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Some Observations on Case Law Reporting

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SOME OBSERVATIONS ON CASE LAW REPORTING

THE scene is in 1309, in the reign of the dissolute and degenerate King Edward II. It is ten years since the fire in which Westminster Hall burned, and twenty years since the scandal that drove Sir Thomas de Wayland and his companions from the bench in disgrace. The place is the court of common pleas at Westminster.

At the farther end of the room the judges sit side by side on a long bench on a platform raised considerably (say thirty inches) above the floor. In front of this platform is a table stretching nearly across the room; and around this table are seated the court clerks and benchers or students of the law, entering records, drawing writs, copying pleadings, and taking notes of the trial as it progresses. A little this side of that table is a railing or bar about three feet high; and at that bar stand the contending parties and their sergeants, pleading their case to the court to reach an issue. The long, loose, crimson robes worn by the judges are their distinctive apparel. The sergeants are distinguished by robes of similar cut, the right half of one color and the left of another. The close-fitting head-dress of white linen worn in common by the judges and sergeants, which you might mistake for their night-caps, are called coifs; and these are the most prized and honored badge of the legal fraternity; though it is said that they were first used to conceal the tell-tale scalps of the ecclesiastics when they came here to plead cases during the rupture between the pope and the king, who therefore forbade them to appear in the courts in behalf of litigants.

The man who sits in the center of the bench is the great William de Bereford, made chief justice this very year, though he has long been known as a most wise and just judge, and has held repute as more learned in the law than any man since the days of Henry de Bratton (Bracton).

This case is a writ of dower. The tenant has made default after default. Now here comes A and says that the tenements were given to his father and the heirs of his body begotten, and that he (A) is the eldest son and heir apparent; and he prays to be received to defend his right.

BEREFORD, C. J.[1] Heir you cannot be during your father's life, for you cannot know which of you will be the survivor. And I put the case that lands are given to a man in fee-tail, and he to whom the gift is "tailed" engenders a daughter, and is afterwards impleaded,

[1] Whether Bereford was chief justice when this case was decided does not appear from the report, but I take it that he was from the fact that he alone speaks for the court. He became chief justice March 15th, 1309.

and the daughter comes and prays to be received to defend her right, and she is received, and then pending the plea he engenders a son, and then the daughter makes default, and the son comes into court and prays to be received:—How can he be received, and how could the right jump across to the male when she has been received as heir? And it is certain that the daughter cannot be heir so long as there is a male; thence it follows [in the present case] while his ancestor is living he cannot be heir.

Toudeby [sergeant arguing for A]. These tenements were given to [his father] and the *issue* of his body, and ne is issue and is the eldest.

Herle [sergeant for the plaintiff]. You will never make out that he is "heir"; and if you leave out this word *heir*, then he will not be within the statute [Westm. II, c. 3], for the statute says the *heirs shall be admitted.*

Toudeby. These tenements are given to [the father] and to the heirs of his body engendered, so that the father is only tenant for his life, and for [a mere] freehold, and the right dwells in the person of the issue.

Passeley [also for the plaintiff]. I will show that that is not so; for the father by himself can vouch to warranty in the right, and the warrantor in the right can join battle and the grand assize, and if he [the father thus] loses, he [the son] never shall have recovery of the same land.

Toudeby. If no issue issues, he to whom the reversion belongs shall be received, and [what is more] so shall a remainderman who is a total stranger. Why not then the issue, who is more privy?

BEREFORD, C. J. If the tenements were given to the father and mother and the heirs of their two bodies begotten, and the one of them died and the survivor was impleaded, in that case peradventure the issue should be received, for in that case one can know for certain that an heir there cannot be other than one who is begotten of their two bodies.

Toudeby. There may be just the same uncertainty in the one case that there is in the other, for albeit [in the case that you put] one of the two donees is dead, it may be that he has issue three or four sons, and we cannot say which of them will be the heir.

Passeley. If the father desired to pray aid of the son he should not be received, and no more shall the issue [be received in this case].

Toudeby. We have seen before now that a linen-draper of London purchased tenements to himself and his wife and to the heirs of their two bodies begotten: and [the husband and wife] were impleaded

and made default: and, because there was no issue, he to whom the reversion belonged came and prayed to be received; and pending the plea a son was born, who was brought into the bench before you in a cradle and prayed to be received and was received; and yet the father and mother were in full life, as they are to this day. Wherefore we pray to be received.

And he was received, etc.

Thus ends the report of the case as taken down by one of the benchers in attendance, as above mentioned, and those desirous of reading it in the original will find it as follows:

ANON, in the Common Pleas, 2 Edw. 2, A. D. 1308-9—Selden Soc. Year-books, Vol. 1 (1 & 2 Edw. 2), case No. 19, pp. 70-72, also noted in Fitzherbert's Abr. t. Resceit 147.

Now, this case is interesting and instructive from many points of view: but it is embodied in this article to show the effectiveness with which prior decisions were cited to influence the action of the courts even at that early day. Knowledge of what had already been decided was indispensable to success at the bar even then, and it has remained so ever since. And if any man thinks that the case lawyer is a modern product, let him take a lesson from this little incident. Observe how the court seemed to be quite convinced that the decision must be against the right of the heir apparent to appear and defend, till his counsel remembered a case in which the court had already ruled the point in his favor; and that case being remembered, that settled it.

There is an old tradition, still believed by many lawyers, that these year-books were official reports made by a reporter appointed and paid by the king. If there ever was such a reporter, he is yet to be discovered. No year-books have been found in the treasury of the courts; there is no record of the appointment or payment of any official reporter, through all the two hundred and fifty years covered by the year-books; all the year-books now in the British Museum were found in private hands.[2] Is it conceivable that an official reporter would criticize the court and its decision, and add comments as the writers of the year-books often did? For example: Bereford is chief justice of the common pleas, Mutford and Stoner are justices. Stoner has been taking part in a debate with counsel. Then we read this:

Mutf. Some of you have said a great deal that runs counter to what was hitherto accounted law.

Ber. Yes! That is very true, and I won't say who they are.

[2] For further proofs and arguments on these and other points the reader is referred to F. W. Maitland's learned introduction to Vol. 1 of the Selden Society edition of the year-books of Edward II. pp. xi-xiii.

The chief justice refuses to name any names: but the reporter, perhaps interpreting a glance along the bench eloquent as words, presumes to add:

And some people thought that he meant Stoner.[3]

The year-books contain internal evidence of having been prepared for the personal use of the makers of them, as we know the reports of Plowden and others were prepared in later times.

Records of the cases and decisions were kept in those days, and they are still in the treasury of the courts. In them we find all the dry form and verbiage—the pleadings, judgment, etc.; but we do not find there what was said and done at the trial—the arguments of court and counsel. Yet they contained so much information as to what had been ruled on matters of law that we find the record of an order to Henry de Bratton (Bracton) to return to the treasury the records he had borrowed (without authority), as we may surmise, to aid him in making his notebook.[4] The writers of what are known as the year-books may not have thought of their manuscripts ever being used as authority, their sole object being to learn what the law was, and to make notes of what was decided to aid them in that object. There were no law schools in those days, and the candidates for admission to the bar obtained much of their preliminary training by sitting in the courts to listen to the arguments and rulings. One day when BEREFORD, C. J., was laying down the law, one of the sergeants interjected a remark, to which the judge replied: 'Really, I am very much obliged to you for your challenge; not for the sake of us who sit on the bench, but for the sake of the young men who are here. Nevertheless, you must plead over.'[5]

Under the precedent system of jurisprudence it is evident that the man who has the best command of the adjudicated cases is master of the situation. We find that this was always the fact. Fitzherbert and Brooke, the makers of the great abridgments, became the leaders of the English bar and the judges of best repute. Later Plowden, Moore, Coke, and Maynard common-placed everything in any of the year-books; and like their predecessors in the time of Chaucer (1328-1400) could cite every case off-hand from memory, and

> "In termes hadde caas and domes alle,
> That fro the tyme of kyng Will were falle."

To this fact in no small degree they owed their power and success

[3] Ibid., XIII.

[4] 1 Bracton's Note Book 25; Exchequer Memorandum Lord Treasurer's Remembrancer, 42 Hen. 3, m. 12 d.

[5] See Maitland's introduction to the year-book above cited, p. XIII.

at the bar. The invention of printing put an end to the necessity for such drudgery. With the end of that such lawyers disappeared. The printer furnished books better and cheaper than they could make them. Before the death of Lord Coke there were more law reports and abridgments in print than a man could carry in his arms. About this time Maynard's edition of the year-books was printed.

With the introduction of printing, a new class appeared,—men who were not lawyers themselves, but who had the good of the profession at heart, men who could make sufficient protestation of that fact without forgetting the profits in the business. If a lawyer attended court and made notes of new cases sufficient for a book, and the judges would recommend that it be printed, these men would undertake the task, without charging the author anything for the service beyond what the sales would yield. From these small beginnings they have grown and multiplied, flourished and waxed great. At first the lawyers were very grateful to these philanthropic printers, realizing how much the printed books assisted them in their search for the law. But before long we begin to hear murmurs of complaint that there are too many books already. Then every new volume of reports was accompanied by apologies and excuses to show the necessity of printing that particular one. The arm-load of reports became a wheelbarrow-load, cart-load, wagon-load, car-load. Shall I say train-load? What any had, all must have who would keep up with the procession; but the burden was becoming intolerable. The lawyers became desperate. A determined movement was made to dam up the stream and stop the flood, at least to limit the flow. Only the most important decisions were to be reported, and the rest to be suppressed. At last a partial solution of the evil had been found. But hold! Presently a commercial organization appears and offers a set of the hitherto unreported cases; then another exploiter comes with a set containing all the decisions whether reported or not. Now the lawyer finds that instead of improving his condition, he has to buy two or three duplicate sets in place of the one required before. He must have the authorized collection and the voluntary complete set. Since each is published with a view to giving as little assistance in the use of the other as possible, he finds himself further embarrassed.

Now comes an entirely new friend to the oppressed lawyer, saying: "In this set I have included all the cases of any real or permanent value, buy these, stop the rest, and save the difference!" It is agreed. He is relieved of his coin, and made happy. The next day another man calls with another set and the same story. The lawyer tells him that he has a set containing all the cases of value; but the agent is not slow to show him that the cases in the two sets are not at all the

same. He puts them both to the test, and finds that the case of which he has learned, and which he wants most is in neither set. Where statutes have been enacted limiting the number of cases to be reported, and directing the judges to make the selection of decisions to be published, the result has been no better. They often indulge in long discussions on questions of fact and evidence, or write essays and digressions on legal topics remotely connected with the case in hand, or quote at length from cases already in print and order the whole printed. On the other hand, the cases are not few in which a decision ordered not to be printed has become the leading case on the question, cited by all the courts in the land. Only a few days ago I was looking for the answer to the question as to whether a covenant for title in the sale of standing trees without the soil would run with the trees. At last the answer was found clearly and precisely put, with the reasons for it, in an opinion of one short paragraph, in a case squarely presenting the question. The case was marked, "not to be officially reported."[6]

The only effective escape from the increasing bulk of case law is to persuade the judges not to write so much; to avoid long statements of fact: to avoid digressions, quotations, and arguments; to put their reasons precisely and succinctly; and then to state their decision without more. This has already been attempted; but it is easier to take the statement of facts from the briefs and records than to make a more concise one; it is easier to dictate to a stenographer at length than to put the gist of the case in a few words; and many of the higher courts are worked almost to the limit. To require the judges to write out their opinions in their own hands might bring better results. That might conduce to brevity. It might not.

It is believed that the Federal Cases is the only series of American reports of any considerable size in which the editor has attempted consistently to make reference at the head of each case reported to every report, magazine, or other publication in which the same case might be found. This fact has won much praise for the publisher. It is believed that few persons use the series without recognizing the great advantage to them of such cross-reference. One citing a case from that series and desiring to make every reference need only copy them down. But think of the labor required to do the same thing in citing a case from any other series. Suppose that one citing a case from any of the official state reports would do it, what does it cost him? He can refer his reader to the West reporters by spending the time to find the case in the West blue book tables, for he knows all the decided cases after a known date are in that system. Beyond

[6] Asher Lumber Co. v. Cornett (Sept. 26, 1900), 22 Ky. Law R. 569, 58 S. W. 438.

that his search is a series of experiments, involving consultation of a number of separate tables, one at least for each set of reports that he may guess might contain the case. Thus one to ten minutes is wasted on each case every time he consults it to make a citation. But why should everyone be required to make this search separately and repeatedly, when the reporter could do it once for all and print the references at the head of the case? What has been said applies with equal force to most of the reports other than the official. It applies not to the case reported merely, but to every citation in the opinion.

All the decisions of the higher courts are now regularly reported in more than one publication, and there are a number of publications in which important decisions in general or on particular topics are regularly reported as soon after the decision is rendered as may be; and besides these there are collections of cases on all the principal topics of the law, selected from the entire mass of decisions, old and new, without much regard to the date of decision, but designed to bring together the best cases on each point falling within the topic covered by that collection. With all this duplication of reports, very few of these editors make any effort at all to refer to any publication other than their own, in which the decision cited or being reported may be found; and some are too slovenly to make reference even to their own publication of the case cited, unless the judge who wrote the opinion was fortunate or diligent enough to discover and incorporate the citation in his written opinion. Thus it often happens that the case referred to is reported in full in a book lying at my elbow, and yet for want of reference to it as being in that report, I conclude that it is beyond my reach, unless by some happy chance or extraordinary diligence I should make the discovery myself. Ordinarily the casual user of any report cannot afford time to chase down all the citations in all the vagrant reports, magazines, and miscellaneous collections; and yet the editor, at the time of publication, could do it once for all, for his own and his subscribers' benefit, at a comparatively small expense.

The superior value of such a report to the owner and the user would be too great to calculate, and yet a few of its advantages might be mentioned. It would enable him to run down the law in much less time, by pointing him to the most available report, or the one nearest at hand, or the one and the only one within reach that contained the case. It would indicate to him in fewer words and more precisely than in any other possible way, that the case cited is, or by several persons most competent to judge has been considered, of little or great importance; for which reason it has been included in or omitted from so many special collections. It would enable him to

discover the valuable monographic notes appended to the case in the series of annotated cases in which it has been included. It would enable him to refer the judge, or whomsoever he would address, to the book containing the case which he knows such person to possess. If the case is in some other series at the courtroom where he expects to make an argument, it would save him the burden of taking his own book along. In any event it would enable him to make reference to all the books in which it has been reported, without turning to any other book or making any unnecessary expenditure of his time. The time thus saved in making a single brief would be great. The improved facility in getting at the law in all cases would be almost incalculable. Many other advantages of this policy of making reference to all parallel reports will readily occur to anyone, and therefore further comment will not be made.

This policy of cross-reference would be a great convenience to the owner of reports containing all the cases decided within a given jurisdiction and time; this for the reasons above stated and others, but more especially because it would in all cases save him the time needed to look up any desired case for himself, to find where in his reports it is printed. But to the owner of a series of selected cases it is of the utmost importance, and almost indispensable; for, inasmuch as his series does not contain all the cases, he cannot be sure that he has the case at all till he has looked it up.

The West reporters are improved somewhat by reason of the fact that the judges usually cite the official reports, and the publishers of the reporters add references to their own, as a matter of imperative necessity. The user thus has the advantage of two references to all citations. But the report of any case in the reporters seldom shows where that case can be found in the official reports; and this is usually unavoidable, by reason of the fact that the case appears in the reporters before it is officially reported. The only way to correct this omission would be to prepare new plates after the cases are elsewhere reported.

Of all the recognized and commonly used reports the L. R. A. are the most conspicuously faulty in this regard, by embodying the evils of both and the benefits of neither. That is to say, you cannot know that any particular case is to be found there till you have found it there, or have been referred there for it, because the series does not contain all the decisions of any jurisdiction; and when you do find it you are not informed as to any other place where it can be found, but must throw aside these books and continue your quest for the rest of the history of the case. In other words, you are not sure that you will find the case there, but you are sure that if you do find it you

will not be informed there as to those facts concerning it which you must ascertain. You cannot even learn from it the citation to the official reports, to say nothing of the page in these on which any part of the case will be found. The failure to refer to the official reports is probably due to the fact that the case usually appears in the L. R. A. before it is officially reported. This fact in no way tends to relieve the inference that the publishers of the series consider their set all sufficient in itself, and perhaps fear that reference to any other place where the same case could be found would detract from the credit due them from the profession for reporting it; for only in rare instances do cases appear in the L. R. A. until some time after they have appeared in the West reporters. Yet who ever saw at the head of the report of a case in the L. R. A. a statement that the same case would be found reported at such a place in such a reporter? The omission is the more vexatious because we know that so many of the most important cases are in the L. R. A., and often accompanied by excellent monographic notes.

If you attempt to use the Am. St. Rep. you meet the same difficulty as in using any set of selected cases, in this, that the search is an experiment till you find the case, for the set does not contain all the cases in any jurisdiction. But you have one very considerable reward assured you if your search is successful—you know you will be informed about the case to the extent at least of learning where it is to be found in the official reports, and the very page of such reports on which any given part of the opinion is printed. Reference to the parallel report in the reporters has also been added, so that in all volumes published in the past few years, you can get a history of the case nearly complete in that one place if you find it there at all. For some reason, probably that it would be too much free advertising of competitors, a business consideration for which the subscribers to the series must suffer the penalty, the publishers have not as yet seen fit to make reference at the head of any case in their series to the fact that the same case has already appeared in the L. R. A. or any other series of selected cases.

A mutual admiration society seems to have been organized by the publishers of the West reporters, the Am. St. Rep., and the L. R. A., which redounds greatly to the advantage of all users of any of these books. But none of these publishers seems entitled to much credit for the improvement. It would seem that they each concluded that mention of their publications in all the others would be valuable advertising, and therefore agreed to a trade, each agreeing to refer to the others in making citations in the body of the cases in exchange for having like reference made to their reports. These assumptions

may be false, and it is fitting that mention be made here of the reasons on which they are based, in order that each reader may decide for himself whether the conclusion is warranted by the facts. These are some of the reasons: About four or five years ago the policy was adopted by all of these publishers at about the same time, the arrangement between the West Publishing Co. and the Lawyers' Co-operative Co. seeming to precede by some months the compacts with the other publisher. The agreements seem not to include reference at the head of each case to the parallel reports of the same case. An explanation of this fact seems to be furnished by the fact that in the publication first made it would be impossible to do so, which would leave the other publishers without a *quid pro quo*. Lest any should suppose that these publishers had the good of the profession at heart, it ought to be observed that they still omit reference to the official reports in the citations unless such reference is made by the judge who wrote the opinion; at least several instances of this kind have been noticed recently. Perhaps due generosity should give the publishers more benefit of the doubt, for it is to be observed that none of them print on their coat-of-arms the motto: It is our business to do the lawyer to the limit, and tax him for all he will stand.

Notwithstanding the very limited nature of the plan of cross-reference thus adopted, it has proved of very great assistance in the use of the cases published since it went into operation. Much time is saved in chasing down the parallel citations; but more especially has it proved helpful in estimating the value of the cases cited in the opinions. It is only when the point is of especial interest, or when we are endeavoring to exhaust the authorities on it, that one will leave the case he is reading to run down every case cited in it; but very often he is greatly assisted by being informed that such a case is so important that it has been included in two or more collections of selected cases. Perhaps the assistance thus derived has not been more than obtained by thus being directed to the monographic notes on the subject, which these special reports contain.

While some of the criticisms in this article may seem rather severe, they are made without malice, and in the hope that a discussion may be aroused and a sentiment created which will demand a general improvement in the matters complained of. The complaints are not based on any theory, but are observations on inconvenience suffered in actual use of the books. The search for the law is no easy task at the best; and while we adhere to the precedent system we must have the reports and use them, and ought to have them in as convenient a form as may be.

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