work, and return to his efforts only reluctantly. In any event, we will see that keeping the work timely proved to be the *bete noir* of far too many legal citators.

## Later Citators

Greenleaf was not immediately followed by other citators. In the intervening decades, the most common updating service consisted of a “table of cases cited” which was included in many case reporter volumes, as well as in some digests.<sup>349</sup> These tables were certainly useful; however, they required that the researcher consult a sequence of volumes, depending on how old the cited case was. Thus, it might only take consulting three or four books in order to update a recent case; however, if the cited case was twenty or so years old, the researcher was confronted with a stack of volumes to consult.<sup>350</sup>

When citators did begin to appear, they typically were limited to cases from a particular jurisdiction. An early example is Samuel Lynn’s *Analytical Index* to Pennsylvania cases, published in 1857.<sup>351</sup> Lynn’s work came in two parts. In the first, he methodically included every instance in which a later case mentioned each cited case. Cited cases were listed alphabetically, and information on citing cases was limited to volume, page and source. In the second part, Lynn listed every instance in which a later case had a negative impact on the cited case. These entries were longer, including both a word to indicate the treatment, and a quotation to show the issue involved.<sup>352</sup>

The last third of the 19<sup>th</sup> century and first decades of the 20<sup>th</sup> were a sort of “golden age” of citators. “The 1870s ... produced some dozen citation books and in succeeding years, the trickle quickly became a

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<sup>349</sup> Michael J. Lynch, “Citators in the Early Twentieth Century - Not Just Shepard’s” 16(3) *Legal Reference Services Q* 5, 7 (1998); Ogden, at 18-21.

<sup>350</sup> *Id.*, at 6-7.

<sup>351</sup> Samuel Lynn, *Analytical Index of Parallel Reference to the Cases Adjudged in the Several Courts of Pennsylvania, with an Appendix Containing a Collection of Cases Overruled, Denied, Doubted or Limited in Their Application* (Phila., Key 1857).

<sup>352</sup> Ogden, “Mastering”, 85 *L. Library J.*, at 21-22.

torrent.”<sup>353</sup> This, of course, was precisely the time period in which states initiated a three-tiered court system, making reversal of lower court decisions a much more common phenomenon. Michael Lynch, in his intriguing study of early citators uncovered no less than six citators of Ohio decisions, in addition to Shepard’s.<sup>354</sup> Competition among citators was no doubt as fierce in numerous other states.

The format for entries in these citators varied widely. Many, such as *Rose’s Notes* on Supreme Court decisions employed a format in which entries for citing cases included as much as a paragraph denoting the issue involved, and the citing court’s treatment of that issue.<sup>355</sup> However, a much more truncated format for entries was also emerging. Thus, when Melvin Bigelow determined to edit an omnibus citator for cases from “America, England and Ireland from the Earliest Period to the Present”<sup>356</sup> the sheer volume of cited and citing cases no doubt led him to trim his entries to the bare minimum: volume, source and page of the citing case, with a single word to indicate treatment.<sup>357</sup>

## Enter Frank Shepard

Unlike most of the other editors of legal citators, Frank Shepard was neither a practicing attorney nor a legal scholar. Rather, he was a book salesman, working in Chicago, and specializing in law books. Shepard was astute enough to perceive that there was a ready market for a reliable, up-to-date citator. Thus, in 1875, he published the *Illinois Citations*.

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<sup>353</sup> *Id.*, at 23.

<sup>354</sup> Lynch, “Citators” 16(3) *Legal Reference Services Quarterly*, at 11-15 (1998), citing *Laning’s Notes to Ohio Reports and Statutes* (1904); “a citator by Beebe (1886) and one by Thompson (1900)”; *The Ohio Citation Digest* (1905); *Notes on the Ohio and Ohio State Reports* (Cincinnati, W.H. Anderson 1912) *The Ohio digest and Citator* (Norwalk, Ohio; Lansing 1904) in addition to *Shepard’s Ohio Citations*

<sup>355</sup> See, for example, Walter Malin Rose, *Notes on the United States Reports; a Brief Chronological Digest of All Points Determined in the Decisions of the Supreme Court, etc.*

<sup>356</sup> Melvin Bigelow, *An Index of Cases Overruled, Reversed, Denied, Doubted, Modified, Limited, Explained and Distinguished, by the Courts of America, England and Ireland from the Earliest Period to the Present* (Little Brown 1873)

<sup>357</sup> See the discussion of, and examples of entries from Bigelow in Ogden, “Mastering”, 85 *L. Library J.*, at 24-25.

*Illinois Citations*, and Shepard's other early citators, had three distinguishing characteristics. First, the work did not come out in book form. Rather, it was made up of gummed labels, which were to be pasted on to the margins of the cited cases.<sup>358</sup> These labels alerted the researcher, at a glance, that the case he was reading had been addressed in later cases, and obviated the need to go to a second source to obtain this information. However, the labels were labor-intensive in that someone had to cut them out and attach them to each cited case, when a new edition arrived. Shepard stressed that this was "work [that] can be done by any office boy."<sup>359</sup> However, at least one reviewer criticized the "pasters" as "bothersome, as they involve continual cutting and pasting."<sup>360</sup> In any event, the gummed label format survived until the early 20<sup>th</sup> century, when Shepard's transitioned to a book format.<sup>361</sup>

The second distinguishing characteristic was the radical terseness of the entries. While other citators, particularly the "notes" ones, provided considerable information, often in discursive form, regarding the way the later case treated the cited case, and the issue addressed, Shepard's initial citators employed a bare-bones style, listing only volume and page of the citing case, with an abbreviation for the source.<sup>362</sup> This approach had the benefit of allowing Shepard's to provide its citing information in a much shorter publication than most other citators. However, by providing only "a skeletal list of citing cases" "devoid of any treatment analysis or indication of the point of law cited" Shepard's "forced the attorney to look up every citing case to determine its

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<sup>358</sup> Lance E. Dickson and Harry S. Martin, "Questions and Answers 68 *L. Library J.* 97, 97 (1975).

<sup>359</sup> Edwin C. Surrency, *A History of America Legal Publishing*, 182 (Oceana 1990), quoting "directions" in *Shepard's National System of Adhesive Annotations - Arkansas Decisions* (1891).

<sup>360</sup> Ogden, "Mastering", 85 *L. Library J.*, at 32, quoting "In the Matter of Citations" 1 *Law Book News* 324 (1894)

<sup>361</sup> Some authors have asserted that Shepard's did not begin publishing in book format until the time when it ceased using the gummed labels. See Dickson and Martin, "Questions and Answers" 68 *L. Library J.* at 97. However, a close reading of the sources suggests at least the possibility that there may have been a period, in the late 19<sup>th</sup> century, when Shepard's employed both formats. The author's efforts to identify a book-format *Shepard's Citations* from prior to 1903 have, to date, been unavailing.

<sup>362</sup> Ogden, at 27.

relevance.”<sup>363</sup> Arguably, Shepard took a good thing, brevity, and pushed it too far in his early citators.

Over time, of course, Shepard began to include the two coding features familiar to all who have used his print citators, namely a simple, straightforward system of letter codes to indicate how the later case treated the citing case, and a system of small supernumerary numerals to indicate the issue of the citing case which was addressed in the later case. These features were in place at least by the time of Shepard’s transition to book format in 1903.<sup>364</sup>

Perhaps most important characteristic of *Illinois Citations* was that the publication was envisioned, from the beginning, as the first in a series of citators. Indeed, “Frank Shepard announced in his first Illinois annotations his intention to prepare citations for all the states.”<sup>365</sup> Certainly, it is not unprecedented for an author or editor to announce ambitious plans for future projects. What distinguished Shepard was that he actually followed through; with *Shepard’s* eventually publishing not only citators for every state, but also an assortment of Federal case citators as well as citators for each of West’s regional reporters.<sup>366</sup> Shepard was realistic in his expansion plans, adding only one or two states per year.<sup>367</sup> One author estimates that “Shepard’s Citor for most jurisdictions was in place by 1920.”<sup>368</sup>

Shepard’s gradualistic approach offered a significant advantage over the publisher of “universal” citators, such as Greenleaf or Bigelow. While the latter, from the beginning, would have been confronted with the imposing task of updating all cases from all U.S. jurisdictions, Shepard was able to focus on updating

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<sup>363</sup> Ogden, at 28.

<sup>364</sup> See “Book Review: *Shepard’s Citations*” 56 *Central L.J.* 64, 72-73 (1903).

<sup>365</sup> Surrency, *History of American Law Publishing*, at 183.

<sup>366</sup> See Lynch, “Citators in the Early Twentieth Century” 16(3) *Legal Reference Services Q.* at 9 and fn. 16.

<sup>367</sup> Lynch provides a list of the earliest citators for numerous states, as well as regional reporters at 16(3) *Legal Reference Services Q.* 20 fn. 16.

<sup>368</sup> *Id.*

individual jurisdictions, expanding his capacity to do so, as his product became more established. It is also evident that Shepard was quite cognizant of the need to provide timely, regularly scheduled updates, and that he consistently set and met deadlines for updating each of his citators.<sup>369</sup> It is probably impossible to exaggerate the importance of this aspect of his work ethic. As Ogden writes,

[o]ther compilers seemed content to publish a single volume of citations and then move on to other projects, leaving their books in almost immediate need of revision as new cases were reported. Shepard, committed to long-term publication, offered supplements for his annotations. Uniform, reliable and current citation information seem to have been the hallmarks of Shepard's annotation system, and these distinctions rescued what was otherwise a mediocre product.<sup>370</sup>

### **What Might have Been**

Ogden notes that “the competition did not simply give up and die after Frank Shepard introduced his first citator.”<sup>371</sup> As another observer has noted, Shepard “was the victor in a fierce competition to provide a missing link when the volume of case authority made [citators] essential.”<sup>372</sup> The struggle for dominance proved to be a protracted effort, spanning decades, and it was not until the 1920s that Shepard's was able to effectively eliminate his competition.

One competitor in particular deserves mention. In 1892, A.C. King and H.B. Leonard published *Annotations of the Texas Court of Appeals Criminal and Civil Cases*.<sup>373</sup> They followed this up with an 1894 California citator.<sup>374</sup> These publications are significant for two reasons. First, their entries bear an uncanny resemblance to the format ultimately employed in Shepard's citators. For each citing case, the entry includes volume and page information. (Since citations are all to the same case reporter, there was no need to include an

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<sup>369</sup> Footnote.

<sup>370</sup> Ogden, “Mastering”, 85 *L. Library J.*, at 29.

<sup>371</sup> *Id.*

<sup>372</sup> Lynch, “Citators in the Twentieth Century” 16(3) *Legal Reference Services Q.* At 7.

<sup>373</sup> (Dublin, Tex., King and Leonard 1892)

<sup>374</sup> *King and Leonard's California Citations and Conflicting Cases* (Dublin, Tex., King and Leonard 1894).



abbreviation, in each instance, for that source).<sup>375</sup> Many entries also included a letter code, which informed the reader as to the later case's treatment of the cited case. Finally, entries included a numerical code, which indicated the issue (headnote) of the cited case which was addressed in the later case.<sup>376</sup> This array of coded entries - volume, source, page, treatment, issue - was, of course precisely the format which Shepard's would come to adopt. Indeed, Ogden observed, "[m]odern users of Shepard's will immediately understand the information presented" in the King and Leonard entries.<sup>377</sup> Did Shepard (or Shepard's company) "borrow" this format from King and Leonard? Or is this simply a case of "great minds thinking along similar lines"? We may never know the answer to this intriguing question. In any event, it is clear that King and Leonard had arrived at a citator format which was both economical and informative, and thus was capable of giving Shepard a run for his money.

The other intriguing aspect of King and Leonard's citators is a business deal that the editors worked out with West Publishing. Under this agreement, "King and Leonard, as the National Citation Company, would compile a series of [citators] for the National Reporter System.... King and Leonard as ... would publish the volumes, but West Publishing, as 'exclusive special agents', would sell the new citators."<sup>378</sup> Consider the possibilities here. King and Leonard, who had worked out a very effective and competitive coding system, would publish citators to accompany all the reporters in West's National Reporter System, the set of reporters which would soon take over case reporting in the United States. Certainly, the synergies here promised to make King and Leonard - West's a key, possibly a dominant, player in the citator field.

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<sup>375</sup>"Mastering", 85 *L. Library J.*, at 32.

<sup>376</sup> See examples of entries in King and Leonard's California citator in Ogden, "Mastering", 85 *L. Library J.*, at 31.

<sup>377</sup> *Id.*

<sup>378</sup> Ogden, "Mastering", 85 *L. Library J.*, at 32-33, citing 2 *Law Book News*, at vii.a (advertisement).

A number of citators were published under this agreement in 1895 and 1896.<sup>379</sup> “And then - nothing.”<sup>380</sup> Without explanation, indeed without even an announcement, the citators ceased publication. This decision must rank as one of the few times that West misjudged the market for its products, leaving observers, then and now, to speculate on “what might have been.” The obvious beneficiary of the decision was Frank Shepard, who inexplicably was left to compete with a motley crew of localized citators, none of which had the wherewithal of West’s to mount a sustained challenge to Shepard’s ultimate ascendancy.

## IMPLICATIONS

A student of legal history might note that the birth of modern legal research methods during the “golden decades” roughly corresponded with two very significant developments, namely the emergence of the doctrine of *stare decisis* as a basis for judicial decision-making, and institution of the “case method” of instruction at American law schools. These correspondences raise the question whether there might be a relationship, causal or otherwise, between the three phenomena.

### *Stare Decisis*

It is reasonable to posit a causal connection between the invention of modern case-finding methods and emergence of the doctrine of *stare decisis*, given that both developments occurred during the mid- to late nineteenth century. We are thus confronted with two questions. Was there such a connection? And, if so, which caused which?

It is important to distinguish between the general concept of precedent and the specific doctrine, *stare decisis*. Precedent refers to any time when a court looks to prior decisions for guidance in determining a legal principle.<sup>381</sup> On the other hand, *stare decisis* “is based on the idea that a series of precedents should not be

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<sup>379</sup> Ogden indicates that King and Leonard citators were published those years for the NorthEastern, NorthWestern, Pacific and Southeastern Reporters. Ogden, Mastering”, 85 *L. Library J.*, at 33.

<sup>380</sup> *Id.*

<sup>381</sup> Neil Duxbury, *The Nature and Authority of Precedent* 1-4 (Cambridge U. Press 2008)

departed from.... It reaches its apogee when a single precedent is considered to be a 'binding' authority."<sup>382</sup> In other words, precedent applies any time that a court seeks to discern a legal rule by looking at case law. There is no requirement that the court follow any one decision. Rather, the court is looking for a pattern from which it can draw a rule. *Stare decisis* is mandatory; it requires that the court strictly follow a prior ruling so long as that decision is "on all fours" with the presenting case. It has been observed that the true test of whether a court is adhering to *stare decisis* occurs when that court reluctantly adopts a case precedent with which it disagrees.<sup>383</sup> Numerous authors have concurred that American courts have always looked to precedent in reaching decisions.<sup>384</sup> However, the strict notion of *stare decisis* only came to be accepted gradually.

There is a parallel between these two concepts and the different conceptions of how law is derived. A natural law philosopher will contend that law exists as a set of abstract principles, independent of any particular case decisions. The decisions can be consulted, as "specimens" to help a jurist ascertain the principles; but cases are not *per se* "the law." This philosophy accepts precedent in its broader sense, but would reject strict *stare decisis* reasoning.<sup>385</sup> A positivist approach contends that cases *are* the law; that the court in rendering a decision declares law, and that jurists must look to those decisions - and reconcile them - as the basis for ascertaining law. This approach supports a *stare decisis* approach.<sup>386</sup>

Two developments undermined the notion of law as a universal set of principles. Following the

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<sup>382</sup> Frederick G. Kempin, Jr., "Precedent and *Stare Decisis*: the Critical Years, 1800 to 1850", 3 *American J. Legal History* 28, 29 (1959).

<sup>383</sup> Kempin, "The Critical Years", 3 *American J. Legal History*, at 39.

<sup>384</sup> *Id.*; Polly J. Price, "Precedent and Judicial Power after the Founding" 42 *Boston College L. Rev.* 81, 104 (2000). Duxbury, *Nature and Authority of Precedent*, at 32 traces reliance on precedent in English courts to the thirteenth century.

<sup>385</sup> See Price, "Precedent and Judicial Power" 42 *Boston College L. Rev.* at 104-05; Joseph C. Cascarelli, "Is Judicial Review Grounded in and Limited by Natural Law?" 30 *Cumberland L. Rev.* 373, 425-26 (1999); Charels J. Reid Jr., "Judicial Precedent in the Late Eighteenth and Early Nineteenth Centuries" 5 *Ave Maria L. Rev.* 47, 50-52 (2007); Michael J. Gerhardt, *The Power of Precedent*, 47 (Oxford 2008)

<sup>386</sup> Price, "Precedent and Judicial Power", 42 *Boston College L. Rev.*, at 104-05; Gerald J. Postema, *Bentham and the Common Law Tradition*, 210-17 (Oxford 1986).

American Revolution, courts in the former colonies were compelled to examine English case law to determine whether its holdings were consistent with conditions in the new republic. This necessarily led to an awareness that the principles that comprised “the law” might be different depending on where that law was declared. Likewise, as case law developed in the new state courts, it was inevitable that lines of cases in the different jurisdictions would occasionally reach different conclusions.<sup>387</sup> This evident trend also had the effect of undermining the notion of law as one universal set of principles. As this transition occurred, it was reasonable for practitioners and judges to focus on the decisions of their respective jurisdictions, rather than on the treatises which purported to summarize universal laws.

Historians have noted that there an essential prerequisite to the invocation of *stare decisis* in any jurisdiction is a reliable, preferably official source for the text of judicial decisions.<sup>388</sup> This is a simple matter of common sense. One cannot insist that a later court strictly follow the holdings of earlier decisions if one cannot put one’s faith in the accuracy of court reports.

There are a number of ways in which this vital element may be lacking. In the early days of state courts there were times when literally no sources of decisions were available. One cannot help but empathize with the Georgia judge who, in 1808, proffered the following disclaimer.

I have no access to books, and therefore will not venture to state from recollection, the principles upon which each case was decided. My mind is satisfied with throwing out these general, and perhaps they may be called desultory, observations, which convey, on this part, my opinion as strongly as I can express it.<sup>389</sup>

A second problem was that the judges who authored the decisions did not, to put it bluntly, always command respect. As one court, referring to an earlier generation of judges, tactfully put it: “these judges, though as men,

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<sup>387</sup> See R. Ben Brown, “Judging in the Days of the Early Republic: A Critique of Judge Arnold’s Use of History in *Anastasoff v. United States*,” 3 *J. Appellate Practice and Process* 355, 360-61 (2001).

<sup>388</sup> *Id.*, at 35.

<sup>389</sup> *Grimball v. Ross*, T. Charlton Rep. 1805-10, 175, 177-78 (1808), quoted in Kempin, “the Critical Years,” 3 *American J. Legal History*, at 42.

of great consideration and respectability, yet, had no pretension to that legal knowledge which judges in the last resort ought to possess.”<sup>390</sup> Thus,

[a] court is not bound to give a like judgment, which has been given by a former court, unless they are of opinion that the first judgment was according to law; for any court may err; and if a judge conceives that a judgment given by a former court is erroneous, he ought not in conscience to give like judgment....<sup>391</sup>

On the other hand, some jurists were viewed with the greatest respect, and, consequently their decisions were followed - not because they had been decided, but because of who decided them. Thus, “citation of cases appears to [have] rest[ed] as much on the authority of the particular judge as on the decision itself.”<sup>392</sup>

A third problem was that “reporters were of varied reliability” in the early 19<sup>th</sup> century.<sup>393</sup> Clearly one could not insist that a judge strictly adhere to a reported decision if the accuracy of the report of that decision was in question. As Sir Carlton Kemp Allen, put it “[a] precedent is not a precedent unless it is accurately reported.”<sup>394</sup> In this regard, two parallel developments were at play. The first was simply the greater accuracy of reported decisions as the 19<sup>th</sup> century progressed. This was, no doubt, related to the fact that the deciding judge had become the author of the written opinion in a growing number of cases. The second development was the emergence of official reporters. “The movement toward official state reports gained momentum in the 1840's and 1850's and was shortly universal.”<sup>395</sup> Clearly, an argument for the binding nature of authority carries more weight if it is premised on a decision found in an official state reporter.

However, a system of accurately reporting cases is not, in itself, sufficient. There must be a way for

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<sup>390</sup> *Martin v. Commonwealth*, 1 Mass. 347, 387 (1805).

<sup>391</sup> *Kerlin's Lessee v. Bull*, 1 U.S. (1 Dallas) 175, 178 (Penn. 1786).

<sup>392</sup> Kempin, “The Critical Years”, 3 *American J. Legal History*, at 38.

<sup>393</sup> *Id.*, at 32.

<sup>394</sup> Sir Carlton Kemp Allen, *Law in the Making*, 7<sup>th</sup> Ed., 312 (Oxford 1964)

<sup>395</sup> Kempin, “The Critical Years”, 3 *American J. Legal History*, at 36.

litigants, counsel and judges to *find* relevant cases. “If the judge is to be bound by precedents, he should have all the relevant authorities at his command. But he cannot carry them all in his head, nor is it always easy to find them, in spite of the many modern devices for facilitating the search.”<sup>396</sup> Thus, the emergence of digests in the early to mid-nineteenth century, culminating in West’s Digest System, was a critical precondition, as was the development of reliable citators, culminating in *Shepard’s Citations*.

In his article on the growth of *stare decisis*, Frederick Kempin traces that development in a number of states. Thus, in Maryland, the author of an 1821 decision wrote, “I cannot perceive why on any principle either of law or policy, an opinion of any court should be deemed of binding authority when the foundation of that opinion is taken away. It is the principle that should govern, the substance and not the shadow.”<sup>397</sup> However, thirty years later, a Maryland court reluctantly accepted the holding of a prior case, despite misgivings about the wisdom of the earlier case. The court felt compelled to do so because of *stare decisis*.<sup>398</sup>

Likewise, in Pennsylvania, early 19<sup>th</sup> century cases used case law as a guide to the underlying principles and not as strictly binding precedent. However, by 1853, the Pennsylvania Supreme Court offered the following ringing endorsement of *stare decisis*.

[I]t is sometimes said that this adherence to precedent is slavish; that it fetters the mind of the judge and compels him to decide without reference to principle. But let it be remembered that *stare decisis* is itself a principle of great magnitude and importance.... [A]djudications of this court, when they are free from absurdity, not mischievous in practice, and consistent with one another are the law of the land. <sup>399</sup>

Kempin offers examples from Georgia, New York and Massachusetts, as well as from a number of Western states. The chronology is quite consistent, with courts of many states endorsing *stare decisis* during

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<sup>396</sup> Allen, *Law in the Making*, at 315.

<sup>397</sup> *Hammond v. Ridgley’s Lessee*, 5 Har. & J. 245, 274 (Maryland 1821), quoted in Kempin, “The Critical Years”, 3 *American J. Legal History*, at 39.

<sup>398</sup> *Milburn v. State*, 1 Maryland 1 (1851).

<sup>399</sup> *McCwell v. Oyer*, 21 Pa. 417, 423 (1853), quoted in Kempin, “The Critical Years”, 3 *American J. Legal History*, at 41.

the 1850s, although Western states tended to adopt the principle a bit later.<sup>400</sup>

One can discern a pattern among the developments discussed here. Certainly, the a system of accurate, often official case reports was a *sine qua non* which made possible the notion that individual case decisions must be adhered to by later courts. Thus, *stare decisis* is conceivable only where such a system of case reports exists. Likewise, once *stare decisis* has taken hold, it is logical to expect that attorneys will begin to focus on finding the cases which provide binding authority for their arguments. It no longer was it sufficient to simply glean the key legal concepts from a leading treatise. Rather cites to specific cases were required. Thus, new methods of finding relevant cases became vitally important to the research process, and digests and citators emerged as absolutely essential research tools. In John West's memorable phrase, they provided a "blanket [insurance] policy" protecting the attorney against the risk of missing the one determinative case precedent.<sup>401</sup>

One might have expected that *stare decisis* would be broadly applied only after the system of case reporting and case-finding came to full fruition, with the development of West's National Reporter System, West's Digests and Shepard's Citations. However, the evidence suggests that *stare decisis* was first applied near the beginning, and not the end of the "golden decades," indeed, by the late 1850s and 1860s. The logical conclusion is that the system of case reports, in all their variety, prevalent during that somewhat earlier period was considered sufficient to the task, and that early digests and citators, with their various quirks and flaws enabled "case lawyers" and their ilk to find winning cases. In any event, the emergence of West's National Reporter System, West's Digests and Shepard's Citations, taken together, transformed *stare decisis* from an aspirational goal to an eminently workable, indeed dominant, approach to legal reasoning

### **Dean Langdell and the Case Method of Instruction**

"Christopher Columbus Langdell introduced the case method of teaching at Harvard Law School in 1870

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<sup>400</sup> See Kempin, "The Critical Years", 3 *American J. Legal History*, at 42-49.

<sup>401</sup> John West, "A Symposium of Law Publishers" 23 *American L. Rev.* 396, 406 (1889).

and dramatically altered the course of legal education in the United States.”<sup>402</sup> There is no hyperbole in this assertion; it is a simple statement of fact. A virtual cottage industry has arisen around Langdell, with scholars challenging and defending both the pedagogical significance of the case method, and Langdell’s role in promoting it.<sup>403</sup> However, no one can deny that law school education was profoundly affected by Langdell’s innovations, both as a law professor and as Dean of Harvard Law School.

“In retrospect, Langdell was an unlikely candidate for the deanship of any law school. He was born in New Hampshire in 1826. His mother died when he was seven. His father was from a line of farmers, but not much else is known about him. After their mother’s death, the children ... were distributed among different families.”<sup>404</sup> Langdell overcame these circumstances, obtaining an education as a “pauper scholar” at Philips Exeter Academy, Harvard College and Harvard Law School.<sup>405</sup> He practiced law on Wall Street for fifteen years. Some historians have disparaged Langdell’s legal career;<sup>406</sup> however, according to a recent account, “he belonged to the vanguard of attorneys pioneering a new role in litigation; that of crafting the highly technical

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<sup>402</sup> Russell L. Weaver, “Langdell’s Legacy: Living with the Case Method”, 36 *Villanova L. Rev.* 517, 518 (1991)

<sup>403</sup> A representative and occasionally humorous selection of Langdell articles appeared in the Summer 1995 issue of *Law & Social Inquiry*. These included: Paul D. Carrington, “Hail! Langdell!”, 20 *Law & Social Inquiry* 691 (1995); William P. LaPiana, “Honor Langdell”, 20 *Law & Social Inquiry* 761 (1995); John Henry Schlegel, “Damn! Langdell!” 20 *Law & Social Inquiry* 765 (1995) and Laura Kalman, “To Hell with Langdell” 20 *Law & Social Inquiry* 771 (1995). Other commentaries include: Bruce A. Kimball, “The Langdell Problem: Historicizing the Century of Historiography: 1906-2000s”, 22 *L. & History Rev.* 277 (2004); John Henry Schlegel, “Langdell’s *Auto-de-fe*”, 17 *L. & History Rev.* 149 (1999); Bruce A. Kimball, “‘Warn Students That I Entertain Heretical Opinions, Which They Are Not to Take as Law’: The Inception of Case Method Teaching in the Classroom of the Early C.C. Langdell”, 17 *L. & History Rev.* 57 (1999); W. Burlette Carter, “Reconstructing Langdell”, 32 *Georgia L. Rev.* 1 (1997); Robert W. Gordon, “The Case for (and against) Harvard”, 93 *Michigan L. Rev.* 1231 (1995); Russell L. Weaver, “Langdell’s Legacy: Living with the Case Method”, 36 *Villanova L. Rev.* 517 (1991); Thomas A. Woxland, “Why Can’t Johnny Research? Or it All Started with Christopher Columbus Langdell”, 81 *L. Library J.* 321 (1973); John Henry Schlegel, “Langdell’s Legacy or The Case of the empty Envelope” 36 *Stanford L. Rev.* 1517 (1984); Thomas C. Grey, “Langdell’s ‘orthodoxy’” 45 *U. Pittsburg L. Rev.* 1 (1983); Marcia Speziale, “Langdell’s Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory”, 5 *Vermont L. Rev.* 1 (1980).

<sup>404</sup> W. Burlette Carter, “Reconstructing Langdell”, 32 *Georgia L. Rev.* 1, 16 (1997)

<sup>405</sup> Bruce Kimball, “The Langdell Problem: Historicizing the Century of Historiography: 1906-2000s” 22 *L. & History Rev.* 277, 278 (2004).

<sup>406</sup> Most notably, Grant Gilmore wrote that “Langdell seems to have been an essentially stupid man....” Grant Gilmore, *The Ages of American Law*, 42 (Yale, 1977).



written brief that was beginning to displace oral argument in complicated cases.”<sup>407</sup>

In any event, when Charles William Eliot, President of Harvard, sought to inject new life into the curriculum at the Law School, he turned to Langdell, appointing him as Law Professor in 1870, then as Dean the same year.<sup>408</sup> Over the years, historians have disputed the value and implications of Langdell’s reforms;<sup>409</sup> however, virtually every observer agrees that Langdell transformed the parameters of legal education. James Barr Ames, a student of Langdell’s who went on to succeed him as Dean of Harvard Law School summed up his accomplishments as follows.

He found at Cambridge a school without examination for admission, or for the degree, a faculty of three professors giving but ten lectures a week to 115 students of whom 53 per cent had no college degree, a curriculum without any rational sequence of subjects, and an inadequate and decaying library. He lived to see a faculty of ten professors, eight of them his former pupils, giving more than fifty lectures a week to over 750 students, all but nine being college graduates, and conferring the degree after three years’ residence and the passing of three annual examinations.<sup>410</sup>

All these achievements contributed to the development of American law schools as we know them: a three year curriculum, requirement of an undergraduate degree for admission, a progression of required courses, a full-time academically-oriented faculty. However, Langdell’s most lasting contribution occurred in the classroom. There, he transformed law school instruction from a set of lectures based on the leading law treatises to an interactive dynamic, in which students, with the professor’s guidance, parsed cases, and derived for themselves the guiding legal principles.

When Charles Warren came to write the authoritative history of Harvard Law School, he understandably focused on the innovations which Dean Landell brought to the school, not least the case study method. He laid

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<sup>407</sup> *Id.*, at 277-78.

<sup>408</sup> Charles Warren, *History of the Harvard Law School*, 359 (N.Y., Lewis, 1908); Carter, “Reconstructing Langdell”, 32 *Georgia L. Rev.*, at 1-16.

<sup>409</sup> See, in particular, Bruce Kimball’s exhaustive essay, “The Langdell Problem” 22 *L & History Rev.* 277 (2004).

<sup>410</sup> James Barr Ames, “Christopher Columbus Langdell”, 8 William Draper Lewis, ed., *Great American Lawyers* 465, 481 (Phila., John C. Winston, 1909)

out the key elements of this method in a chapter titled “What the Case System Really Is.” Warren begins with an extended quotation of Dean Ames.

[W]e believe that men who are trained, after examining the opinions of the greatest judges that the English Common Law system has produced, are in a better position to know what legal reasoning is and are more likely to possess the power of solving legal problems than they would be by taking up the study of the law of any particular state. In my own case, I am sometimes asked by first-year men what the law of Massachusetts is on the point under discussion, and I always tell them that sitting in this chair I do not know, but that if they speak to me after the hour I will tell them.<sup>411</sup>

Two important ideas are embodied in this quotation. First, the case method is a dynamic approach to instruction, compelling students to engage in legal reasoning in order to extract principles from the leading cases. This approach is directly opposed to the notion of students passively imbibing legal principles as set out in the treatises and in professors’ lectures.

Equally important is the notion of how a practicing attorney discerns the law. When Professor Ames states that he will have an answer to a legal question “after the hour” one can surmise, from the context, that he is not planning on consulting a treatise during that hour; rather, he will be looking for relevant case law precedent. Warren is even more explicit on this point. “[T]he student is practically doing, as a student, what he will be consistently doing as a lawyer”,<sup>412</sup> i.e. looking for case law precedent. However, Warren also counters the common criticism that Langdell’s method turns out “case lawyers.”

By a “case lawyer” I suppose is generally meant a lawyer who has a great memory for the particular circumstances of cases, but who is unable to extract the underlying principles. But the “case system” has no tendency to produce lawyers of this type..... It uses the cases merely as material from which the student may learn to extract the underlying principles.<sup>413</sup>

Whether the Langdell method turned out “case lawyers” in the pejorative sense of the term, there is no doubt that lawyers trained under this method came to the profession with an acute appreciation of the importance of

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<sup>411</sup> Warren, *History of HLS*, 420, quoting James Barr Ames, *Address before the Association of American Law Schools* (1907).

<sup>412</sup> Warren, *History of HLS*, at 421.

<sup>413</sup> *Id.*, at 424, quoting John C. Gray, “Cases and Treatises”, 22 *American L. Rev.* 756, 762 (1888) (ellipsis in Warren).

case law in determining the answer to a legal question, and in constructing arguments in support of a legal point.

### **Cause or Effect?**

Langdell initiated the case study method at Harvard in 1870. The significance of this date will not be lost on the alert reader of this essay. Consider the following dates: 1867 - *Abbotts' Digest*; 1875 - *Shepard's Citations*; 1879 - the first West regional case reporter. Given the proximity of these occurrences, it is reasonable to ask: was there a cause-and-effect relationship? If so, which is the cause, and which is the effect?

This author was not able to find any article or book that discusses this issue, and will therefore seek to apply logic and common sense in addressing it. Common sense dictates that there would have to be a source for the text of cases and a way of finding relevant ones in order to initiate a case-based method of instruction. This suggests that research developments - in particular, case reporters and digests - may have “caused” the case method. There are two problems with this theory. First, as the above chronology suggests, Langdell initiated the case method before the national reporter system or West digests saw the light of day. However, as discussed above, there were numerous predecessors - case reporters and digests - prior to 1870, so this is not an insuperable obstacle. The other caution is that the leading proponents of the case method - notably Langdell and Ames - stressed a reliance on landmark British cases, decided long before the revolution in legal research methodology. Be that as it may, one can say that case law resources, particularly American resources were dramatically more accessible post-1870, and thus the case method of instruction became much more feasible after that date.

An argument can also be made that Langdell's method generated an unprecedented demand both for text of decisions and finding aids, since lawyers who learned to practice under the case method were no doubt much more likely to turn to cases, when searching for authority in support of their arguments. While that teaching method may not have “caused” a revolution in research methods, it certainly produced generations of lawyers likely to appreciate and use those methods.

Rather than thinking in terms of cause and effect, it may make more sense to see the Langdell method and the legal research advances of the “golden decade” as complementary developments both of which derived from the long, slow progress made in case reporters, digests and citators, particularly in the middle years of the 19<sup>th</sup> century.

### **From Principles to Precedent**

With the emergence of reliable case reports and more effective case-finding tools, came a subtle but unmistakable shift in the way lawyers constructed their legal arguments. One way to express this change is to say that legal research went from being a search for legal *principles* to a search for *precedent*. This is something of an oversimplification. It certainly was not a matter of either/or. Rather, over time, lawyers constructing legal arguments came to focus more on case law - on finding decisions “on all fours” with the case at hand - and less on legal principles as expressed in treatises.

The use of cases also changed. Where, previously, cases were seen as exemplars of eternal legal principles, by the late 19<sup>th</sup> century, case law *was* ‘the law.’ When confronted by a judge with the question “what is your authority for that point?” the practitioner in the late 1800s was much more likely to cite a case than a treatise. And the argument to the court was less “you must apply this principle” than “you must follow this case precedent.” This is a subtle, but important difference.

This is not to say that the search for legal principles fell by the way-side. There certainly were “case lawyers”, obsessed with finding as many cases on point as possible, with little regard to the principles expressed in those cases. However, a practitioner might also rightly contend that he still is engaged in the search for principles; however, he seeks the expression of those principles in case law. In essence, the attorney argued that *stare decisis* was the ultimate legal principle.

Predictably, this change of emphasis had an impact on judicial practice.

The function of the judicial opinion changed. The modern judge addresses an opinion only incidentally to the parties and to the lawyers who argued the case. Especially for appellate judges, the primary audience is the readership of the published report. The main job is not explaining the outcomes to the

immediate participants, but rather generating precedents to guide future conduct and adjudication.<sup>414</sup>

Did the developments of the “golden decades” cause this shift of emphasis? Once again, questions of causation are perilous. However, one can safely say that the development of reliable, affordable, prompt case reporters, and of the new methods of finding cases made the case-oriented approach possible. Indeed, taken together, they were a *sine qua non* for that new approach.

Certainly, the dramatic developments of the “golden decades” bolstered the preeminence of cases as a source for legal authority. From that point on case-finding became the most common form of litigation-related research, and it has remained so to the present day.

## CONCLUSION

Realistically, there is no way to quantitatively compare the impact of the developments of the “golden decades” with the more recent impact of inline legal research. Suffice to say, the changes wrought on the practice of legal research, and on law practice generally, were profound in both instances.

One interesting contrast is the relative anonymity of the innovators of the present generation. Who invented Key Cite? Who was responsible for automating BNA’s looseleafs? We may never know the names of these individuals. With the possible exception of John West, the names of the great innovators of the 19<sup>th</sup> century - Ephraim Kirby, Henry Wheaton, the Abbott brothers, John Mallory, Frank Shepard - are hardly household words. Yet, they have left an imprint. Their names are known. And with a modicum of effort an interested person can acquaint him- or herself with the stunning accomplishments of this remarkable generation.

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<sup>414</sup> Langbein, “Chancellor Kent”, 92 *Columbia L. Rev.*, at 578.