Cornell Law Review

Volume 10
Issue 2 *February 1925*

Article 1

Art of Judicial Reporting

Alden I. Rosbrook

Follow this and additional works at: http://scholarship.law.cornell.edu/clr

 Part of the Law Commons

Recommended Citation
Alden I. Rosbrook, *Art of Judicial Reporting*, 10 Cornell L. Rev. 103 (1925)
Available at: http://scholarship.law.cornell.edu/clr/vol10/iss2/1

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

The Cornell Law Quarterly

VOLUME X FEBRUARY, 1925 NUMBER 2

The Art of Judicial Reporting

"Report me and my cause aright." *Hamlet, Act V, Scene 2.*

ALDEN I. ROSBROOK†

Judicial reporting, which had its beginnings more than six hundred years ago, has developed into a distinct art of the legal profession commanding the services of lawyers astutely trained and possessing an instinctive editorial ability not common to the profession generally. An earnest effort has been made during the last fifty years by official reporters to improve the reports,—to make their contents readily available and their use more convenient. The profession, generally, knows very little about the actual work done by reporters, and it is only when errors are found in the reports that the existence of the reporter is recalled. The history of law reporting in the early days is obscure, and it would serve no good purpose to attempt to trace it. However, a discussion involving a consideration of the art of law reporting as practiced in England would not be complete without some reference to the origin of the present system in use in that country.

For some time prior to 1843, the legal profession in England had been dissatisfied with the system of reporting then in use. At that time the judgments of the courts were reported by private enterprise. The principal objections were the delay in publication and the expense of keeping a library complete and up-to-date. Active steps to improve conditions were taken in 1843, but the effort proved abortive, and it was not until 1848 that the Law Amendment Society

†Of the Albany Bar, and Deputy New York Supreme Court Reporter.

The writer is deeply grateful for the reading of the manuscript of this article and the suggestions and criticisms made by Sir Frederick Pollock, editor of the Law Reports, London, England, Dr. Hugh H. L. Bellot, secretary of the International Law Association, London, England, Dean Roscoe Pound of the Harvard Law School, Professor John H. Wigmore of the Northwestern University School of Law, Hon. Frank Irvine, Ithaca, N. Y., and Mr. George W. Greene, of the Albany, N. Y., Bar.

The writer also wishes to express his appreciation of the assistance given him by many reporters in this country in outlining the work in their respective offices.

took up the subject with a determined purpose to overcome the existing evil. A special committee published a valuable report on existing conditions, which was circulated extensively, but it failed to suggest a definite remedy, and for the second time the contemplated reform resumed its slumber. Not for long, however, was the subject to rest, and in 1853 the same society appointed another committee, which suggested that the remedy lay in the appointment of official reporters and the publication of the reports at the expense of the government. But this suggestion met with scant approval. One effect, however, was that a very active and militant sentiment was aroused and continued to grow until 1863 when W. T. S. Daniel, Q. C., took up the burden and without fear carried on the advocacy of reforming the system of Law Reporting. A paper prepared by him and circulated among the members of the Bar received instant and interested attention. The Attorney-General called a meeting of the Bar, which was held early in December, 1863, to ascertain the opinion as to the existing system of Law Reporting with a view to its amendment. So keen was the interest that more than 700 members of the Bar attended, and a committee of twenty-one was appointed to formulate a plan. The report of the committee which was submitted at a meeting of the Bar in July, 1864, brought forth a storm of protest and criticism by those who, through fear of the untried or a knowledge of past failure, considered that the scheme was unworkable and did not furnish a remedy for the existing evil. Some opposed the plan because they thought the burden should be assumed by the Government. But parliament complacently ignored the suggestion and the Government very plainly said that Law Reporting was of no concern to it and must be taken care of by the Bar. About a year after the committee of twenty-one was appointed and on November 28, 1864, its report was considered by the Bar at a meeting held at Lincoln's Inn Hall and was adopted.

The plan finally adopted, which, with some modification, is in force today, provided for a Council of Law Reporting to be composed of members to be appointed by the several Inns of Court and the Incorporated Law Society, representing solicitors, and to include, *ex-officio*, the attorney-general, the solicitor-general, and the Queen's advocate. In later years, the Bar Council has been represented. The reports were to be prepared by reporters under the supervision of two editors, both of whom were to be appointed by the Council. The appointment of reporters in each court was to be subject to the approval of the presiding judge. It is to be noted, however, that the House of Lords appoints its own reporters. Both the reporters and

the editors were to be permitted to practice. The Council, which was subsequently incorporated, proceeded to formulate a plan and commence its work, and publication began on November 2, 1865. The plan functioned far more successfully than many of its supporters had hoped.

The method of reporting in England has changed little since the institution of the Law Reports. In most cases the Judge does not render a written judgment, called in this country the opinion of the court. The reporters must attend at court to take down the oral judgments delivered and after three weeks to two months, the reporter, having in the meantime decided whether the case should be reported or not, hands his manuscript report to the editor. All judges see their judgments in proof as a matter of course and correct them if necessary; some of the judges correct their judgments with a great deal of care.

Editorial suggestions to the judge are seldom made, and then only to point out some apparent specific error in the judgment (opinion). Editorial amendments, other than mere corrections of verbal inaccuracies, are made, if required, in consultation with the judge. The headnotes are shown to the judges, but they do not often comment upon or change them. Under the English system, there are no weekly advance sheets containing a full publication of the cases, but a prompt note of the case generally appears in "Weekly Notes," a weekly publication of the Council, and monthly parts are issued ready for binding.

The time required for publication of a reported case varies considerably. The promptness of publication depends on several conditions. Ordinarily a case is published within two to four months after the decision is handed down.

Law Reporting in this country has gradually changed from unofficial reporting, sometimes the work of the judges themselves, but more often a commercial venture carried on by a lawyer, to that of official reporting by a reporter, a constitutional officer in several of the states, appointed by the court to hold office for a definite period or at the pleasure of the court.

The office of official court reporter was first established in this country in 1817. The Federal statute then enacted[1] provided for reports of the decisions of the Supreme Court of the United States and the appointment of a reporter. Gradually the elimination of

[1] U. S. Stat. at L., 1817, Sess. II, Ch. 63.

the unofficial reports has progressed until at the present time all the courts in this country have official reports, prepared in somewhat different styles and with varying degrees of effectualness. We still have unofficial reports which are used on occasions when the official reports are not at hand and in jurisdictions wherein the volume of production is so small that the official volumes are published infrequently. Again, some lawyers buy the unofficial edition on the ground of economy and a belief, generally lacking foundation in fact, at least so far as New York is concerned, that the opinions are printed sooner in the unofficial reports than in the official. The experience of law librarians is that lawyers will not use an unofficial report when the official report is available. This is surely a very certain indication of the wishes of practicing members of the bar.

Moreover, the use of the official reports is deemed necessary by the courts, since it is generally provided by rule of court or statute that the official citation of a case must be given in briefs if the case has been officially published. And virtually all the reporters in the many jurisdictions in this country say that the lawyers in their respective jurisdictions have a decided preference for the official reports. This is so because the official reports are absolutely reliable and represent the real and not the hearsay evidence of the law.

Reports Compared

A comparison of the reports will, in a measure, develop that which is to be commended if there is any weight to be attached to uniformity of action in the same circumstances. For that purpose then, each part of a report will be discussed separately. But let it be said now, that the mere fact that many reporters follow a particular method is not conclusive that that method is the best. Many changes for the better are prevented by stubborn adherence to ancient custom. If the practical use of a report suggests, and logic and good reasoning show, that another method should be adopted, then the mere weight of numbers should not prevent its use. The blind following of precedent is easy, but not necessarily wise. Cowper said:

> "To follow foolish precedents and wink
> With both our eyes is easier than to think."

Table of Cases Reported

All of the reports contain a table of the cases reported in the volume. That this table is a necessity needs no argument. Out of

thirty-four lawyers residing in different sections of the State of New York, who were asked if they used this table, thirty-one answered, "yes," and three answered, "seldom." In some jurisdictions there are added features apparently for convenience of use. In Illinois the name of the judge writing the opinion follows the title of the case. In the New York Reports (Court of Appeals) and in other reports there is a separate list of the opinions written by each judge. In Wisconsin the catchlines of the headnote follow each case in the table, while in Utah the nature of the action is stated. In Vermont the cases are arranged under the names of the counties in which they arose. In New Mexico and Louisiana parallel citations to the National Reporter system are included. These added features are of little, if any, use in the table, which primarily is for the purpose of loeating a case in the volume. If the index is well made, a statement of the nature of the action or the recital of eatchlines can be of no conceivable aid. Listing the opinions written by each judge is perhaps of some use to the practitioner who has forgotten the name of the case and remembers merely that the opinion was written by a particular judge. But in that case the index should furnish the desired information, unless the attorney has forgotten the principles involved. Such a list is, of course, a standing testimonial to the industry and energy of the judges, and is useful, if for no other purpose, as a ready and easy method of determining how many opinions each judge has written.

Table of Cases Cited

There is a difference of opinion as to the value of a table of the cases cited in the opinions. So much has been done by law publishers to supply the profession with tables of cases which give a very accurate history of the citation of each reported case, that a table in the reports of cases cited in the opinions is becoming more and more a thing of little value—a waste of good white paper. An inquiry directed to more than fifty New York lawyers as to the value of that table was answered by all but one with a statement that the table was never used and should not be printed. A cumulative table might be of use. Still is must be remembered not only that private publishers have supplied the need but also that a cumulative table would be of real value only if the State published a complete table of cases with the history of each citation and kept that table up to date. A table of cases cited is not published in the reports for Alabama, Florida, Illinois (Appeals) Iowa, Kansas, Kentucky, Mississippi,

New York (Miscellaneous), Ohio (Court of Appeals), Oklahoma, Pennsylvania State, Tennessee (Civil Appeals), and South Dakota.

In Arizona, Oregon, Porto Rico, Rhode Island, and Wyoming, there is a table of all the cases cited in the volume and a separate table of the cases from the local jurisdiction. In Delaware, Georgia, and New Mexico the table contains only cases from the respective jurisdictions, and in Montana, which follows the same plan, the table of Montana cases cited states the point to which each case is cited. In Tennessee (Supreme Court) and Virginia there is a separate table of cases criticized, distinguished, or explained; while Missouri New York (Court of Appeals), and Tennessee (Supreme Court) have a separate table of cases distinguished, disapproved, or overruled. The Indiana, Porto Rican, and Wisconsin reports have a table of the text books cited in the opinions. In the Nevada reports there is in addition to the table cases alphabetically arranged, a table of Nevada cases arranged according to volume and page, while in Connecticut the cases cited are arranged in the table under each jurisdiction. In New Brunswick the table of cases cited contains a statement of the year in which the decision in each case cited was rendered.

Table of Statutes

There is no table or list of statutes construed and applied by the court in the reports in Colorado, Illinois (both reports), Maryland, North Carolina, North Dakota, Nova Scotia, Ohio (Court of Appeals), Tennessee (both reports), Texas (Criminal), and the Indian Appeals of the English Law Reports.

The statutes construed and applied are a part of the index, in the reports in Alabama, Arkansas, British Columbia, Delaware, Florida, Georgia (both reports), Kansas, Kentucky, Minnesota, Mississippi, Missouri (Supreme Court), Montana, New Brunswick, New Hampshire, New Jersey, New Mexico, all reports of New York, Oklahoma, South Dakota, Texas (Supreme Court), Utah, Vermont, Wyoming, and in the English Law Reports (King's Bench Division, Chancery Division, and Appeal Cases).

In all other reports the table of statutes construed and applied is separate and is usually to be found in the preliminary matter following the table of cases. In many jurisdictions the reporter has greatly increased the usefulness of the table of statutes by stating either the exact holding of the court on the statute or at least the nature of the question under consideration. This practice, which is to be commended, is followed by the reporters in California (both reports),

Connecticut, Massachusetts, Ohio (State), Rhode Island, and West Virginia.

That it is far better and more useful to have the index include a list of the statutes construed and applied under appropriate headings with a statement of the decision of the court is indicated by the fact that thirty-four New York lawyers, whose opinions were asked, all stated positively that the index was the proper place for a list of the statutes construed and applied. In some of the reports in which an attempt has been made to list the statutes construed and applied under appropriate headings in the index, the plan adopted has not been well thought out nor fully developed and possesses that most irritating of all things to a lawyer, "See Master and Servant," or whatever the cross reference may be. Why, in the name of good reporting, a lawyer, after reading in the index a construction of the very statute he is interested in, should be compelled to look in some other part of the index to find the citation to the case, is one of the things that is not easily understood.

Titles of Cases

I have so far been discussing the preliminary matter in a report. I will now consider the question of the titles of the cases printed. The reporters follow widely different practices—all the way from simplicity to elaborateness. There are two theories concerning the titles of the cases in the reports. One is that the report is a record of the work of the court, and, that, therefore, the title should conform closely to that given in the papers on appeal. As incidental to this there exists a notion that a case may be found more readily if a full title is printed. The opposing theory is that the report of the case is not the record of the particular litigation, but is merely the written evidence of the law, and, therefore, it is not necessary that the title should be more than the surname of one party against the surname of the other. Between these two extremes there ought to be a form of title that will satisfy the requirements of all.

The simplest form of title is "Doe v. Roe." In this form the first names of the parties are not given and there is nothing to show which is the appellant and which the respondent, nor is there anything to show whether one or the other of the parties is suing or being sued in a representative capacity. This is simplicity to the point of distraction, and is hardly to be commended. There should be at least a characterization of the parties, as appellant and respondent, or whatever other phraseology may be necessary to show

the relation of the parties on the appeal. However, this simple form of entitling cases in the appellate reports is used by many reporters. The first names of the parties are not given in the titles of cases in the reports in Alabama, Arkansas, Colorado, Georgia, Indiana (both reports), Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, New Mexico, Ohio (Supreme Court), Oklahoma, Oregon, Pennsylvania (State Reports), South Carolina, South Dakota, Utah, Wisconsin, Wyoming, Porto Rico, the Canadian reports (excepting New Brunswick), and the English Law Reports. Thus it appears that in twenty out of sixty-eight reports examined, the first names of the parties are not printed. In Virginia the first names are given sometimes.

With the exception of Montana, Pennsylvania (State Reports), South Dakota, Wisconsin, and Porto Rico, and Appeal Cases, Chancery Division, and Indian Appeals of the English Law Reports, the relative position of the parties as appellant or respondent is not stated in the titles of the cases printed in any of the above reports. Furthermore, the relation of the parties on the appeal is not stated in the titles, though the first names of the parties are given, in Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey (Equity), North Carolina, Ohio (Court of Appeals), Rhode Island, Tennessee (both reports), Texas (both reports), Virginia, West Virginia, and New Brunswick. In Maine the relation of the parties on appeal sometimes is shown.

Summarizing, there are twenty-nine reports in which the first names of the parties are not stated in the titles and thirty-eight reports in which the relation of the parties on appeal is not shown.

The title of a case is frequently a material aid to the reading of the opinion. Especially is this true where the opinion is written in terms of the appellant and the respondent. In such cases, if the parties are characterized in the title, understanding the opinion is not as difficult.

However, the fact remains that in about forty per cent of the reports the first names of the parties are not given and in sixty-four per cent of the reports the parties are not characterized in the titles as appellant or respondent. It would seem, therefore, that more than a majority of the reporters are of the opinion that convenience of use does not demand such a characterization. Or, it may be that the practice is an inherited custom, and that the question has never been seriously considered. It was the practice in years back to do just what these reporters are now doing. The change to the form

now used in the New York reports began about the middle of the last century and has grown slowly but steadily ever since. Of course from the standpoint of precedent the title is essential only as a means of identifying and locating the case. No one cares whether the first name of a party is "John" or "James". Who is there who knows now the first name of "Shelley"? In the citation of cases the surname only is used and it is never stated whether the plaintiff or the defendant is the appellant. And so, from the standpoint of citation only, there is no necessity for stating the first name of the parties, and no need for stating whether the plaintiff or the defendant is the appellant. But, in order to read the opinion intelligently, there should be a statement of the relation of the parties on the appeal.

Where there are two or more parties plaintiff or defendant, it is the practice of most reporters to use one name and state that there are others. In Idaho, Kansas, Kentucky, New Jersey (Law), Vermont, British Columbia, and Nova Scotia, if there are two appellants or two respondents, both names are given, but if there are more than two, only one is given, followed by a statement that there are others. This is rather inconsistent and can find little support in reason. If it is important to know the names of two parties appellant or respondent as the case may be, it would seem to be just as important to know the names of all where there are more than two. In Arizona, Hawaii, Missouri (Appeals), and the Philippines, the names of the parties are set out fully, while in Arkansas it does not appear in the title how many parties there are. The very simplest form of title is used in Arkansas.

In some of the reports, notably all those in New York, the relation of the parties to the cause of action is stated. In most reports in which this is done, the name of the party is followed by a single indicative word as "Administrator", "Receiver", and the like.

It is my opinion that the form of title used in the New York reports (Court of Appeals) and the Appellate Division, is the most satisfactory for all purposes. The following titles taken from those reports are typical:

"S. W. Bridges & Co., Inc., Appellant, v. Charles E. Barry et al., Copartners under the Firm Name of Henry W. Peabody & Company, Respondents."[2]

"Herbert Cox, Appellant, v. Lykes Brothers, Defendant, and United States Shipping Board Emergency Fleet Corporation, Respondent."[3]

---

[2]237 N. Y. 281 (1923).
[3]*Ibid.*, p. 376 (1924).

"In the Matter of the Estate of Frederick G. Bourne, Deceased. Arthur K. Bourne et al., Appellants; May B. Strassburger et al., Respondents."[4]

"Dexter Sulphite Pulp and Paper Company, Respondent, v. William Randolph Hearst, Appellant, Impleaded with James E. Campbell and Others, Defendants."[5]

"Isidore Friedman, as Administrator, etc., of Louis Friedman, Deceased, Respondent, v. New York Central Railroad Company, Appellant."[6]

CATCHLINES FOR HEADNOTES

It is quite generally thought that the black letter catchlines preceding a headnote are essential to a first-class headnote. Still there are a few reporters who do not catchline their headnotes. Catchlines are not used in the United States Supreme Court reports, nor in the reports of Connecticut, Georgia, New Hampshire, New Jersey (both Law and Equity) and New Mexico, and seldom in the Florida reports. Good reporting demands that the headnote be catchlined. There is a difference of opinion as to the style of catchlines, but there are few who advocate leaving out the catchlines. Catchlines properly written give a fairly comprehensive view of the case and enable the reader to read the headnote intelligently, the same as a good headnote helps the reader in his subsequent reading of the opinion.

There are two types of catchlines. One is non-assertive, e. g., "Contracts—action for breach." The other is assertive or positive. This style states the nature of the action and the rule applied. The following is a good example: "Sales—action for refusal to accept delivery of paper—evidence shows making of contract—rejection of goods on ground of price precludes defendant from raising other objections—'prevailing price' where there is but one source of supply is price asked by producer plus reasonable profit—measure of damages is difference between contract price and cost of production." The non-assertive catchlines are much easier to write, requiring little ingenuity and little thought. Those who favor them say that the purpose of the catchlines is merely to indicate the nature of the action and the subject or principle of law under discussion. In view of the fact that in the early days of reporting this was the only style of catchlines used where any were used, one reaches the conclusion that here again inherited custom has prevented

[4] *Ibid.*, p. 341 (1924).
[5] 206 App. Div. (N. Y.) 101 (1923).
[6] *Ibid.*, p. 169 (1923).

active thinking on the comparative worth of the two styles. However, if thought, and not blind following of the past has preceded the adoption of this style of catchlines in those jurisdictions wherein the reporter uses non-assertive catchlines, and this type of catchlines has been adopted after deliberation, then it must be admitted that the prevailing opinion is in favor of non-assertive catchlines. But I believe that the question has not been seriously considered in many jurisdictions and that where it has been so considered the conclusion reached has been aided somewhat by the difficulty of writing assertive catchlines that will carry the headnote and not be unreasonably long.

Assertive or positive catchlines are used in the reports in Alabama, Delaware, Louisiana, Maine, Mississippi, Nevada, New York (Appellate Division and Miscellaneous), Oregon, South Carolina, Tennessee (Supreme Court). The same form is quite generally used in Illinois (both reports), Missouri (Appeals), New York (Court of Appeals), and West Virginia. The non-assertive catchlines are used in all other reports except those in California (both reports), North Dakota, and Vermont there is an occasional use of the positive catchline.

Thus it appears that, there are eight reports in which catchlines are not used, forty-five reports in which the non-assertive catchlines are used exclusively or nearly so, nine in which assertive or positive catchlines are used, and six in which the catchlines used are generally of the assertive or positive type.

Whether it is better to place all the catchlines at the beginning of the headnote or catchline each paragraph is a difficult question to answer. There is merit in both systems and likewise each is subject to criticism. Those who argue that it is better to catchline each paragraph say that by so doing the reader can the more easily find the precise point in the headnote in which he is interested. That may be so, but as against this there must be set off the fact that a headnote so written must, if it is well written, be either longer than one with all the catchlines at the beginning or the paragraphs must be written in the style of digest paragraphs, stating an abstract rule of law. To this it is replied that it is not necessary to write the headnote in any different style, but all that is required is to put in catchlines at the beginning of each paragraph. But this argument loses sight of the fact that in a headnote not divided by catchlines there is an interdependence between the paragraphs. All succeeding paragraphs are very apt to depend for understanding on what is stated in the opening paragraph. The continuity is broken by the insertion of catchlines. The only way to overcome this is by repeating, to some

extent, what has preceded, or confining the headnote to an abstract statement of a rule of law. This is not good headnote writing.

Catchlines placed at the beginning of the headnote, if properly written, will carry every paragraph in the headnote, and the paragraphs of the headnote will be in exactly the same relative position as the separate lines in the catchlines, so that one who has read the catchlines can almost instantly locate the point in the headnote. Again, catchlines at the beginning of the headnote, if properly written, give the reader the substance of the headnote and of the case and do away with any need for running through catchlines at the beginning of several paragraphs to ascertain the nature of the case and the rules announced.

But, whatever weight common practice may have in determining that a given thing has merit, that weight tends to establish that it is better to catchline each paragraph of the headnote. In the sixty reports in which catchlines are used, catchlines are placed at the beginning of each paragraph in the headnote in forty, and at the beginning of the headnote in twenty. Notwithstanding this seemingly overwhelming majority in favor of the first method, I feel that it does not represent the best class of law reporting.

There is about as much reason for dividing a headnote by catchlines as there would be in dividing an opinion by inserting headnote paragraphs at the beginning of the discussion of each point in the case.

In Iowa, if a headnote has more than two paragraphs, the catchlines for each paragraph are used also as side notes in the opinion at the beginning of the discussion relating to that point. In the Ohio Court of Appeals reports there is a main catchline above the title of the case which shows the nature of the action. In Washington a reference is made to the section of the official digest wherein the same subject is treated. And in Montana, in addition to catchlines at the beginning of each paragraph there are main catchlines at the beginning of the headnote.

HEADNOTES

It is now to some extent, and has been for all time past, considered a privilege of the profession to find fault with court reporters. Most lawyers think that it is a very simple matter to write a good headnote or syllabus. It is, if one knows how. But experience has shown that while every lawyer deems himself capable, but few can actually perform the work. It is a work requiring special and peculiar skill. Practice alone, in the absence of the particular ability, will not develop a good writer.

The headnote writer should keep in mind that a headnote or syllabus is a statement of the rules of law announced in the case correlated to the facts.

In style, the headnote should be a direct statement of the rule of law followed by or incorporated with the facts necessary to show its application. In other words, the inverted form of writing in which the writer states a series of facts followed by the statement of the rule is to be avoided at all times. This style compels the reader to carry in his mind a series of facts until he has reached the statement of the rule, which may and often does necessitate a re-reading of the facts in order to understand the application of the rule. This style, always bad, is too frequently used. Another style to be avoided—a style very similar to the one just stated but somewhat different in form—is what may be called "held" headnotes. Sometimes this style cannot well be avoided without making the headnote a long and involved one. But generally it will be found that, with a little study, the simple, direct style of headnote may be written. The temptation is to recite facts and then state the decision of the court after the word "Held." This is following the course of least resistance.

Whenever possible, and in many cases it is possible, headnotes should be written in the impersonal form. It is better to use, say, "buyer" in an action by a buyer to recover damages for breach of a contract of sale, than "plaintiff," but if it is found to be necessary to use "plaintiff," then that word should be used throughout the headnote, and the other party should be spoken of as the "defendant" throughout the same headnote. In writing headnotes in the impersonal style, the writer should be careful not to fall into the habit of writing mere abstract rules of law. Such a headnote has little if any value.

Generally better results are obtained by writing in the present tense, as one would in a text-book. The reader will be able to apply the rule announced in a headnote so written to the facts of his own case more readily than where it is written in the past as the statement of the holding of the court. A headnote is not primarily a statement of the decision of the court in the particular case, but is a statement of the law as declared by the court, which should govern in any case presenting the same facts. The particular case is merely the vehicle to carry that pronouncement to those within the jurisdiction of the court. And therefore, the headnote should be so written as to announce a rule for the guidance of all rather than as the record of the result of an action which has made it possible for the court to state the law that should apply under circumstances the same as or similar to those appearing in that action.

The use of letters to represent parties to the action should be avoided. The names of the parties or of any other persons connected with the case never should be used except in extreme necessity. The words "plaintiff" and "defendant" should be used as little as possible and the words "appellant" and "respondent" only where the situation in the particular case makes their use imperative.

The headnote writer should avoid, as much as possible, the use of quotations. Occasionally, it is necessary to quote where the construction of a statute, contract, or will is involved. When it is necessary, care should be taken to quote only the words or phrases under construction.

Fact cases are troublesome. When the question before the appellate court is whether or not the verdict is contrary to or against the weight of the evidence, there are two courses open to the reporter—he may recite the salient facts with the conclusion reached on appeal, or he may simply state, after having stated the nature of the action, that the verdict is contrary to the evidence or against the weight thereof, as the case may be. Sometimes one course is the wiser and sometimes the other. It is very largely a matter of discretion.

There is no place in a headnote for argument or for the reasons upon which the decision is based. A headnote is not the opinion. But care must be taken to distinguish between the reasons supporting a rule and a part of the rule or the facts to which it is applied introduced by "since," "where," or like words.

A few reporters cite in the body of the headnote the cases followed, disapproved, distinguished, or criticised by the court. This should not be done. But it is a convenience to the reader to have a citation of such cases at the foot of the headnote, warning him that certain cases, some or all of which he may have read, are approved, distinguished, criticised, or overruled by the instant case. This aid to the profession should be more widely adopted. Wherever it is in use it is appreciated and approved by the bench and bar.

A dictum may be placed in the headnote at the discretion of the reporter. In most instances, unless the particular court is given to wandering into problematical territory, it is wiser to include a dictum in the headnote. If that is done, it should be introduced by some word or words indicating that it is a dictum merely. Some reporters introduce a dictum by the two words in italics, "It seems." This, if understood by the profession, furnishes sufficient warning to the reader that what he is reading has not the weight of authority to support it, but a foundation of reason only.

It is not meant, however, that the practice, adopted by those engaged in the commercial publication of reports, of headnoting every statement of law the judge makes, should be followed. Statements of law used by the court incidently arguendo should never be headnoted. But it not infrequently happens that the court sees fit to declare that under somewhat different circumstances another rule would apply. Such a statement when made for the information of the trial court on a new trial may possibly not be a dictum, but if it is, it should be written into the headnote. Again, a dictum on a question of practice is almost as valuable as a rule of law coming within the scope of the decision. Such a dictum should be headnoted.

The reporter should bear in mind, in deciding whether or not to headnote a dictum, that many obiter dicta have become, by subsequent decisions, rules of law, and that a number of trite expressions stated arguendo have become famous quotations. Most lawyers remember Chief Justice Marshall's statement in *McCulloch v. Maryland*,[7] a statement that has been quoted over and over, that "the power to tax involves the power to destroy."

Lack of confidence or a lackadaisical disposition induces some headnote writers to use the exact words of the opinion, often with ludicrous results. The headnote writer who does this either cannot surround the case or else he is building a defense to any criticism, which he will be able to answer by saying, "I used the exact words of the court." A writer should not strain himself to garner from the opinion a phrase here, a clause there, and a sentence somewhere else for the purpose of tying them together to make a headnote. However, there may be in an opinion a sentence or two or a paragraph which states the rule exactly. If so, it may be used. But a headnote should never be written with the notion that it can be defended successfully by stating that the exact words of the court were used. In some of the opinions of all judges, and in nearly all the opinions of a few judges, there will be found a precise statement of the rule of law announced correlated to the facts of the case. The writer should use it and be thankful that he is so fortunate. It is a temptation for every headnote writer to pick up sentences found in the opinion of judges who are masters of English expression—statements that for purity of diction, simplicity, and clearness of expression at once command the attention of the reader. Only in rare instances can the writer use these gems of English in the headnote. To take them from the context of their surroundings is to rob them of their beauty. And beyond that, they seldom, if ever, constitute good headnote material.

[7] 4 Wheat. (U. S.) 316, 431 (1819).

I recall the headnote to a recent opinion of the court of last resort in one of our largest states which, though taken almost literally from the opinion, stated neither the nature of the action nor the ruling of the court. The profession has a just cause for complaint against a reporter who does such things.

The paragraphs of a headnote should seldom exceed one hundred and fifty words. If they generally are longer than that or if generally they reach that length, it may safely be said that something is wrong. Likewise, there are few cases which require a headnote including catchlines of more than one-half page. Occasionally, an opinion covering many points may call for a longer headnote, but that is the exception. The reporter should keep constantly in mind that he is not rewriting or paraphrasing the opinion, but that his sole work is to state the rules of law correlated to the facts of the case.

In many reports each paragraph of the headnote is numbered, and a number corresponding is placed in the margin of the opinion at the place where the discussion of the rule stated in the paragraph begins. This is no doubt a convenience and a help to the profession in locating the rule and discussion in the opinion. Twenty-five out of thirty-two representative lawyers in the State of New York said that it would be of considerable service if this were done, and the remaining seven were of the opposite opinion. And furthermore, twenty-two lawyers stated that it would be of more service to number the paragraphs of the headnote as stated than to insert at the end of each paragraph the number of the page on which the statement of the rule and the discussion and application of it begins. My opinion, based on these facts and my experience, covering twenty years of legal editorial work involving the reading of many thousand opinions, is that the paragraphs of the headnote should be numbered and a corresponding number placed in the margin of the opinion at the place where the discussion of the rule begins.

The revision of headnotes by the writer, and more especially by another lawyer, is absolutely essential. Headnotes should be revised in manuscript by one who has read the opinion. This revision should be both as to substance and as to style and grammatical construction. When it is considered that very often a headnote writer will say in less than one hundred words the substance of that which the court has taken a half dozen pages to say, it will be seen that there is grave danger that some salient fact may be omitted or an error made in grammatical construction that will blur, if not totally change, the statement of the rule intended or the facts to which it is applied. There should be a second revision of the

headnote as soon as it is in type and before it goes to the judge. This should be directed especially to clearness of expression and grammatical construction.

The weight that a headnote may have will be increased when it is known that it was submitted to the judge who wrote the opinion and approved by him. The practice of submitting headnotes to the judges is followed by most reporters. The headnote is a part of the case and should be as reliable as the opinion from whence it sprang. It is the duty then of each judge—a duty which is conscientiously performed by most judges—to examine the headnote with care and suggest such changes, if any, that should be made to make it truly represent the rule announced and applied in the opinion.

In some states the judges write the headnotes for their own opinions. This is usually done under compulsion of statute, although there are a few judges who feel that they are better qualified to headnote their own opinions than the reporter. As a rule, with some rare exceptions, judicial headnotes are not satisfactory. They present certain common faults. Some do not cover the entire case, others contain matters not discussed in the opinion and still others are indefinite. These faults are serious when it is considered that a judicial headnote is in a sense at least, a part of the opinion of the court. If the headnote is inconsistent with the opinion, which shall prevail? If it is broader than the opinion, is the headnote to be considered as extending the scope of the opinion and the decision of the court? If it is narrower, shall the opinion be restricted in its application?

Judge Frank Irvine, formerly Judge of the Supreme Court of Nebraska and more recently Dean of the College of Law at Cornell University and Public Service Commissioner of this State, agrees with my views. It may be stated here that the Nebraska statutes compelled Judge Irvine to headnote his own opinions and that his headnotes were always of the highest grade. Dean Pound of the Harvard University School of Law in criticising this article in manuscript, wrote me on this point as follows: "Like Judge Irvine, I have had some experience with the judicial headnote. Emphatically, I do not believe in it. I have seen many cases of argument hitched not to the law but to the meaning of the oracular judicial headnote."[8]

Appeal Line

The appeal line or notice of appeal as it is sometimes called, which follows the headnote, varies in the different jurisdictions, due, no

[8]See Holliday v. Brown, 34 Neb. 232 (1892).

doubt, to the difference in civil and criminal practice. In most jurisdictions the appeal line is very simple. There is no uniformity in the reports. In general the appeal line should show which party is appealing, the judgment or order below, and the date and place of entry. Following the appeal line there should be a statement of the decision on appeal, *i. e.*, whether the judgment or order below is affirmed, reversed, or modified, or the appeal dismissed.

In several reports the name of the trial judge is given, but this is not general. It is the opinion of many very able lawyers that the name of the judge before whom the case was tried should be stated in the report on appeal, preferably at the foot of the appeal line. The contention is that the lower court judge will be more careful if he knows that in case of appeal his name will be published in the report of the case. It is also claimed that the profession should know which judges are least apt to err and that this would constitute a fair way of determining a judge's ability. If a particular judge is reversed on appeal in one-half of all cases in which appeals have been taken from judgments or orders in actions or proceedings had before him, for errors which he committed, the inference would seem to be that he does not possess the required ability. Why should litigants be compelled to go before a judge who is in error so often? It will be found that appeals are much more frequent in cases tried before a judge who is known to be unreliable than in cases tried before a judge who is almost always affirmed. Whether or not the result of printing the trial judge's name in the report on appeal would be to decrease the number of reversible errors is problematical. A comparison of the work of the lower court judges in New York State, covering 4,850 cases appealed in 1923, is very interesting.

Attorneys' Names

It is the uniform practice to print the appearances on the appeal, but the addresses of the attorneys are not given in any reports except Alabama, Kansas, Louisiana, New Mexico, Utah, and Wisconsin. In the English reports the first name of the barrister is not printed.

Points of Counsel

The points of counsel, which in many of the earlier reports were as prominent, almost, in the report of a case as the opinion itself, are printed more or less fully in the United States Supreme Court Reports, and in the reports of Alabama, Arkansas, Delaware, Mississippi, Missouri, Nevada, New Brunswick, New York (Court of Appeals), Nova Scotia, South Carolina, South Dakota, Texas,

Wyoming, and the English Law Reports. In all other reports points of counsel are not printed.

Points of counsel have some value if and when they are properly prepared. But as a general rule, too little care is taken in preparing them for publication, resulting in a destruction of what value they might otherwise have. Their real value lies in showing the line of argument used to uphold the contentions of the parties. Professor Pound in a letter to me said: "I regret the passing of the practice of reporting arguments. It makes all the difference in the world how a case was argued. Some report of the argument showing whether it was well or ill presented is of real value." However, points of counsel do not have the worth to the profession as briefs on litigated points that they possessed in years back when digests, encyclopedias, tables of cases, text books, and other aids were not in common use.

Statement of Facts

In years gone by it was considered necessary by most reporters to precede the opinion by a statement of the facts of the case. This no doubt was necessary to an understanding of the opinion. In fact, many opinions in the earlier history of law reporting were written apparently on the assumption that the reporter would make a statement of the facts. But opinion writing has undergone a marked change in the last fifty years, and in most cases today the opinion not only gives a review of the essential facts of the case but also states the contention the parties made before the court. So that, except in cases where the judge himself prepares a statement of facts to precede the opinion, one is seldom found. Occasionally, however, the opinion is not clear in the absence of a history of the case. Where that is so, the reporter should not hesitate, and indeed, it is his duty to prepare a statement of facts sufficiently full of detail to make the opinion an intelligible document, and to print the same with the approval of the judge who wrote the opinion.

Much has been said in the past in favor of the preparation of a statement of facts by the reporter. But common experience dictates that the judge writing the opinion should state the facts upon which the opinion is based, for he alone can know what facts he considers as salient—the facts on which he relies in reaching the legal conclusions. If a reporter prepares a statement of facts, that statement only represents what facts the reporter believes the judge relied on in reaching his conclusions.

EDITING THE OPINION

The reporter has certain duties to perform in reference to the opinion. He should act in a semi-editorial capacity at least. All citations should be verified as to volume and page and substance. Mistakes are easy to make and once made are not readily discovered by the author of the opinion. Verifying the cases cited to ascertain whether or not they are correctly cited would at first seem to imply that the judge was not competent to determine whether or not the case was in point. Not so. Anyone who has written briefs or done legal editorial work well knows that, through clerical mistake, cases are cited that never were intended to be cited. I have in mind an early case in which the judge stated that he would follow the numerical weight of authority. There were two reported cases one way and another holding the contrary. By some mistake the judge mixed the citations and actually decided the case in accordance with the minority rule.

The reporter should also verify, from the papers on appeal, the facts recited in the opinion, for errors may creep in, especially where the facts are involved or the history of the case is long. It is seldom, however, that mistakes in a recital of the facts affect the decision of the court. In verifying the facts the reporter should bear in mind that it is to be presumed that the judge who wrote the opinion is right. And a very strong presumption it is, when one considers that from three to seven or more judges sitting in the appellate court have heard the argument on appeal and read the opinion. A major mistake in the facts can occur in such a case only through clerical error. Most reporters do not make a special effort to verify the facts recited and do so only when it is apparent from the reading of the opinion that there is a mistake. Exactness to the minutest detail is likely to become an obsession with those who do this kind of work.

The verification of statutory citations should be done with care. This work requires a familiarity with the statutes that is not posesssed by the average lawyer nor, it may be said without much fear of contradiction, by the average judge. The legislative bodies seem to be possessed with a mania to amend, revise, repeal, and enact laws. It is not a simple or an easy task to keep abreast of this hectic rush of legislation. And so it is no wonder that judges and lawyers occasionally make a slip of more or less importance to the particular case. It is no part, however, of those who do this work to go beyond the point of suggesting to the judge that the citation is incorrect or of calling his attention to amendments or to other statutes that may be applicable.

The reporter does not have the responsibility for the construction of a statute.

So, also, a good reporter will watch the opinion carefully for grammatical errors. There is nothing sacred about opinions. They are written by human beings, possessing human frailties, whose work is not necessarily perfect, and, indeed, in many instances it is far from perfect. Every judge is grateful to a reporter who points out actual errors in English. Judge Story in a letter to Mr. Richard Peters, the reporter of the Supreme Court of the United States said:

"As to the correction of verbal and grammatical errors in an opinion, I can only say for myself, that I have always been grateful for the kindness of any reporter of my opinions, for doing me this favor. Verbal and grammatical errors will occasionally occur in the most accurate writers. I have found some in my own manuscript opinions, after careful perusal, and have not detected them till I saw them in print. I think it would be a disgrace to all concerned, to copy gross material and verbal errors and misrecitals, because everyone must know that they would at once be corrected if seen. They mar the sense, and they pain the author. So the occasional change of the collocation of a word often improves and clears the sense. If a reporter do no more than acts of this sort, removing mere blemishes, he does all Judges a great favor. I do not believe any good reporter in England or America ever hesitated to do so. This is my opinion. Other persons may think differently from me, but I have ever supposed this a part of the appropriate discretion of a fair and accomplished reporter. You will find that Lord Coke thought very much as I do on this subject if you will look on the fourth page of his report of *Calvin's Case* (7 Co. Rep. 4) where he states the duty of a reporter. Douglass in his preface to his Reports (p. 12, 13) adopts an equally correct method. Yet who ever excelled him as a reporter?"[9]

There are certain grammatical errors, easily made and as easily overlooked, that are more or less common in all opinions, and in all writing for that matter. Those most common are mixed tenses, singular verbs with plural subjects and the reverse, dangling participles, split infinitives, and the misuse of relative pronouns. All mistakes in this class should be discovered and the attention of the writer of the opinion called to them.

But, on the other hand, there are many questions of grammatical construction about which good authorities disagree. And if that

[9]Story's Life and Letters, vol. II, p. 232.

which may seem to the reporter to be wrong is only doubtful, it should be left as written. In other words, in case of doubt as to whether the judge is right or wrong the text should be left as written. Furthermore, the style in which a judge writes should never be interfered with. The reporter may think he can express the same idea in a more pleasing style. Perhaps he can. But whether he can or not, it is entirely beyond his jurisdiction even to suggest a change, unless it be at the express request of the particular judge.

The final act of an astute reporter is the careful reading of the advance sheet, where one is published, for the purpose of picking up typographical errors and those of greater substance. This reading will be profitable, if carefully done, and the report as finally printed will be much better. Many minor errors are found in this way. If no advance sheet is published, then the reporter should read from the pages taken from the plates. At all events care should be taken to guard against "dropped letters" and the countless inaccuracies that may creep in after the final revise and before plating.

INDEX

While law reporting had its beginnings more than six hundred years ago, indexing is a comparatively modern convenience in law book making. It is now considered an essential part of every book. It is the key that unlocks the knowledge of the printed page. Unfortunately reporters have not adopted a uniform scheme of indexing. The index in the reports is principally valuable in current volumes and until the current number of the regular digest appears. As soon as the digest is in print, the index in the reports is used very little except by those who do not have a digest available, or for the purpose of finding an authority that may possibly have been omitted from the digest or not digested under the proper heading.

Slowly, very slowly, the indexes to law reports are evolving towards a more usable, and more convenient, form. The age-old style of lifting the complete headnote and putting it down under a main head in the index still has a strong hold on the fancies of many reporters, either because of the ease with which an index may be made by that method, or the perverse persistence of practice long followed and presumed to be good because of the length of its use. Many reporters make up an index for a volume of reports by the simple method of arranging the headnotes under main heads in the order of the pages on which they appear. In sixteen reports the main part of the index consists of the headnotes reprinted, without catchlines, under main headings. In twenty-one reports the headnotes with all

the catchlines are reprinted, and in nine reports the headnotes with all catchlines but the first or principal word are reprinted. So that in forty-six out of sixty-eight reports the index is constructed out of reprinted headnotes with or without the catchlines. Here again the predominating practice tends to the conclusion that the headnote index is the most convenient and most usable form.

There is a tendency to break away from that style and to make an index that will meet the needs of an active profession. Such an index cannot be made by reprinting headnotes. The headnote itself must be digested or, in case the catchlines for the headnotes are positive or assertive, they may be used with some slight changes. The paragraphs of the index should be short, should show the nature of the action, the rules of law announced, and their particular application. Less than this is insufficient, more is unnecessary. In an index a long headnote containing a statement of facts and the holding of the court *in extenso*, usually in fine type, is an imposition on the profession and so considered by the profession generally. In several jurisdictions the index has been simplified by the use of digested headnotes (digest paragraphs), catchlines, or a combination of the two. In the Appellate Division and the Miscellaneous reports of New York, the index is constructed entirely from the catchlines to the headnotes. In view of the fact that the catchlines in those reports are positive and actually state the rules laid down, they make an excellent index. The change made in the Appellate Division reports in 1921 has met with the approval of the profession generally in New York, and many lawyers have stated that it marked a great improvement. Thirty-four representative lawyers in New York State were asked which style of index was the better. The twenty-nine who answered the question at all said that the style now in use in the reports of the Appellate Division of New York is very much better than the old headnote index. It will be noted, however, that occasionally it is necessary to change the catchlines slightly, and where a case covers two or more subjects the catchlines appropriate to each subject must be placed under the proper heads. Unless the catchlines cover the entire headnote, as they do in the Appellate Division and Miscellaneous reports of New York, there is the danger in this style of index that some points may be omitted.

In Maine, a combination is used. In some instances the catchlines alone are used in the index while in other cases the headnote is used for an index paragraph. The same is true of West Virginia. In the reports of the United States Supreme Court and in the New Mexico reports the index is made from digested headnotes so that the para-

graphs are materially shortened. This makes a very workable index and is to be commended over the use of the entire headnote and is fully as good as the use of catchlines. Undoubtedly both reporters would use catchlines if any were written with the headnotes. In Nebraska the same method is followed to a certain extent and the index paragraphs are made by making digest paragraphs based on the headnotes. In Georgia the index is made of digest paragraphs written from the headnotes, but so written that in many cases it is impossible to learn the holding of the court from the index. In Ohio (Court of Appeals) the index, which appears to be a combination of the headnotes and the catchlines, does not stand high as an index. In Illinois (both reports), South Dakota, West Virginia, and the English Law Reports (King's Bench Division Chancery Division, and Appeal Cases) the catchlines are used extensively in the index. But the fault with many of those indexes is that the catchlines make no positive statement of the rule of law and its application, and, therefore, the reader must necessarily refer to the opinion or headnote to learn whether a particular case found in the index is applicable to the question he has under consideration. In the reports like the Appellate Division and Miscellaneous reports of New York, in which the catchlines make positive statements, an index carefully made, based on the catchlines, is almost ideal. In Connecticut the index now used is very similar to a text book index; the reference is made to the exact page where the rule is announced, and the title of the case is omitted. In New Hampshire, the index is very full and evidently made with care and not confined exclusively to the headnotes for material. The paragraphs are short and positive, and the references are both to the first page of the case and to the page on which the principle is stated. These reports are exceptionally well indexed, and the reporter is to be commended for his skill and painstaking care.

The index in the United States Supreme Court reports presents many valuable features. The paragraphs of the index are made by digesting the headnotes, and on the whole the index is very far above the average, though a decided improvement would result if a more careful division of the main subjects were made.

The classification used in the index, that is, the division into main or subject heads, should conform closely to that which is generally used in the country or state of publication. In the United States the American Digest classification should be adopted as a base. In connection with this, the reporter should examine the subject or article heads in the principle law encyclopaedias. It will probably be found desirable to use a combination of the two. Some subject

heads in the American Digest classification are too broad for use in an index to a report, while, on the other hand, some of the article heads in an encyclopaedia are too narrow. So, also, it may be found advisable to use a few main heads that are not used in either the American Digest classification or the law encyclopaedias. This will depend largely on local practice. But with some few exceptions the American Digest classification will be found well adapted to an index for reports. Once having adopted a classification, that classification should be followed.

In a few reports, little if any attention has been directed towards following the classification which is in general use in this country—a classification which, in most cases, is satisfactory for the index to a law report. In these reports the main heads have been selected apparently without due consideration. The following are some examples of main or subject headings which should never be used as such: "Agriculture (Commissioner of)", "Commissioners", "Dumbwaiters", "Decedent's Estate", "Estates", "Franchise", "Grade (change of)", "Markets", "Money Lent", "News Service", "Proximate Cause", "Rivers", "Royalties", "Services", "Sheep", "Ticker Service". A main title is one under which the reporter has placed a digest paragraph (or catchlines) carrying a citation. The examples just recited may be acceptable for cross-reference heads but they should not be used as main heads.

Under the main heads should be placed all the paragraphs carrying a citation to a case. Such a paragraph should never be placed under a cross-reference head. These latter heads have a very definite place in the scheme of an index but they should never carry a paragraph with a citation.

Having settled on the classification to be used, the next step is to divide the main heads into subdivisions. In doing this, the reporter will get some help from the American Digest classification but more from the encyclopaedias. He will find that the division of main heads in the American Digest is often too broad for an index. This is not so certain to be the case with the encyclopaedias. If it were advisable to divide the sub-heads then the work would be easier. But with the comparatively small number of paragraphs that ordinarily appear under any one head, it is hardly advisable to make a further division. In the main, however, the reporter will find that it is the part of wisdom not to be too technical in dividing the main heads. He should work with an eye to what will be useful and best suited to attract instant attention. Many cases should be indexed under two main heads by repeating the same paragraph under

each head. It seems better to do this in border line cases which might be indexed under one head or another according to the particular ideas that different persons may have as to the best place for it. In case of doubt, it should be put in both places. Where the main heads are divided, it is often necessary to index a case under two or more subdivisions.

While main heads of the index are not divided into subheads in thirty-eight reports, this is a convenience that should not be overlooked by reporters as it helps greatly in the examination of the index. This advanced and very commendable feature is to be found in the indexes in the reports of Alabama, Indiana (both reports), Iowa, Louisiana, Maryland, Massachusetts, New Hampshire, New Mexico, New York (Appellate Division and Miscellaneous), Oklahoma, South Dakota, Virginia, Washington, and the same feature is used in many of the principal subjects in the indexes of the United States Supreme Court reports and in the reports in Arizona, Connecticut, Idaho, and Vermont.

In most of the reports the cross references in the index are sufficient in number and fully adequate. But the reporter should bear in mind that it is better to have too many than too few. General cross references should be used only in cross referring an article heading. For example, negotiable instruments is quite generally treated under "Bills and Notes". In that case there should be a general cross reference from "Negotiable Instruments" and "Commercial Paper" to "Bills and Notes". But when the cross reference is from one article to another or from a word to an article, there should be a statement of the point to which the cross reference is directed but not of the rule announced. For example "Alimony; Power to order reference to report on amount of alimony defendant should reasonably be required to pay. See 'Husband and Wife'." A cross reference of this kind shows the reader instantly the exact point under consideration and if it is not the point desired he is relieved of the necessity of looking under the main head. But this statement should be short. If in cross referring from one main head to another it is necessary to use several lines in the cross reference, then the case should be cited and the cross reference omitted. In some reports, the catchlines of the headnotes are used as cross references, and then the reader, after in many cases learning the rule from the reading of the cross reference, is referred to another article in the index for the citation of the case. If a reporter goes to the extent of printing a dozen lines or more it would seem absurd to close up with a citation "See Municipal Corporations 2-4". Cross references should be short, concise, and to the point.

In many reports the classification of the index is not good, the main heads are not sub-divided, and the cross references are often too long. In some of the reports in which the index as made of reprinted headnotes and long cross references, more than eighty pages are used for the index. This same amount of material could be put into an index of forty pages or less that would be far more usable and convenient. To do so, however, would require work and an understanding of law book making.

Speed of Publication

The principal purpose of printing the opinions of the courts in advance sheets is to place the latest decisions in the hands of the lawyers at the earliest possible moment. Most active practitioners, and probably all judges, are anxious to have before them the last word of the courts. The time between the handing down of the decision and the publication of the opinion varies widely in different jurisdictions. In England, the opinions, or judgments, as they are called there, are published from two to four months after delivery, but a note of the case is published in "Weekly Notes" shortly after the judgment is rendered. In this country in those jurisdictions in which advance parts are published, the average elapsed time between the handing down of the opinion and the publication is approximately two months. In some jurisdictions delay is caused by the necessity of awaiting the lapse of the time given to apply for reargument. Other causes for delay are the difficulties presented by individual cases, failure of some judges promptly to return proofs, and the fact that at certain times of the year the number of opinions handed down is very large.

Notwithstanding the complaints that are made by the profession, reporters in the past were, and some of the present are, apparently indifferent to the real needs of the profession and the duties of their offices. Lack of facilities or assistance, small pay, and the fact that reporting is in some jurisdictions a side issue may account for much of the delay. But there is no excuse for a reporter who is well paid and furnished with the necessary assistants, working in sympathetic cooperation with him, who delays the publication of opinions for six months or a year after they are handed down.

Some there are who contend that the work in order to be done well must be done slowly—that it should be mulled over—and that concentration of effort and steady application to the work in hand will tend to deteriorate the reports. In other words, those of this school

of thought believe that better work can be accomplished by the drifter than by the doer. That this contention is against all experience of mankind does not need argument. Sir Frederick Pollock, editor of the English Law Reports, said in an address before the American Bar Association at Hot Springs, Virginia, in August, 1903:

"It is not so very long since our present speed would have been thought impossible or hardly decent; but I have not observed that promptitude leads to any falling off in accuracy."

In the past the Reporter for the Supreme Court of the United States was one of the worst offenders against the rule of promptness. Not long ago he was often as much as a year or more behind the court. It is a pleasant thing, however, to record that within the last year or so the work of his court has come to the Bar with a promptitude that is refreshing. As this article is being written, October, 1924, he is not more than four months behind the court. Perhaps a little closer application would reduce the time to two months.

Honorable E. V. Grabill, Reporter of Decisions of Massachusetts, has recently put a plan in operation whereby, for a small extra cost, every subscriber to the Massachusetts reports is supplied with the opinions of the Supreme Court within forty-eight hours after they are handed down. It is hardly necessary to say that the Massachusetts lawyers are pleased.

Notes of Cases

A feature of the reports, which, so far as I know, has not been adopted in this country is the publication in the advance sheets of a list of opinions handed down, with a short statement of the point or points passed on in each case. If, as soon as the opinions are handed to the reporter, he would make a list of the cases in which an opinion was delivered and publish a short note of each case in the advance sheet, the profession would be informed in a general way as to the last word of the courts, nearly two months before publication of the opinion. In England, notes of cases are published weekly and very shortly after the case is decided.

Cumulative Index in Advance Sheets

The advance sheet should contain a cumulative index of all advance sheets of the current volume so that an attorney will find in the last advance sheet an index of all cases that have been printed in that volume. As it is now, except perhaps in one or two jurisdictions, an attorney in running down late cases, must look at the index in each advance sheet and as it not infrequently happens that fifteen or more

advance sheets have been published since the last bound volume, the task of running down late cases is not a pleasant one. If the advance sheet contains a cumulative index, then the last advance sheet will furnish all the information. That this improvement would meet with the instant and hearty approval of the profession is certain. I asked thirty-four lawyers living in different parts of New York State if a cumulative index published weekly in the advance sheets would be of any assistance. Thirty answered emphatically, "Yes", and many, expressing a very strong desire to have this improvement made, said that it would be a boon to the busy lawyer.

Number of Reported Cases

The increasing number of reported cases has ever been a cause for complaint. Chancellor Kent nearly a hundred years ago complained of the number of reports at a time when there were less than six hundred reports, digests, and text books, and even in the beginning of written reports, Sir Edward Coke warned the judges, when there were not more than thirty books on the common law, against reporting all eases.

In this precedent-following age in which men more and more rely upon the past for their guidance and conduct, if opinions are written we must expect them to be cited and relied on as controlling the rights of individuals. So long as they are written, so long will the lawyers use them. It may be a habit or an hereditary taint, but whatever the propelling force, it is well known that many lawyers are lost without an "all four citation" and will cite everything in print though a single case or none at all would be as well. If chided by the courts for this they may well answer in the words of Omar:

> "Why, be this juice the growth of God, who dare
> Blaspheme the twisted tendril as a snare?
> A blessing we should use it, should we not?
> And if a curse,—why, then, who set it there."

In this country an attempt is made in the constitutions and statutes of many states to force a written opinion in every case passed on in the court of last resort. These apparently mandatory provisions have at times been ignored through the very simple medium of construction by courts which, while respecting the constitution, refuse to be hampered by it,[10] while statutes imposing the same duty on the courts have been held to be invalid.[11]

---

[10]Willets v. Ridgway, 9 Ind. 367 (1897); Louisville & Nashville Railroad Co. v. Sharp, 91 Ky. 411 (1891).

[11]Vaughn v. Harp, 49 Ark. 160 (1886); Houston v. Williams, 13 Cal. 24 (1859).

Many remedies have been suggested in the past to relieve an overburdened profession. Most were impractical. The best solution would seem to be to give the courts a free hand in determining in what cases opinions should be written and then by proper suggestion fix in their minds that not more than one case in five requires an opinion. Stop the writing of opinions. It is much easier to do that than to limit the number of written opinions that may be published. I do not mean that lower court judges should not give reasons for their decisions. In fact, I believe that every lower court judge should, as many of them do, write a memorandum stating their reasons and the authority on which the decision is based. In some instances a judge will have difficulty in supporting a decision by sufficient and adequate reasoning and authority, and the practice of supporting a decision by a written memorandum will surely induce a greater degree of care in the consideration of a case. Furthermore, a memorandum is always helpful to the defeated party in determining whether or not an appeal should be taken, and to the appellate court as showing the basis for the conclusion reached below. But this memorandum should not be published.

For the purpose of showing what has been done in New York, the outstanding commercial state in the Union, the following table of the work of the Court of Appeals of New York (court of last resort) and the Appellate Division of the Supreme Court of New York (the intermediate appellate court) has been prepared. The table shows the work of these courts for the years 1906, 1911, 1916, 1920–23.

NEW YORK REPORTS (COURT OF APPEALS)

Year	No. of decisions	No. of opinions	Percentage of cases in which opinions were written
1906	575	201	35
1911	751	212	38
1916	783	236	30
1920	532	153	28.7
1921	464	130	38
1922	603	145	24
1923	667	192	28.6

APPELLATE DIVISION REPORTS

Year	No. of decisions	No. of opinions	Percentage of cases in which opinions were written
	First Department		
1906	1444	538	37
1911	1860	432	24
1916	1906	465	24
1920	1890	423	22
1921	2142	438	20
1922	2275	508	22
1923	2356	331	14
	Second Department		
1906	1250	369	29
1911	1435	402	28
1916	1522	231	15
1920	1189	153	13
1921	1202	166	14
1922	1388	136	9
1923	1322	109	8
	Third Department		
1906	458	192	41
1911	510	179	35
1916	579	228	39
1920	428	173	40
1921	633	215	35
1922	553	170	30
1923	519	173	33
	Fourth Department		
1906	563	179	30
1911	666	138	20
1916	686	65	8.6
1920	561	50	9
1921	738	64	9
1922	615	88	12
1923	653	105	16

The following table shows the work of the Supreme Court of the United States.

Year	No. of decisions	No. of opinions	Percentage of cases in which opinions were written
1906	398	187	47
1911	279	170	60
1916	549	223	40
1920	649	181	27.8
1921	595	211	35
1922	662	179	27
1923	728	211	29

These tables show what may be accomplished by intelligent and determined action by the courts. It works well. If the same average had been maintained by all the courts in the country as that maintained by the New York Appellate Division, the number of reports printed in the last twenty years alone would have been approximately one-seventh of those printed, and the country would have been as well, if not better, for it. Again, if the average of the New York Court of Appeals had been maintained by the entire country, the number of reports printed would have been approximately one-third of those printed, and the country would not have suffered. Many opinions are but the dipping from the stream of the law and a pouring back of that which is dipped; they neither clarify, purify, nor add to the jurisprudence of a people. Those opinions we can dispense with. They are interesting to the successful litigant and his counsel, poor law to the defeated, and useless to mankind.

Conclusion

It would be unfair to those heroic figures of by-gone years who labored to preserve something tangible for the law were to dismiss my subject without so much as a passing thought from an historical standpoint. Nowhere in all literature is the Drama of the Ages portrayed with more poignant significance than in the law reports. In an unbiased—yet colorful—hand there looms from volume after volume the graphic story of the rise and fall of dynasties, the separation of peoples, and the formation and preservation of governments. Here we see the birth and development of religious freedom and tolerant thought; there the rising tide of liberalism sweep away the last traces of the forces of reaction. Step by step through the countless pages we may trace the development of the struggle to secure and maintain the divine guaranty of those inalienable rights which mankind from King John down through the years wrested from unwilling governments and despotic kings.

Few are the reported cases that were not engendered by man's love of power, his desire for wealth, his delusion of self-interest, or his sad perversion of talent. Yet what far-reaching influence for good they have been; what majestic themes they record; what pathos peers out upon us from their pages! At every turn the changing life and customs of humankind pass in review, while court upon court records the divine advance of the far-flung hosts of civilization!