

American Law Reports: Yesterday and Today

FRANCIS R. AUMANN*

One of the most thought-provoking problems which confronts the American lawyer today has to do with the great volume of recorded decisions with which he has to deal. Writing in 1929, Elihu Root noted that "there are a million and a half reported decisions available as judicial precedents; and the increase last year represents 170,000 printed pages."¹ Nor is the end in sight. "The fecundity of our case law," remarks Mr. Justice Cardozo, "would make Malthus stand aghast."² It is not necessary to belabor the point. There is sufficient evidence at hand to convince the most reluctant observer that the volume of American case law has now reached almost unmanageable proportions.³ This fact brings several questions to mind. First of all, how did the situation evolve in this way, and secondly, what is the future likely to hold for us, if we continue to move along this line. It will be the purpose of this article to consider these questions in a very brief and summary fashion. This attempt will take us back into the period following Independence, during which time the essentials of the American legal system took form and shape.

"Two periods," remarks Dean Pound, "require special study by anyone who would know Anglo-American law. The first is the classical common law period, the end of the sixteenth and the beginning of the seventeenth century. The other is the

* Associate Professor of Political Science, Ohio State University.

¹ *Address to American Law Institute for the Study of Law*, Circular, 1929, No. 7, p. 10.

² Cardozo, *The Growth of the Law* (1929) p. 4.

³ *Recent Social Trends in the United States*, Vol. 2 (1933) p. 1430; Goodhart, *Essays in Jurisprudence and the Common Law* (1931) p. 65; Y. B. Smith, *Education and Research*, N. Y. St. Bar Ass'n. Bull. 1930, pp. 189-90.

period which some day will be regarded as no less classical than the former—the period of legal development in America that comes to an end with the Civil War.”⁴ This statement seems to be true. While colonial influences have played an important part in the evolution of the American legal system, the more important developments took place after the War of Independence and were greatly affected by the character of the English common law. While this fact is taken for granted today, it is somewhat surprising since opposition to England and its institutions characterized the Revolutionary period and lingered on long after the second war with England.⁵

This story of American legal development in these years immediately following Independence is an amazing one in all respects. It is particularly so insofar as it relates to our system of reporting decisions. At the outset, a system of recorded decisions was not only conspicuous by its absence,⁶ but hostility to our only available source of law was widespread. During the immediate post-war years, for example, laws were passed in New Jersey, Delaware, Pennsylvania and Kentucky, forbidding the citations of English decisions which were made after Independence.⁷ In New Hampshire a rule was adopted forbidding such citations and judges and legislators everywhere were influenced by the popular feeling.⁸ As late as 1808, Henry Clay was

⁴ Pound, “Judge Story in the Making of American Law,” 48 *Am. Law Rev.* 680.

⁵ William Baldwin, *The American Judiciary*, pp. 14-15, Henry Van Shaack, *The Life of Peter Van Shaack* (1842) pp. 400-403; William Sullivan, *Address to the Suffolk Bar* (1825).

⁶ Pound, *The Spirit of the Common Law*, p. 115.

⁷ Some of these measures may have been influenced by other considerations than hostility to England. For instance, Thomas Jefferson, who favored a rule prohibiting the citation of English authorities after George III, explained that such a rule would eliminate all of “Manfield’s innovations.” Tyler, *Letters and Times of the Tylers*, I, 265.

⁸ Many of the untrained magistrates of the time encouraged this feeling. The justices of the court of New Hampshire who stopped the reading of an English law-book because the court understood “the principles of justice as well as the old wigged justices of the dark ages did,” is a good example of this tendency. See Baldwin, *The American Judiciary*, pp. 14-15; Plumer, the *Life of William Plumer*.

prohibited from citing an English authority by the Supreme Court of Kentucky,⁹ and Ralph Waldo Emerson in his "Essay on Power" writes that "a Western lawyer of eminence said to me, he wished it were a penal offense to bring an English law book into court in this country so pernicious had he found in his experience, our deference to English precedents."¹⁰

In Pennsylvania opposition to English common law principles led to the impeachment of the Chief Justice and two Associate Justice of the Supreme Court for sentencing one Thomas Passmore to jail for "contempt of court." The ground of the impeachment was that punishment for "contempt" was a piece of English common law barbarism, unsuited to this country.¹¹ Many lawyers of the day, as Chancellor Kent points out, came from the Revolutionary armies or from the halls of Congress. They brought with them "many bitter feelings and often but scant knowledge of the law."¹² Some opposition to English precedents may be explained as an effort on their part "to palliate this lack of understanding by a show of patriotism."¹³ The opposition of some of the untrained magistrates of the times may be similarly explained.¹⁴ Public sentiment was also influ-

⁹ *Hickman v. Hoffman*, Hardin's Reports, 348, 364; Baldwin, *op. cit.* p. 14. "A statute of 1816" writes Lewis Collins, the Kentucky historian in 1847, "enacted, that all reports of cases decided in England since the 4th of July, 1776, should not be read in court or cited by the court. The object of this strange enactment was to interdict the use of any British decision since the declaration of American independence. The statute, however, literally imports, not that no such decision shall be read, but that 'all' shall not be. And this self-destructive phraseology harmonized with the purpose of the act—that is, to smother the light of science and stop the growth of jurisprudence. But for many years, the Court of Appeals inflexibly enforced the statute—not in its letter, but in its aim. In the reports, however, of J. J. Marshall, and Dana, and Ben. Moore, copious references are made (without regard to this interdict) to post-revolutionary cases and treatises in England, and now that statute may be considered dead." *Historical Sketches of Kentucky* (1848) p. 107.

¹⁰ *Conduct of Life* (ed. 1893) p. 63.

¹¹ 56 Univ. of Pa. L. Rev. 106 (1908).

¹² Pound, *The Spirit of the Common Law*, pp. 116-117.

¹³ *Ibid.*, p. 116. Alexander Hamilton's preparation for the bar, it will be recalled, was four month's reading.

¹⁴ Baldwin, *op. cit.*, pp. 114-115.

enced by the radical elements who excoriated English precedents as the "rags of despotism" and the judges who rendered them as "tyrants, sycophants, oppressors of the people and enemies of liberty."¹⁵ This was a direct survival of wartime thinking. In short, precedents were not only unavailable in these first years after the war, but public sentiment was turned against them in many parts of the country.

Under these circumstances, how could this period be so important with regards to the adoption of English legal materials? The answer is that the material needs of the day overcame all other considerations. Some system of legal principles applicable to existing conditions had to be adopted and some system of courts established as well. Since colonial reports and precedents were virtually lacking as Chancellor Kent points out, no great help from that source was available.¹⁶ English legal materials were not only at hand, but were particularly appealing, since the English common law was just coming to the end of one of its great growing periods.¹⁷ These materials were received in due course by men learned in the English law "sitting on the

¹⁵ Pound, *ibid.*, pp. 116-117.

¹⁶ Pound, *The Spirit of the Common Law*, p. 115.

¹⁷ "The true period of the common law," writes Peter Du Ponceau in 1825, "is the period, which followed the Revolution of 1648, to the time of our own emancipation. It was then that it assumed that bold and majestic shape, those commanding features which have made it the pride of the nations who possess it, and the envy of those who do not. During that period, the rights of man have been acknowledged and defined, and limits have been set to sovereign authority. The prerogatives of the crown (I am speaking here of England) have been ascertained, and restricted within proper bounds; the legislative, executive, and judicial authorities, have taken their respective stations, and know the extent of their several powers; judges, have been rendered independent, and juries have been freed from ignoble shackles. The writ of *habeas corpus* has been made effectual, a fair and unexceptionable mode of trial has been provided for cases of high treason. The press has been freed from the unhallowed touch of state licensers. Religious toleration has been established. The hand of arbitrary power has been paralyzed; and man has been taught to walk erect, and to feel the dignity of his nature; civil jurisprudence has also been considerably improved, and it is in a progressive state of further amendment." Quoted from his *Address before Law Academy of Philadelphia*. See *The North American Review*, Vol. 21, July, 1825, pp. 132-133.

bench, making law in the legislature and lecturing and writing as law teachers,"¹⁸ and with their reception came the beginnings of our great volume of recorded decisions. In a very short time after Independence a perfectly bewildering array of reported decisions were established. By 1822, there were already about "one hundred and forty volumes of American Reports, all published since the organization of the federal government."¹⁹ By 1824 complaints were being made concerning the "vast and increasing multiplication of reports" as well as law treatises.²⁰ By 1826, the condition had become even more noticeable. "It is not a matter of little surprise," writes one observer in 1826, "that twenty-five years ago, the best library of American reports that could be summoned by money or magic, within the circumference of the Union, might have been borne on the circuits in a portfolio while now there are hardly less than two hundred within our territories."²¹

While this rapid increase was viewed with considerable doubt by some members of the legal profession, it received

¹⁸ Pound, *The Spirit of the Common Law*, p. 118.

¹⁹ See "A Collection of Cases Overruled, Doubted, or Limited in Their Application. Taken from American and English Reports." By Simon Greenleaf, Counsellor at Law, Portland, 1821. *The North American Review*, Vol. 15, July, 1822, p. 65.

²⁰ "Previous to the year 1804, but eight volumes of indigenous reported cases had been printed in America; and the lapse of only one-fifth of a century has added to the number one hundred and ninety volumes, exclusive of many valuable reports of single cases. Of these eighty-nine volumes and part of a few others are occupied with the decisions of the state courts of Virginia, Massachusetts, New York, and Pennsylvania. Reports have been purchased in fifteen states, and in eight of them there is a reporter appointed and commissioned by the public authority in addition to the reporter of the decisions in the Supreme Court of the United States. (Griffith's Law Register.) Whither is this rapid increase of reports to lead us, and what are to be the ends and consequences of it? If year after year is to be thus prolific of its annual harvest of reports, we do not ask what fortunes will ere long be capable of compassing the purchase of a complete law library, but we ask what mind will be adequate to the task of storing up the infinite multiplicity of decided cases!" *The North American Review*, Vol. 9, April, 1824, p. 377.

²¹ *Reports of Cases Argued and Determined in the Supreme Judicial Court of Maine*, by Simon Greenleaf, Vol. II, Containing cases of the years 1822 and 1823. Hallowell, 1824, Reviewed in *The North American Review*, Vol. 22, January, 1826, p. 27.

strong support from others. In view of its defenders, the common law naturally grows and becomes more extensive as material progress is made. To assist its growth, able reports of well investigated cases are necessary.²² The rapid multiplication of law reports, they said, should be “regarded with feelings of unmingled satisfaction,” since it indicated clearly “the increasing demand, and the more general diffusion of intelligence, on a subject, of all others, the most important to the peace and good order of society.” The publication of such reports, remarked one writer of this early period, “is the promulgation of the laws. They are promulgated, too, with the principle on which they are founded. In no other way is it possible to make them generally known; and as they arise out of the actual demands for justice, they are likely to be peculiarly well suited to the existing want and condition of society.”²³ It was also contended “that the prompt and full publication of law reports” was of inestimable importance to personal rights.

Another argument which received wide consideration was the allegation that printed reports secured the judiciary, by every possible motive, to the faithful administration of justice. “What wrongs from this service we may not look for in a community where the decrees of the courts of judicature are suppressed and kept from public view,” inquired one advocate of

²² It is by the publication of printed reports “that the Common Law like all other sciences is destined perpetually to improve. The system is becoming better, as well as more generally known. On the hearing of a question of controversy, the object is looked upon from every possible point of view. All the various and seemingly conflicting decisions upon the subject, are brought before the court and canvassed. The postulates and arguments on which they rest, are severely scrutinized; the valuable truths selected and the material errors discarded, from each. And there is every reason for believing that by this mode of proceeding, the really sound principles of law will inevitably be reached at. This is precisely the way by which all sciences improve; and it’s the only way which our courts of judicature can take on the settlement of a litigated question.” *The North American Review*, Vol. 27, July 1838, p. 181.

²³ p. 179, *The North American Review*, Vol. 27, July, 1828. This is part of an able review of the *Reports of Cases Argued and Determined in the Circuit Court of the United States for the Second Circuit, comprising the Districts of New York, Connecticut, and Vermont*. By Elijah Paine, Jr., Counsellor-at-Law, Vol. 1, 800, pp. 178, New York, 1827.

printed reports who argued that judges cannot do their best work unless they are required to write out the reports of their decisions. When they know that their decisions will go unreported, he says, "although they feel the sense of duty in all its purity yet want the consciousness of being narrowly and extensively observed, which is a powerful incentive to great and generous efforts, even among the most elevated minds" their work will naturally suffer.

Moreover, he adds, "when they know that their opinions may be severely scrutinized by the ablest men of their own and perhaps of coming ages; when they reflect that these opinions will be either made the basis of further adjudications or rejected as inconclusive and false; above all, when from fear or error they are led, as in this country they almost universally are, to write their opinions at length, and themselves prepare them for the press, they have every inducement, interested and disinterested, which can possibly be crowded upon the mind to be laborious, accurate, and impartial." In short, he was of the opinion that our legal decisions should be brought before the public, "for nothing can tend more unerringly to the faithful administration of justice."²⁴ This is a powerful argument for our system of adequately prepared reports of judicial decisions. Chancellor Kent in his *Commentaries* made an equally powerful argument along similar lines.²⁵ Other writers of the day did likewise.²⁶ In short, the case for the printed report could not be denied during this early period. A glance at some of the beginnings of the reporting movement may be of interest.

The state of Connecticut was one of the first of our commonwealths to become active in establishing a system of regularly printed reported cases. This was due largely to the efforts of

²⁴ Op. cit., pp. 179-180.

²⁵ pp. 455, 462, 463.

²⁶ A splendid argument for the necessity of adequate reporting is set forth in *The North American Review* of January, 1825, at pages 180-191, in a review of Octavius Pickering's *Reports of the Cases argued and determined in the Supreme Judicial Court of Massachusetts*.

men like Zephaniah Swift,²⁷ to whom Connecticut owes her simple and orderly system of private law; Jesse Root,²⁸ one of her earliest reporters; and Tapping Reeve, the founder of the Litchfield Law School.²⁹ In 1789, another Connecticut man, Ephriam Kirby (1757-1804), made a permanent place for himself in the annals of American law when he published in Litchfield, his *Reports of Cases Adjudged in the Superior Court*

²⁷ The career of Zephaniah Swift (1759-1823) is of special interest because he also published the first American law text. This was *A System of the Law of the State of Connecticut* which was published in two volumes in 1795 and 1796. His career as a jurist was interrupted by political factors and he consequently diverted more of his time to his legal studies. In 1810 he published a *Digest of the Law of Evidence, in Civil and Criminal Cases; and a Treatise on Bills of Exchange, and Promissory Notes*. In 1816, he published a *Vindication of the Calling of the Special Superior Court, at Middleton, *** for the trial of Peter Lung*. This treatise arraigned legislative interference with the judiciary and defended his own conduct as chief justice. In 1822-23 he published a *Digest of the Laws of the State of Connecticut*. The second volume of this work came out after his death. This work came to be widely used throughout the country both in legal instruction and as guide to the courts. It was invaluable in Connecticut; where it was said "no other individual has done so much towards reducing the laws to an intelligible system adapted to our habits and condition." Simon E. Baldwin, "Zephaniah Swift," *Great American Lawyers*, Vol. II, 1907; F. B. Dexter, *Biographical Sketches of the Graduates of Yale College*, Vol. IV, 1907; E. D. Larned, *History of Windham County, Conn.*, Vol. II, 1880; *Proc. Am. Antiquarium Society*, April, 1887; memoir in Swift's *Digest of the Laws of the State of Conn.*, Vol. II, 1823; R. J. Purcell, *Connecticut in Transition*, 1918; *Encyclopedia of Connecticut Biography*, Vol. I; *Amer. Hist. Rev.*, July, 1834.

²⁸ Jesse Root (1736-1822) was admitted to the bar in 1763. In 1789 he was appointed assistant judge of the superior court of Connecticut and in 1798 succeeded to the duties of chief justice. In the same year he published *Reports of Cases Adjudged in the Superior Court and Supreme Court of Errors *** 1769 to *** 1793*. In 1793 he added a second volume. See J. P. Root, *Root Genealogical Records*, 1870; J. H. Trumbull, *The Memorial History of Hartford County, Connecticut*, 1886, Vol. I, *Connecticut*, 1904, Vols. II, III, ed. by Forrest Morgan; Thomas Day, *Reports of Cases *** in the Supreme Court of Errors *** Conn.*, Vol. I, 1817, p. XXXII.

²⁹ W. D. Lewis, ed., *Great American Lawyers*, Vol. II, 1907, 469-71; A. C. White, ed., *The Bi-Centennial Celebration of the Settlement of Litchfield*, 1920, 49-58; T. D. Woolsey, *Hist. Discourse ** Pronounced Before the Alumni of the Law Department of Yale College at the Fiftieth Anniversary of the Foundation of the Department*, 1874; A. C. White, *The History of the Town of Litchfield*, 1920, pp. 98-109; D. C. Kilbourn, *The Bench and Bar of Litchfield County, Conn.*, 1709-1909, 1909, pp. 181-214; D. S. Boardman, *Sketches of the Early Lights of the Litchfield Bar*, 1860, pp. 7-10.

and *Court of Errors of the State of Connecticut from the year 1785 to May, 1788* (1789). This work was the first fully developed volume of law reports published in the United States. In some regards it holds the place in American legal literature comparable to Plowden's *Commentaries* in English legal literature. In a preface to this work Kirby contended that a system of reporting was necessary to the development of American Law.³⁰ Kirby's task of putting these Connecticut cases into book form³¹ was made possible by a statute passed in 1784 on the recommendation of Roger Sherman and Richard Law which required the Judges of the Supreme and Superior Courts to file written opinions, in disposing of cases on points of law, in order that they might be properly reported and "thereby a foundation laid for a more perfect and permanent system of common law in this state."³² Under the influence of Swift, a systematic scheme of reporting was made permanent.

In 1790, Alexander Dallas³³ issued his first collection of Pennsylvania decisions. This collection of cases, it should be pointed out, begins as far back as 1754. In 1793, Chipman's Reports were started in Vermont.³⁴ In 1790, the United States

³⁰ D. C. Kilbourn, *The Bench and Bar of Litchfield, Connecticut*, 1709-1909, 1909; M. E. Dwight, *The Kirby's of New England*, 1898; P. W. Kilbourne, *Sketches and Chronicles of the Town of Litchfield, Connecticut*, 1859; Dunbar Rowland, *Courts, Judges, and Lawyers of Mississippi*, 1783-1935, 1935, Vol. I, pp. 8, 11, 20, 21.

³¹ Charles Warren, *History of the American Bar*, p. 324.

³² *Statutes of Connecticut*, Revision of 1784, p. 207; see also J. H. Boutell, *The Life of Roger Sherman*.

³³ Alexander J. Dallas (1759-1817), secretary of the treasury under James Madison and United States district attorney for the Eastern District of Pennsylvania for thirteen years, not only brought out the *Reports of Cases Ruled and Adjudged in the Several Courts of the United States and Pennsylvania*, etc., 4 Vols., 1790-1807, but also the *Laws of the Commonwealth of Pennsylvania*, 4 Vols., 1793-1801. See Geo. M. Dallas *The Life and Writings of A. J. Dallas*, 1871; James Dallas, *The History of the Family of Dallas*, 1921.

³⁴ In 1793, Nathaniel Chipman (1752-1843), published his *Reports and Dissertations*, which consisted mainly of reports of cases before the Supreme Court of Vermont. In 1787, he had been appointed assistant justice of that court, the first lawyer, in fact, to hold that post in Vermont. In 1796 and again in 1813, he was to sit in the same court, but on these occasions as chief justice. A thorough student of the law, he was one of the ablest men in early

Supreme Court Reports were instituted.³⁵ In 1804 a regular and systematic series of Reports was commenced in Massachusetts. Previous to that time many points were mooted and opinions delivered which would have been well worth receiving, "still the minutes of them were so few and loose," that no reliance could be placed upon them.³⁶ In 1804 Caines became the first official reporter in New York State.³⁷ While Connec-

Vermont. His *Sketches of the Principles of Government* (revised ed., 1833), still remains well known. See Daniel Chipman, *Life of the Honourable Nathaniel Chipman* (1846) and *Vermont Historical Collections*, (2 volumes, 1870-71). It was his brother Daniel Chipman (1765-1850) however, who served as the first official reporter of Vermont. In 1823, the legislature appointed him to that post and he prepared volume I of *Reports of Cases Argued and Determined in the Supreme Court of * * * Vermont*, covering the years 1789-1824. This volume was published in 1824. He also wrote *An Essay on the Law of Contracts for the Payment of Specific Articles* (1822), referred to elsewhere; the life of his brother previously mentioned; and a *Memoir of Thomas Chittenden, the First Governor of Vermont, with a History of the Constitution, during his Administration* (1849). See *Vermont Historical Gazeteer* (1868, I, p. 87.)

³⁵ These reports were named for the official reporters until 1874. They include: Dallas (1790-1800); Cranch (1801-1815); Wheaton (1816-1827); Peters (1828-1842); Howard (1843-1860); Black (1861-1862); Wallace (1863-1874).

³⁶ p. 421, *The North American Review*, Vol. 29, October, 1829.

³⁷ In 1802, George Caines (1771-1825), published anonymously the first volume of *An Enquiry into the Law Merchant of the United States; or Lex Mercatoria Americana on Several Heads of Commercial Importance*. See J. G. Marvin, *Legal Bibliography* (1847). Although somewhat indifferently received it called attention to his capacities and when the New York legislature in 1804 provided for the appointment by the state supreme court of a reporter of its decisions, Caines was immediately considered for the post. He received the appointment and became the first official reporter in this country. Prior to his appointment all legal reports in the United States had been private ventures. In due course he issued *New York Term Reports of Cases Argued and Determined in the Supreme Court of that State*, in three volumes, covering the period May, 1803-November, 1805 (1804-06). In 1813-14, a second edition of this work was issued with corrections and additions. During the same period he compiled his *Cases Argued and Determined in the Court for the Trial of Impeachments and Correction of Errors in the State of New York*, (two volumes 1805-07), commonly cited as *Caines' Cases in Error*. In 1808 he edited a second edition of William Coleman's *Reports of Cases of Practice Determined in the Supreme Court of Judicature of the State of New York, 1794 to 1805*, adding cases up to November, 1805. This work is usually cited as *Coleman and Caines' Cases*. A later edition appeared in 1883. Retaining his position of reporter for less than three years, his work was extremely useful.

ticut was the first American state to print judicial decisions, this work was done, as we have seen, as a private venture. New York and Massachusetts were the first states to order official publication of decisions. New Jersey followed this practice in 1806 and South Carolina in 1811.³⁸ Connecticut did not attempt to print judicial decisions as a state enterprise until 1884; and Kentucky waited until 1815 before the legislature provided for the reporting of decisions.³⁹ While the growth of the reporter

His reports were brief but accurate and long enjoyed a high reputation with bench and bar. Subsequent statutory amendments have, of course, deprived them of much of their original utility. In addition to his work as a reporter, Caines was the author of a practical manual, *Summary of the Practice in the Supreme Court of New York* (1808) and *Practical Forms of the Supreme Court (of New York) Taken from Tidd's Appendix* (1808). See D. McAdam, et al. ed., *History of the Bench and Bar of New York*, Vol. I, (1897); B. V. Abbott and A. Abbott, *Digest of New York Statutes and Reports* (1860), I, XIV, XVI; Charles Warren, *History of the American Bar* (1911), p. 331; *New York Spectator*, July 15, 1825.

³⁸ South Carolina's experience with reporting cases is of interest. During the colonial period important or controversial decisions were preserved in full, in the records of the court or the journals of the Assembly. In 1799, a law provided that every judge in the Constitutional Court of Appeals (which was the name given for the Circuit Judges *en banc*) "should give for preservation in writing his opinion and reason." In 1809, Judge E. H. Day published the first volume of his reports of South Carolina cases and in 1811 his second volume. In 1811, an act was passed, requiring the opinions of the Appeal Court to be recorded and indexed in books. In 1819, two volumes of Appeal Court cases for 1817 and 1818, were privately published by John Mill. In 1816, an act was passed, requiring one judge to write the court opinion and directing the court to select the most important opinions for publication. In 1820, the first two volumes were presented. These volumes were edited by Nott and McCord. In 1823, an official reporter was provided for, to report both equity and law cases. This step was part of the judicial reform movement culminating in 1824. After this time, few private reports applied. Wallace, *History of South Carolina* (1934), Vol. II, p. 471.

³⁹ A provision in the first constitution of Kentucky in 1792 required judges of the appellate court "to state in their opinion such facts and authorities as should be necessary to expose the principle of each decision." No method of reporting the decision was provided by the legislature until 1815, however, when the governor was authorized to appoint a reporter. Previous to that time, writes Lewis Collins, "James Hughes, an eminent 'land lawyer' had, at his own expense, published a volume of the decisions of the old District Court of Kentucky whilst an integral portion of Virginia, and of the Court of Appeals of Kentucky, rendered in suits for land — commencing in 1785 and ending in 1801: Achilles Sneed, clerk of the Court of Appeals, had, in 1805, under the authority of that court published a small volume of miscellaneous

system could not be held back there was an early recognition of the defects which must arise if they were to grow too rapidly and too extensively. As noted before, the reporting movement was hardly under way before it was charged with over-extension. Nor did such charges come from irresponsible sources. Speaking upon the subject in 1829, Mr. Justice Story suggested that steps be quickly taken to "avert the fearful calamity which threatens us of being buried alive, not in the catacombs but in the labyrinths of the law."⁴⁰ Prominent jurists of this earlier

opinions, copied from the court's order book; and Martin D. Hardin, a distinguished lawyer, had, in 1810, published a volume of the decisions from 1805 to 1808, at the instance of the court in execution of a legislative injunction of 1807, requiring the judges to select a reporter. George M. Bibb was the first reporter appointed by the Governor. Alexander K. Marshall, William Littell, Thomas B. Munroe, John J. Marshall, James Dana, and Benjamin Monroe, were successively appointed, and reported, afterwards. The reports of the first, are in three volumes — of the second, in six — of the third, in seven — of the fourth, in seven — of the fifth, in nine — and the last, who is yet the reporter, has published seven volumes. Consequently there are now forty-six volumes of reported decisions of the Court of Appeals of Kentucky, of these reports, Hardin's, Bibb's, and Dana's are the most accurate — Littell's, Thomas B. Moore's, and Ben Monroe's next. Those of both the Marshall's are signally incorrect and deficient in execution. Dana's in execution and in the character of the cases, are generally deemed the best. Of the decisions in Dana, it has been reported of Judge Story that he said they were the best in the Union — and of Chancellor Kent, that he said he knew no state decisions superior to them. And that eminent jurist, in the last edition of his *Commentaries*, has made frequent references to opinions of Chief Justice Robertson, and has commended them in very flattering terms. *Op. cit.*, pp. 106-107.

⁴⁰ "The mass of the law is, to be sure, accumulating with an almost incredible rapidity" said Justice Story in 1829, "and with the accumulation, the labor of students, as well as professors, is seriously augmented. It is impossible to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our jurists. The habits of generalization which will be acquired and perfected by the liberal studies which I have ventured to recommend, will do something to avert the fearful calamity which threatens us of being buried alive, not in the catacombs but in the labyrinths of the law. I know indeed of but one adequate remedy, and that is, by a gradual digest, under legislative authority, of those portions of our jurisprudence which under the forming hand of the judiciary, shall from time to time acquire scientific accuracy. By this reducing to a text the exact principles of the law, we shall, in a great measure, get rid of the necessity of appealing to volumes which contain jarring and discordant opinions; and thus we may pave the way to a general code, which will present in its positive and authoritative text, the most material rules to guide the lawyers, the statesman,

period also suggested remedial measures of one kind or another. Their efforts were of no avail, however, and American case-law has continued to expand steadily from that day to this. When America moved from its simpler agricultural economy into its present complicated industrial civilization in the latter half of the nineteenth century the expansion became more rapid and of wider scope. The new power age required more law and the volume of reported decisions multiplied with that demand.

Today we are paying the price for this expansion. Every year 350 or more volumes of reports are published. Its bulk is now almost beyond control. "Unless courts set some restraints on the length and number of published opinions," says Mr. Justice Stone, "it is inevitable that our present system of making the law reports the chief repository of new unwritten law will break down of its own weight."⁴¹ Moreover, if we continue to multiply our written reports we will injure the cause of an effective law administration in one of its most vital places by introducing the element of uncertainty. The value of certainty in a developed legal system needs no explanation. "Law as a guide to conduct" remarks Mr. Justice Cardozo "is reduced to the level of mere futility if it is unknown and unknowable." Yet today he asserts "our law stands indicted for uncertainty." In explaining this condition, he cites the eight or more reasons enumerated by the American Law Institute at its organization

and the private citizen. It is obvious, that such a digest can apply only to the law, as it has been applied to human concerns, in past times; but by revision, at distant periods, it may be made to reflect all the light which intermediate decisions may have thrown upon our jurisprudence. To attempt any more than this would be a hopeless labor, if not an absurd project. We ought not to permit ourselves to indulge in the theoretical extravagances of some well meaning philosophical jurists who believe that all human concerns for the future can be provided for in a code speaking a definite language. Sufficient for us will be the achievement to reduce the past to order and certainty; and that this is within our reach cannot be matter of doubtful speculation." p. 31, "Address delivered before the Members of the Suffolk Bar in 1821," *The American Jurist*, No. 1, Boston, January, 1829. Reviewed in *The North American Review*, Vol. 29, Oct., 1829, 418-426.

⁴¹ *Law and Its Administration*, 1915, p. 214.

meeting. Of all the causes mentioned, however, the weightiest in his opinion is the increasing multiplication of decisions.

Adherence to precedent, he asserts, was once a steadying influence, making for stability and certainty. At the present time he is not sure that such is the case. "Increase of numbers," he says, "has not made for increase of respect. The output of a multitude of minds must be expected to contain its proportion of vagaries. So vast a brood includes the defective and helpless. An avalanche of decisions by tribunals great and small is producing a situation where citation of precedent is tending to count for less and appeal to an informing principle is tending to count for more."⁴² The tremendous volume of reported cases which we now have, produces another important difficulty in his view. It prevents the courts from keeping the larger aspects of the law in mind because their eyes are fixed upon the multiplicity of smaller problems that come before them. "The very strength of our common law," he remarks, "its cautious advance and retreat a few steps at a time is turned into a weakness unless bearings are taken at frequent intervals, so that we may know the relation of the step to the movement as whole. One line is run here; another there. We have a filigree of threads and cross-threads, radiating from the center, and one another into sections and cross sections. We shall be caught in the tenacles of the web, unless some superintending mind imparts the secret of the structure, lifting us to a height where the unity of the circle will be visible as it lies below."⁴³

In Cardozo's view the legal profession today must do something about the flood of reported decisions which threaten to overwhelm our law, and with the uncertainty which arises out of this condition. He places his hopes for improvement here in the efforts of the American Law Institute, to formulate a scientific and accurate restatement of the law in specially selected fields. Through efforts of this kind, he believes the profession

⁴² Cadozo, *The Growth of the Law* (1924), p. 5.

⁴³ *Ibid.*, p. 6.

can grapple successfully "with the monster of uncertainty and slay him." In such a struggle the present method of reporting decisions based as it is on the precedent system, may be only slightly modified. Then again it may be considerably altered, as the success of the Institute's work depends in large part upon the degree to which past cases are no longer cited as precedents. "The restatements," remarks Arthur L. Goodhart, "are not intended to be well-made digests of past cases; they are substituted for these cases."⁴⁴ In Goodhart's view the day is not far distant when precedents in the American legal system, and especially the precedent of a single case, will no longer be considered a binding source of law which Judges must accept under all circumstances.⁴⁵ If this proves to be true, the ultimate effect of this trend upon our law will be a remarkable one. In some quarters the belief is held that the final result will be a condition approximating the civil law. If such a condition should come to pass, it would give rise to a very strange paradox indeed. It would mean that the American reporting system which did so much to give shape to the American legal system during its formative years, has in these later years developed in such an unexpected direction as to threaten to take away the common law character which has so long distinguished it. Whether such a circumstance takes place or not, it is clear that our system of reporting has been inextricably tied up with the successes and failures of our system during all the days of its existence and will undoubtedly have an important influence upon its course in the days which are yet to come.

⁴⁴ *Essays in Jurisprudence and the Common Law* (1931), p. 71.

⁴⁵ "Precedents, and especially the precedent of a single case, will no longer be considered a binding source of law which judges must accept under all circumstances. Only if decided cases have created a practice upon which laymen have relied will the American courts feel that they are bound to follow them. This, as I have attempted to show, is the doctrine of the civil law and directly contrary to that of the English law with its insistence upon the need for certainty. I therefore believe that, as concerns the fundamental doctrine of precedent, English and American law are at the parting of the ways." *Essays in Jurisprudence and the Common Law*, p. 74.