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THE "LAW REPORTS."

 PROF. NATHAN ABBOTT.

The period between the years 1860 and 1870 marks an interesting stage in the history of law reporting. Within this period a system of reporting that had existed for upward of three centuries came to an end, and an experiment was begun whereby it was hoped to produce reports not merely in a new way, but reports that were to be materially different in form and substance from those of the previous system. The conception of the enterprise and its successful accomplishment is due to the energy and discretion of one man, whose history of the affair, after twenty years of trial had tested the merits and defects of his scheme, makes one of the most entertaining contributions to legal bibliography.*

Lawyers know the story of the Law Reports: to give an outline of it may not be uninteresting to those who are beginning to consult them.

For twenty years prior to 1860 the question, What improvement may be made in the system of law reporting? was the subject of reports to societies for promoting social science and law amendment, and of articles in the current lay and legal periodicals. The customary panacea, a "motion" in the House of Commons "for the appointment of a select committee to inquire into the expediency of appointing authorized reporters in the courts of law" fortunately was not prescribed. Notice of such a motion was given in 1855, but nothing further was done.

There is no doubt that the system of reporting was unsatisfactory, and the legal profession wanted relief from the evils which grew out of it. But to reform the system was an enterprise which timid men regarded as over-hazardous and the sanguine felt to be full of difficulty.†

It may be helpful to recall the method of reporting that was in use, and some of its defects, and the difficulties in the way of a change.

In the English courts, a judge is not obliged to give a written decision. He may give written decisions. Any barrister may make notes of the oral decisions, and selecting from them and the written decisions those he thinks of value may publish them as his reports, as often and in such form as his industry and ambition may prompt. For two centuries prior to 1785, whether or not a decision should be published, and whether or not it would be accurate, depended on the energy and intelligence of the individual reporter. The growth of commerce, the development of the

* The History and Origin of the Law Reports: W. T. S. Daniel, Q. C., London, William Clowes & Sons, 1884, pp. 359.

† G. W. Hemming, Q. C., The Law Reports, Law Q'tly. Rev., Vol. I, p. 237 (July, 1885).

law, and increase of litigation in the time of Lord Mansfield, occasioned a material increase in decisions, and the need was felt of having them reported more promptly and continuously than was the practice in the early method. To meet this need, in 1785, the publication of the Term Reports was begun as a *commercial enterprise* (Daniel, p. 267.)

In the preface to the first volume of these reports it was announced that they were to be published "within a short time after each term" of court, "the primary object of which is to remedy the inconvenience felt by every part of the profession of waiting two or three years till some gentleman of experience and ability had collected matter sufficient to form a complete volume." With the Term Reports began the system of reporting for profit and not for honor, a system which was maintained with increasing ill results, until put an end to in 1865.

What were the evils of the two systems? It is apparent, from comparing the dates of decisions with the dates of their publication, that the reporters were dilatory. Moreover it is not infrequent to find long lapses of time in which no decision is published, although the reporter may have made his notes, and these notes thereafter might become the best evidence of the law. When one considers the formalities with which the most trifling statute is announced, and the accuracy with which it is engrossed, and with this contrasts the fact that a decision materially affecting the status of life or property may be hidden away to be used or not at the convenience of some reporter, there seems an inconsistency in the method of perpetuating these two great branches of the law. Such a thing is possible but perhaps not probable; it was one of the purposes of the Law Reports to remedy this inconsistency.

To appreciate the state of that evil one might refer to the report of Sergeant Pulling, in 1849, to the Law Amendment Society, more especially to his allusion to "an eminent *Nisi Prius* reporter," who preserved "in MS. a whole pile of decisions of a late Chief Justice which he deemed *bad law*," and to the quotation from the preface of Watkins' Principles of Conveyancing, where Mr. Watkins perhaps after a hard experience, asked, "Is the law of England to depend upon the private notes of an individual, and to which an individual can only have access? Is a judge to say, 'Lo! I have the law of England on this point in my pocket; there is a note of the case which contains an exact statement of the whole facts, and the decisions of my Lord A or my Lord B upon them. He was a great, a very great man; I am bound by his decision; all you have been reading was erroneous. The printed books are inaccurate; I cannot go into principle. The point is settled by this case.' Under such circumstances, who is to know when he is right or when he is wrong? If conclusions from unquestionable principles are to be overthrown in the last stage of a suit by private *memoranda*, who can hope to become acquainted with the laws of England? * * * Is a paper, evidencing the law of England, to be buttoned up in the side pocket of a judge, or to serve for a mouse to sit

upon in the dusty corner of a private library? If the law of England is to be deduced from adjudged cases, let the reports of those cases be *certain, known and authenticated.*"*

To these defects in the reports must be added those occasioned by the undue stimulation of the number of reports by the spirit of commercial enterprise. To explain this a word should be said as to the meaning and signification of the "authorized reporters." Theoretically decisions reported by a barrister could be cited as authorities. Generally only those barristers reported who enjoyed the patronage of the judge of the court where decisions were reported. This patronage might take the form of sole privilege of access to the judge's written decisions, or the advantage of his revision of the reporter's notes of his oral ones. It also might take the form of exclusive privilege of citation in the judge's court. This privilege of citation, originally a necessity, grew into a right which was maintained by authority (Daniel, p. 268). Under this patronage and privilege, reporting became a monopoly with large profits. "The remuneration of the reporters was as high as £40 per sheet of sixteen pages,—a volume of Barnewall and Cresswell was worth £2,000 a year to the reporters" (Daniel, p. 268). It is apparent that the number of pages in a report meant something different to the reporter and publisher from what it did to the reader. A transcript of all the pleadings, a detailed statement of the facts, and arguments of counsel, with insertion in parentheses of comments of the judges, followed by the decision of each judge, presented as cheerful a prospect to the reporter as it was annoying to the lawyer. Under sanction of the privilege of citation, and in harmony with the doctrines of free trade the process went merrily on until in 1866, there were sixteen sets of authorized reports, and, as they could not be published contemporaneously with the decisions, there also were six publications that appeared weekly or monthly. But increase of numbers meant decrease in profits, so that in 1863 it was said, "the persons who report now are remunerated, a few, well—a few more, reasonably well—most of them shabbily—some *not at all* literally (Daniel, p. 49). Two results had attended this competition, the reporter was obliged to pad his reports, and the publisher to raise the price, until it was a burden to buy or read the reports. The cost of the entire series was £50 per year (Daniel, p. 255).

*An instructive illustration of this may be found in the opinion given by Mr. Hargrave in the Walpole Case (2 Hargrave's Juris consult Exercitationes, p. 70), where he says (p. 100), "In truth, as far as my researches hitherto enable me to assert, no such precedent is to be met with in our *printed* books. However it so happens that, fortunately for the interests of Lord Walpole, . . . there is in my possession a *manuscript* containing five judgments of the late Lord Camden whilst he was Lord Chancellor, carefully copied from his own handwriting. . . . I consider this case . . . as a precedent of solemn adjudication." (p. 107.) "Nor is it a little remarkable that this judgment of Lord Camden is one of the only five written judgments which his various court books, whilst he was Lord Chancellor, furnish." (p. 108.)

The case in manuscript was *Dufour v. Ferraro*. It had lain in secret for twelve years until Mr. Hargrave resurrected it, and it would be instructive to trace the influence of the decision as produced by him in his *Law Tracts*, vol. 2, p. 100, and in connection with *Orford v. Walpole*, 3 Ves., 125, in England, and *Izzard v. Middleton*, 1 Dessaus, 116, in this country.

It was estimated that the annual cost of such reports as were required by a considerable body of the barristers was £30 (Daniel, p. 12 and 51).

It is apparent that there was occasion for change in the method of law reporting. Acting on this supposition, May 18, 1863, Mr. Daniel prepared and circulated among the bar a paper headed "Suggestions for an Alteration in the Present System of Law Reporting." In this Mr. Daniel said "the evil is felt and admitted, the cause is patent. The stage of inquiry is passed. What is wanted is a remedy" (Daniel, p. 24.) A proposition had been made previously that the chancellor issue a royal commission to inquire into the evils. Mr. Daniel asserted that neither such a commission nor government aid was suitable, but that the remedy was to be looked for and could be found only within the bar itself, and proposed that "the members of the bar now engaged in reporting or such of them as should think proper, together with any other member of the bar who may offer acceptable services or co-operation, should form themselves into a body of associated reporters, and by means of a proper system of division of labor and editorial superintendence, undertake the preparation and publication in *weekly* numbers, at a moderate charge, of the decisions of all the Superior Courts of Law and Equity, including the Probate and Divorce Courts, the Admiralty Courts and the House of Lords and Privy Council." He invited an expression of opinion from the bar to which there was such encouraging response that on the 12th of December, 1863, he addressed a public letter to Sir Roundell Palmer, Solicitor General, "On the Present System of Law Reporting."

In this letter Mr. Daniel narrates at length the history of law reporting with the causes of the defects therein, and gives the details of his scheme of reform. In substance this was that a meeting of the bar be called by the Attorney-General, as the head of the profession, for the purpose of passing resolutions condemnatory of the then existing system. If such resolutions were passed by a well attended meeting supported by the leaders of the bar, Mr. Daniel further said "I should then suggest that the Benchers of the Four Inns of Court be memorialized by the meeting, represented by the president, to concur in the necessary measures for the appointment of a joint committee of the Four Inns . . . to be called the Council of Reporting, and to consist of fifteen members, of whom the Attorney-General, the Solicitor-General, and the Queen's Advocate, for the time being, should be members *ex officio*. The other twelve members to be elected and appointed by the Benchers of each Inn,—for the period of three years, and to be fairly selected from practicing members of each department of the bar, without reference to standing, so as to form a body who, from their position in the profession, would themselves be interested and would also fairly represent the interests of the rest of the profession in establishing and maintaining the constant efficiency of the "Reports . . . I propose that this body should act gratuitously." Provision was made for the appointment of editors and reporters subject to the approval of the

judges of the several courts, and "that the reporters so to be appointed and approved be recognized as officers of the respective courts, have a place assigned to them at the bar, and have access to and possession, for the purpose of reporting, of all copies of pleadings, evidence, papers, and documents connected with cases to be reported, which it is in the power of the court to authorize or afford." Weekly numbers of the reports were to be published for use of the profession and citation until the more complete reports shall have been published, which should be once in three months or oftener. The series to be called "The Bar Reports," and be the only reports citable as authority. The labor of reporting and editing to be directed toward rendering "these reports a work which will not only be a safe guide in the future administration of justice, but also by preventing the accumulation of useless and mischievous matter for the future, help to promote the study of law as a science." Reasons were given tending to show that at an annual cost not to exceed 10£ 10s. subscriptions could be had from the profession sufficient to provide not only for the expenses of printing and salaries of reporters and editors, but for a fund with which to compensate vested interests or to pension superannuated reporters.

Early in November, at the suggestion of Sir Roundell Palmer, who now was Attorney General, a paper requesting him to call a meeting of the bar was circulated among the barristers, and was signed by three hundred and eighty-two, including the leaders of the equity bar with two exceptions, and twenty-six leaders of the common law bar. November 21st, in response to this requisition, the Attorney General called a meeting of the bar, to be held December 2d, in the dining hall of Lincoln's Inn, "For the purpose of ascertaining the opinion of the bar as to the existing system of law reporting, with a view to the amendment thereof."

This meeting was duly held, and it is estimated that seven hundred members of the bar attended. It was the opinion of the meeting that the system of reporting required amendment, and a committee of twenty-two, composed of distinguished law officers and leaders of the bar, was appointed to prepare a plan to that end. The committee at once set to work. Invitations to the number of several thousand were sent to the judges and profession, requesting suggestions. Among the number of responses printed by Mr. Daniel, those of Lord St. Leonard, G. W. Hemming, Esq., and Joshua Williams, Esq., are of especial value. A sub-committee obtained facts, and reported as to the mode of recording and reporting decisions in Europe and the United States. The committee did not agree as to the method of reform, but, a report was signed by sixteen of the twenty-two, and was submitted to a meeting of the bar July 1, 1864. The report set out the doings of the committee and contained a scheme of reporting. This provided; 1st, That the reports should be under the supervision of a council of reporting, composed substantially as suggested by Mr. Daniel in his letter of September 12, 1863. 2d, That the reports

should be prepared by reporters under the supervision of editors,—all cases useless as precedents to be rejected. 3d, That there be two editors with salaries of £600 each, and twenty-four reporters with salaries from £500 to £100 each. All the salaries aggregated £10,700, of which one-half was to be payable on a contingency as to profits. The editors and reporters to be barristers, to be appointed and removed by the council, the appointment to be subject to the approval of the judge of the court in which he was to report. In selecting reporters, preference to be given existing reporters. 4th, The profession to be invited to subscribe to the reports according to a scale of prices submitted, payable in advance, not to exceed 5£ 5s. per annum for the entire set, unless the total subscription fell below £10,000, when a new subscription might be issued at advanced rates. The proceeds of sale of reports to be applied to expenses of publication, other expenses and salaries of editors and reporters in a certain order, and lastly to augmenting the salaries of editors and reporters, and to prove a reserve fund to meet certain contingencies.

This scheme was disapproved of by several men whose judgment was entitled to respect, and was actively opposed by several of the existing reporters. But at an adjourned meeting of the bar, November 28, 1864, the report of the committee was adopted. Shortly after this the societies of the Inner and Middle Temple, of Lincoln's Inn and the Incorporated Law Society elected members of the Council of Law Reporting. Gray's Inn and Sergeant's Inn did not concur until after the scheme was well established and they had received a second invitation.

Negotiations were now begun with parties in interest, and subscriptions were circulated. It was not clear that sufficient money would be pledged, or that fair terms could be made, because of the uncertainty of the venture. But a most advantageous contract was made with William Clowes & Sons, printers, and a three years' guarantee of the first half of the salaries of the editors and reporters having been signed by a sufficient number of barristers, no trouble was had with persuading most of the old reporters to join in the enterprise.

The judges generally sanctioned the affair, and November 2, 1865, the new reporters took their seats in the several courts in Westminster Hall, Lincoln's Inn and at the Rolls in Chancery Lane. January 1, 1866, the first volume of the new series of "The Law Reports" was issued.

The subscriptions had amounted to over £20,000 and 5,000 volumes were printed. There was no longer doubt as to the financial success of the scheme. The annual reports of the Council of Law Reporting, which is now incorporated, tend to show that lawyers are capable of being financiers. At least by the report of 1883, the latest to which the writer has access, it appears that the subscriptions for 1883 are £25,732. The total receipts, including *income from investments*, £29,247. Receipts in excess of expenses, £6,455. And that not only have the weekly and permanent Reports been furnished to subscribers for £4, 4s., instead of £5, 5s., as at

first, and £30 to £50 under the old system, together with extra volumes, such as digests and sets of the statutes, but the reporters and editors have received their salaries and bonuses from time to time, and a contingent fund of £20,000 has been accumulated from which to pension off superannuated reporters.

An inspection of the title pages of the Law Reports will show that most of the old reporters joined the staff of the new reporters. This is true of all but three, Mr. Beavan, Mr. Hurlestone and Mr. Smith, and their reports soon ceased to appear. June 10, 1869, in the preface of the 36th and last volume of his reports, Mr. Beavan said, "More than thirty years have now elapsed since this, the longest series of authorized reports ever published, was commenced," and after expressing his obligations to the several branches of the legal profession concluded "with these remarks I take leave of the profession in my character of the last of the authorized reporters of the court of chancery and commit my three dozen volumes to their indulgent readers."

It would be profitable to give the plans suggested in opposition to the scheme of Mr. Daniel and consider whether if one or more of them had been adopted the Law Reports might not to-day be somewhat nearer the ideal of scientific reports. It is not uncommon to read criticisms on the Law Reports, unfortunately most of them are trifling and undignified. Certainly it may be affirmed that the profession in England and America is under obligation to Mr. Daniel and the Council of Law Reporting for initiating and maintaining so excellent a series of reports. Inaugurated so auspiciously, maintained so sumptuously, and edited so intelligently, it is possible that the "Law Reports" may become a considerable factor in aiding in a solution of the problem of whether the embarrassment of the legal profession and the public by reason of the super-abundance of reports shall find relief in codification or in a more and more scientific system of reporting case-law.