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Occasional Publications of the Bounds Law Library, Number Five: Commonplace Books of Law: A Selection of Law-Related Notebooks

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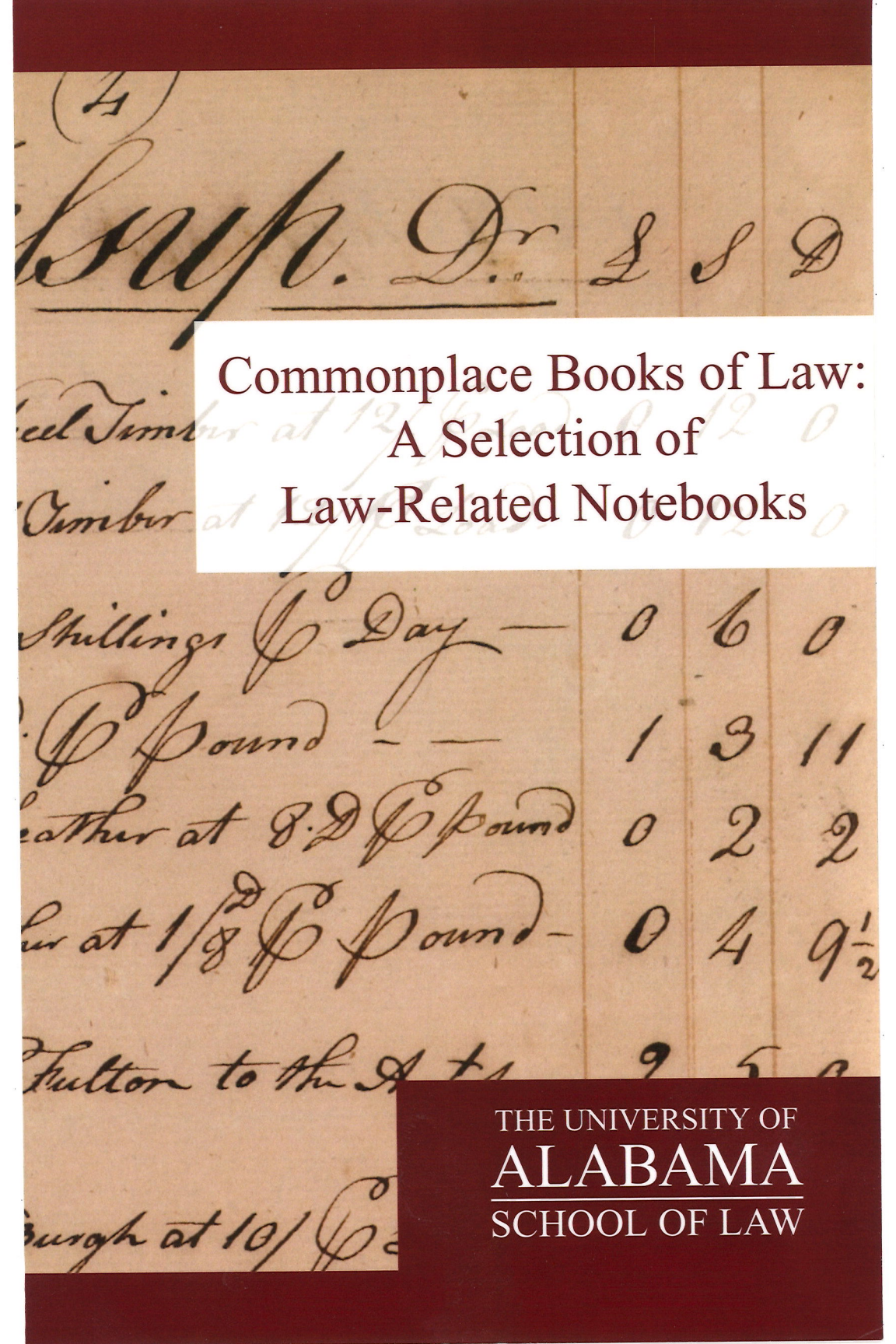

Commonplace Books of Law: A Selection of Law-Related Notebooks

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

Commonplace Books of Law: A Selection of Law-Related Notebooks from the Seventeenth Century to the Mid-Twentieth Century

Paul M. Pruitt, Jr. and David I. Durham

with contributions by
Tony Allan Freyer and Timothy W. Dixon

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On the cover—a sample page from the Alexander Dorcas Ledger, Bounds Law Library.

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FOREWORD AND ACKNOWLEDGMENTS

Note-taking has been a feature of the scholarly landscape for centuries. For most of that time it was taken for granted. Only recently, as handwritten texts have been supplanted by a sea of e-mails and word-processed documents, have significant numbers of scholars realized that notebooks represent a distinct approach to learning. Despite this late start, historians of the book have produced a literature of notebook studies chiefly devoted to analysis of late medieval and early modern commonplace books. For their part legal historians have likewise been interested in manuscript books, including commonplace notebooks—and with good reason.[1] The life of the law may have been experience,[2] but a great deal of that experience has been set down by hand.

Commonplace Books of Law is first and foremost a collection of excerpts from seven law-related notebooks, all held by the Bounds Law Library. These notebooks range from a rough commonplace book used by anonymous seventeenth-century law students to a sourcebook compiled for Supreme Court justice Hugo L. Black. *Commonplace Books of Law* begins with an introductory essay, following

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[1] For a pioneering study in three volumes see F.W. Maitland, editor, *Bracton's Note Book: A Collection of Cases Decided in the King's Courts During the Reign of Henry the Third, Annotated by a Lawyer of That Time, Seemingly by Henry of Bracton* (London: C.J. Clay and Sons, 1887).

[2] Oliver Wendell Holmes, *The Common Law* (Boston: Little Brown, 1881), 1.

which each chapter consists of (a) background information on a specific notebook, (b) transcripts of selected pages,[3] and (c) facsimile pages of interest. Further information on two of the notebooks can be found in the appendices.

Editorial and scholarly responsibility for *Commonplace Books of Law* is as follows. Paul M. Pruitt, Jr.[4] wrote the general introduction. He wrote introductions and provided transcriptions for the first chapter (the Seventeenth Century Legal Notebook) and the sixth chapter (the Jerome T. Fuller Notebook), was co-author and co-transcriber for the third chapter (George Josiah Sturges Walker's Litchfield Notebook) and transcriber for chapter seven (the Hugo L. Black Notebook). David I. Durham[5] wrote introductions and provided transcriptions for chapter two (the Alexander Dorcas Ledger), chapter four (the Thomas K. Jackson Diary), and chapter five (the James Thomas Kirk Notebook), and was co-author and co-transcriber of chapter three. Tony Allan Freyer[6] introduced and interpreted the Hugo L. Black Notebook. Timothy Dixon[7] was a co-author and co-transcriber of chapter three.

The editors would like to thank Dean Kenneth C. Randall and Professor James Leonard for support, encouragement, and patience. They thank the entire staff of the Bounds Law Library for their support and forbearance. But they especially thank Peggy Cook for her expert assistance in acquiring several of the notebooks featured herein, Penny C. Gibson for securing both primary and secondary sources via interlibrary loan, and Ruth Weeks and Julie Kees for advice on cataloging and classification.

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[3] Because the documents in question are quite different from each other, the editors have not adopted a uniform style of transcription.

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Additional thanks go to Jason Baker, Sharene Abrams, Clint Leonard, and Meagan Myers for research and production assistance. For many helpful acts, thanks go to Creighton Miller and Robert Marshall, to the Law School's Manager of Communications, Jennifer McCracken, to Brenda Pope and B.J. Harrison from the Office of Fiscal Services, and to Kim Spencer, Bulk Mail Coordinator at University Printing. Thanks also to Teresa Golson of the Faculty Resource Center for her wonderful photographic imaging. For assistance on a related project, the editors thank Chuck Thompson of the Tuscaloosa Public Library.

For assistance in interpreting the Seventeenth Century Notebook, the editors thank Professor William Hamilton Bryson, Alan Holland, and Paul M. Pruitt, Sr. For interpretive help concerning the Dorcas Ledger, they thank Professor Kenneth Rosen. For advice concerning both of these documents, they thank Michael von der Linn of the Lawbook Exchange.

For help in interpreting the Walker Notebook and for comparing it with other Litchfield notebooks, the editors are indebted to an impressive number—a network, really—of Litchfield scholars. These librarians, archivists, professors, lawyers, and volunteers include Whitney Bagnall, Karen Beck, Peg Bradner, Margaret C. Cook, Cathy Fields, Bunny Gamble, Charles Goetsch, Kris Gilliland, Nancy Hadley, Hilary Kreitner, John Langbein, Julie Lyons, Donald F. Melhorn, Jr., Karen Spencer, Tracy L. Thompson, David Warrington, and Marcia Zubrow. Thanks for encouragement and advice also go to Professors Alfred L. Brophy, Bryan Fair, and Wythe Holt.

For assistance with the Thomas K. Jackson Diary, the editors thank Professors Michael V. Thomason and Warren Rogers. For assistance in the publication and interpretation of the Hugo L. Black Notebook, the editors thank Mr. Hugo Black, Jr., Judge Melford O. Cleveland, and Professors Daniel J. Meador and Glenda Conway.

INTRODUCTION

PERSONAL STANDARDS V. STANDARDIZATION: NOTEBOOKS IN LEGAL CULTURE THROUGH THE CENTURIES

Writing has always been a Janus-faced business, one that looks forward to assert ideas, backward to preserve memories. This has been true since the Dark Ages, when keepers of monastic records sought both to testify to their faith and to create what one scholar has called an "enduring community on parchment."[1] Apparently it was equally true of English jurist Henri de Bracton, whose twelfth-century *De Legibus et Consuetudinibus Angliae* attempted to graft principles of Roman law onto the evolving Common Law. Fittingly, Bracton's work itself comes to us through the labors of anonymous scribes, some of whom reorganized—almost obliterated—his particular merger of past and present.[2] Each of these redactors, it seems, produced a

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[1] Quoted in Rosamond McKitterick, "Social Memory, Commemoration and the Book," in Susan J. Ridyard, editor, *Reading and the Book in the Middle Ages* (Sewanee: University of the South Press, 2001) [*Sewanee Medieval Studies*, Volume 11], 19-25 (quoted passage on 20).

[2] Samuel E. Thorne, "Translator's Introduction," in George E. Woodbine, editor, *Bracton de Legibus et Consuetudinibus Angliae* [*Bracton on the Laws and Customs of England*] (Cambridge: Harvard University Press, 1968), I: xv, xxiv-xlviii. In all probability, likewise, Bracton was not the sole "original" author of the treatise that bears his name.

fusion of reading and personal judgment typical of pre-modern authors, who tended to set forth their own thoughts as "a kind of post-script or sequel" to what had gone before, and of note-takers to this day.[3]

Prior to the invention of printing, formal documents were products of an elaborate scribal culture.[4] Printing supplanted that culture, but only to the extent that it became the exclusive method of publishing books.[5] There remained a world of clerks, students, members of the learned professions, and ordinary letter-writers[6] who continued to pursue disciplined practices of handwriting, at least until the perfection of the typewriter some four hundred years later.[7] In the meantime the proliferation of books, noted since Biblical times but speeded by the combination of Renaissance learning and printing,[8] gave impetus to another scribal activity—namely, the copying or summation of significant passages. If nothing else, this latter was the most

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[3] Chris Given-Wilson, *Chronicles: The Writing of History in Medieval England* (New York: Hambledon and London, 2004), 59. And see Michel Foucault's 1969 essay "What Is an Author?" reprinted in Paul Rabinow, editor, *The Foucault Reader* (New York: Pantheon, 1984), 101-120.

[4] Elizabeth L. Eisenstein, *The Printing Revolution in Early Modern Europe* (New York: Cambridge University Press, 1984), 5-11; Lucien Febvre and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing, 1450-1800* (London: Verso, 1984), 15-28; and Warren Chappell, *A Short History of the Printed Word* (Boston: Nonpareil Books, 1980), 8, 35-37.

[5] Febvre and Martin, *Coming of the Book*, 109-332, *passim*.

[6] For an analysis of the "everyday writing" of early modern times, see Peter Mack, *Elizabethan Rhetoric: Theory and Practice* (New York: Cambridge University Press, 2002), 103-134.

[7] See Michael H. Adler, *The Writing Machine* (London: Allen & Unwin, 1973).

[8] See *Ecclesiastes*, 12:12; and Eisenstein, *The Printing Revolution in Early Modern Europe,* 42-50, 51-106.

common method by which readers sought to escape the mnemonic devices of the pre-literate world.[9]

As literacy expanded, so did the practice of note-taking. Readers began to keep permanent notebooks organized according to whatever topical, chronological, or spatial systems worked best. Scholars, professionals, and gentry made reading an integral part of their lives. Their surviving notebooks contain a diversity of religious and literary materials, interspersed with recipes, business notes, and medical lore.[10] Studious readers arranged extracts and notes in order to facilitate discussion or disputation. By the sixteenth century such compilations were known as commonplace books, after the classical "common places," or shared categories of rhetorical inspiration.[11] Only recently have scholars paid serious attention to the role of "commonplacing" in medieval and early modern education,[12] though surely the evidence has been hidden in plain

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[9] Alberto Manguel, *A History of Reading* (New York: Penguin Books, 1996), 55-65; and H.J. Jackson, *Marginalia: Readers Writing in Books* (New Haven: Yale University Press, 2001), 184-185. See also Richard Ross, "The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640," *Yale Journal of Law and Humanities*, 10 (1998), 236-256, 272-302.

[10] Earle Havens, "'Of Common Places, or Memorial Books': Books and the Art of Memory in Seventeenth-Century England," *Yale University Library Gazette*, 76 (2002), 137, 140; and Deborah Youngs, "The Late Medieval Commonplace Book: The Example of the Commonplace Book of Humphrey Newton of Newton and Pownall, Cheshire (1466-1536)," *Archives*, 25 (2000), 60-61, 62, 65, 67, 69-70, 72.

[11] Havens, "Of Common Places, or Memorial Books," 140, 141; Youngs, "The Late Medieval Commonplace Book," 59, 63; Ann Blair, "Humanist Methods in Natural Philosophy: The Commonplace Book," *Journal of the History of Ideas*, 53 (1992), 541-542; and Ann Moss, "The *Politica* of Justus Lipsius and the Commonplace-Book," *Journal of the History of Ideas*, 59 (1998), 422-423, 428.

[12] See Susan Miller, *The History, A History, and Liminal Spaces: Common Books in Three Keys* (Minneapolis: University of Minnesota Center for Interdisciplinary Studies of Writing, 2000), 2-4.

sight. Even Hamlet, scribbling away after his first ghostly encounter, speaks of wiping from the "table" (notebook) of his memory "all trivial fond records, all saws of books, all forms, all pressures past that youth and observation copied there."[13]

Grand figures of the Renaissance and Enlightenment, from Erasmus to Bacon to Locke, kept commonplace books and dispensed advice on how to keep them.[14] Practitioners of the Common Law were persistent students of commonplacing techniques,[15] in part because of the expanding volume and importance of printed statutes and reports[16] but also because the law was changing qualitatively—as medieval writs and precedents were recast to fit the needs of a more commercial world.[17] Not surprisingly, early modern lawyers developed a parallel

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[13] *Hamlet*, 1: 5.

[14] See works discussed in Havens, "Of Common Places or Memorial Books," 141; Miller, *The History, A History, and Liminal Spaces*, 4, 6; and Blair, "Humanist Methods in Natural Philosophy," 550.

[15] For the role of commonplacing in legal education, as well as the connections between legal training and rhetorical theory, see Allen D. Boyer, *Sir Edward Coke and the Elizabethan Age* (Stanford: Stanford University Press, 2003), 15-16, 27, 29, 31-33, 88-91.

[16] J.H. Baker, *The Law's Two Bodies: Some Evidentiary Problems in English Legal History* (Oxford: Oxford University Press, 2001), 81-84 85-86, 88; and David J. Seipp, "The Law's Many Bodies, and the Manuscript Tradition in English Legal History," *Journal of Legal History*, 25 (2004), 79-80. For an example of the civil and foreign law titles available to early modern lawyers in England, see Alain J. Wijffels, "Law Books at Cambridge, 1500-1640," in Peter Birks, editor, *Life of the Law: Proceedings of the Tenth British Legal History Conference* (London: Hambledon Press, 1993), 59-68, 81-82.

[17] Boyer, *Sir Edward Coke*, 108-134, and 154 (quoting Sir William Holdsworth). Ross, "Memorial Culture," 259-267, 267-270, 302-306, argues that early modern lawyers were more involved with interpreting the customary laws of "manorial, commercial, and tithe disputes" than their predecessors, and also that the growth of printed sources led to systematic and involved patterns of citation. Both of these factors promoted note taking.

fascination with the problem of memory. The law was historically a memory-oriented profession,[18] yet the gathering clouds of witness were such that lawyers who relied on undisciplined memory risked finding, as seventeenth-century jurist and law writer Edward Coke put it, that "at their greatest need they shall want of their store."[19] Besides, as Coke well knew, the study of law (like commonplacing in general[20]) was an activity fraught with intellectual choices.

Through the end of the seventeenth century, the Inns of Court provided the setting for a pattern of study that combined respect for authority and personal initiative. Students observed courts at Westminster, spoke with judges and practitioners, heard lectures (or "readings"), participated in moot courts,[21] and read both court reports and works of synthesis.[22] Over years of study each proto-barrister compiled his commonplace book, which functioned as a nexus of precedential rule, "common learning,"[23] and private reflection. No one could sum up the process in

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[18] Ross, "Memorial Culture," 267-296, 302-319; see also Alfred L. Brophy, "The Law Book in Colonial America," *Buffalo Law Review*, 51 (2003), 1133.

[19] "Preface" to Part 1 of *The Reports of Sir Edward Coke, Knt., in Thirteen Parts*, introduction by Stephen Sheppard (Union, New Jersey: The Lawbook Exchange, 2002 (1826)), I: xxvii; hereinafter *Reports of Sir Edward Coke*. See also Ross, "Memorial Culture," 301.

[20] Blair, "Humanist Methods in Natural Philosophy," 545-547.

[21] Thomas W. Evans, "Study at the Restoration Inns of Court," in Jonathan A. Bush and Alain Wijffels, editors, *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900* (Rio Grande, Ohio: Hambledon Press, 1999), 287-302. See also Boyer, *Sir Edward Coke*, 29-31; and D. Plunket Barton, Charles Benham, and Francis Watt, *The Story of Our Inns of Court* (Boston: Houghton-Mifflin Company, 1924), 10-14 (on the hierarchies of students and methods and duration of study).

[22] For such a program of reading see Roger North, *Discourse on the Study of the Laws* (London: Charles Baldwin, 1824), 16-23.

[23] Baker, *The Law's Two Bodies*, v, 5-6, 59-90 *passim*.

better Jacobean language than Coke, who stated that "reading, hearing, conference, meditation, and recordation are necessary," but concluded that "an orderly observation in writing is most requisite of them all."[24]

When Coke, on the first page of his *First Institute*, famously observed that "Reason is the life of the law," he was referring to an "artificial perfection of reason" by which "we bring the reason of the law so to our own reason, that we perfectly understand it as our own."[25] Other writers took different paths to the same conclusion. Coke's much younger contemporary, the jurist and legal historian Matthew Hale, after noting the difficulty of applying abstract principles to particulars—likewise after pausing over "the common usage of this kingdom"—concluded that the Common Law system could best be comprehended through a combination of "study and experience."[26]

Like Coke, Hale took it for granted that commonplacing was the key to this marriage of deduction and induction. He suggested that the novice law reader continually revise his notes, urging him not to mind that he "will waste much paper this way." Frequent reconsideration, Hale asserted, "will strangely revive and imprint in his memory what he hath formerly read."[27] Thus in the end each student's

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[24] *Reports of Sir Edward Coke*, I: xxvii.

[25] See J.H. Thomas, editor, *A Systematic Arrangement of Lord Coke's First Institute of the Law of England, on the Plan of Sir Matthew Hale's Analysis* (Philadelphia: Robert H. Small, 1827), I: 1. For more on "artificial reason" and the manner in which Coke used the concept to "privilege" the judicial process, see Boyer, *Sir Edward Coke*, 88-91.

[26] "Sir Matthew Hale's Preface to Rolle's Abridgment, Published 1668," in Francis Hargrave, editor, *Collectanea Juridica: Consisting of Tracts Relative to the Law and Constitution of England* (London: E. and R. Brooke, 1791), I: 268, 273, 274, and (for quoted passage) 275-276.

[27] *Ibid.*, 277-278. For more advice on commonplacing, see William Fulbeck, *Fulbeck's Direction, or Preparative to the Study of the Law*, introduction by Peter Birks (Brookfield, Vermont: Gower Publishing Company, 1987 (1600; 1829), 115-116, 220-228; John Doderidge, *The*

indexing system (like his understanding of Common Law) was derivative, shared, but also his own. It was a personal version of a public business.

The Inns of Court declined in the eighteenth century, though the use of notebooks as personal legal repositories continued to flourish. The discovery of fifty-five volumes filled with the notes of the King's Bench jurist, Lord Mansfield, testifies as much, confirming that note-taking was an ongoing activity of bench and bar and not just an exercise for students.[28] It is not surprising, in a transatlantic world crammed with hand-written documents, that several types of bound manuscript books—including practice notes, diaries, and ledgers—should join commonplace books as resources left to posterity by lawyers.[29] In the meantime, the profession had gained an authoritative topical summary in the four volumes of Blackstone's *Commentaries*.[30]

A summarizer and innovator in the classically inspired manner of Bracton, Blackstone promoted legal studies as an element of humane education. Like his predecessors, he

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English Lawyer, Describing a Method for the Managing of the Lawes of This Land (Abingdon, England: Professional Books Limited, 1980 (1631)), 20, 62-63, 107 ff., and 149-256; and "Lord Chief Justice Reeve to His Nephew," in Hargrave, *Collectanea Juridica*, I: 79-81.

[28] James Oldham, editor, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (Chapel Hill: University of North Carolina Press, 1992), I: xxi, 3-5. Baker, *The Law's Two Bodies*, 11, speculates that "there might once have been a hundred times the present volume of available case-law in manuscript form."

[29] The various notebooks excerpted below bear witness to this statement. For copious examples of these genres, readers can carry out keyword searches on OCLC's FirstSearch/WorldCat.

[30] William Blackstone, *Commentaries on the Laws of England*, four volumes, introduction by Stanley N. Katz (Chicago: University of Chicago Press, 1979 (1765-1769)); hereinafter Blackstone 1st (to distinguish it from later editions cited below).

regarded law as a logical science.[31] His work was influential on both sides of the Atlantic but powerfully so in America, where it was embraced by founding fathers and law students alike.[32] Yet the evidence from Litchfield, one of America's earliest law schools, is that Blackstone's status as an oracle diminished the science of note-taking. At Litchfield, students took notes word for word, from lectures derived (at times to the point of paraphrase) from the *Commentaries*.[33] This literal approach was a precursor of what nineteenth-century legal educator David Hoffman described as "the *usual* manner of taking notes, which is founded on no principle and regulated by no rule" but that of transcription.[34]

Writing in an age when the entry-level standard of knowledge had declined significantly,[35] Hoffman's approach to commonplacing echoed Coke and Hale. The "simplest things," he asserted, "lose none of their value by giving to them that philosophy which really belongs to

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[31] Blackstone 1st, I: 32-34, 3-37. See also Paul O. Carrese, *The Cloaking of Power: Montesquieu, Blackstone, and the Rise of Judicial Activism* (Chicago: University of Chicago Press, 2003), 109, 112, 121, 122.

[32] Beverly Zweiben, *How Blackstone Lost the Colonies: English Law, Colonial Lawyers, and the American Revolution* (New York: Garland Publishing, 1990). Also see Erwin C. Surrency, "The Beginnings of American Legal Literature," *American Journal of Legal History*, 31 (1987), 216; and W. Hamilton Bryson, *Essays on Legal Education in Nineteenth Century Virginia* (Buffalo: William S. Hein & Co., 1998), 13-21.

[33] Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* (New York: Oceana Publications, 1986), 63-67, 147-148; see also Bryson, *Essays on Legal Education in Nineteenth Century Virginia*, 27, 29.

[34] David Hoffman, *A Course of Legal Study Addressed to Students and the Profession Generally*, second edition (Baltimore: Joseph Neal, 1836), II: 776.

[35] See Lawrence M. Friedman, *A History of American Law*, 2nd edition (New York: Simon and Schuster, 1985), 315-322.

them." He advised students to keep no fewer than eight types of notebooks, and in his *Course of Legal Study* took pains to provide examples.[36] Still, he cannot have expected that his suggestions would be widely adopted. Their very extravagance marks the end of an era. Commonplace books would continue to be popular as treasure-houses of literary quotation, religious devotion, or scholarly inspiration.[37] Yet Hoffman was probably one of the last law professors to expect students to achieve, through commonplacing, an early modern style of preparation—namely a grasp of general principles obtained via a scheme of classification, set down in an individual style.[38]

By the mid-nineteenth century, most American lawyers accepted the conceptual framework set forth by Blackstone and his successors James Kent and Nathan Dane.[39] Still the

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[36] Hoffman, *Course of Legal Studies*, II: 778 (quoted passage), 779-800. The eight types are "1. Note Book of Exceptions to General Principles. 2. Note Book of Abridgment of Statute Law. 3. Note Book of Remarkable Cases Modified, Doubted, or Denied. 4. Note Book of Leading Cases. 5. Notebook of Uncommon Titles. 6. Notebook of Obiter Dicta and Remarkable Sayings of Distinguished Judges and Lawyers. 7. Note Book of Books Approved or Condemned. 8. Note Book of Doubts and Solutions."

[37] For a printed example, see John Wood Warner, editor, *Southey's Common-Place Book, Second Series, Special Collections* (London: Longman, Brown, Green, and Longman's, 1849). See also James Davie Butler, "Commonplace Books: A Lecture," *Bibliotheca Sacra*, XLI (1884), 478-505.

[38] For subsequent approaches, see Roscoe Pound, "Classification of Law," *Harvard Law Review*, 37 (1924), 933-969; and Julie Griffith Kees, "A Rhizomatic Inquiry Into Legal Classification: 'Taking Differences,' Discourse, and Domestic Violence" (Ph.D. dissertation, University of Alabama, 2003), 46-98.

[39] James Kent, *Commentaries on American Law*, four volumes (New York: O. Halsted, 1826-1830); and Nathan Dane, *A General Abridgment and Digest of American Law*, nine volumes (Boston: Cummings, Hilliard, 1823-1829). More focused knowledge was the sphere of single-state commentators or such treatise-writers as Joseph Story (1779-1845) and Joseph Chitty (1776-1841); see Friedman,

practice of law resisted standardization, mirroring the commercial, demographic, and legislative fluidity of an expansive era. As lawyer-author Joseph Glover Baldwin wrote in 1853 of the frontier states of Alabama and Mississippi: "[A]ll the points, dicta, rulings, offshoots, quirks and quiddities of all the law, and lawing, and law-mooting of all the various judicatories and their satellites, were imported into the new country and tried on the new jurisprudence."[40]

Under these circumstances it was only natural that many lawyers kept general practice notebooks, less ambitious than the commonplace books of former times but serving the same purpose of preserving research paths, winning techniques, and personal insights.[41] Interestingly, publishers of that time provided ready-made notebooks furnished with printed topical indexes. At least four editions of the nostalgically titled *Lawyers' Common-Place Book* were issued between 1836 and 1884.[42] Perfectly adapted to record local variants of prescribed categories, such publications were ghosts of a bygone legal culture in a world soon to be dominated by the typewriter and the products of the West Publishing Company.

The practice of law became more specialized, stratified, almost mechanized during the late nineteenth and early

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History of American Law, 318-333; and Surrency, "Beginnings of American Legal Literature," 218-220.

[40] Joseph G. Baldwin, *The Flush Times of Alabama and Mississippi: A Series of Sketches* (Gloucester, Massachusetts: Peter Smith, 1974 (1853)), 175.

[41] For emphasis on information-on-demand, see Butler, "Commonplace Books: A Lecture," 497.

[42] The edition excerpted below is *The Lawyer's Common-Place Book, With an Index Alphabetically Arranged of the Titles Generally Used in the Practice and Study of the Law* (Philadelphia: J.B. Lippincott and Company, 1884). A title search on WorldCat reveals copies of an 1836 Boston edition (with notes on Illinois law), an 1860 Philadelphia edition (with notes on Arkansas law), and an 1876 Philadelphia edition.

twentieth centuries,[43] but these developments did not diminish the uses of practice notebooks. A variety of factors, including the proliferation of accredited law schools and the perfection of the West "Key Number" system, kept lawyers from thinking for themselves about larger issues of classification. But these same trends expanded access to patterns of precedent, allowing painstaking lawyers to marshal larger masses of persuasive authority.[44] The notes thus taken, judging by the 1920s notebook of Alabama practitioner Jerome Fuller,[45] were intended to be helpful in specific types of proceedings. Similarly, a notebook compiled for Supreme Court justice Hugo L. Black,[46] circa 1939-1940, consisted of topical excerpts assembled for use in writing particular opinions. Surviving practice notebooks and judicial notes are valuable, like commonplace books, as documents that blur the distinction between private and public purposes.[47]

Modern notebooks tend to be typewritten, the work most likely of secretaries, the counterparts of Perry Mason's omnicompetent Della Street.[48] The Fuller and Black notebooks cited above consist of sheets held in ring-style

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[43] Marc Galanter and Thomas Palay, *Tournament of Lawyers: The Transformation of the Big Law Firm* (Chicago: University of Chicago Press, 1993), 1-19.

[44] Kees, "Rhizomatic Inquiry Into Legal Classification," 99-132; also see Robert C. Berring, "Collapse of the Structure of the Legal Research Universe: The Imperative of Digital Information," *Washington Law Review*, 69 (1994), 9-34.

[45] See the Jerome Fuller chapter, below.

[46] See the Hugo L. Black chapter, below.

[47] This is especially true considering the secrecy that has characterized the decision-making process of the United States Supreme Court; see Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon And Schuster, 1979), 1-4.

[48] For Della Street in action, see Erle Stanley Gardner's *Case of the Drowsy Mosquito* (New York: W. Morrow, 1943), and *Case of the Moth-Eaten Mink* (New York: W. Morrow, 1952); or simply open any Perry Mason mystery.

binders, which give them an impersonal air appropriate to typescript and the twentieth century. They resemble in outward appearance the case-specific trial notebooks that many litigators still bring to the courtroom.[49] Yet in the age of laptop computers all types of paper-bearing devices are at risk[50] in ways perilous to our understanding of the recent past. In the absence of uniform methods of archiving and collecting the computer files of lawyers and firms, future historians may have to conclude (once more, with Hamlet) that "the rest is silence."[51]

Even if the use of legal notebooks is destined not to survive the twenty-first century, it can be said that the tradition has died hard. Several recent works of legal fiction or reminiscence bear the word "notebook" in the title. While these are typically modern, even cynical in tone, they pay homage to notions of creative observation and unfettered thought.[52] A few twentieth-century works, less dramatically law-related, are essentially printed common-place books in the classical mode, topically arranged collections of quotations demonstrating that their compilers enjoyed intellectual lives outside the courtroom or classroom.[53] All this is as it should be, since the law—in spite of many changes and an accelerating pace of

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[49] See Donna Lusher, *et al.*, "Preparation of the Trial Lawyer's Notebook," *West Virginia Lawyer*, [15] (March 2002), 20.

[50] A decade ago, a review of a trial-management software system bore a significant title. See Rebecca Thompson Nagel and Aaron P. Morris, "Better Than a Notebook," *Law Office Computing*, 5 (December 1995), 28.

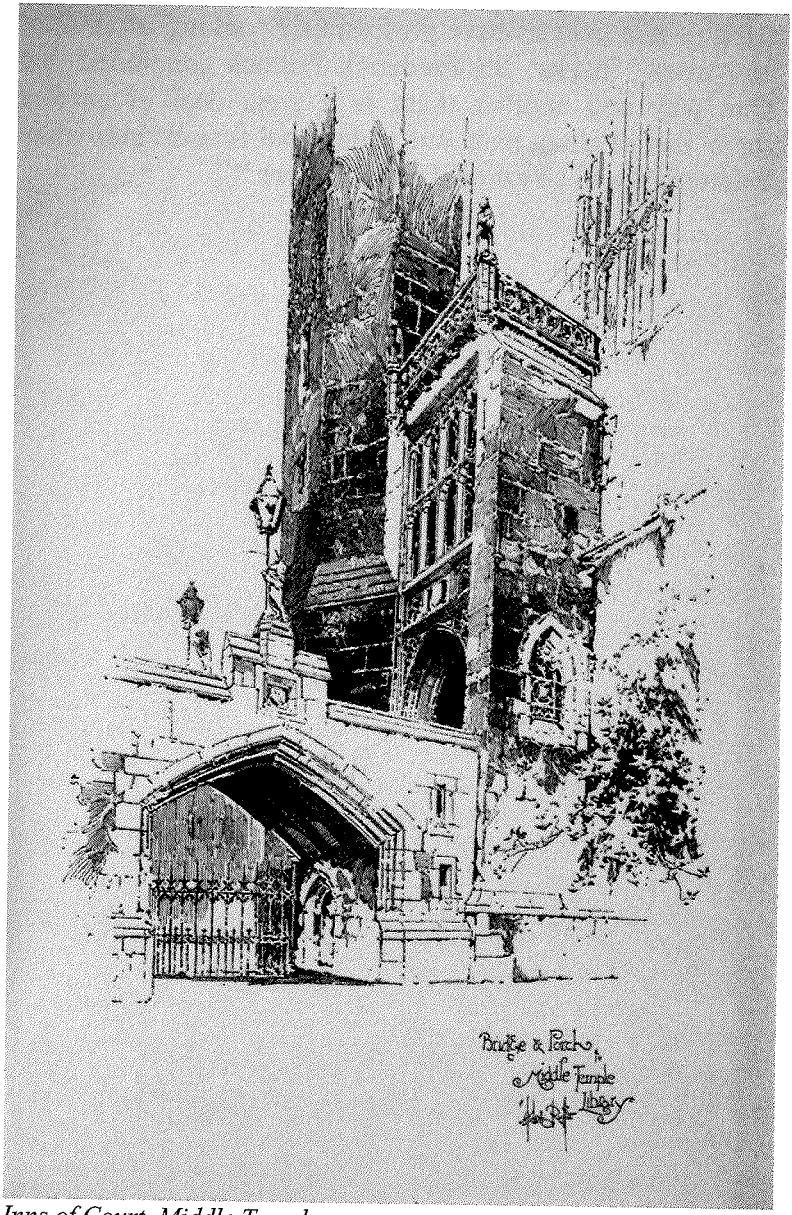
[51] *Hamlet*, 5: 2.

[52] See especially Lowell B. Komie, "Intimate Pages: A Lawyer's Notebook," *Legal Studies Forum*, 25 (2001), 123-131; and Michael Steven Smith, *Notebook of a Sixties Lawyer: An Unrepentant Memoir and Selected Writings* (Brooklyn: Smyrna Press, 1992).

[53] See *More from a Lawyer's Notebook: By the Author of "A Lawyer's Notebook"* (London: Martin Secker, 1933); and Thomas W. Christopher, *A Book-Marker's Scrapbook* (N.p.: 1975).

change—is a conservative profession. Speaking in 1892 of "archaisms" in law, Sir Frederick Pollock concluded that "One way and another there is a great deal of ancient human nature about man, and it does not forsake him when he determines to be rational and a lawyer."[54]

[54]Sir Frederick Pollock, "Archaism in Modern Law," in his *Essays in the Law* (London: Macmillan and Company, 1922), 221.



Inns of Court, Middle Temple
From Loftie's The Inns of Court and Chancery, 1895

SEVENTEENTH-CENTURY LEGAL NOTEBOOK*

Seventy-eight leaves long, the work of several persons, the Bounds Seventeenth-Century Legal Notebook is in many ways a mysterious compilation. Beginning with a page of household memoranda and recipes, written in two different hands,[1] it continues with ten pages of notes of trials or moot courts, written in a distinct, informal hand.[2] At the top center of each page, from the first leaf through the recto of the forty-fourth leaf, are subject headings (alphabetically from letters T through W)[3] in a hand influenced by Chancery styles.[4] At three points, positioned directly under subject headings and written in a variant of the Court hand, are brief reading notes or excerpts taken

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* Folio, 78 leaves numbered irregularly. Sewn in vellum binding, 27.5 x 20.5 cm. Pastedown end sheets. Following this introduction are transcriptions, of (A) leaf 1, recto, and (B) a portion of leaf 6, recto.

[1] On leaf 1, recto. See accompanying illustration and transcription. These two hands are different from all the hands discussed below.

[2] Leaf 2, recto, through leaf 4, verso; continued on leaf 5, recto, and continuing through leaf 6, verso. See accompanying illustration and transcription from leaf 6, recto.

[3] Of these leaves, 43, verso, is without any subject heading; 44, recto, has only the capital letter W. Some of these headings are struck through.

[4] The writer of these headings (and the index headings discussed below) shaped his capitals (T, V, A, B, and C) in a manner consistent with or influenced by that of the early modern Chancery hand; see Andrew *Wright, Court Hand Restored: Or, the Student's Assistant in Reading Old Deeds, Charters, Etc.*, 2nd edition (London: Andrew Wright, 1778), Plates 3, 4, 18, 19.

from standard texts.[5] Following several blank leaves (forty-four, verso, through fifty-two, verso) the notebook concludes with twenty-six leaves of pages divided into columns and containing legal index terms (letters A through C).[6] Based on a comparison of letterforms, this hand appears to be the same as that of the writer of subject headings.[7]

The compilers of the notebook are essentially anonymous.[8] Yet they have left enough traces to show that

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[5] These relatively short passages of reading notes (most citing to "Co. Litt:") are found on leaf 5, recto; leaf 23, verso; and leaf 40, recto. For the influence of Court Hand, compare the capital C in "Co. Litt:" (leaf 5, line 1) and the capital P in "Periure" and "Premunire" (both leaf 5, line 2) to the examples given in Wright, *Court Hand Restored*, Plates 1, 2, 4, and 18. This hand and that of the note-taker cited in note 2, above, are of a type preferred by post-Restoration lawyer Roger North. His *Discourse on the Study of the Laws* (London: Charles Baldwin, 1824), 27, advised students to use "a small, but legible and distinct hand, which in a common-place book must be affected, for room will be required, and a fair, French hand will eat upon it too fast."

[6] Leaves 53, recto, through 78, verso.

[7] Since the subject headings and index terms are drawn from different ends of the alphabet, it is difficult to compare capitals. However, the shapes of the lower-case e, r, p, and t are virtually the same in each case.

[8] This anonymity does not extend to the man whose name appears (in a hand different from all others) in the lower right corner of leaf 27, recto. There, in what is evidently a signature, are the words "John Place," or alternately "John Hare." The uncertainty is due to the complexity of the surname capital and to the fact that the letters are somewhat smudged. John Place was a well-known bookseller and stationer, identified as such on the title pages of Henry Rolle's *Un Abridgment* des *Plusiers Cases et Resolutions del Common Ley, Alphabeticalment Digest Desouth Severall Titles* (London: A Crooke, *et al.*, 1668), William Rastell's *A Collection of Entries: Of Declarations, Barres, Replications, Reioinders, Issues, Verdits, Iudgements, Executions, Proces, Continuances, Essoynes, & Divers Other Matters Newly Augmented & Amended* (London: John Streeter, *et al.*, 1670), and [Thomas Littleton], *Littleton's Tenures in French and English, with an Alphabetical Table of the Principal Matters Therein*

they were students in the Inns of Courts, and (beyond, even, the evidence of their hands) that they wrote in the late seventeenth century. The writer of the brief reading notes, whose hand is the most formal of the writings,[9] concentrated on paraphrases of *Coke on Littleton* (also known as Coke's *Commentaries*),[10] a classic student work since its publication in 1628. Of course, the paraphraser could have been following the advice of a sergeant or bencher at any time thereafter. But it is just as likely that he was following the path marked out in Matthew Hale's preface to Henry Rolle's 1668 *Abridgment des Plusiers Cases*.[11] Hale sets forth a course in which the student

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Contained (London: John Streater, *et al.*, 1671). If the signature is Place's, the paper (sturdy and commonplace, the sheets bearing either no watermark or that of a crown) may have come from his shop, said by Rolle to be "at Fleetstreet and Holborne." But if the signer was named John Hare, then he could have been the third son of an Irish Baron, admitted to the Middle Temple on May 2, 1668. The Hares were a distinguished family whose contributions to the life of the Middle Temple go back to the reign of Mary I. See H.A.C. Sturgess, *Register of Admissions to the Honorable Society of the Middle Temple, From the Fifteenth Century to the Year 1944* (London: Butterworth & Co., 1949), I: 176; and J. Bruce Williamson, *History of the Temple, London* (London: John Murray, 1925), 236.

[9] He was also one of the Notebook's first users. The more informal writer of the longer courtroom notes wrote around the reading-notes on leaf five, recto.

[10] Edward Coke, *The First Part of the Institvtes of the Lawes of England, or, A Commentarie vpon Littleton* (London: Printed for the Societie of Stationers, 1628). Compare Coke, Folio 6.a. ("as if the witness were infamous: for example, if he be attainted of a false verdict, or of a conspiracie at the suite of the king, or convicted of perjury, or of a praemuniere, or of forgerie") with Notebook, leaf 5, recto ("If a wittnesse be infamous as if he be attainted of a false verdict or of a conspiracie or convicted of Periure or of a Premunire or of forgerie").

[11] [Matthew Hale], "The Publisher's Preface Directed to the Young Students of the Common Law," in Rolle, *Abridgment,* [1]-[10]. This preface is signed "W.E." For the attribution to Hale, see Francis Hargrave, editor, *Collectanea Juridica, Consisting of Tracts Relative to*

would read and make abstracts of works including Littleton's *Tenures*, St. Germain's *Doctor and Student*, Fitzherbert's *Natura Brevium*, and "especially my Lord Coke's *Commentaries*, and possibly his *Reports*."[12]

The Notebook's writer of headings and index terms was also undertaking a classic student task. Seventeenth-century lawyer Roger North, in his advice to first-time compilers of commonplace notes, urges the necessity of a good index, constructed from a lawyer's notes or "from a printed set of titles" and written "at the head of pages, or rather columns, for three, or two at least, in a page, are convenient."[13] North mentions several sources of such information, including the *Graunde Abridgements* of Brooke and Fitzherbert, Rolle's *Abridgment*, and the books of "Entries" compiled by Coke and William Rastell.[14] Hale, for his part, recommended Rolle and Brooke for this purpose.[15] The Notebook's indexer clearly took advice of this sort to heart: Of the fifty-three "A" terms in the index section, forty-eight can be found in Brooke's *Graunde Abridgement*, and forty in Rastell's *Collection of Entries*; substantial matches can also be found in Fitzherbert's *Graunde Abridgement* and in Rolle.[16]

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the Law and Constitution of England (London: E. and R. Brooke, 1791), I: 263. See also W.S. Holdsworth, *A History of English Law* (Boston: Little, Brown, and Company, 1903-1972), V: 378, VI: 496.

[12] [Hale] "Publisher's Preface,"[8]. North, *Discourse*, 11, 22-24, does not greatly care for *Coke on Littleton* but urges students to read the preface to Rolle. For yet another contemporary course of readings, see "Lord Chief Justice Reeve to His Nephew," in Hargrave, *Collectanea Juridica*, I: 79-81.

[13] North, *Discourse*, 26-27.

[14] North, *Discourse*, 18-19, 24. For full cites to the mentioned works by Fitzherbert (1573), Brooke (1577), Coke (1614), and Rastell (1670), see Appendix I, below.

[15] See [Hale], "Publisher's Preface," [8].

[16] See Appendix I, below.

The authorities disagreed over the amount of preparation necessary before a student could profitably attend sessions of the Courts at Westminster.[17] The Notebook's most industrious writer, he of the informal hand, had apparently progressed to that point. He dated his notes to the Michaelmas and Hilary terms of 1684; in one note he summarized a point of law decided at the Hilary 1684 sitting of the Court of King's Bench.[18] His notes are chiefly in English, with Law French, Latin phrases, and legal citations[19] mixed freely in. Likewise they contain references to particular arguments (such as one made by "Williams de Gray's Inn"[20]), and they attempt to follow patterns of questions and responses. After one such series, it is plain that "The action cannot lye, for it would be a great oppression to the Subject, e [and] a diminution of ye K. Pr[e]rogative."[21] In general, this writer's work exemplifies what North called the "short note of the law, . . . by which you may know at first view if it be to your purpose or not."[22]

Given the somewhat hasty air of these latter notes, and the incomplete nature of the reading notes and index

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[17] [Hale], "Publisher's Preface," [8], says that a student should attend after gaining a basic competency in reading law; Chief Justice Reeve (Hargrave, *Collectanea Juridica*, I: 80-81) counsels waiting until the "second stage" of reading.

[18] Leaf 2, recto (Michaelmas 1684) and leaf 6, recto (Hilary 1684). Note that the placement of these entries, referring to terms held in September and January, respectively, seem to be out of chronological order. For information on the King's Bench case, see notes of the transcription of leaf 6, recto, below.

[19] On leaf 2, recto, for example, there are references to "Mag. Char," to various reporters (including Dyer) and to statutes.

[20] Leaf 2, recto. For a possible identification as Sir William Williams of Gray's Inn, who in 1685 gave a dinner for Chief Justice Jeffreys, see Francis Cowper, *A Prospect of Gray's Inn* (London: Stevens & Sons, 1951), 79.

[21] Leaf 2, verso.

[22] North, *Discourse*, 28.

materials, the Notebook could hardly have been a cherished reference tool. Given the diversity of hands, it clearly did not belong to any one student. It is true that the recto of leaf one, with its household business and home remedies, contains types of information often found in more finished notebooks.[23] Yet such notations were often scribblings of convenience, and these must have been written at times when the Notebook was ready at hand. Commonplacing was a skill attained by practice, as Roger North conveyed by intoning that "whoever doth not bestow a fruitless beginning shall never know a fruitful conclusion of his studies."[24] Thus the most likely explanation of the Notebook's origins is that it was a type of teaching aid, swapped[25] among law students who used it either as a pattern for commonplacing or filled its leaves (before or after binding)[26] with rough notes to be recopied later. The wonder is that an object intended to be ephemeral has survived.

The Notebook's survival may have been due to the fact that, long after it had ceased to be useful to law students, it was used as a scrapbook. Leaves one through nineteen bear traces of paste and (on some leaves) fragments of newspaper clippings. The stories, which appear to have no common theme, date to the nineteenth century. A headline on the "Early Life of Bernadotte" probably refers to Napoleonic Marshall Jean Bernadotte, King of Sweden

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[23] Deborah Youngs, "The Late Medieval Commonplace Book: The Example of the Commonplace Book of Humphrey Newton of Newton and Pownall, Cheshire (1466-1536)," *Archives*, 25 (2000), 61-62.

[24] North, *Discourse*, 26.

[25] On note-swapping, see Thomas W. Evans, "Study at the Restoration Inns of Court," in Jonathan A. Bush and Alain Wijffels, editors, *Learning the Law: Teaching and the Transmission of Law in England, 1150-1900* (London: The Hambledon Press, 1999), 302.

[26] The Notebook's vellum binding is, to all appearances, contemporary with the writing.

from 1818 to 1844.[27] A bleed-through image of a masthead shows that one article at least was taken from a Norwich paper.[28] Certainly, these remnants testify to the low esteem in which the Notebook was held approximately a century after its creation. Still it was rescued at some point, perhaps by an antiquarian intrigued by the oddity of its multiple functions, or simply by some owner who admired the lovely penmanship of its long-dead compilers.

[27] Leaf nine, verso. The fragmentary text may refer to, or draw upon, one of two early biographies: G. Touchard-Lafosse's three-volume *Histoire de Charles XIV (Jean Bernadotte), Roi de Suede et de Norvege* (Paris: G. Barba, 1838), or to B. Sarrans' two-volume *Histoire de Bernadotte, Charles XIV-Jean: Roi de Suede et de Norvege, etc.* (Paris: Comptoir des Imprimeurs-Unis, 1845).

[28] Leaf fourteen, verso. A previous owner carefully removed these clippings.

Transcription A, Seventeenth-Century Legal Notebook*

Tender & Refusall

[T]he laste pipen of huney made forty 7 pound. The pipen made ii [11] pounde and a halef so theri was but thity 5 pound and a halfe of the huney.

Lime[1], Reed, Sall[e][2], nailes, wood, coops[3], and carver[4] for the Mall chamber.

For the Gout
Put three Good heads of Garlick in to a Quart of Brandy & when the Gout attacks the Stomack, drink four or five Spoonfull.

Raisin Wine
To a i00 [100] weight of velvide[?][5] raisins lean picked put 20 Gallons of soft water haveing [struck word] first boyled e[6] coold againe[.] let it stand in a tubb three weeks Stirring it twice a day. Strain it of[f] thro' a hair bag then put it into a vessel, let it stand in the vessel i2 [12] Months before you bottle it.

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* This transcription consists of all the legible writing on the recto of leaf one.

[1] Alternatively, "Sime," referring to straw rope; see *Oxford English Dictionary*, 2nd edition (online), (hereinafter OED 2nd).

[2] Alternatively, "Sull" or "Sulle," probably meaning soil.

[3] Baskets (OED 2nd).

[4] Wood used for carving (OED 2nd).

[5] Possible additional letters obliterated. Meaning is unclear. A contemporary meaning for "valid" was "strong, mighty, puissant, able." See OED 2nd.

[6] Lower-case "e" used in place of ampersand.

[T]he sure way of haveing good wine of this sort is to add to every Gallon apound [sic] of raisins of the Sun, it will often turn eager[7] if the fruit be not extraordinary good.

Transcription B, Seventeenth-Century Legal Notebook*

Hill. Terme. 36. Car 2d.
Jan: 23. 1684.

Jury A Returne of Jurys without Sheriffs.

Parish ought to maintaine ye high-way, Els[e] Indictable. e[8] ye Parishoners may have theire action agst. any one yt[9] ought to repaire y[t] particularly.

Indictmt. quashed for not saying (what yeare ye session was on)

Can: Law. H.8.[10] Conserning Cannon Law.

Prohib:[11] not granted for (lying incontinently with another mans wife) because ye Ecle Crt hase conusance[12] of it.

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[7] "Pungent, acrid." (OED 2nd).

* This transcription begins with the fifth line of legible writing on the recto of leaf six.

[8] Again (see previous transcription), a lower-case "e" used in place of ampersand.

[9] In this style of abbreviation yt stands for "that," just as ye stands for "the."

[10] "H.8." refers to the Statutes of Henry the Eighth.

Indictmt. No copy of it granted before ye Prison: pleads Guilty or not Guilty to it. also he must plead Guilty or not before ye Returne of ye Indictmt. be read.

Discharge No Discharge till ye last day of ye Terme.

Appearances All Appearance of Priso: to be reconized [sic].

Baile No Baile without notice to ye Att: genl. in ye Kings Case.

Prohib. not granted for calling a woman (whore).

Dilapidations. The Act for Dilapidations does not take away ye duty, but ye Criminal punishmt.[13]

Error because verdict given before issue joynd.[14]

Bar: e feme Action brought by Bar: e feme e Jugmt. ad damnu[m][15] illius obit damna sua good[s].[16]

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[11] Prohibition. Writ by which superior courts supervised inferior courts (including ecclesiastical courts and courts baron) in matters of jurisdiction. See Benjamin J. Shipman, *Handbook of Common Law Pleading*, 3rd edition (St. Paul, Minnesota: West Publishing Company, 1923), 542-543.

[12] An "early form of cognizance"; see *Oxford English Dictionary*, 2nd edition (online), (hereinafter OED 2nd).

[13] For this ruling (made during Hilary Term, 36 Car. 2, in King's Bench), see *Pool v. Trumbal*, 3 *Modern Reports* 56 (87 *English Reports* 35).

[14] For similar errors see Lewis Carroll, *Alice's Adventures in Wonderland* (1865), Chapters 11 and 12.

[15] A judgment ad damnum was a judgment for damages to a certain amount See Brian A. Garner, editor, *Black's Law Dictionary*, 7th edition (St. Paul: West Group, 1999).

Priviledge H.8. of ye Privilegdes [sic] of Oe[x]ford.

Conusance may be demanded after Imparlance[17], but no Privilegde after Imparlance.

If a man Pleads a Plea of Privilege [sic] as of (Oxford) he must then be had an allowance of ye University.

A Writ of Priv: (concerning Oe[x]ford chambers) extends onely to Ye Schollars e poore seizers[18] or servitors or ye Buttler or Steward of any house e not to an House Keeper in ye Towne whatsoever.

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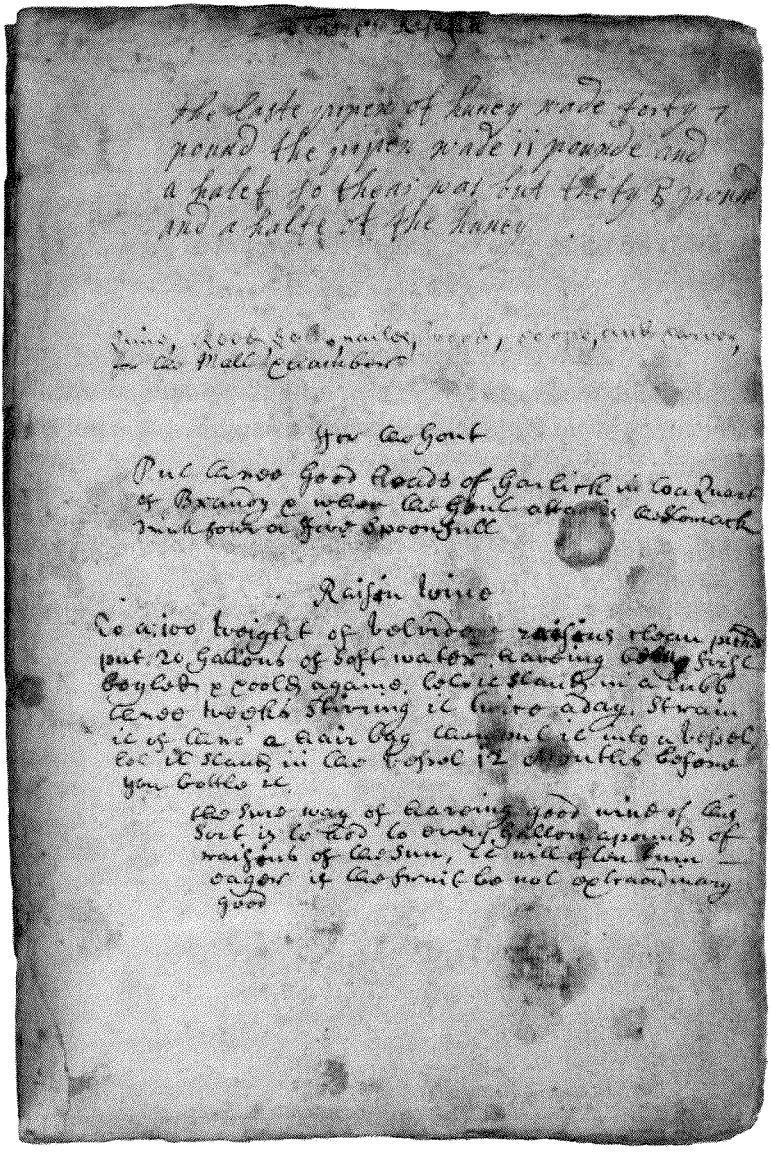
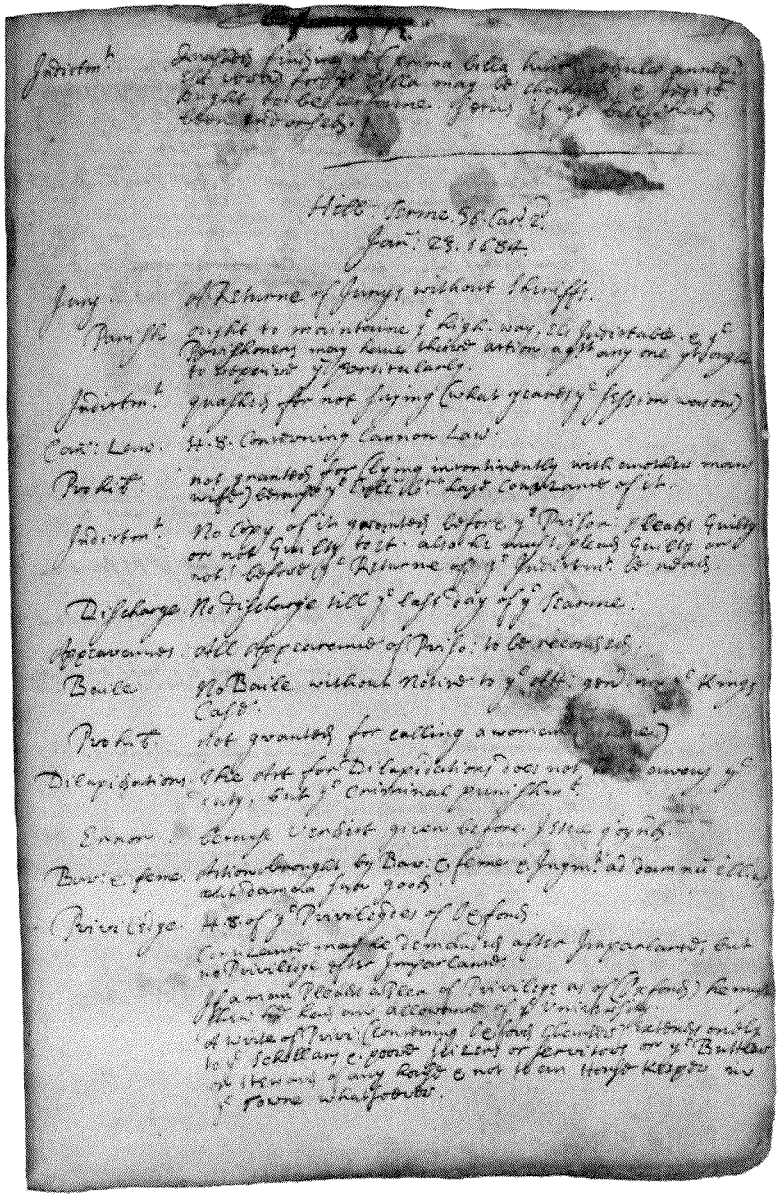
[16] The Latin is problematical, but the reference is probably to an award sufficient to cover damages incurred.

[17] Imparlance is "conference, debate, discussion, parleying." See OED 2nd.

[18] "Seizers" could be intended to refer to one who has seisin of a property; see *Black's Law Dictionary*. However, the word in question most resembles "scizers," an obsolete spelling of "scissors" (OED 2nd).



Seventeenth-Century Legal Notebook
Leaf 1, Recto
Bounds Law Library



Seventeenth-Century Legal Notebook
Leaf 6, Recto
Bounds Law Library

Period Detail, Newburgh, Orange County, New York
Courtesy of the Library of Congress

ALEXANDER DORCAS LEDGER*

In addition to serving as a source of artificial memory for the recollection of law practice information, quotations, verse, and other knowledge, commonplace books were widely used as account books for the storage and retrieval of numerous financial transactions. The practice of using bookkeeping "day books," was in popular service in England from the sixteenth through the nineteenth centuries, and was transferred to America where the custom was continued by Colonial merchants and lawyers.[1] The Alexander Dorcas Ledger offers an example of the use of a commonplace book as financial ledger of a merchant and lawyer in the prosperous environment of post-Revolution New York. Quite different from many intellectually formidable commonplace books of the pre-seventeenth century that consisted primarily of quotations and philosophical arguments from ancient authorities, Dorcas' ledger arguably falls into a more literal definition of a "commonplace" record, functioning as a working ledger.[2]

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* Irregular signatures, approximately 100 leaves (some uncut), numbered by client account entries. Sewn-in cardboard binding, 21 x 32 cm.

[1] Earle Havens, "'Of Common Places, or Memorial Books:' An Anonymous Manuscript on Commonplace Books and the Art of Memory in Seventeenth-Century England," *Yale University Gazette*, 76 (2002), 141, 152, note 24.

[2] For the pre-seventeenth century perception of commonplace books and their subsequent fall into disrepute, see Ann Moss, "The *Politica* of Justus Lipsius and the Commonplace-Book," *Journal of the History of Ideas*, 59 (1998), 421. The function of individual commonplace books

Dorcas' notebook not only serves as a traditional example of a contemporary account ledger, but also provides a window into the founding generation's legal and merchant activities. Alexander Dorcas' professional activities spanned the period between Colonial society and the creation of the new nation, and the record of these activities demonstrates a conjoined merchant and legal culture attempting to establish its independence within the large shadow of English precedent.

Located in the lower Hudson River Valley near Newburgh, New York, Andrew Dorcas operated a thriving mercantile business from the late-Colonial period to at least 1817.[3] Not only was his business significant for the variety of activity that it represented, but also for its distinguished clients. Representing some of the most prominent members of the founding generation and their offspring, Dorcas' clients included individuals such as Alexander Hamilton, DeWitt Clinton, George Clinton, Jr., and Cadwallader D. Colden.[4]

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frequently overlapped with other literary forms such as diaries, scrapbooks, journals, and account ledgers. See Havens, "Of Common Places, or Memorial Books," 140, 152, note 24.

[3] The Andrew Dorcas Notebook is an account ledger of Dorcas' mercantile business that also operated as a lower-tier law office. The earliest date in the account ledger is 1785; however, the accounts indicate activity prior to the creation of this record, and the last entry was in 1817. Census records indicate that Andrew Dorcas resided in Ulster County, New York, in 1790, and in adjacent Orange County in 1810. Dorcas' clients were located primarily in Orange County, Ulster County, and New York City.

[4] Alexander Hamilton's account concerned grain transactions between April 10, 1815 and February 15, 1817. Dorcas Ledger, entry 5. Orange County lawyer and merchant—and later United States Senator and famed New York City mayor—DeWitt Clinton's account records Clinton's filings of various New York Supreme Court cases from 1794. Dorcas Ledger, entry 82. For DeWitt Clinton, see Allen Johnson and Dumas Malone, eds., *Dictionary of American Biography* (New York: Charles Scribner's Sons, 1958) 2: 221-225. George Clinton (1771-

For his numerous lawyer clients, Dorcas appears to have performed low-level legal writing services such as preparing writs and summons, as well as accounting for sheriffs' and other fees.[5] Law practice in post-Revolution New York was individualistic, and it is likely that Dorcas created a position for himself in an informal "office practice" that allowed him to perform services such as writing wills, writs, deeds, and other legal documents without submitting himself to the rigors of formal admission to the bar.[6] On the eve of the Revolution and

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1809), was the son of Continental Congress member, New York governor, and Vice-President of the United States George Clinton (1739-1812), and cousin of DeWitt Clinton. Dorcas recorded fees involved in several of George Clinton's cases from 1794-1796 in the Ulster County Court of Common Pleas. Dorcas Ledger, entry 76. For George Clinton, see *Biographical Directory of the United States Congress, 1774-1989* . . . (Washington: Government Printing Office, 1989), 795. Cadwallader D. Colden was a lawyer, district attorney of New York City, and mayor of that city from 1818-1820. He was the grandson of Cadwallader Colden who was the Loyalist lieutenant-governor of New York on the eve of the Revolution, merchant, and owner of the Orange County manor Coldengham. Cadwallader D. Colden advocated for the emancipation of slaves in New York, sponsored relief efforts for the state's poor, and promoted juvenile welfare programs. He was an outspoken supporter of fellow Dorcas client DeWitt Clinton. Dorcas recorded fees for filing Colden's New York Supreme Court cases from 1794. Dorcas Ledger, entry 72. For the Coldens, see *Dictionary of American Biography*, 2: 286-288.

[5] For the structured fee system of the period, see *Laws of the State of New York Passed at the Sessions of the Legislature Held in the Years 1789, 1790, 1791, 1792, 1793, 1794, 1795 and 1796, Inclusive* (Albany: Weed, Parsons and Company, Printers, 1887) III: 39-57. From justices and judges to sheriffs and supporting staff such as court clerks, the act describes in pounds, shillings, and pence the numerous fees for services. For more on structured fees, see David McAdam, *et al.*, *History of the Bench and Bar of New York* (New York: New York History Company, 1897) I: 105-106, 120-121.

[6] For the individualistic nature of the post-Revolution bar, and for a description of the New York office practice, see Julius Goebel, Jr., ed., *The Law Practice of Alexander Hamilton, Documents and Commentary*

during the immediate period that followed, the New York bar demanded much stricter requirements for admission as attorney or counsel than it would later. During the nineteenth century, legal standards declined, legal education was mostly informal, and admission to the bar became colloquial.[7] A number of Dorcas' service fees came from writing *capias* writs that directed the sheriff to produce the defendant—often residing outside of the county—in court at a specific time.[8] Having performed legal writing during the Colonial period, Dorcas would have been quite familiar with the execution of these types of writs because they did not significantly change from the period of Crown rule to that of the new nation—a service that young lawyers with an active trial practice may have found useful.[9]

(New York: Columbia University Press, 1964), I: xi, 2; and Lawrence M. Friedman, *A History of American Law* (New York: Simon and Schuster, 1985 (1973)), 272. New Jersey and Massachusetts had maintained a distinction between classes of attorneys for several years following Independence, and Northwest Territorial statutes fleetingly recognized a distinction between attorneys and the higher grade of counselors. For the vague and transitory existence of the English distinction of the graded bar, see Friedman, *A History of American Law*, 275-276.

[7] See Goebel, *The Law Practice of Alexander Hamilton*, 46-47; and Friedman, *A History of American Law*, 266.

[8] A sample of Dorcas' *capias* entries is offered in facsimile below. The George Clinton, Jr., entry provides a good example of the form of many of the fee postings and reads: "By cash Received from James Bell twenty Shillings and Six pence in full for my fees on a Capias against John Arnot. Dorcas Ledger, entry 76. For period *capias* writs, see Goebel, *The Law Practice of Alexander Hamilton*, I: 64-66.

[9] See Goebel, *The Law Practice of Alexander Hamilton*, I: 64-69. Notebooks kept by Alexander Hamilton and DeWitt Clinton illustrate some confusion. Instead of their understanding of the writ as a combination of the English common pleas and a bill of New York, Goebel argues that the important characteristics of the writ remained unchanged from the English period, most notably substituting the people of the state of New York in place of the name of the King.

In addition to his law-related activities, Alexander Dorcas maintained a diverse mercantile business. A significant part of his ledger highlights a client list that consisted of numerous grain merchants, lumber and building contractors, farmers, labor brokers, property managers, and individuals for whom Dorcas managed their business accounts, keeping detailed records of income and purchases. Additionally, recorded entries of Dorcas' personal accounts illustrate the vigorous activity of his function as a grain and dry goods merchant. Dorcas not only recorded transactions of grain raised and sold from as early as 1789, but in his personal postings detailed more than three hundred individual entries of purchase or sale of such items as grain, pork, lumber, nails, flour, salt, rum, corn, butter, flaxseed, and powder and shot.[10] Other entries for much smaller spending include sundries, six shillings for a church subscription, one shilling per rod for the construction of a stone wall, and a disbursement of one shilling, three pence to "a poor man," indicating that Dorcas also used his ledger for non-business expenitures.[11]

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[10] Most of Dorcas' purchases or sales of items were likely for re-sale and the amount of currency in the transaction indicates that these were large quantities. One ledger entry recorded £22 for flour sold and soon after another £69 for flour. Similarly, on December 2, 1794, Dorcas recorded a transaction for £35 of butter. English standards of measurements and currency are used throughout the ledger. It would be well into the nineteenth century before the United States would establish a reliable national currency. The currency is recorded in pre-decimalization pounds and is calculated at twenty shillings per pound.

[11] Attempts had been made to liquidate the heavy debt incurred during the building of Trinity Church at Montgomery, New York, through the sale of pews and private subscriptions. Alexander Dorcas was listed as a vestryman in the Church, and several members were Dorcas' clients including Cadwallader Colden, Peter Galatian, and Andrew Graham. For Trinity Church, see Samuel W. Eager, *An Outline History of Orange County with an Enumeration of Names* (Newburgh [New York]: S.T. Callahan, 1846-7), 40.

A fine example of Revolutionary-era double-entry bookkeeping, Alexander Dorcas' account ledger is, in its form, rooted in fifteenth-century Venice. Generally introduced by Luca Paccioli in his 1494 work *Summa de Arithmetica, Geometria, Proportioni, and Proportionalita*, the debtor and creditor system of bookkeeping was soon embraced throughout the continent. Paccioli advocated the use of a three-part system that included a memorandum book for chronological business transactions, an account book or narrative journal of credits and debits, and an account book or ledger in which amounts and dates were recorded with debits on one side and credits on the other.[12] A later English version, and perhaps an antecedent of Dorcas' book, was introduced by Hugh Oldcastle in 1588 and entitled, *A Briefe Instruction and Maner How to Keepe Bookes of Accompts After the Order of Debitor and Creditor.*

Dorcas' version of the account ledger is a bound volume containing eighty-five leaves of lined ledger stock. The open volume reveals a series of facing pages with client entries that contain dated debitor postings on the left page, or funds coming in, and creditor listings on the right facing page indicating outgoing funds. In addition to his personal account information filling twelve full pages including the back paste-down sheet, Dorcas recorded the account information for seventy-nine clients, and provides a client directory on the first three pages of the volume. The front paste-down sheet contains three Dorcas signatures in addition to a notation that the blank volume was purchased in New York from the bookseller Robert Hodge for six shillings.

Dorcas did not use a clerk for his entries, choosing to make them all in his own hand.[13] Most of the ledger entries

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[12] Havens, "Of Common Places, or Memorial Books," 153, note 31.

[13] Throughout the ledger, Dorcas frequently posted entries that were written in the first person. This, along with the fact that the text in the

occurred from 1789 through 1805, and indicate the primary period of activity for this account book. The earliest entry was a series of postings for a shoemaker named Silas Jessup in 1785, and the last dated entry was a posting on February 15, 1817, for Alexander Hamilton. Dorcas records no legal work for Hamilton, and the postings are related to a series of wheat, oats, and corn sales between 1815 and 1817.

At this writing, it is unknown what became of the merchant-lawyer Alexander Dorcas following his 1817 entry. He last appeared in the census records in 1810 residing in Orange County, New York, as the head of an eight-person household.[14] Even though he practiced law in post-Revolution New York, which was the center of American mercantile activity during this period, he is not listed as attorney in any appellate case. Dorcas, however, was not practicing law at a trial level as an attorney or counselor, but functioned in the self-defined sphere of an office practice that provided legal writing for a handful of lawyers in the surrounding counties. His legal activity served to complement his mercantile business and offers an example of the individualistic nature of the profession during the first years of the new nation.

The following pages offer transcribed examples from representative Dorcas clients George Clinton Jr. (pages 36-37) and John McEwen (pages 38-39). Facsimile images follow the transcribed pages.

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body of the ledger was written in the same hand as the signatures on the front paste-down sheet indicates that Dorcas made his own entries.

[14] 1810 Census, Orange County, New York.

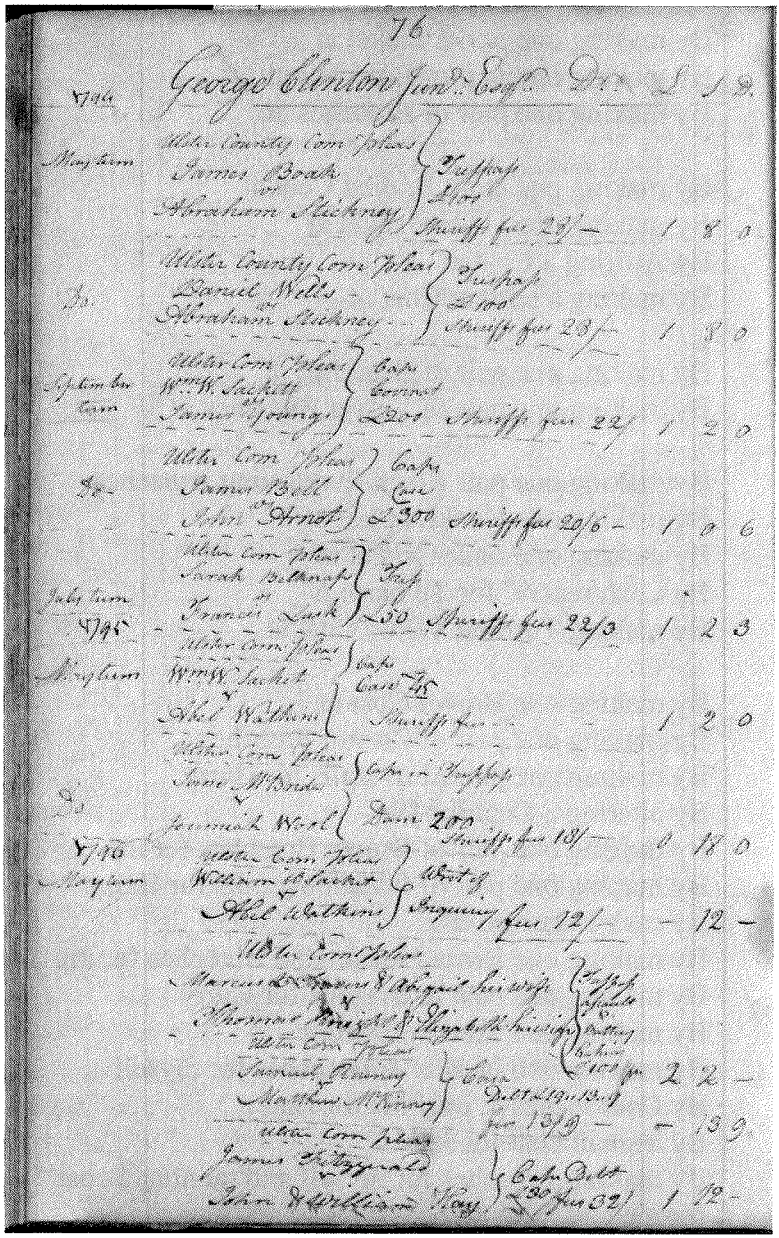
	George Clinton J[r]. Esq[r]. D[r]		L	S	D
1794					
May Term	Ulster County Com Pleas James Boak v Abraham Stickney	Trefpafs £ 100 sheriffs fees 28/	1	8	0
Do.	Ulster County Com Pleas Daniels Wells v Abraham Stickney	Trefpafs £ 100 sheriffs fees 28/	1	8	0
September Term	Ulster Com Pleas W[m]W. Sackett v James Young	Caps Covnat £ 200 sheriffs fees22/	1	2	0
Do.	Ulster Com Pleas James Bell v John Arnot	Caps Case £ 300 sheriffs fees 20/6	1	0	6
July Term 1795	Ulster Com Pleas Sarah Belknap v Francis Lusk	Tref £ 50 sheriffs fees22/3	1	2	3
May Term	Ulster Com Pleas W[m]W. Sackett v Abel Watkins	Caps Case £ 45 sheriffs fees	1	2	0
Do.	Ulster Com Pleas Jane M[c]Bride v Jeremiah Wool	Case in Trefpafs Dam 200 sheriffs fees 18/		18	
1796 May Term	Ulster Com Pleas William W. Sackett v Abel Watkins	Writ of Inquiry fees 12/		12	
	Ulster Com Pleas Marcus B. Travers & Abigail his wife v Thomas Bright & Elizabeth his wife	Trefpafs Assault & Battery Capias £ 100 for	2	2	0
	Ulster Com Pleas Samuel Rainey v Mathew McKinney	Caps Debt £ 19.13.9 fees 13/9		13	9
	Ulster Com Pleas James Fitzgerald v John & William Hay	Caps Debt £ 30 /fees 32	1	12	

1795	Contra Cra	L	S	D
October 5	By cash Received from James Bell twenty Shillings and Six pence in full for my fees on a Capias against John Arnot	1	0	6

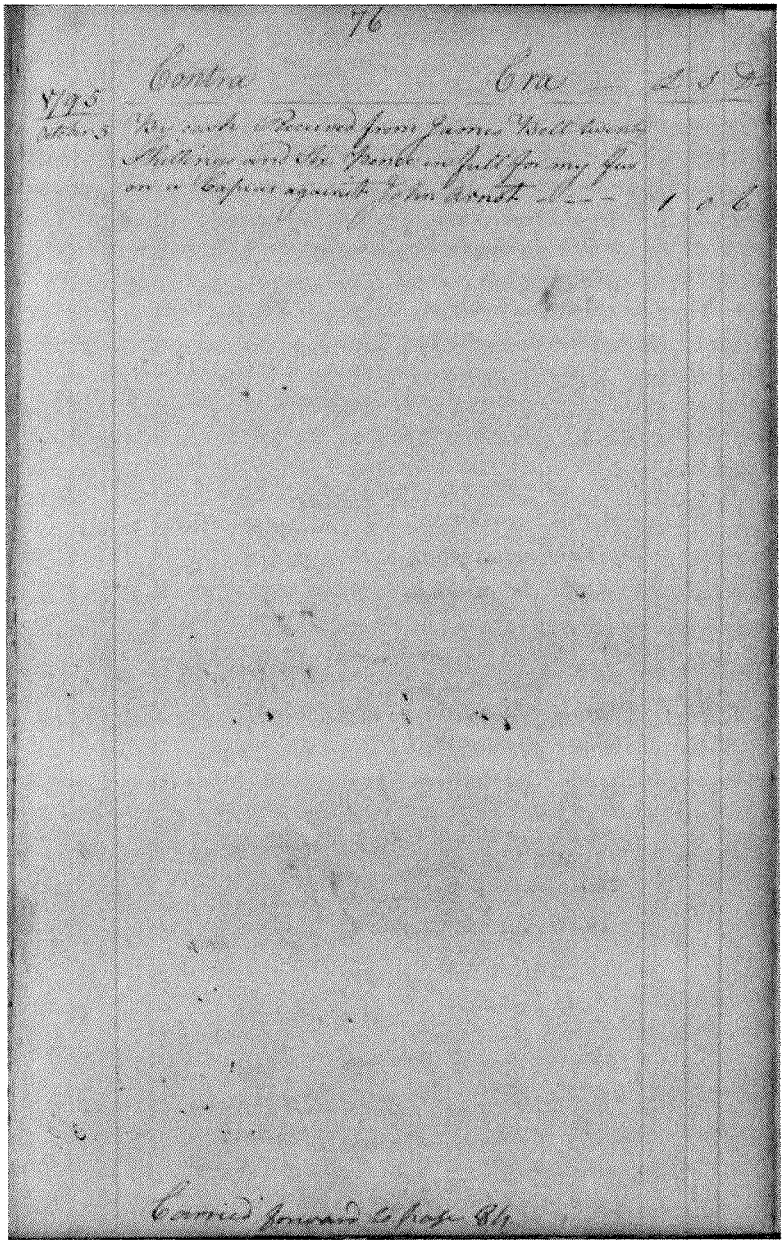
Carried forward to page 84

1792	John M^{c}Ewen D^{r}	L	S	D
Dec^{r} 24	To Writing a pair of Indentures at 8/	0	8	0
1793				
May 15	To one small Hat at 1/6	0	1	6
Nov^{r}	To five prime Boards at 1/p^{r} piece	0	5	0
Dec^{r} 3	To one Bufhel of Buckwheat at 2/6	0	2	6
1794				
Jan^{ry} 8	To 3 small pigs at 3/ p^{r} piece	0	9	0
August	To One Bushel of Rye at 6/ p^{r} Bush	0	6	0
Oct^{r} 6th	To One Bushel of seed wheat at 9/ p^{r} Bus	0	9	0
1795				
April 22^{d}	To writing a Deed at 12/	0	12	0
Oct^{r} 28	To one paper of tobacco at 6^{d}	0	0	6
1796				
Nov^{r}	To cash paid you 8/10	0	8	10
1797				
July 18th	To one hundred and three Quarters of flour at 54/	2	14	
August 18th	To a piece of grafs at 24/	1	14	
D^{o}	To Cash paid you at John S.M. Cays 12/		12	
Sept^{r}	To one Bushel of Club wheat at 13/		13	
	To one 2 Inch plank at 2/		2	
1800				
	To one Surtout Coat for J. Strout 28/	1	8	
Febry 20	To two Quarters Schooling at 10/ p Q^{r}	1		
May 1st	To one Shilling in Cash at W^{m} Smiths		1	
July 9th	To One Quarter and 19 days schooling at 10/		12	8
	Amount Carried to Page 45	11	9	0

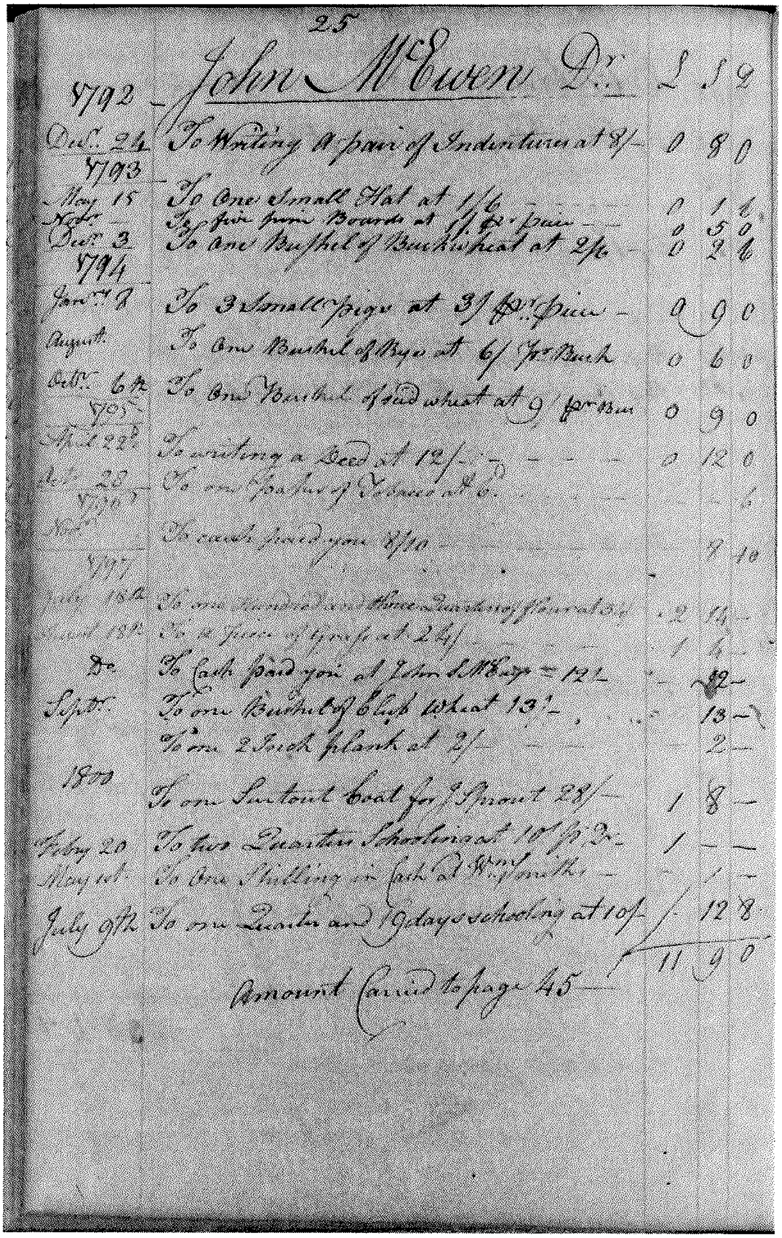
1791	Contra Cra	D	S	P
)ctr.1792	By making one under Jacket at		5	
une	By making one pair of Breeches at		5	
Jov^{r}	By making one pair of Breeches at		5	
1793				
\pril	By making one strait Bodied Coat at		10	
Jov^{r}	By making one Under Jacket at		5	
)o Do	By Attiring a Coat at			
)ec^{r}	By making a surtout Coat at		10	
1794				
Aarch 3	By making one pair of Breeches at		5	
)ec^{r} 5	By making one pair of Velvet Breeches at 5/	0	5	0
1795				
une 6th	By making one pair Black Everlasting Breeches		5	
\ugust	By making one Nankun Coat at		8	
)ct^{r} 31	By making one under jacket at		5	
Jov^{r} 28	By Cash receiv^{d} for Tobacco 6^{d}			6
)o Do	By making Turning a Blue Coat at		8	
1796				
une 18	By making one Brown Coat at		10	
)ct^{r} 15	By making one pair of Casmir breeches		5	
79	By making one pair of overalls for Harry		2	6
	By altering a Coat for Do			
	By making one pair of Brown Breeches for me		5	
une	By making one pair of fustain overalls for Harry		2	6
	By cash Received 8/		8	
Jov^{r}	By making one Brown Jacket and Breeches for me			
)ec^{r}	By making one coat & overalls for Harry		9	
'ebry 1798	By making one Surtout for John		4	
	By making two jackets & Breeches for myself		16	
	By ~~Coat~~ Jacket & overalls for Harry		6	
	By a small coat for James		3	
	By making Breeches for myself and tanning a coat for me		10	
800	By making overalls for Harry		2	6
une	By 25¼ Veal at		8	5
uly 12	By one Shilling receiv^{d} at W^{m} Smiths	1		
		8	19	5



Alexander Dorcas Ledger, Entry 76
Bounds Law Library



Alexander Dorcas Ledger, Entry 76
Bounds Law Library



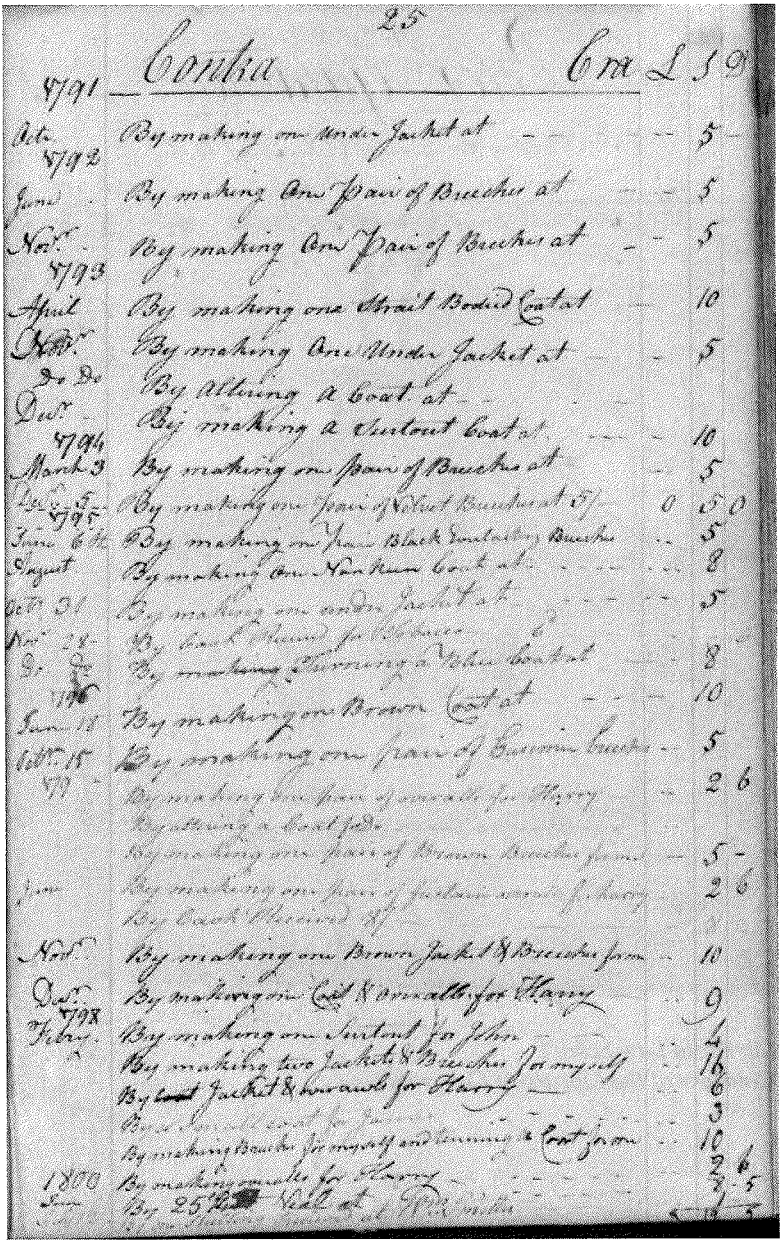
25

John McEwen Dr.

Date		£	s	d
1792 Decr. 24	To Writing A pair of Indentures at 8/-	0	8	0
1793 May 15	To One Small Hat at 1/6	0	1	6
Novr.	To five pine Boards at 1/ Pr. pair	0	5	0
Decr. 3	To One Bushel of Buckwheat at 2/6	0	2	6
1794 Janry 8	To 3 Small pigs at 3/ Pr. Piece	0	9	0
August	To One Bushel of Rye at 6/ Pr. Bush	0	6	0
Octr. 6th	To One Bushel of seed wheat at 9/ pr Bu	0	9	0
1795 Apl 22d	To writing a Deed at 12/	0	12	0
Octr 28	To one Quarter of Tobacco at 6			6
1796 Novr	To cash paid you 8/10		8	10
1797 July 18th	To one Hundred and three Quarters of flour at [illegible]	2	14	-
[illegible] 18th	To a pair of Geese at 24/	1	4	-
Do.	To Cash paid you at John McKay = 12/		12	-
Septr.	To one Bushel of Clup Wheat 13/		13	-
	To one 2 Inch plank at 2/		2	-
1800	To one Surtout Coat for J Sprout 28/	1	8	-
Febry 20	To two Quarters Schooling at 10/ pr Qr.	1	-	-
May 1st	To One Shilling in Cash at Wm. [illegible]		1	-
July 9th	To one Quarter and 19 days schooling at 10/		12	8
		11	9	0

Amount Carried to page 45

Alexander Dorcas Ledger, Entry 25
Bounds Law Library


25

1791 Contra Cr £ s d

Oct. By making one Under Jacket at — 5 —

1792

June By making One Pair of Breeches at — 5

Nov. By making One Pair of Breeches at — 5

1793

April By making one Strait Bodied Coat at — 10

Nov. By making One Under Jacket at — 5

Do Do By Altering a Coat at —

Dec. By making a Clothcut Coat at — 10

1794

March 3 By making one Pair of Breeches at — 5

Dec. 5 By making one Pair of Velvet Breeches at 5/ 0 5 0

1795

June 6 By making one Pair Black Imitating Breeches — 5

August By making One Nankeen Coat at — 8

Oct. 31 By making one under Jacket at — 5

Nov. 28 By Cash Allowed for Clothes —

Do Do By making & Turning a Velvet Coat at — 8

1796

June 18 By making one Brown Coat at — 10

Oct. 15 By making one Pair of Barroon Breeches — 5

1797 By making one Pair of overalls for Harry — 2 6

By altering a Coat for —

By making one Pair of Brown Breeches for — 5 —

June By making one Pair of Fustian overalls for Harry — 2 6

By Cash Received of —

Nov. By making one Brown Jacket & Breeches for — 10

Dec. 1798 By making one Coat & Overalls for Harry — 9

Febry. By making one Surtout for John — 4

By making two Jackets & Breeches for myself — 16

By Coat Jacket & Overalls for Harry — 6

By Making Breeches for myself and Turning & Coat for — 3

By making Breeches for myself and Turning & Coat for — 10

1800 By making overalls for Harry — 2 6

June By 25 Yds Veal at 5 d per Yard 5 10 5

Alexander Dorcas Ledger, Entry 25
Bounds Law Library

Litchfield Law School
Courtesy of the Library of Congress

GEORGE JOSIAH STURGES WALKER'S LITCHFIELD NOTEBOOK*

George J.S. Walker was nineteen years old in 1826, the year he studied at the Litchfield Law School. A native of Georgia and a graduate of the University of Georgia, he was one of many ambitious southerners who would undertake the long journey to Connecticut. Over Litchfield's forty-nine-year history, Georgia and South Carolina provided more students than any other states except Connecticut, Massachusetts, and New York. John C. Calhoun, who studied there in 1805, was the school's best-known southern alumnus.[1]

Founded in 1784 by Princeton graduate Tapping Reeve, the Litchfield Law School was by the 1820s a prestigious institution, many of whose graduates were judges and

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* Quarto-sized but composed of signatures of twelve leaves. In all, approximately 450 leaves, unnumbered. Red spine label with *Gould's Lectures* in gold; black spine label, with *Vol. I* and *G.J.S.W.* in gold. Contemporary leather binding, 20.5 x 26 cm. Hereinafter cited as Walker, *Gould's Lectures*. Citations to leaf-numbers will be in square brackets, beginning with the first full page of note taking. Following this introduction is a transcription of leaves one through six.

[1] Marian C. McKenna, *Tapping Reeve and the Litchfield Law School* (New York: Oceana Publications, 1986), 124-134, 145; and Samuel H. Fisher, *Litchfield Law School, 1774-1833: Biographical Catalogue of Students* (New Haven: Yale University Library, 1946), 131. See also J.R. Scafidel, "A Georgian in Connecticut: A.B. Longstreet's Legal Education," *Georgia Historical Quarterly*, LXI (1977), 222-232; and John Donald Wade, *Augustus Baldwin Longstreet: A Study in the Development of Culture in the South* (Athens: University of Georgia Press, 1969), 39-47.

members of Congress.[2] Over the years, Reeve had developed a curriculum of lectures heavily influenced by Blackstone, as well as library exercises and moot courts that made Litchfield training both practical and theoretical. Under this system, Litchfield students took notes on an array of topics, including bailments, contracts, municipal law, pleadings, evidence, real property, the law merchant, and the law of baron and femme (domestic relations).[3]

A freestanding institution, Litchfield was a link with the tradition of the English Inns of Court, those medieval institutions whose students dined together, heard lectures, took part in moot courts, and received all the advantages of living in an atmosphere of legal discourse. Walker and other young southerners may have regarded Litchfield as a substitute for the Inns, which (though in decline by the eighteenth century) had trained a number of lawyers from the southern colonies.[4] In any case, Litchfield would serve

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[2] John H. Langbein, "Blackstone, Litchfield, and Yale: The Founding of the Yale Law School," in Anthony T. Kronman, editor, *History of the Yale Law School* (New Haven: Yale University Press, 2004), 17-32, especially 23, 25. Also see McKenna, *Tapping Reeve*, 144-147, 199-202; and Steve Sheppard, editor, *The History of Legal Education in the United States* (Pasadena: Salem Press, 1999), 195-204.

[3] Lawrence Friedman, *History of American Law*, 2nd edition (New York: Simon and Schuster, 1985), 319-320; Alfred Z. Reed, *Training for the Public Profession of the Law: Historical Development and Principal Contemporary Problems of Legal Education in the United States* (New York: Carnegie Foundation, 1921), 44, 45, 131, 423; and Langbein, "Blackstone, Litchfield, and Yale," 21-23, 26-29; see also Andrew M. Siegel, "To Learn and Make Respectable Hereafter: The Litchfield Law School in Cultural Context," *New York University Law School Review*, 73 (1998), 1978, 2007. For citations to studies of the Litchfield curriculum, see Karen S. Beck, "One Step at a Time: The Research Value of Law Student Notebooks," *Law Library Journal*, 91 (1999), 34 note 34.

[4] McKenna, *Tapping Reeve*, 1-9. For further information, see Langbein, "Blackstone, Litchfield, and Yale," 19, 25; and W. S. Holdsworth, *History of English Law* (Boston: Little, Brown, 1903-1972), XII: 77-91. See also D. Plunket Barton, *et al.*, *The Story of the Inns of Court*

as a model for many antebellum law schools, which typically were controlled by one or two distinguished lawyers committed to teaching from a list of standard texts. Litchfield and its progeny thus represented a transitional moment in American legal education. They were different in approach both from the traditional law office apprenticeship and from the type of casebook training that evolved after the Civil War.[5]

In 1798, Reeve's former student James Gould joined him at Litchfield. They taught together until 1820, after which Gould carried on alone, making few changes in the conduct of the school. Like Reeve, Gould gave lectures, though in comparison his manner was formal and precise. He read his notes twice, giving students an opportunity to copy down his words verbatim, occasionally indulging in a professorial aside.[6] His purpose, shaped by scientific

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(Boston, Houghton Mifflin, 1924), 8-9, 11-16, 25-27; and Beck, "One Step at a Time," 30-31, 31 note 7.

[5] Beck, "One Step at a Time," 36; Langbein, "Blackstone, Litchfield, and Yale," 18-20, 29-32; Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: University of North Carolina Press, 1983), 20-22, 51-52; James Willard Hurst, *The Growth of American Law: The Law Makers* (Boston: Little, Brown, and Company, 1950), 259-260; McKenna, *Tapping Reeve*, 121-123; and on the birth of the casebook system, see William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: Oxford University Press, 1994), 22-28.

[6] Alain C. White, *The History of the Town of Litchfield, Connecticut, 1720-1920* (Litchfield: Enquirer Print, 1920), 102-106; and Reed, *Training for the Public Profession of the Law*, 131. See generally McKenna, *Tapping Reeve*, 93-106, 107-119, 147-151, 166-167, 169, 170-171, and 174-175. Both men viewed the contents of their lectures as privileged information, not to be published for fear of undermining the need for the school. Late in their respective careers, Reeve and Gould did publish portions of their work. See Tapping Reeve, *The Law of Baron and Femme; of Parent and Child; of Guardian and Ward; of Master and Servant; and of the Powers of Courts of Chancery* (New Haven: Oliver Steele, 1816); and James Gould, *A Treatise on the Principles of Pleading in Civil Actions* (Boston: Lilly and Wait, 1832).

interests that he shared with contemporary legal educators, was "to teach the law—the common law, especially—not as a collection of insulated positive rules, as from the exhibition of it in most of our books it would appear to be; but as a system of connected rational principles."[7]

The school day began for Walker and his classmates at nine o'clock with attendance upon Gould's lectures. Gould expected that after note-taking and recitation, his students would spend time in the school's law library. There they could consult authorities and recopy their notes, finishing, after an hour off for lunch, by 3:00 o'clock. A complete set of notes could consist of as many as nine volumes.[8] Naturally Litchfield graduates prized these notes for both practical and sentimental reasons; even today, more than fifty sets are extant.[9]

Only one Walker volume is extant in the collections of the Bounds Law Library. It contains his notes on Master and Servant, Contracts, Bailments, and Executors and Administrators. Written in a graceful hand with a minimum of errors, these pages were almost certainly copied from rough notes or from finished notebooks in circulation among Litchfield students—the latter being a practice that Gould deplored but could not stamp out.[10]

What follows is a discussion of that portion of Walker's Master and Servant notes that discuss the law and status of slavery. The passage is of interest because, though brief (it

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[7] Gould (letter of November 17, 1822), quoted in McKenna, *Tapping Reeve*, 108. On the notion of law as a "science of principles," see LaPiana, *Logic and Experience*, 29-44, 46.

[8] White, *History of the Town of Litchfield*, 98-99; and McKenna, *Tapping Reeve*, 171. A typical complete set consisted of five volumes; see Beck, "One Step at a Time," 35.

[9] McKenna, *Tapping Reeve*, 183-186.

[10] See McKenna, *Tapping Reeve*, 171-172; and Beck, "One Step at a Time," 35-36, 42-43.

takes up six of the section's forty-six leaves),[11] it reveals Gould's approach to a controversial topic, revealing much of his intellectual style. Evidently, as might be expected, Walker—a product of Georgia's slaveholding regime—listened carefully and took clear, serviceable notes.

Gould's lecture was pointed but philosophical. Like Blackstone, whose approach he largely follows, he made no effort to conceal his distaste for slavery.[12] Yet his purpose was to apply rules of reason to the concept of servitude and to a group of associated legal problems in Connecticut. After a brief introduction, he began to attack the legal foundations of slavery by means of a logical argument, considering three possible origins of such a state: captivity, contract, and birth. In making his analyses he brought to bear three levels or systems of law: the Law of Nations (which he calls "National" law), Common Law, and local law.[13]

Gould knew that slavery had been legitimized under the Law of Nations by virtue of the right, recognized since classical times, to kill or enslave captives of war. This

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[11] Master and Servant is the first "title" in the notebook; in this section, the notes are all on the recto of the leaves. For later titles, Walker wrote chiefly on the recto, but with frequent supplementary comments on the verso of leaves, often recording Gould's extemporaneous moments. Opposite the recto of the first leaf of Executors and Administrators, for example, he wrote: "Judge Gould in lecturing in this Title, said, he presumed, there was not such a nonsensical paper extant, as y[e] Connt St. of Distributions. Quaere, Is this a wrong presumption?" Toward the end of the volume, Walker wrote on both sides of leaves.

[12] Blackstone's discussion of slavery, like Gould's, is under the heading of "Master and Servant." The citations in the transcript below reflect the pagination of an edition of Blackstone later than the first (1765) edition. Walker is likely to have consulted an early American edition, such as Sir William Blackstone, Knt., *Commentaries on the Laws of England: In Four Books* (Philadelphia: Robert Bell, 1771) I: 422-432 (hereinafter Blackstone 1771), or subsequent editions of similar pagination.

[13] Walker, *Gould's Lectures*, [1-2].

doctrine was well established in Justinian, as Blackstone had pointed out; Grotius had also accepted it.[14] But Gould preferred to emphasize that the "best modern commentators" had denied the legitimacy of enslavement by means of war. Therefore he drew his students' attention to works by Montesquieu and Burlamaqui, as well as to Blackstone's discussion of slavery.[15]

In fact, as Gould must have known, questions concerning the status of captives had considerable currency in 1826. The previous year, the United States Supreme Court had ordered the return of African prisoners captured while on board the Spanish vessel *Antelope* by a privateer. Chief Justice Marshall, in his decision, had condemned the slave trade but declared that in Africa, it was "still the law of nations that prisoners are slaves."[16] Gould did not see fit to mention the *Antelope* opinion. One of his unspoken lessons, apparently, was a doctrine of selective citation.

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[14] Blackstone 1771, I: 423-425; and see Hugo Grotius, *De Jure Belli ac Pacis,* Francis W. Kelsey, *et al.*, translators (New York: Oceana, 1964) (1646), 3: 690-692.

[15] Walker, *Gould's Lectures*, [2]. For citations to Montesquieu and Burlamaqui, see the Walker Notebook transcription below, note 4. Note also that Walker and his fellow-students could find citations to Montesquieu in their daily readings: see Blackstone 1771, I: 416. For references to Montesquieu, "whom we all revere," see "Mark Antony," "Slavery 'Ought to be Regreted . . . But It Is Evidently Beyond Our Controul': A Defense of the Three-Fifths Clause," in *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles and Letters During the Struggle Over Ratification, Part One* (New York: The Library of America, 1993), 742. For yet another Enlightenment view, see Emer de Vattel, *The Law of Nations, or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns*, Joseph Chitty, editor, (Philadelphia: T. & J.W. Johnson, 1867(1758)), 356-357.

[16] *The Antelope, the Vice-Consuls of Spain and Portugal, Libellants*, 23 United States Reports [10 Wheaton] 66 (1825); and see John Thomas Noonan, *The Antelope: The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (Berkeley: University of California Press, 1977).

Gould's second category of slavery was that initiated by bargain or contract.[17] Gould demolished the justification for this supposedly voluntary form of servitude by linking freedom and property in the Enlightenment manner. He observed that an "absolute sale of his liberty" would destroy the slave's right of property, hence destroying the "quid pro quo" essential for a valid contract under Common Law.[18] Turning to the question of slavery by birth, Gould extended his logic, maintaining that such a condition would presuppose slavery by captivity or contract, neither of which was valid.[19] To augment the philosophical part of his argument Gould employed an historical argument, citing cases, statutory law, and Hume's *History of England* to show that the Common Law did not recognize slavery.[20]

Yet when he began to discuss affairs in Connecticut, Gould had to admit that a "qualified slavery" existed there.[21] In truth, slavery had been given legislative sanction as early as 1650, though the laws concerning slavery, as Gould understood, had been written not to legitimize the institution but to control slaves or to facilitate their emancipation.[22] Similarly the courts in Connecticut had taken the existence of slavery for granted, ruling on such questions as the status of slave property in actions of trover or detinue,

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[17] For early recognition of this form of slavery, see Grotius, *De Jure Belli ac Pacis*, 2: 255-256, citing Tacitus and others.

[18] Blackstone 1771, I: 423-425.

[19] Walker, *Gould's Lectures*, [3].

[20] For these sources, including David Hume's six-volume work of 1778, see the Walker Notebook transcription below at note 10.

[21] Walker, *Gould's Lectures*, [4].

[22] See John Codman Hurd, *The Law of Freedom and Bondage in the United States* (Boston: Little Brown, 1858), I: 258, 268-272 (for Connecticut statutes); and William M. Wiecek, "The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America," *William and Mary Quarterly*, 34 (1977), 258, 260-261.

the nature of emancipation, and the settlement and care of emancipated slaves.[23]

Summarizing, Gould took as his guide a summary of law in the "Master and Servant" section of Reeve's *Law of Baron and Femme*, telling his students that masters had never had total power of slaves' lives, hinting that slavery in Connecticut was more akin to a state of semi-permanent apprenticeship than to one of abject servility, and noting that the legislature had provided for the emancipation of slaves born after March 1, 1784.[24] The end game of slavery had been playing out in Connecticut for decades. Gould used the subject chiefly as a means of exhibiting patterns of legal logic, and to a lesser extent as an excuse for excursions into the feudal past.

Walker's notes provide little hint of his reaction to Gould's lecture. They contain only one possible editorial comment—the addition of the phrase "as J.G. supposes" following Gould's description of a "qualified slavery" in Connecticut. Otherwise the notes convey the impression of a nearly verbatim transcription, approached with the seriousness appropriate to a grave matter of practical interest.[25] The extent to which Walker took Gould seriously, displaying a marked intellectual interest in the

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[23] Walker, *Gould's Lectures*, [4].

[24] Compare Walker, *Gould's Lectures*, [4-6], with Reeve, *Law of Baron and Femme*, 339-341. To compare Connecticut's regime with those of plantation states, see Thomas D. Morris, *Southern Slavery and the Law, 1619-1860* (Chapel Hill: University of North Carolina Press, 1996).

[25] While Gould's notes may seem theoretical, lawyers in Alabama and Georgia would subsequently argue whether there were valid parallels between villeinage and southern slavery, whether slavery was ever recognized by the common law, and how much of the civil law was applicable to the status of slaves in the south. See, for example, *T. and W. Brandon v. Planters and Merchants Bank of Huntsville*, in 1 Stewart 320-345 (1828); *William Neal v. Nancy Farmer*, 9 Georgia Reports 555-575 (1851); and *Seaborn C. Bryan v. Hugh Walton*, 14 Georgia Reports 185-207 (1853).

subject, appears most clearly when Walker's slavery notes are compared to those of other, roughly contemporary Litchfield students.[26]

The editors examined five additional sets of notes, taken by Augustus Longstreet Baldwin (1813),[27] Charles Greely Loring (1813 or 1814),[28] an anonymous student (1813 or 1815),[29] Horace Mann (1822),[30] and Origen Storrs Seymour (1824).[31] Of the six sets, Walker's is by far the longest at nearly 1100 words; most of the others were less than half as long. Walker also reflects the most library work, citing nineteen sources. His closest competitors, Loring and Seymour, weigh in respectively at twelve and fifteen sources. Most of these notes contain passages of

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[26] The following comparison is not comprehensive. The excerpts employed reflect those librarians, archivists, and historians (see Foreword) who were kind enough to send photocopies. For suggestions of the types of studies that could be carried out through comparisons of Litchfield notes, see Langbein, "Blackstone, Litchfield, and Yale," 28, 47 note 105.

[27] The R.W. Woodruff Library of Emory University holds Longstreet's notes. His distinguished career included service as a Georgia state judge, educator, and college president. He was the author of *Georgia Scenes* (1835) a classic of Southwestern humor. See Scafidel, "A Georgian in Connecticut," 222; White, *History of the Town of Litchfield*, 313; and Fisher, *Litchfield Law School*, 78.

[28] The Litchfield Historical Society holds Loring's notes. For more on Boston lawyer and legislator Loring, see Fisher, *Litchfield Law School*, 79.

[29] The Earl Gregg Swem Library of the College of William and Mary, Manuscripts and Rare Books Department, holds the notes of an anonymous Litchfield student, *circa* 1813 or 1815.

[30] The Dedham Historical Society holds the notes of Massachusetts congressman and celebrated educator Horace Mann; see also Fisher, *Litchfield Law School*, 82.

[31] The Litchfield Historical Society holds Seymour's notes. For his careers as a congressman and as Connecticut's chief justice, see Fisher, *Litchfield Law School*, 110.

sloppy writing and inaccurate citation; but these are qualities almost inevitable in student work.[32]

After finishing his Litchfield experience, Walker returned to Georgia, practicing law in Richmond County and serving in 1828 as a member of the Georgia House of Representatives.[33] Within a few years he had migrated to Alabama, where in 1832 he married Ann Elizabeth McCauley Mitchell of Cahaba, Dallas County. During these years he practiced law and politics (he represented Mobile County in the 1835 legislature)[34] but mainly

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[32] A comparison of the excerpts reveals that Longstreet's notes (430 words) share ten sources with Walker, citing also two sources not in Walker; Loring's notes (840 words) share twelve sources with Walker; the anonymous student's notes (550 words) shares ten sources with Walker, citing also to a source not in Walker; Mann's notes (430 words) shares ten sources with Walker; and Seymour (350 words) shares fifteen sources with Walker. The citation forms used and pages cited by the students are similar, strikingly so in the case of Seymour and Walker. The notes cited date from an era when Gould was the dominant (or only) lecturer, and the larger number of sources cited in Seymour and Walker no doubt reflects changes in Gould's teaching, or possibly in the school's library. The editors also examined two sets of earlier notes derived from Reeve's classes. These reflect his more discursive style, though they do foreshadow the types of logical and historical arguments that would be employed by Gould. The 1802 notes of Ulysses Selden (in the Boston College Law School Library) run to 1600 words and contain extensive Biblical analogies but no citations. Notes taken in 1802 or 1803 by Reeve's son Aaron Burr Reeve (held by Yale's Lillian Goldman Library) are approximately 230 words long and contain only one incomplete citation to Blackstone. For Selden and Aaron Burr Reeve, see Fisher, *Litchfield Law School*, 103, 109. The word counts above ignore citation words, which some students placed in the text and some in the margins.

[33] Fisher, *Litchfield Law School*, 131. For Walker's law practice and involvement in political, civic, militia, and academic affairs, see the Augusta *Chronicle and Georgia Advertiser*, May 30, December 21, 1827, February 5, July 9, August 20, 23, November 8, 12, 1828, May 27, 1829, January 27, February 3, August 21, 1830.

[34] For a biographical sketch covering these years, see "Colonel George Josiah Sturges Walker," in Box 62-063 ("Walker" folders), Sturdivant

interested himself in the social and economic worlds of Cahaba, located in Alabama's rich plantation belt.[35] There he managed real estate and slaves, and by the 1850s owned a moderate fortune—land worth $60,000 and fifty-five human beings.[36] A gentleman farmer, he exhibited prize pumpkins, served on the board of Cahaba's Female Academy, and lent his influence to public improvement projects.[37]

By 1860 (possibly much earlier) Walker had retired from the practice of law to enjoy what one of his relatives would later call "the pleasures of a planter's employment" and to study literature, philosophy, and religion.[38] In terms of political philosophy, he remained an admirer of the states-rights doctrines of his fellow Litchfield alumnus John C. Calhoun.[39] A member of a Cahaba-based clique of "fire-eaters," Walker presided over Democratic meetings and attended conventions; almost certainly he was a

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Hall Collection (Walker-Reese Family Papers), Hoole Special Collections Library, University of Alabama. In the same collection see also [Black] Notebook, [5], Box 62-063. For Walker's legislative service see Willis Brewer, *Alabama: Her History, Resources, War Record, and Public Men, 1540-1872* (Montgomery: Barrett & Brown, 1872), 433.

[35] See, for example, Dallas County, Alabama, Courthouse Records, Deed Book D, at 56 (August 26, 1834), and 339 (August 35, 1835), both pertaining to Walker as estate administrator.

[36] 1850 Census Records, Dallas County, Alabama, Cahawba Beat, at 269, 269-B, Household #546; and 1850 Census Records, Dallas County, Alabama, Cahawba Beat (Slave Schedules), at 227. In 1850, Walker's white household consisted of himself, his wife Ann, 37, a native of Georgia, and seven children.

[37] Cahawba *Dallas Gazette*, November 16, 1855, September 5, 1856, August 28, 1857, April 16, October 8, 1858, and August 12, 1859.

[38] See "Copied from a Scrap-Book," Sturdivant Hall Collection, cited above, note 34. See also Francis M. Hails, "Alabama Lawyers in 1860," *Alabama Lawyer*, 6 (1845), 343.

[39] George J.S. Walker, *Eulogy on the Life, Character, and Services of Hon. John Caldwell Calhoun: Delivered at Cahaba, Alabama, May 6, 1850* (Cahaba: Charles E. Haynes, 1850).

secessionist in 1860-1861.[40] Over the following years the regime of slavery came crashing down, and Walker did not long survive it. In November 1868 at his plantation "Tranquilla" he succumbed to pneumonia.[41]

[40] J. Mills Thornton, *Politics and Power in a Slave Society: Alabama: 1800-1860* (Baton Rouge: Louisiana State University Press, 1978), 243; Cahawba *Dallas Gazette*, October 27, 1854, August 22, 1856, and April 22, 1859.

[41] "Colonel George Josiah Sturges Walker," cited above, note 34. Evidently, Walker's surviving family left Alabama after his death. There is no biographical entry for Walker in Brewer's *Alabama* or in any of the state's standard biographical histories.

Transcription, George Josiah Sturges Walker's Litchfield Notebook*

Master and Servant[1]

A servant is one who is subject to y[e] personal authority of another. Not to y public official authority of another.

A master is one who exercises yt [that] authority. The authority is personal. Subjection to civil authority is not servitude.

The authority exercised by y master is generally by virtue of a compact with y Servant, or his guardian; but not always. In case of slaves it is not; such as are in y Southern states.

The kinds of servants in Connt. are five. Where slavery is not known there are but 4 kinds.

1st Slaves. 2d Apprentices. 3d Menial Servants. 4th Day labourers. 5th Agents, of any kind as Factors, Brokers, Stewards, Bailiffs, Ship Masters, Attorneys etc. 1 Blk 423-7. Stat. Connt. 34. T. Woods 464-5-9.[2]

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* Walker's misspellings, improper capitalization, contractions, abbreviations, and asterisks have either been left uncorrected, or have been corrected within square brackets in this transcript of leaves 1 through 6. Walker's source references have been left in the text, and are explained in footnotes.

[1] This use of the contemporary legal language of apprenticeship is revealing of conditions in Connecticut. Note also, ten lines below, that slavery and apprenticeship are grouped together.

[2] 1 Blk 423-427 refers a later (probably an American) edition of Blackstone, such as William Blackstone Knt., *Commentaries on the Laws of England: In Four Books* (Philadelphia: Robert Bell, 1771), 423-427, (hereinafter Blackstone 1771) or to a subsequent edition based on it. Stat. Connt. 34 is an unclear citation. Subsequently (see notes 11, 22, 23, below) Walker cites to the *Public Statute Laws of the State of Connecticut, Book I* (Hartford: Hudson and Goodwin, 1808), but in that work the material on slavery is found on pages 623-627. T. Woods 464-5-9 is a reference to Thomas Wood, *An Institute of the*

The first of these kinds are unknown to y C.L. [Common Law] of Engd. vide Loft 1. 1Bl. 417.433. T. Woods 968. Salk 424.666.[3]

I. Of Slaves.

It is doubted by many whether slavery is legalized in Connt. By the C.L. it is not, but it has been by Stat. And if legitimate slavery exists here, it must depend on National [international] law—y C.L. or our own local laws. I. According to national Law, slavery, if authorized at all, must be authorized by a state of captivity in war—by contract—or by what Bl. calls a negative kind of birthright, i.e. by being born slaves.

II. By Captivity.

It is said yt a captor has a right to kill his captive, & ergo to enslave him. But by the law of nature as explained by y best modern commentators, & as recognized by y practice of y modern civilized world, this right to kill does not exist, except in cases of necessity for self defence. And in the

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Laws of England: Or, the Laws of England Their Natural Order, According to Common Use (London: Henry Lintot, 1745), 464-465, 469.

[3] Loft 1 refers to Capel Lofft's *Reports of Cases Adjudged in the Court of King's Bench, from Easter Term, 12 Geo. III to Michaelmas, 14 Geo III* (see 98 English Reports 489). For the case cited, see *Somerset v. Stewart*, 98 English Reports 499 (1772). 1 Bl. 417.433 refers to Blackstone 1771, I: 417, 433 but neither page seems precisely on point. Likewise the reference to Wood's *Institute of the Laws of England*, 968, is apparently erroneous. Salk 424.666 refers to pages in William Salkeld's three-volume *Reports of Cases Adjudged in the Court of King's Bench: With Some Special Cases in the Courts of Chancery, Common Pleas, and Exchequer. . . from the first year of King William and Queen Mary to the Tenth Year of Queen Anne* (see 91 English Reports 1). The citation to 424 is erroneous; for Salk 666 see *Smith v. Brown and Cooper*, and *Smith v. Gould*, 91 English Reports 566 (1795).

case of actual capture the necessity cannot exist in favour of y captor. 1Bl. 432 or 423. Burl. 211-19. Montesq.[4]

II. By Contract.

This cannot be y foundation of strict slavery; which implies an absolute right over y life, liberty, & property of y slave.

A man has no right to dispose of his own life-Ergo, he can confer no such right on another.

So he cannot make an absolute sale of his liberty. For ys [this; possibly yt] would imply an obligation to obey unlawful commands, & destroy free agency. And as after such a cont. [contract] he can have no rights of property, there can be no considn [consideration] for such a sale, no "quid pro quo." Ergo y cont. does not bind on principles of y C.L.

But a contract to serve another is good. This is nothing more than y sale of one's labour.

III. By birth.

1st this supposes y slavery of one's parents created in one of last mentioned ways; & ergo y foundation of y claim foils [fails].

2nd The C.L. clearly does not recognise any species of private slavery, nor can y local laws of any country be enforced in Eng. in favour of slavery. Salk 666. Loft 1.[5]

Indeed a foreign slave on landing in Eng. becomes free. Salk 666.424.[6] i.e. he is protected in y enjoyment of the rights of personal security, liberty, & property.

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[4] 1 Bl. 432 or 423; see Blackstone 1771, I: 423 (not 432). Burl. 211-19 refers to an English-language edition of Jean Jacques Burlamaqui (1694-1748). See his *Principles of Natural and Politic Law* (Boston: Joseph Bumstead, 1792) I: 211-219, for discussions of sovereignty and subjection. Montesq. refers to Charles-Louis de Secondat, Baron de Montesquieu, *Esprit des Lois* (1748). An American edition was printed in 1802 by Isaiah Thomas, Junior, of Worcester, Massachusetts, and distributed by Philadelphia publishing magnate Mathew Carey.

[5] For Salk 666 and Loft 1 see note 3, above.

[6] For Salk 666.424 see note 3, above.

There were in England under y feudal system what were termed villains [villeins]; but they never were absolute slaves. Lyt. S 189-94.214.[7] The lord had no right to kill or maim them. This species of slavery arose from y feudal tenure of villienage [sic].

But there are no feudal villains in England now. For y tenure in villienage was virtually abolished by y 12th Stat. Car. 2nd,[8] & at y time it is said there were but two villiens in Engd. Loft. 8. 2Bl. 96.[9] Indeed y character was hardly known in Eng in y reign of Elizth. 3 Hume's Eng 307.[10]

3rd By our local laws a qualified slavery is legalized. i.e. in Connt. as J.G. [Judge Gould] supposes. We have no St. [statute] expressly authorizing y holding of slaves, but we have Sts. counting upon y existence of slavery & making provision exclusively for slaves; as for ex. against y irregular conduct of slaves—providing particular punishment for crimes committed by them—obliging masters to maintain emancipated slaves—providing a mode of

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[7] Lyt S 189-194.214 refers to either Littleton's *Tenures* or to *Coke on Littleton*; in either, the sections (including 189-194, 214) are essentially identical. Contemporary editions included [Thomas Littleton], *Littleton's Tenures, in English* (London: Henry Butterworth, 1825), and Sir Edward Coke, *The First Part of Institutes of Laws of England: Or a Commentary Upon Littleton*, 1st American from the 16th European Edition (Philadelphia: Johnson and Warner, and Samuel R. Fisher, Jr., 1812). Walker cites Littleton/Coke in various ways (see below). This may have been due to carelessness; or Walker may have taken his citations from one or more sets of circulating notes.

[8] 12th Stat. Car. 2nd. The reference is probably to the Court of Wards and Liveries Act, 1660, which abolished a number of feudal usages; see *Statutes of the Realm* (London: Dawson, 1963) (1810-1828), 12 Car. 2, Chapter 24.

[9] The Lofft citation is to the *Somerset* case, cited in note 3, above; see 98 English Reports 503-504. For 2 Bl. 96 see Blackstone 1771, II: 96.

[10] The reference is to David Hume's six-volume *History of England from the Invasion of Julius Caesar to the Revolution in 1688* (London: T. Cadell, 1778), or a similar edition. The citation appears to be erroneous.

emancipation to exonerate y master etc. St. Cont. 141. 228.337-296. 399.[11]

Long acquiescence of y Legislature in y known practice of holding slaves, furnished a strong argument in support of ys opinion.

Beside our Supr Cts. have several times manifested an opinion yt slavery is legalized here, & ys doctrine is supported by judicial opinions. 2 Root 361.517.[12]

Thus it has been determined by y Supr Ct yt a master cannot maintain Trover for y servant—Root—it has also been determined yt a slave may be sold or taken in execution.[13]

The reason is, in y first case, yt a slave is not subject in wh an absolute property can exist, any more, than in a child, or apprentice, since y person or body of y slave is not y masters property, tho' y services of y slave are. vid. Salk 666.[14] Hence it follows yt an action for taking away a slave must be y same as for taking away an apprentice; (of wh. post [later]) Salk 666. Ld. Ra 1274. Contra. 3 Keb. 785. 2 Lev. 201. Salk 606.[15]

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[11] See note 2, above, for discussion of Walker's citations to St. Connt. Otherwise, see *Public Statute Laws of the State of Connecticut, Book I*, 623-625.

[12] 2 Root 361.517 refers to Jesse Root's two-volume *Reports of Cases Adjudged in the Superior Court and Supreme Court of Errors from July, A.D., 1789 to June, A.D., 1793, with a Variety of Cases Anterior to that Period* (Hartford: Hudson and Goodwin, 1798). The cases cited are *Geer v. Huntington*, 2 Root 364 (1796), and *Town of Bolton v. Town of Haddam*, 2 Root 517, (1797).

[13] See note 12, above.

[14] See note 3, above.

[15] For Salk 666, see note 3, above; Salk 606 is an erroneous citation. Ld. Rd 1274 refers to the second volume of Robert Lord Raymond's *Reports of Cases Argued and Adjudged in the Courts of King's Bench and Common Pleas, in the Reigns of the Late King William, Queen Anne, King George the First, and King George the Second* (see 92 English Reports 1). The case is *Smith v. Gould*, 92 English Reports 338 (1706). 3 Keb. 785 refers to the third volume of Joseph Keble's

But strict absolute slavery never existed in Connt. For y master has clearly never had any power over y slaves life. And it has been held yt a slave may hold property, & sue for it by his next friend. He may even sue his master.

It has also been decided by the Supr. Ct. yt y marriage of y slave with y consent of y master, is an emancipation.* Because he thus contracts with his masters consent a relation, thought to be inconsistent with a state of slavery. vide 3 T.R. 316-356.
2 H. Bl. 511. 3 Bac. 547. as to y emancipation of infants.[16]

Upon the same principle yt minors are emancipated vid. last part of title "Parent & Child."[17] J.G. doubts whether ys would be considered Law. It was a rule of y ancient C.L. yt

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Reports in the court of King's Bench at Westminster, from the XII to the XXX Year of the Reign of Our Late Soveraign Lord King Charles II (see 84 English Reports 560). The case is *Butts and Penny,* 84 English Reports 1011 (1067). 2 Lev. 201 refers to the second volume of *The Reports of Sir Creswell Levinz, Knt., Late One of the Judges in the Court of Common Pleas, at Westminster, Containing Cases Heard and Determined in the Court of King's Bench, During the Time that Sir Mathew Hale, Sir Richard Rainsford, and Sir William Scroggs Were Chief Justices There* (see 83 English Reports 424). The case is *Butts Against Penny*, 83 English Reports 518 (1677).

[16] 3 T.R. 316-356 refers to the third volume of *Term Reports in Court of King's Bench: By Charles Durnford and Edward Hyde East* (see 100 English Reports 423). The case cited is *The King against the Inhabitants of Wittom cum Twambrookes*, 100 English Reports 617 (1789). 2H.Bl. 511 refers to the second volume of Henry Blackstone, *Reports of Cases Argued and Determined in the courts of Common Pleas and Exchequer Chamber* (see 126 English Reports 395). The case is *Keane against Boycott*, 126 English Reports 696 (1795). 3 Bac 547 is believed to be an erroneous citation to Bacon's *Abridgment.* For references to infants see Mathew Bacon, *A New Abridgment of the Law,* 5th edition (Dublin: J. Exshaw, 1786), III: 117-163.

[17] Here Walker is apparently referring to notes on the subject of Parent and Child. These notes are not contained in the notebook held by the Bounds Law Library.

a female villien was not emancipated by marrying a villien. Litt. S 81. 2 Bl. 94.4.[18]

* A wife however is not emancipated by marrying a villien. But perhaps no consent of y lord is supposed. 2 Bac. 93.4 Litt. S 81.2 or 187.[19]

On y other hand a wife is in effect emancipated during coverture, if she marry a freeman; & forever if she marry her lord. 1 Co. Lyt. 123.a. n.3. 126.b. Perk. S 314.[20]

Can an illegitimate child be a slave by birth? By the civil law he may, for "partus sequitur ventrem" [the offspring follows the mother]. In y Eng law of villienage, y condition of y child followed yt of y father; & an illegitimate child, has in law no father. So yt under y feudal law, an illegitimate child could not be a villien by birth. But a legitimate child born of a villien or a slave is a villien. 2 Bl. 7/93-4. Lyt. S 187-188.[21] In connt. however according to universal usage, y rule of y civil law has prevailed.

The owner of y mother is y owner of y child in our country-but slavery is now nearly abolished in Connt.

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[18] Litt. S 81 is a citation to section 81 of either *Littleton's Tenures* or to *Coke on Littleton* (see note 7, above). Reference to section 81 is apparently erroneous; see section 187 for related material. For 2 Bl. 93. 4 see Blackstone 1771, II: 94.

[19] 2 Bac. 93. 4 is an erroneous citation; see Blackstone 1771, II: 93-94. For the second citation see either *Littleton's Tenures* or *Coke on Littleton*, section 187 (not 181).

[20] 1 Co. Lyt. 123.a. n.3. 136.b. is a reference to *Coke on Littleton*, section 123a, note 3, and section 136b. The latter citation is erroneous; see section 137b. For Perk. S 314, see John Perkins, *Perkins Profitable Book: A Profitable Book Treating the Laws of England: Principally as They Relate to Conveyancing* (London: J. & W.T. Clarke, 1827), section 314, note c.

[21] See Blackstone 1771, II: 93-94; and see either *Littleton's Tenures* or *Coke on Littleton,* sections 187-188.

The importation of slaves is prohibited, St. Connt. 625[22] & all children born of slaves after march 1st 1784 & before y 1st of Augst 1797 are free at y age of 25. Those born after Augst 1st 1797 are free at 21. St. Connt. 625.6.[23]

Importation of slaves is now prohibited by y U. States,[24] as it was previously by all y several states.

It has been agreed generally, yt offenders may be judicially condemned to slavery for crimes. Ex. Confinement to labour in New Gate, & other penitentiary houses. This is a qualified civil slavery; a slavery to y public.

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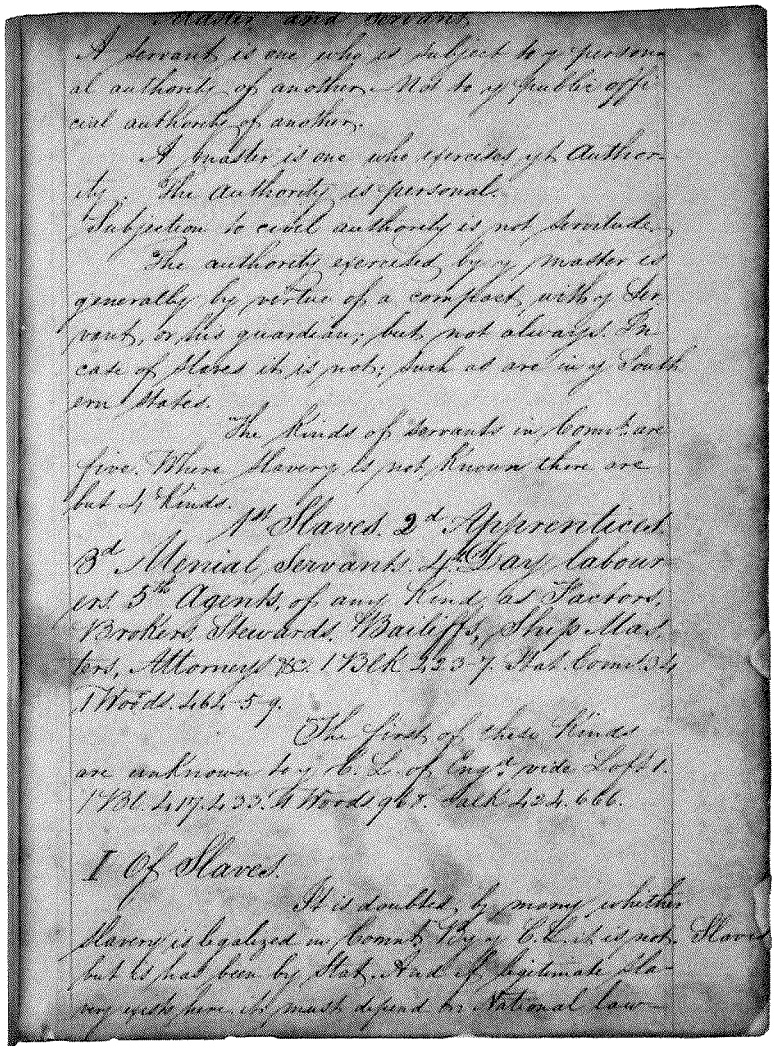
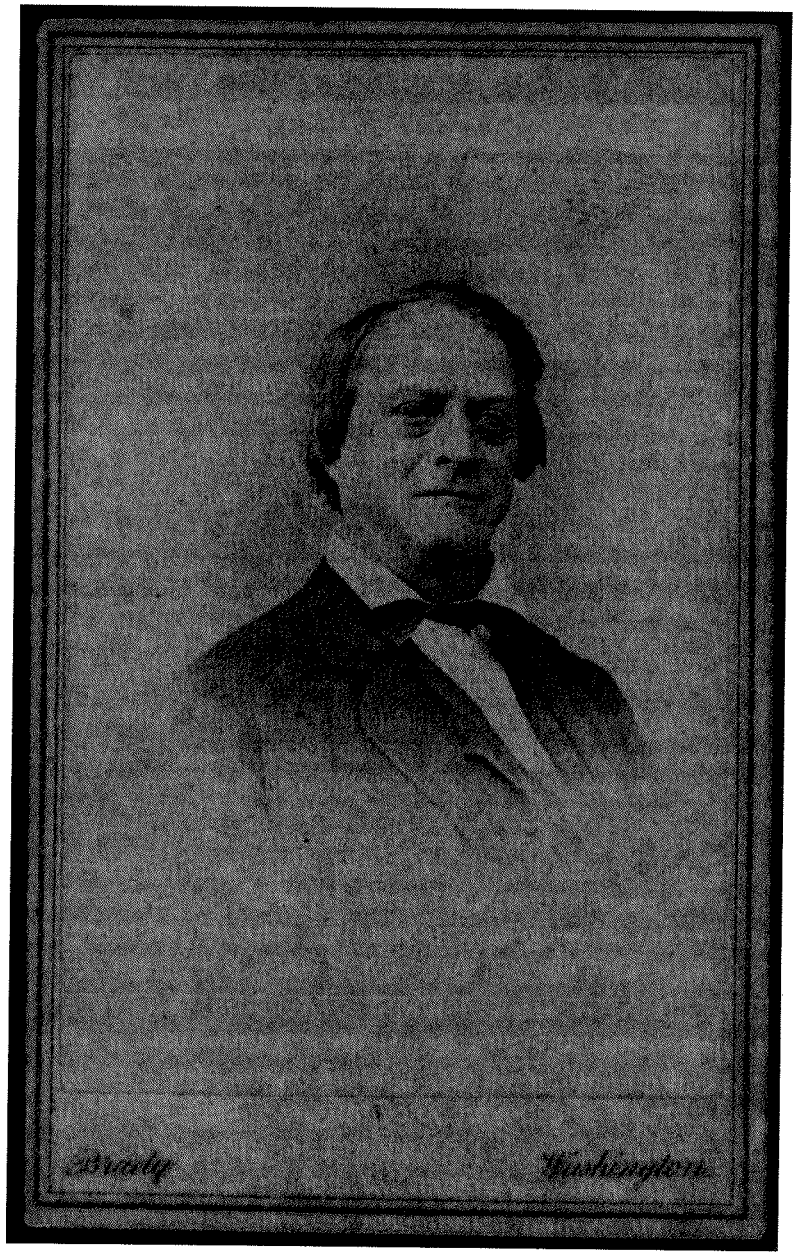
[22] *Public Statute Laws of the State of Connecticut, Book I,* 624 (not 625). See also note 24, below.

[23] *Public Statute Laws of the State of Connecticut, Book I,* 625-626.

[24] Importation of slaves into the United States had been banned by an act of 1807 (2 Statutes at Large 426) pursuant to Article I, section 9 of the United States Constitution.



George Josiah Sturges Walker's
Litchfield Notebook, Leaf 1, Recto
Bounds Law Library



Turner Reavis, by Mathew Brady
Bounds Law Library

THOMAS K. JACKSON DIARY*

In January 1871, merchant and farm manager Thomas K. Jackson began penciling entries into a diary that would, at its completion, surpass the typical function of a journal, serving as a window into a nineteenth-century Alabama legal career. Jackson's diary satisfied many of the usual functions of a yearly log, including such information as weather entries, daily schedules, various adages, ledger postings, and personal observations. It is within the latter category that Jackson's entries offer a perspective not only of his life, but the life and career of his notable father-in-law, Turner Reavis.[1] Through observations and comments about the successful lawyer, judge, and state senator, we are presented with a glimpse into the life of a Sumter County practitioner at the end of his career.

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* Printed almanac and calendar with cover title, *Excelsior Diary for 1871.* Duodecimo. Bound in brown leather, 5 x 10 cm. Decorative illustration on front cover.

[1] While at first glance a somewhat atypical example of a commonplace book, Jackson's diary, along with other documents in the Turner Reavis Collection, contains elements that are characteristic of many commonplace holdings. Items such as a collection of twenty-three recipes, ledger sheets from the Account of Subsistence Stores of the Confederate States of America used as scrapbook pages, weather observations, inspirational adages, and account entries, are types of entries associated with commonplace books. For Thomas K. Jackson's diary and the associated collection of photographs, letters, legal papers, and various other documents, see the Turner Reavis Collection, John C. Payne Special Collections, Bounds Law Library, University of Alabama School of Law. Hereinafter, Reavis Collection.

Born into a farming family in Wake County, North Carolina, on June 18, 1812, Reavis was orphaned early in his life and apprenticed to a confectioner at Hillsboro, North Carolina, when he was ten years old.[2] Although he experienced little formal educational training, throughout his late teens he worked his way through a series of clerkships at mercantile and dry goods stores, eventually forming a partnership in the independent mercantile company, Reavis, Gully, and Minnice.[3] A fortuitous accident suffered by the partnership stimulated Reavis' interest in a legal career. A ship carrying goods contracted by the firm was lost off the Atlantic coast, and Reavis hired a lawyer, H.W. Husted, to process the insurance claim. Husted, impressed by Reavis' intelligence—and perhaps working on a limited budget—supplied law books for his young client to research the issues involved with the claim. Within days Reavis had not only mastered the case, but had awakened a strong interest in himself for the study of law.

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[2] For biographical information on Turner Reavis, see Thomas McAdory Owen, *History of Alabama and Dictionary of Alabama Biography* (Chicago: The S.J. Clarke Publishing Company, 1921) IV: 1419-1420; Willis Brewer, *Alabama: Her History, Resources, War Record, and Public Men, From 1540 to 1872* (Montgomery: Barrett and Brown, Steam Printers and Book Binders, 1872), 531-532; and Reavis Collection. Reavis was apprenticed to Gabriel Roccairdi in February 1823. He later followed Roccairdi to Raleigh, North Carolina.

[3] In a letter to his friend, H.W. Husted, Reavis wrote of his childhood, "I was born in Wake County on the 18th of June, 1812. There is nothing in my birth, parentage, or early education, upon which I can felicitate myself, or which I take pleasure in remembering. I do not desire, therefore, that they should be dragged from their obscurity. Whatever of education I possess, I have acquired myself, unaided, never having gone to school twelve months in my life." Reavis to H.W. Husted, Undated Letter, Reavis Collection, Bounds Law Library, University of Alabama School of Law.

Studying under Husted's direction, Reavis was admitted to the North Carolina bar in 1838.[4]

Reavis moved to Gainesville in Sumter County, Alabama, the same year, and began a legal partnership with fellow North Carolinian, Harrison W. Covington. However, his association with Covington would be brief, and he partnered with a number of attorneys during his thirty-four-year career.[5] Reavis maintained a successful practice whose clients included individuals, small businesses, and corporations, notably the Mississippi, Gainesville, and Tuscaloosa Railroad Company.[6] Involved in more than 115 appellate cases before the state supreme court, Reavis' practice focused primarily on estate and decedent law.[7]

In 1847, Reavis began work on creating a digest of state supreme court decisions, and by 1850, he had published *A Digest of the Alabama Reports.*[8] It is likely that Reavis took great pleasure—and perhaps some strategic advantage—in citing to his own work either at trial or during the appellate process. In addition to Turner Reavis' accomplishments as author and at the bar, he was twice appointed to the bench. In 1851, Governor Henry Watkins Collier appointed Reavis to fill a vacancy on the Seventh Circuit created by William R. Smith's election to Congress.[9] The following year he was defeated for election to the position; yet, in 1854, he was again appointed as a judge to the

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[4] Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1419.

[5] For Reavis' appellate cases, see Alabama Reports 1838-1872.

[6] For an example of Reavis' work for the Mississippi, Gainesville, and Tuscaloosa Railroad Company, see case at 35 Alabama Reports 33 (1859).

[7] Alabama Reports 1838-1872.

[8] T. Reavis, *A Digest of the Alabama Reports* (Tuskaloosa: Printed by M.J.D. Slade, 1850).

[9] Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1419.

Seventh Circuit by newly elected Governor John Anthony Winston.[10]

During the Civil War, Reavis served as state senator from the counties of Sumter and Choctaw, and was active in the effort to obtain loans to finance the struggling Confederacy.[11] He spent much of his time during the war years traveling and securing pledges to the fund. Although he seemed satisfied with his duties for the Confederate cause, letters to his wife and children during the war indicated his anxiousness to return home and expressed his distress at burdening his wife with the farm and mercantile business in his absence.[12] On December 22, 1863, Reavis' second child, Lucy Barret Reavis, married a young Confederate Subsistence Department officer, Thomas K. Jackson.[13]

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[10] William Garrett, *Reminiscences of Public Men in Alabama, For Thirty Years* (Atlanta: Plantation Publishing Company's Press, 1872), 777-778. Reavis maintained a solid record on the Seventh Circuit bench. Of the twenty-seven cases over which he presided that were appealed to the state supreme court, sixty-seven percent were upheld. See Alabama Reports 1838-1872.

[11] Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1420.

[12] For Reavis' correspondence to his wife and children during the war, see Reavis Collection. As to the family's dwindling supplies and neighbors' pleas for assistance, Reavis admonished his wife, "In times like these, every one must provide for his own household first." Turner Reavis to Mary Reavis, February 16, 1862, Reavis Collection. Reavis corresponded regularly with his wife, directing her decisions concerning cotton and sugar shipments, as well as other farm matters.

[13] Thomas K. Jackson Diary, July 3, 1871. Lucy Barret Reavis was the first of two children from Turner Reavis' second wife, Mary Stratham Barret. Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1420. A South Carolinian, Thomas K. Jackson had served as Disbursing Officer of the United States Subsistence Department before the war, and was appointed to the same position within the Confederacy. Soon after his last diary entry of 1871, Jackson was audited by the United States Treasury Department and billed for discrepancies in his accounts dating to before the war. See Reavis

Jackson's mercantile experience both before and during the Civil War and his status as son-in-law to Turner Reavis qualified him to take over many of the duties of managing Reavis' post-war farm accounts and his mercantile business. Following Reavis' death in 1872, Jackson established himself as a dry goods and lumber merchant under the name of "T.K. Jackson, Dealer in Staple and Fancy Groceries."[14] It is through his daily journal entries that we gain a much fuller—although often unflattering—understanding of Turner Reavis.

Many of Thomas K. Jackson's entries into his diary are mundane in nature and consist of typical information concerning routine activities such as weather reports and family illnesses; however, Jackson also used his entries to document some of his family's most intimate activities.[15] Jackson's entries are in pencil, and take advantage of the multiple uses of the diary. He recorded memoranda from his farming activities such as money owed or due from house or land rentals, cash accounts for each month, and bills payable. Jackson also used much of the space to

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Collection, United States Treasury Department correspondence, December 4, 1872-March 10, 1873.

[14] Numerous shipping invoices and imprinted ledgers indicating Jackson's business activities after 1872 are found in the Reavis Collection.

[15] The diary is printed "Excelsior Diary for 1871," containing, in addition to ruled and dated spaces for daily entries, a calendar, almanac, stamp duties, postage rates, time zones, distance calculations from New York City, presidents of the United States, and ledger entry pages including cash accounts, bills payable and receivable. Jackson's entries range from ordinary information concerning law students reading in Judge Reavis' office, to insight into family perceptions concerning Reavis' third marriage. On June 5, he wrote "The judge announced his return with his bride tomorrow morning, by telegraph from Mobile. We do not know yet what day he was married." Followed by an entry the next day, "The judge and his Bride arrived 'on time.' He and Miss Sallie Moseby [Sarah Jane Mosby] were married last Saturday Morning at Natchez. They seem very loving."

create a record of his family's history. Frequently, along with weather information for the date of the entry, Jackson would include information such as the birth of a child, or note a family death or marriage from years earlier in an attempt to retain the information in written form. It is likely that he first made the initial daily entries, then where space allowed, used the blank lines to add important remembrances. Jackson's entries varied from brief mentions, such as "weather raw," or "planted Ruta Baga Turnips," or simply "sick," to more detailed writings such as an eighteen-line entry on Sunday, December 31, in which he, in addition to the daily log, prayed for the "poor and needy everywhere" and anticipated a better year in which God would "grant [that] our hopes may be realized, & our fears prove naught."[16]

Jackson's numerous observations of his father-in-law allow the reader slowly to piece together daily observations that provide a picture not only of a successful lawyer and former political figure, but also of a man who struggled with personal problems. Although Reavis wrestled with problems associated with alcohol abuse according to Jackson's observations, he was able to maintain a lucrative practice, traveling the state in his capacity as a public man until his death in 1872.[17] Noted for his cordial and courteous manners, Reavis inspired observer Willis Brewer to write, "As a speaker he was plain, argumentative, clear, and correct. Love of order and method were displayed in all the employments of life, and enabled him to despatch an

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[16] Jackson missed entries on only two days, October 9 and 10, which preceded a series of eleven days from October 12-22 with only the scribbled word "sick."

[17] Jackson mentioned Reavis' struggle with alcohol abuse several times during his 1871 diary entries. On March 2, he wrote "Cloudy, damp & misting during the morning, and set in to rain steadily about 5 P.M. The old thing 'over yonder' again. The Judge is easily affected by liquor. What on earth impels him I can't imagine." Thomas K. Jackson Diary, March 2, 1871.

amount of business that would have staggered any two ordinary men."[18]

Much of Turner Reavis' biography is revealed from Jackson's diary, such as compelling mention of his testimony before the congressional committee investigating the activities of the Ku Klux Klan. On June 16, Jackson wrote, "There was a heavy storm of rain in the neighborhood. The Judge started to Washington City, to appear before the Ku Klux Committee.[19] Jackson further commented on Reavis' return, "The Judge returned from Washington. He is looking well. He does not say much about his trip, and I have asked but few questions."[20]

Within six months of Jackson's last entry on December 31, 1871, Turner Reavis was dead, punctuating the timely nature of Jackson's writings. Reavis suffered a stroke and died on June 13, 1872, two days before his third wife, Sarah M. Reavis, gave birth to his daughter, Sallie Turner Reavis.[21] Thomas Jackson's diary is illustrative of the value of candid observations in gaining an additional perspective of a life or career. It is likely that much of the information

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[18] Brewer, *Alabama: Her History, Resources, War Record, and Public Men*, 532.

[19] On June 23, 1871, Turner Reavis was questioned at length by the Congressional committee investigating illegal activity conducted against blacks, and the state of legal affairs in the former Confederate states. As a member of both the bar and bench in Sumter County, Reavis perhaps would have been familiar with local reports of violence against black Alabamians. Having had an active role in the former Confederacy, Reavis' testimony was predictably guarded and somewhat defensive concerning organized activities against blacks in the state. *Testimony Taken by the Joint Select Committee to Inquire Into the Condition of Affairs in the Late Insurrectionary States, Alabama* (Washington: Government Printing Office, 1872), I: 331-355.

[20] Thomas K. Jackson Diary, June 27, 1871.

[21] Reavis Collection. Unfortunately, by 1882 the relationship between Sallie Mosby Reavis, and Lucy and Thomas Jackson had been reduced to bitterly squabbling over the family silver. See letter from T.K. Jackson to Sallie M. Reavis, May 8, 1882, Reavis Collection.

and insight concerning Reavis that we gain from Jackson's casual entries exist nowhere else.

Transcription, Thomas K. Jackson Diary

MARCH 5-10

March 5—The day beautiful & bright. Lucy, Reavis, & I went to Church to hear the new Presbyterian minister preach.[1] I didn't like him much. The Judge "carrying on." The house was full, and I was generally disgusted.

March 6—Pleasant and bright.

March 7—Capt. Childs & I measured land rented from me last year by Mr. Mobley. We varied 2 acres in our calculations. He made 90 + 15 = 105 acres. I made 92 + 15 = 107 acres. I agreed to knock off 10 acres for waste land, leaving 97 acres for which Mr. Mobley owes me @ 3.00 per acre. Weather cloudy.

March 8—A dull day to me. Business dull. Weather cloudy, damp and blustering. There were troubles reported in Meridian—they have been brewing for some time past, & culminated in a row & some blood shed day before yesterday. Political troubles—whites & blacks.[2]

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[1] Reavis Jackson was born December 4, 1865. See Reavis Collection, Thomas K. Jackson diary, July 4, 1871.

[2] Mississippi was the site of some of the most serious post-war riots preceding the election of 1876 that ended Reconstruction. Attempts to reestablish Democratic control in the South between 1865 and 1875 sparked violence most notably in New Orleans, Memphis, Meridian, Vicksburg, and Yazoo City. See George C. Rable, *But There Was No Peace: The Role of Violence in the Politics of Reconstruction* (Athens: University of Georgia Press, 1984), *passim*. For the Meridian, Mississippi riot of March 1871 which involved many Alabamians and claimed at least six lives, see William Warren Rogers and Ruth Rogers Pruitt, *Stephen S. Renfroe, Alabama's Outlaw Sheriff* (Tallahassee: Sentry Press, 1972), 36-38.

March 9—There was a hard rain storm last night, with wind, lightening[*sic*], & thunder. Judge Reavis returned. Ivy brought him home—found him on the streets in Meridian—he has been drinking."[3]

March 10—Pleasant day. Warm in the sun. Am not feeling well. Bought a Bottle of V. Bittus. Business dull.

JULY 3-8

July 3—Hot & dry—crops needing rain. At the pleasure of the Almighty, I was married to my wife Lucy Reavis upon the 22nd day of December, 1863, in the house of her father, the Hon. T. Reavis, in Gainesville, Sumter Co. Ala., by the Right Rev. Bishop Richard Wilmer.

July 4—Hot & Dry. At the pleasure of Almighty God, my son Reavis, was born upon the 4th day of December 1865, about 10 o'clk. in the morning, and was Baptized by Bishop Wilmer.

July 5—Hot & dry. Lucy is drying peaches. At the pleasure of Almighty God, my daughter Mary Barret, was born upon the 24th day of October 1867, about 2 o'clk. in the morning, and was baptized by Bishop Wilmer. She was a tiny baby.

July 6—Hot & Dry. Judge Reavis left for Montgomery to attend on the Supreme Court of the State. Anger is an interval of Madness—Beware of it.

July 7—At the pleasure of Almighty God my son Thomas Marsden, was born upon the 3 day of October 1870, about

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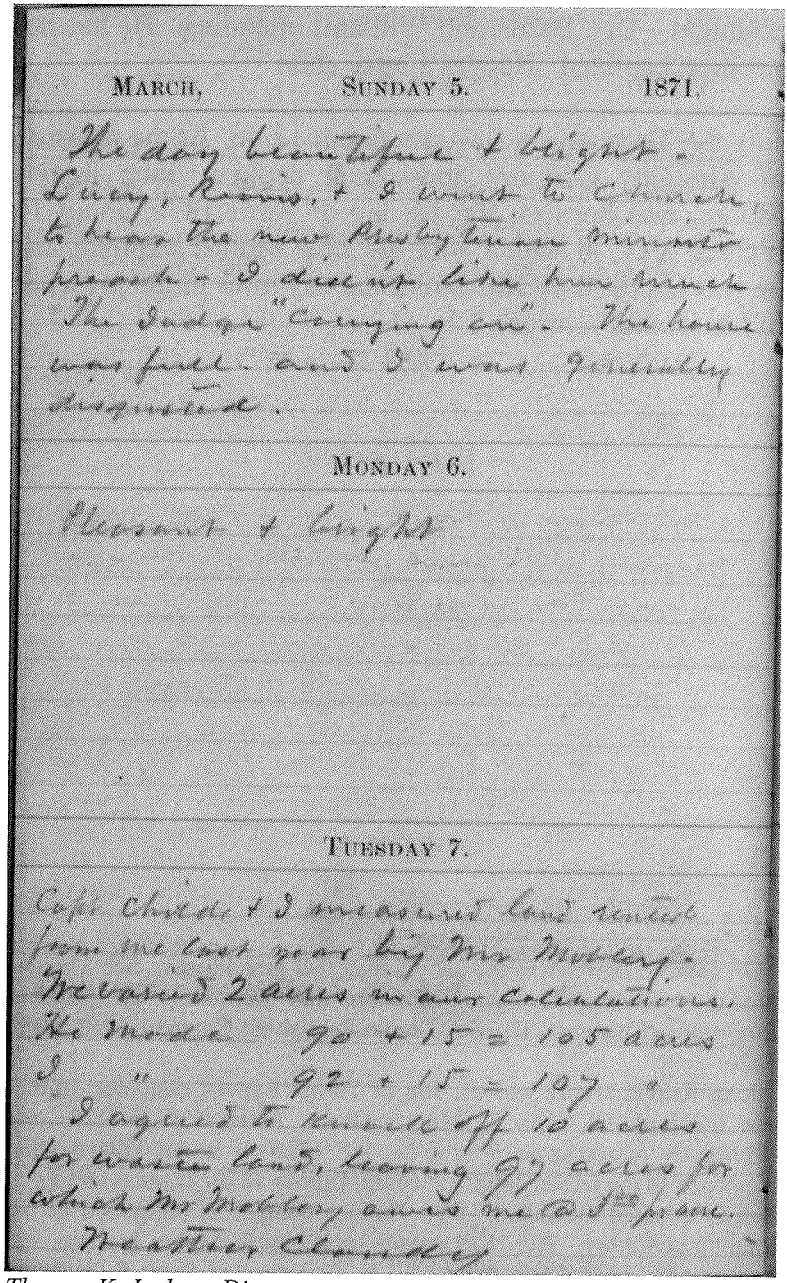
[3] Meridian, Mississippi, is approximately sixty miles southwest of Gainesville, Alabama.

midnight—Drs. Barret and Williams attending. He has not yet been baptized. He was a lusty child.[4]

July 8—There was a fine rain about 12 on. At the pleasure of Almighty God my god-son & nephew, John Reavis Moore, was born on the 18 day of April 1870, about 11 o'clock A.M., at which hour his dear Mother expired; and he was baptized by Mr. Smith the day after in the presence of his Mother's corpse.[5]

[4] Dr. John S. Barret was the baby's maternal grandfather. See Thomas McAdory Owen, *History of Alabama and Dictionary of Alabama Biography* (Chicago: The S.J. Clarke Publishing Company, 1921) IV: 1420.

[5] John Reavis Moore was the son of Turner Reavis' daughter, Mittie, and her husband, John V. Moore. Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1420. It is not known what happened to the father, John V, Moore. During 1870, Thomas and Lucy Reavis adopted the infant—thus Thomas upheld his obligation as the infant's godfather. The 1870 census lists John R. Moore Jackson, age two months, in the household of T.K. Jackson and Lucy R. Jackson. Alabama Census, 1870. Sumter County (Township 21, Ranges 2, 3 West), 319.



MARCH, SUNDAY 5. 1871.

The day began before 4 bright & lovely, & I went to Church to hear the new Presbyterian minister preach - I did not like him much. The Sunday "carrying on". The house was full - and I went peaceably dispersed.

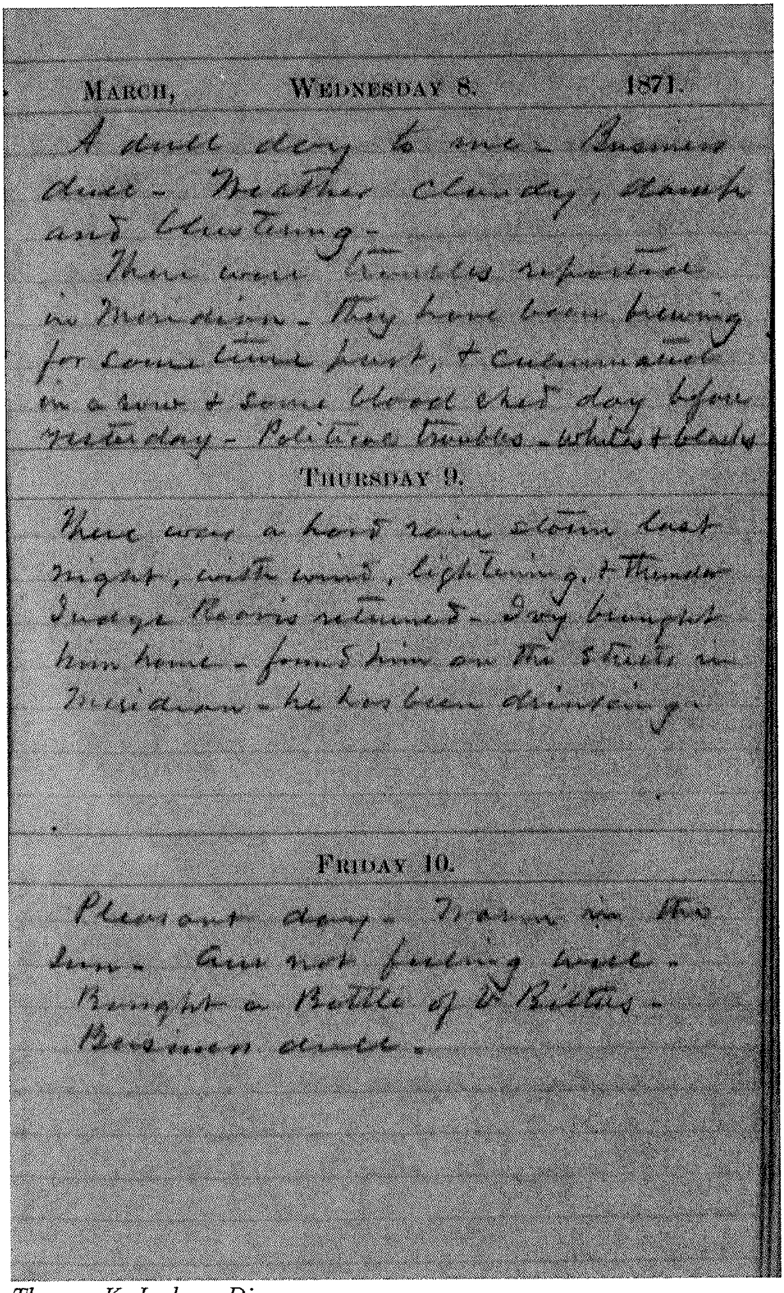
MONDAY 6.

Pleasant & bright

TUESDAY 7.

Capt Chunn & I measured land rented from the last year by Mr Mosby. We found 2 acres in our calculations. The Woods 90 + 15 = 105 acres
S " 92 + 15 = 107 "
I agreed to rebate off 10 acres for waste land, leaving 99 acres for which Mr Mosby owes me 99 $ per acre.
Weather Cloudy

Thomas K. Jackson Diary
Bounds Law Library



MARCH, WEDNESDAY 8. 1871.

A dull day to me – Business dull – Weather cloudy, harsh and blustering –
There were troubles reported in Meridian – They have been brewing for some time past, & culminated in a riot & some blood shed day before yesterday – Political troubles – whites & blacks

THURSDAY 9.

There was a hard rain storm last night, with wind, lightning, & thunder. Judge Beavis returned – Guy brought him home – found him on the streets in Meridian – he has been drinking –

FRIDAY 10.

Pleasant day – Warm in the sun – Am not feeling well – Bought a Bottle of Dr Bitters – Business dull.

Thomas K. Jackson Diary
Bounds Law Library

James Thomas Kirk
From Mary Wallace Kirk's Locust Hill, 1975
Courtesy of the University of Alabama Press

JAMES THOMAS KIRK NOTEBOOK*

A native of Franklin County, Alabama, James Thomas Kirk was born on the eve of the Civil War near Russellville, on April 7, 1858.[1] Orphaned at an early age, Kirk quickly overcame his demanding beginnings by taking advantage of the state's common school system.[2] A combination of farming and teaching sustained young Kirk until, at age eighteen, he began reading law in the office of Joshua Burns Moore of Tuscumbia.[3] Kirk and his tutor had much in common. Where Kirk's challenge early in life was defined by the loss of his family, Moore was reared in an

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* *The Lawyer's Common-Place Book, With an Index Alphabetically Arranged of the Titles Generally Used in the Practice and Study of the Law* (Philadelphia: J.B. Lippincott and Company, 1884), 316 pages. Bound in imitation leather, 26 x 20 cm.

[1] Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography* (Chicago: The S.J. Clarke Publishing Company, 1921), III: 987.

[2] *Northern Alabama: Historical and Biographical* (Spartanburg: The Reprint Company, 1976 (1888)), 439. Kirk's father, James T. Kirk, was only thirty years old when he died on the same day that his son, James Thomas Kirk, was born. His mother, Louisa Cleere Kirk, the daughter of a planter and merchant in Lawrence County, Alabama, died soon after. Kirk was educated in the common schools of Franklin and Lawrence Counties. See Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 987. For antebellum Alabama "common" schools, see William Warren Rogers, Robert David Ward, Leah Rawls Atkins, and Wayne Flynt, *Alabama: The History of a Deep South State* (Tuscaloosa: The University of Alabama Press, 1994), 119.

[3] *Northern Alabama*, 439. Kirk began his apprenticeship with Moore during September 1876.

environment of poverty, and as the result, received little formal education.[4] Kirk's life was significantly influenced by his association with Moore—likely the result of a sense of fraternity with his teacher and friend who, in addition to introducing him to the study of law, offered an understanding ear to Kirk's early hardships.

Kirk was admitted to the state bar in the spring of 1880, choosing to remain in Tuscumbia where he established himself as a sole practitioner.[5] During the first six years he practiced alone, occasionally taking cases with J.B. Moore, and slowly building his practice until 1886 when he formed a partnership with Edward Berton Almon under the firm name of Kirk and Almon.[6] Along with beginning a new practice, Kirk married Ella Pearsall Rather, the daughter of lawyer, circuit judge, and state legislator John Daniel Rather, in December 1886.[7] Ella Rather was a relative of J.B. Moore's wife, and it is likely that Kirk met his future wife through his relationship with Moore.[8] Following

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[4] *Ibid.*, 431. Working in the fields during crop season, Moore engaged in a self-schooled program in his spare time that eventually gained him bar admission at age seventeen.

[5] J.H. Hubbell, ed., *Hubbell's Legal Directory for Lawyers and Businessmen* (New York: J.H. Hubbell and Company, 1882), 733.

[6] See J.B. Moore and J.T. Kirk for the appellant, *King v. Henkie* 80 Alabama Reports 505 (1887). *Hubbell's Legal Directory*, 1886: 785. Edward Burton Almon, judge, state senator, and United States congressman (1915-1934), was in partnership with Kirk until he was elected judge of the eleventh judicial circuit in 1898. See Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 30.

[7] Ella Pearsall Rather was born on September 6, 1857 to John D. Rather's second wife, Letitia S. Pearsall. Kirk married well with respect to access to legal and political introductions in the state, for Rather not only was politically connected in the state as circuit court judge, speaker of the house, and president of the senate, but was the president of the Memphis and Charleston Railroad. Owen, *History of Alabama and Dictionary of Alabama Biography*, IV: 1413-1414.

[8] *Northern Alabama*, 432; and Mary Wallace Kirk, *Locust Hill* (University: The University of Alabama Press, 1972), 140-141. *Locust Hill* was written by James T. Kirk's only child and is a reminiscence of

Kirk's association with Almon, his practice expanded and he began a new partnership that included his brother-in-law, John D. Rather, Jr., and state representative and outspoken states' rights advocate, Archibald Hill Carmichael.[9]

By the turn of the century, Kirk had become politically active, and he and Carmichael served as delegates from Colbert County, Alabama in the 1901 constitutional convention.[10] Kirk, as a member of the Committee on Taxation, was outspoken on committee topics—particularly those involving Colbert County—but also on issues involving suffrage and the rights of foreigners.[11] Kirk's

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her childhood and maternal family line as observed through a narrative of her Tuscumbia home-place, Locust Hill. Mary Wallace Kirk (1889-1978) was an artist, poet, and educator. She received a degree from Agnes Scott College in 1911, and served on their board of trustees for more than sixty years. See *Contemporary Authors: A Bio-Bibliographical Guide to Current Writers in Fiction, General Nonfiction, Poetry, Journalism, Drama, Motion Pictures, Television and other Fields* (Detroit: Gale Research Company, 1962-), 57: 321.

[9] Kirk likely partnered with Archibald Hill Carmichael following their service as delegates from Colbert County to the 1901 state constitutional convention. Kirk ended his affiliation with Carmichael in 1913, continuing thereafter to practice with Rather. See Owen, *History of Alabama and Dictionary of Alabama Biography*, III: 299-300; and *Martindale's American Law Directory, January, 1911* (New York: G.B. Martindale, 1910), 33. John D. Rather, Jr. was brother to Ella Pearsall Rather Kirk. He practiced with Kirk from at least 1911 to Kirk's retirement from law in 1933. See Kirk, *Locust Hill*, 140-141; and *The Martindale-Hubbell Law Directory*, 33, and its antecedents.

[10] *Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901 To September 3rd, 1901* (Wetumpka: Wetumpka Printing Company, 1940), I: 4.

[11] *Ibid.*, I: 1293; II: 2728, 3445-3453. Kirk argued that even pledges of the Democratic Party should not be binding on the convention, and he strongly opposed "extending the privilege of franchise to the foreigner." The 1901 constitution was the last to date of Alabama's six constitutions, and was the culmination of efforts to "redeem" Alabama's state government in the post-Reconstruction era by re-instating white, male rule. See Malcolm Cook McMillan,

nativism, as well as his support of constitutional provisions to disfranchise black Alabamians, was a majority position at the convention. Kirk's stance on these issues was likely a combination of his alignment with the wishes of his Colbert County constituency, and lessons learned during his tutelage under J.B. Moore.[12]

Kirk's career focus was, however, his law practice. Although his practice spanned five decades and involved the association of three other lawyers, it remained remarkably consistent through the years.[13] Representing a diverse group of clients, Kirk and his partners maintained a practice focused on plaintiff cases. Areas of practice such as land titles, actions against railroads, contracts, personal injury, employment law, and even a small number of criminal cases comprised the firm's interests. Mostly serving as counsel for individuals and small businesses, Kirk and his associates litigated many cases through the years with a significant number of them reaching the state's court of appeals and supreme court.[14] His appellate record was solid; he won more than fifty-five percent of his cases

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Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism (Chapel Hill: The University of North Carolina Press, 1955).

[12] Moore was a delegate to the 1865 constitutional convention that conformed to the requirements of Presidential Reconstruction, but was not recognized by Congress. Moore set aside the practice of law for many months to fight unsuccessfully to reverse Reconstruction-era measures. See *Northern Alabama*, 432.

[13] The consistency of the law firm through several partnerships indicates the strong leadership role that Kirk assumed within his practice.

[14] For the introduction and jurisdiction of the Court of Appeals of Alabama, see Tony A. Freyer, and Paul M. Pruitt, Jr., "Reaction and Reform: Transforming the Judiciary Under Alabama's Constitution, 1901-1975," 53 *Alabama Law Review*, Fall 2001, 77-133. The state court of appeals was created on March 9, 1911. For its creation and jurisdiction, see The Code of Alabama 4: 609-616 (1923).

while representing the appellant in almost fifty-eight percent of the actions.[15]

James Kirk's commonplace notebook was used throughout most of his legal career as a form for retaining practice knowledge—the precise use for which it was intended.[16] In a prefatory note, the publishers commented on the utility of an organized notebook for the practicing lawyer, since "many of the subjects which demand his investigation are but occasionally presented for his consideration, and however well he may have mastered them after laborious search, when first suggested, much will doubtless be forgotten before his opinion is again required upon a like matter." Further commenting on the usefulness of the volume for practice references, the publishers wrote "It often happens too, that, in the course of reading, a case occurs involving some important principle, not perhaps immediately needed, but frequently required in the course of practice, reference to which it may be desirable to retain."[17]

Kirk's notebook consists of sixteen pages of printed lists of subjects, followed by lined and numbered blank pages to

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[15] For the appellate record of Kirk and his partners, see Alabama Reports 1884-1932. Out of 133 cases argued before the Alabama supreme court, Kirk and his associates won fifty-five percent (73). They represented the appellant in approximately fifty-seven percent of the cases. Against Kirk's former teacher, J.B. Moore, the firm won five and lost three of the appellate cases that they tried.

[16] *The Lawyer's Common-Place Book, With an Index Alphabetically Arranged of the Titles Generally Used in the Practice and Study of the Law.* (Philadelphia: J.B. Lippincott and Company, 1884), 2. Although Kirk's copy of the printed commonplace book was published in 1884, Lippincott and Company had published the volume (with periodic revisions) since 1859. In addition to Lippincott, C.C. Little and J. Brown of Boston also published a similar printed blank book in 1845. See *The Lawyers' Commonplace Book, With an Alphabetical Index* (Boston: C.C. Little and J. Brown, 1845).

[17] *The Lawyer's Common-Place Book*, 3.

be used for handwritten entries by the owner.[18] Kirk took full advantage of the adaptability of the book by adding thirty-two of his own subjects to the index, and thus tailoring it to the needs of his practice. On a blank leaf preceding the title page, Kirk signed and dated the notebook, indicating that he began using it on April 1, 1891. The notebook provides an excellent example of traditional legal note-taking. The topics are alphabetically arranged, and include brief notes on the issues involved concerning each subject, as well as the associated citations. Numerous citations throughout the notebook indicate that Kirk continued to contribute new information to the book as late as 1916.[19] It is likely that Kirk composed the main entries during 1891 or shortly thereafter, then made periodic supplements to subjects including the updating of citations, throughout the remainder of his career.[20]

Kirk made a long-term commitment to the use of his commonplace book as a guide for retaining practice

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[18] The index is ordered, A-Y (less X), and including the introductory pages, preface, and blank note pages, the book totals 316 numbered pages. Entries occur in the book to page 306.

[19] The most common citations in the notebook are from the Alabama Reports, The Southern Reporter (containing the decisions of the supreme courts of Alabama, Louisiana, Florida, and Mississippi), and various Code of Alabama volumes. Numerous other sources are cited including the Massachusetts Reports, *The Central Law Journal, The American and English Encyclopaedia of Law* (Northport, New York: Edward Thompson, 1887-1896), and Horace Gay Wood, *A Treatise on the Law of Master and Servant. Covering the Relation, Duties and Liabilities of Employers and Employees* (Albany: J.D. Parsons, Jr., 1886).

[20] Throughout the notebook, there is a consistency of pen and penmanship that supports this idea. The majority of the initial cases cited occurred between the years of 1873 and 1893, indicating case law that was current around the time of Kirk's 1891 signature in the notebook. Later entries were added on "continued" pages that were often located toward the end of the notebook, or forced between lines in the original sections. Subsequent entries vary with respect to type of pen, ink, and include penciled additions.

knowledge. Updated for more than twenty-five years, it provided for Kirk a useful practice tool, and for its subsequent readers, a window into a successful turn-of-the-century Alabama law practice.

84 Husband & Wife
Wife's power to alienate her real estate without the consent of her husband.

McCroan v. Pope 17 Ala. 612
Jenkins v. McConico 26 Ala. 246
Short v. Battle 52 Ala. 456
Allen v. Terry 73 Ala. 123

All property acquired by the wife under prior statutes, now pass under the dominion of the Act of Feb[ruary 28,] 1887 defining the rights of married women.

Maxwell v. Grace 85 Ala. 579

The husband's personal skill & labor [may be is struck through] can not be reached [subjected to creditors] when expended in making improvements on wife's property.

Nance v. Nance 84 Ala. 375

Contracts between husband & wife in which they agree to live separately is [*sic*] void.[1]

Foot[*e*] *v. Nickerson* 53 *Central Law Journal* 146

A contract between husband and wife who have separated[,] whereby the husband obligates himself to pay a certain sum for her support is binding.

Fox v. Davis 113 Mass. 255
See page 264) *Page v. Trufant* 2 Mass. 159

[1] Marginal notation, "Contracts when Binding."

The jurisdiction of circuit courts are [*sic*] limited to all amounts over 50.00 dollars.
Haws v. Morgan 59 Ala. 508

The jurisdiction of the court, where it depends on the amount involved in a case, is not determined by the amount of the verdict, but by the amount claimed in the complaint, if the claim is a bona fide one.
Sharp[*e*] *v. Barney* 21 So. Rep. 490

Conflict of Jurisdiction where suit is pending in another court—Discussed

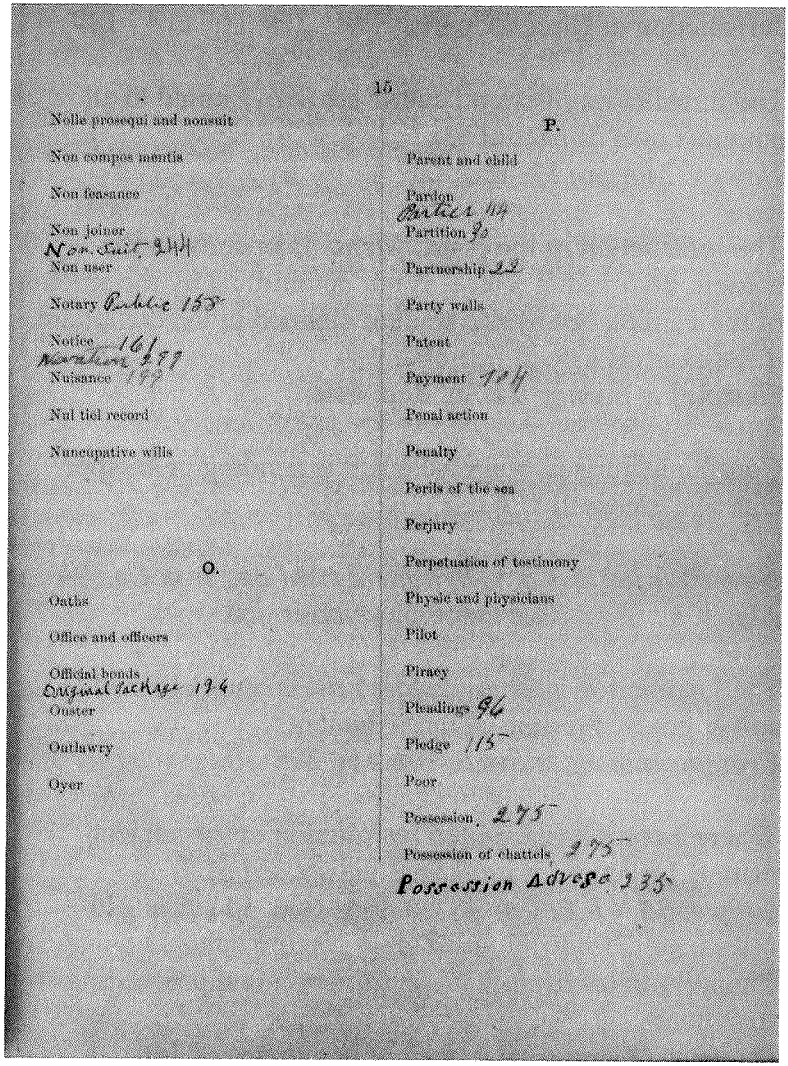
Gay, H[*ardie*] *& Co. v. Brierfield Coal and Iron Co.* 94 Ala. 308 see numerous cases cited

The jurisdiction is determined by the amount claimed in the suit & not by the amt. of the judgment.[2]
Crossthwaite v. Caldwell 106 Ala. 295

Where a court has acquired jurisdiction of the subject-matter[,] it retains it until finally disposed of.
Gray v. S&N R.R. Co. 43 So. Rep. 860 151 Ala. 215

Chancery court can not injoin [*sic*] criminal proceedings by state court.
Brown v. Mayor & Aldermen of Birmingham 140 Ala.[590]

[2] Marginal notation, "By what determined."



15

Nolle prosequi and nonsuit

Non compos mentis

Non feasance

Non joiner
Non. Suit 9141

Non user

Notary Public 155

Notice 161
Mortgage 179

Nuisance 179

Nul tiel record

Nuncupative wills

O.

Oaths

Office and officers

Official bonds
Original Package 194

Ouster

Outlawry

Oyer

P.

Parent and child

Pardon
Public 114

Partition 93

Partnership 22

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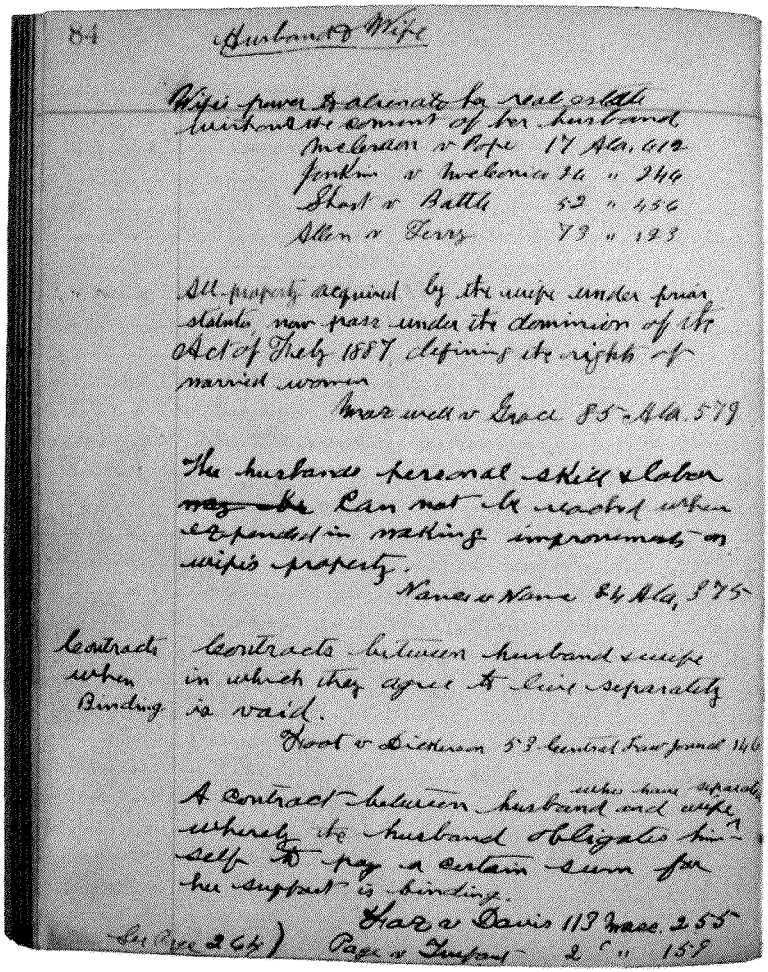
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James Thomas Kirk Notebook
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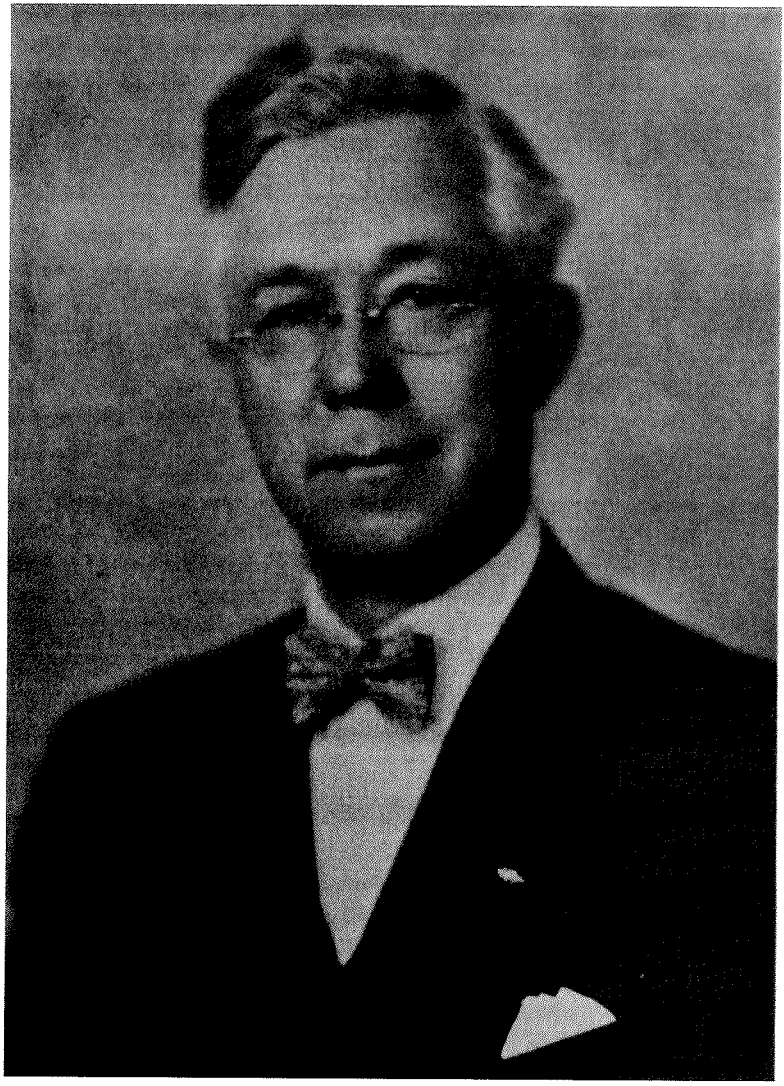

Jerome T. Fuller
From Albert B. Moore's
History of Alabama and Her People, 1927

JEROME T. FULLER NOTEBOOK*

Born in 1874 in Centerville, county seat of Bibb County in west-central Alabama, Jerome Fuller was a child of the local courthouse elite.[1] His father, Nelson Fuller, was a Confederate veteran who served in the legislature in the 1890s and was for eight years (1900-1908) county treasurer. Jerome Fuller was educated in the Centerville schools and read law with the Centerville firm of Hogue and Lavender.[2] Two years after his 1896 admission to the bar, Fuller married Kate Owen, whose father had been for many years clerk of the Bibb County Circuit Court. The Fullers raised three children in Centerville and are buried there.[3]

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* Three-ring binder, 255 leaves, divided alphabetically with tabbed cardstock leaves. Compiled circa 1925-1935. Covered in imitation leather, 29.5 x 25 cm. Hereinafter Fuller Notebook. Citations are to alphabetical sections and to leaves within sections (to recto, unless otherwise noted). Following this introduction is a transcription of leaves V-5 through V-10.

[1] Except where otherwise noted, the sketch below is derived from Fuller biographies in Thomas M. Owen, *History of Alabama and Dictionary of Alabama Biography* (Chicago: S.J. Clarke Publishing Company, 1921), III: 620, and Albert Burton Moore, *History of Alabama and Her People* (Chicago: American Historical Society, 1927), II: 769-770.

[2] The Bounds Law Library holds a legal notebook, circa 1890s, of partner William Webb Lavender.

[3] The grave markers of Jerome T. Fuller (1874-1935), Kate Owen Fuller (1878-1955), and their son Nelson O. Fuller (1908-1965) are located in the Centerville Memorial Cemetery.

On the surface Fuller's legal and political careers were conventional, even predictable. For nearly four decades he pursued a general practice in the courts of Bibb and surrounding counties, collecting along the way several steady clients, including the City of Centerville. During this time he was active in mid-level Democratic politics, winning election to the legislature in 1906, serving on the county and state executive committees, and traveling to New York City as a delegate to the 1924 Democratic national convention. His personal library combined a fair collection of law books with a number of historical titles, as well as works reflecting Fuller's status as a devout Presbyterian and enthusiastic Mason.[4] At first glance he might appear to have been little more than a fair-sized frog in an insignificant pond.[5]

Examined closely, Fuller's background and career are more interesting, in part because he carried forward a family streak of conscientious reformism. As a legislator, his father had sided with Populists and other agrarians who had challenged the state's ruling coalition of Black Belt planters and New South industrialists.[6] Jerome Fuller's service in the House coincided with the anti-railroad

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[4] The Jerome T. Fuller Collection, consisting of several hundred printed volumes, several notebooks, and one cubic foot of documents, is housed in the John C. Payne Special Collections facility, Bounds Law Library. Titles on the subjects cited above may be located by a keyword search (specifying Jerome T. Fuller Collection) on the Library's online catalog. Cataloging of the collection is an ongoing project.

[5] Fuller lived in an age of harsh criticism of small-town life. See Sherwood Anderson, *Winesburg, Ohio* (1919) and Sinclair Lewis, *Main Street* (1920).

[6] For the agrarian reform movement, see William Warren Rogers, *The One-Gallused Rebellion: Agrarianism in Alabama, 1865-1869* (Baton Rouge: Louisiana State University Press, 1970). For key votes by Nelson Fuller, see 1892-1893 Alabama House Journal 948-949 (Fuller voting against the Sayre Act, a measure intended to disfranchise reformist voters) and 1894-1895 Alabama House Journal 7-8 (Fuller voting for the agrarian candidate for Speaker).

campaign of Governor Braxton Bragg Comer, who put together a coalition of merchants, small manufacturers, middle-class whites, and prohibitionists. In this Progressive army Fuller was a capable soldier, supporting rate control, mining regulation, and public education.[7] More than a decade later, in the oxymoronic political world of the 1920s, the former "Comerites" furnished many of the supporters of the second Ku Klux Klan.[8] It is not clear whether Fuller was among them. It is true that in 1924, in his momentary appearance in national politics, he voted for an anti-Klan plank in the Democratic platform.[9]

A study of Fuller's legal notebook also sets him apart from any stereotypical notion of the country lawyer—likewise from any idea that he might have been a real-life counterpart of Atticus Finch. Most general practitioners handle some criminal law, but Fuller made a specialty of representing murderers, moonshiners, and other accused offenders.[10] On the civil side his clients included both

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[7] For Comerism, see William Warren Rogers, Leah Atkins, Robert David Ward, and Wayne Flynt, *Alabama: The History of a Deep South State* (Tuscaloosa: University of Alabama Press, 1994), 356-363; Sheldon Hackney, *Populism to Progressivism in Alabama* (Princeton: Princeton University Press, 1969), 230-323 *passim*. For Jerome Fuller's legislative tendencies, see 1907 Alabama House Journal 332, 778, 1114, 1116-1117, 2792, 3232-3233, 3718-3719, 3897-3898; and 1907 Alabama House Journal (Extra Session) 150-154.

[8] See Glenn Feldman, *Politics, Society, and the Klan in Alabama, 1915-1949* (Tuscaloosa: University of Alabama Press, 1999), 20, 23, 27-28, 31, 65-66, 123-124.

[9] For the story of Alabama's 1924 delegation, hand-picked by Comer and Alabama's staunchly anti-Klan U.S. Senator, Oscar Underwood, see Feldman, *Politics, Society, and the Klan*, 71; Evans C. Johnson, *Oscar W. Underwood, A Political Biography* (Baton Rouge: Louisiana State University Press, 1980), 398-400; and Lee N. Allen, "The 1924 Underwood Campaign in Alabama," in Sarah Wiggins, editor, *From Civil War to Civil Rights: Alabama, 1860-1960* (Tuscaloosa: University of Alabama Press, 1987), 333-334.

[10] For a case involving attempted murder, moonshining, and illegal search and seizure, see *State v. Bam Booth*, Fuller Notebook, B-3; see

plaintiffs and defendants in actions involving lumber companies, railroads, and similar corporations.[11] His interest in such cases went as far back as his legislative service, when he had pressed his colleagues to support a bill regulating "injuries by railroads and burdens of proof."[12] Though he lived in a small town, Fuller's practice fully reflected a mechanized, industrialized, vehicular[13] society. His Centerville was more akin to Hugo Black's bustling Birmingham[14] than to the fictional world created by Harper Lee.[15]

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also *Booth v. State*, 117 Southern Reporter 492 (1928). For criminal cases involving insufficient funds, accomplice testimony, arson, and moonshining under guise of making patent medicine, see Fuller Notebook, A-5, C-27, M-10, and M-14, respectively. For an example of Fuller's extensive notes on liquor issues, see Fuller Notebook, D-4. For the published report of a spectacular case (an axe murder with dismemberment) lost by Fuller, see *Bestor v. State*, 209 Alabama Reports 693 (1923).

[11] For civil cases involving false imprisonment, and claims against railroads and coal companies, see Fuller Notebook, B-1, B-21, B-11, B-14, C-4, C-5, G-5, M-3, M-4, and R-6. For a case in which Fuller defended against the claims of a corporation, see *ibid.*, S-3, "Brief for Defendant Opposing Motion for New Trial." For his notes on "Workman's Compensation" see Fuller Notebook, W-4. For Fuller as plaintiff's attorney, see published cases at 206 Alabama Reports 69 (1921); 210 Alabama Reports 234 (1923); and 217 Alabama Reports 431 (1928). For Fuller as corporate defense attorney, see cases at 208 Alabama Reports 334 (1922); 213 Alabama Reports 596 (1925); and 219 Alabama Reports 529 (1929). Two bound notebooks in the Jerome T. Fuller Collection, "Lands of Southern Mineral Land Company in Bibb County" [Volumes 9 and 10], testify to another aspect of Fuller's professional interest, though whether as attorney, land speculator, or title abstracter is not certain.

[12] See 1907 Alabama House Journal 93, 787-788, 985, 1447, 1927.

[13] See Fuller Notebook, L-4, for notes on a case involving an automobile accident.

[14] Prior to his election to the U.S. Senate in 1926, Black was one of Birmingham's most prominent criminal defense and plaintiffs' attorneys. See Tony Allan Freyer, *Hugo L. Black and the Dilemma of American Liberalism* (Glenview, Illinois: Scott, Foresman, 1990), 14-

Considered as an object, the Fuller Notebook is an ordinary three-ring binder filled with typing paper (including some onionskin). The writing in this notebook is conventional typescript, typed in many instances on the recto and verso of leaves. Fuller made brief handwritten annotations to several pages, writing in a distinctive hand.[16] While many of the notebook's entries are undated, the dates that are provided place the compilation between 1925 and 1935, the last decade of Fuller's life.

Fuller's notebook is worth considering both for what it does and for what it leaves undone. As to the former, the book is a guide to cases and topics[17] spanning the last years of Fuller's career, with entries consisting largely of excerpts from appellate reporters, Alabama's 1923 Code, and a few other lawbooks. His was obviously a busy practice, and he may have handled even more cases than the hundred-plus that appear in these pages.[18] The topical entries are typically less elaborate than the case notes, seemingly of limited value by themselves.[19] Thus it is tempting to speculate that Fuller may have kept a series of such notebooks over time. His handwritten interlineations

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48; and Roger Newman, *Hugo Black: A Biography* (New York: Pantheon Books, 1994), 23-121.

[15] In justice to Harper Lee, her classic *To Kill a Mockingbird* (1960) is set in the Great Depression, when Atticus Finch's law-for-produce practice was perhaps more common.

[16] Compare the writing on Fuller Notebook, R-6, *Red Feather Coal Company vs. M&O Railroad Company*, to the signature at the bottom of his photograph in Moore, *History of Alabama*, II: (opposite) 769.

[17] Sometimes the case entries and topical entries merge, as in Fuller Notebook, Y-1, "W.R. Young and J.G. Randall—Contracts." (Young & Randall was a firm.)

[18] A count of 3/25/04 yielded a total of more than 120 cases; in a few instances it is difficult to tell case notes from topical or client notes. It is possible that Fuller expended his own (and his secretary's) note-taking energy on important or difficult cases only.

[19] For a list of topic headings in the Fuller Notebook, see Appendix II, below.

and occasional variations in the darkness of the typescript suggest that he edited or updated entries, which in turn suggests that the notebook was a tool of practice, not an archive.[20]

Set among Fuller's practical notes is the most intriguing document in his notebook, namely his entry for *Vernon v. Mrs. O.D. Street*, a 1932 dispute over land ownership.[21] Covering three leaves, front and back, it consists of a list of forty-six points to be proved, concluding with citations to the tax records of the property in question. The list items raise points of adverse possession, privity, set-off, and other topics. Beyond these issues, the document reveals a lawyer attempting to master a web of family ties. Number 15 reminds Fuller to "Show how many children of Mrs. Julia Stewart and how many are living and how many are dead, and whether those who are dead left issue that are still living."[22] The *Vernon v. Street* notes are so detailed and explicit, in fact, that they could easily have served as a teaching tool for a young lawyer such as Fuller's son Nelson O. Fuller, who in 1932 had been practicing for less than a year.[23]

Despite its careful organization, the Fuller notebook is unlike several of the notebooks surveyed in the chapters above in that it attempts no systematic approach to law.

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[20] For interlineations and varied darkness of ink, see Fuller Notebook, R-6, the *Red Feather* entry cited above. The varied items laid into the front flap of the notebook, including typed and handwritten documents, and one report by (researcher?) J.F. Thompson may have been material being prepared for insertion.

[21] Fuller Notebook, V-5 through V-10 (excerpted below).

[22] *Ibid.*, V-5 (verso).

[23] For Nelson Owen Fuller, see Moore, *History of Alabama*, II: 770, and *The Martindale-Hubbell Law Directory, January 1935* (New York: Martindale-Hubbell, Incorporated, 1935), I: 7. Nelson O. Fuller was admitted to the bar in 1931. See the case at 25 Alabama Appellate Court Reports 491 (1933) for evidence that he was practicing with his father.

The compilers of the Seventeenth Century Notebook, like the authors of the digests and abridgments from whom they borrowed, thought in terms of a topically complete tool, a work that would represent a fusion of authority and personal vision. The same could be said of generations of commonplacing law students and lawyers. As late as the latter half of the nineteenth century, lawyers such as James T. Kirk were able to purchase ready-made commonplace books. In such cases, the idea was to tie the interior world of practice to an exterior plan of the common law.[24]

Fuller, for his part, was more interested in situations than concepts. What case law, what statutes, had been effective in his particular practice? What line of argument had been persuasive in Circuit Court or before the Supreme Court? The products of the West Publishing Company, which he cited freely, provided all of the conceptual guidance he needed. His was a modern law office, as his typewritten entries show. His notebook was a practical device, a portable filing cabinet keyed to the books on his shelves.

On the other hand, perhaps Fuller's relentlessly practical attitude was nothing new. Even the great sage Edward Coke, according to his modern editor, had "forged his views of law not by pondering its niceties but by fighting in its trenches," acquiring in the process "a reverence for technique, research, and the honing of a good theory of a case in litigation."[25] Fuller's notes were compiled with a very specific set of trenches in mind.

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[24] Kirk, as noted above, did not hesitate to invent his own subject headings.

[25] "Introduction," to Steve Sheppard, editor, *The Selected Writings and Speeches of Sir Edward Coke* (Indianapolis: Liberty Fund, 2003), I: xxiii-xxxi (quoted passage at xxiv).

Transcription, Jerome T. Fuller Notebook*

Vernon vs Mrs. O.D.Street
In Circuit Court Bibb County, Alabama 1932

Prove:

1. When Mr. Allen went into possession -- about December, 1916.

2. Prove actual enclosure by fence and its continuous maintenance.

3. Prove that all these years Mr. Allen and Mrs. Street have been claiming it as their own.

3½. Prove Mrs. Street was widow of Mr. Allen.

4. Show where Mrs. Vernon has been living and that she must have known of the adverse claim of Mr. Allen and Mrs. Street.

5. Show how many of the descendants there are of Mr. Vickery.

6. Prove character and value of improvements put on the place by Mr. Allen and Mrs. Street.

7. Prove that Mr. Allen and Mrs. Street had no children.

8. Prove possession by Dr. Bloomer and claim by him. Who put Bloomer in possession? Probably Mr. Vickery.

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* The following transcription (of leaves V-5 through V-10) preserves the spelling, abbreviations, citation form, and punctuation used in Fuller's law office. For reasons of space it alters his typography.

9. Prove payment of taxes by Dr. Bloomer in 1915, and 1916. By Mr. Allen in 1917 and 1918, and by Mrs. Street ever since 1919 to 1931.

10. Find record of deed of Vickery to Dr. Bloomer, evidently subsequent to March 12, 1912, as on that date Vickery mortgaged lot to West Blocton Savings Bank.

11. Get copy of deed of Belcher to Vickery.

12. Get copy of deed of Robert Hosmer to Vickery.

13. Get copy of deed of Mr. Vickery to Dr. Bloomer.

14. Prove setting aside of this land to Mrs. Allen as homestead.

15. Show how many children of Mrs. Julia Stewart and how many are living and how many are dead, and whether those who are dead left issue that are still living.

16. Show how many children Mrs. Vickery had by both first and second husband.

17. Show when Mr. Vickery died. Probably in January, 1928.

18. If record can not be found setting land aside to Mrs. Allen, but if the original papers can be found, have them recorded.

19. If original papers can not be found but papers can be found showing what was done, get order nunc pro tunc making a record.

20. Possession of life tenant not within the statue of suggestion of adverse possession for three years. Code 1923 Sec. 7460, 7461; 74 Ala 127

21. Permanent improvements set off against use and occupation. 75 Ala 297; 72 Ala 546; 74 Ala 232; 4 Ala 367

22. Can not get advantage of this suggestion and also of statue limiting rents to one year. 75 Ala 297; 80 Ala 589; 89 Ala 448; 80 Ala 594; 75 Ala 297; 88 Ala 346;

23. Liability for rent for only one year. Code 1923, Sec. 7464.

24. Suggestion of adverse possession of three years not necessary to prove listing of lands for taxes. Code Sec. 6069, 7460.

25. Mrs. Street's possession is prima facie evidence of claim by inheritance from Mr. Allen. Jordan vs Smith, 185 Ala 591; 64 Sou 317

26. Mrs. Street's possession may be adverse and ripen into title notwithstanding Mr. Allen was a life tenant. Childs vs Floyd, 188 Ala 556; 66 Sou 470. Childs vs Floyd, 194 Ala 651; 70 Sou 121.

27. Recording is not necessary when there is a claim by inheritance. Smith vs Bachus, 201 Ala 534; 78 Sou 888.

28. This statue requiring payment of taxes does not apply when there is a bona fide claim by purchase. Owen vs Mixon, 167 Ala 615; 52 Sou 527.

29. Entry under purchase from one cotenant of the entire title is basis for adverse possession. Short vs

DeBardeleben, 208 Ala 356; 94 Sou 285. Dew vs Gamer, 92 Sou 647.

30. Conveyance of entire title by part of the heirs is a sufficient basis for adverse possession against cotenants. Weaver vs. Blackmon, 212 Ala 681; 103 Sou 889.

31. "Inheritance" as used in Sec. 6069 of the Code is to be given a common sense and not a technical meaning. 22 Cyc p. 72; McArthur vs Scott, 113 U.S. 340; 380; 28 L. Ed. 1015, 1027.

32. Possession of dowress may become adverse to the heirs. Hays vs Remoine, 47 Sou 97; 156 Ala 465. Sloss Co. vs Taff, 59 Sou 658; 178 Ala 382. 1 Ala & Sou Dig p. 220.

33. The possession of a vendee is adverse as to the world except his vendor. 1 Ala & Sou Dig. p. 222.

34. One tenant in common may recover the whole estate from a stranger in possession. Blakeney vs Dubose, 52 Sou 746; 167 Ala 627. Ala. Fuel Co. vs Bradhead, 98 Sou 789; 210 Ala 545. 19 C.J. p. 1216; Hooper vs Bankhead, 171 Ala 626, 631; 54 Sou 549.

35. As against another cotenant in possession a cotenant out of possession can recover in ejectment only his aliquot part. Ala Fuel Co. vs Broadhead, 98 Sou 789; 210 Ala 545. 19 C.J. p. 1216; Hooper vs Bankhead, 171 Ala 626, 631; 54 Sou 549.

36. If the evidence shows that the Vickerys did not own the mineral interest, can plaintiff recover on his present complaint in ejectment?

37. Certainly the judgment should show that there was no recover of the mineral interest.

38. Where husband and wife are jointly in possession of real estate, what is the presumption as to the title in the absence of evidence showing whether in the husband or the wife or in both?

39. There was no privity between Mrs. Vickery and Dr. Bloomer, or between her and Mr. Allen, or Mrs. Street. They claim under Mr. Vickery and were put in possession by him as purchasers. Therefore, Dr. Bloomer or Mr. Allen, or Mrs. Street could dispute the title of Mrs. Vickery, and could, therefore, claim adversely to her.

40. Mrs. Vickery on one hand and Dr. Bloomer, or Mr. Allen or Mrs. Street on the other, were at the most only tenants in common. The usual roles of the adverse possession applicable to tenants in common are applicable to them.

41. Plaintiff and defendant do not claim from a common source. Plaintiff claims through Mrs. Vickery; defendant claims through Mr. Vickery.

42. Claiming title to land from a common source does not estop a party from setting up adverse possession. Spragins vs Fitcheard, 91 Sou 793; 206 Ala 694.

43. A defendant in possession in good faith and under color of title can defeat ejectment by a prior possessor by proving an outstanding legal title with which he does not connect himself. Swindal vs Ford, 63 Sou 651; 184 Ala 137; Tapia vs Williams, 54 Sou 613; 172 Ala 18; Owen vs Mixon, 52 Sou 527; 167 Ala 615; Price vs Cooper, 26 Sou

238; 123 Ala 392. Stephenson vs Sims (?) 8 Sou 695; 92 Ala 582.

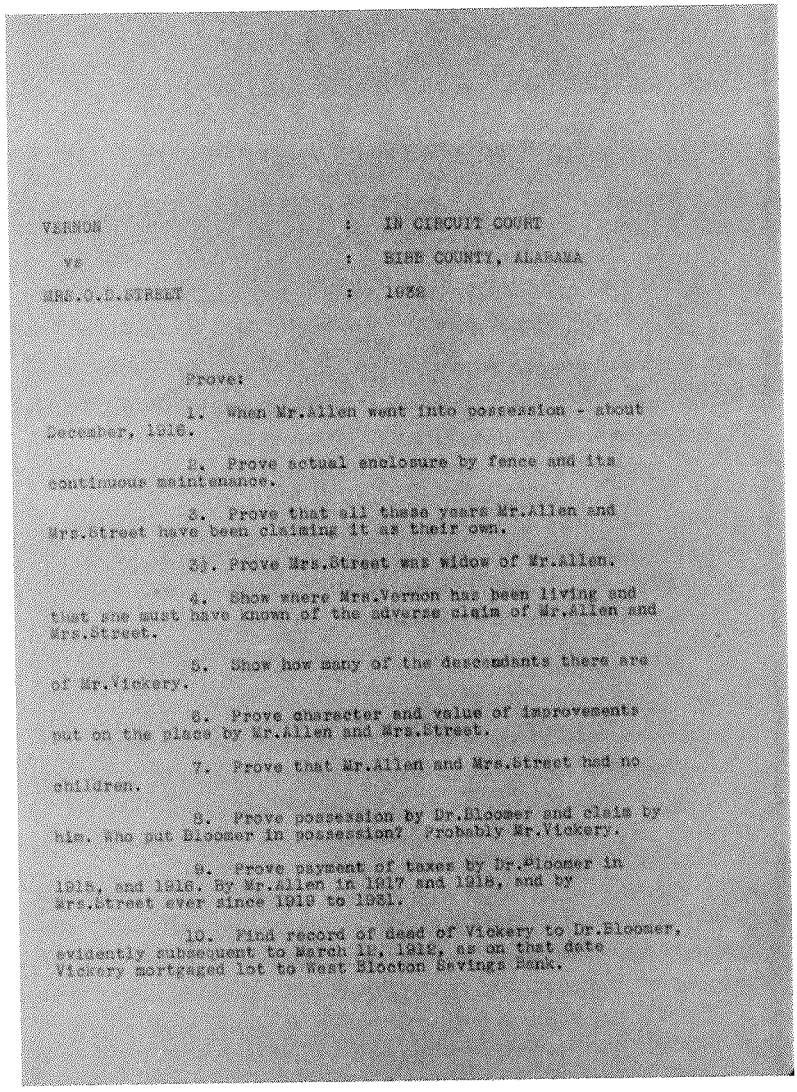
44. Adverse possession by one cotenant against another. Fitch vs. Parslow, 60 Sou 343; 64 Fla. 279; Sumxer vs Hill, 47 Sou 565; 157 Ala 230; Miller vs Bizard, 70 Sou 639; 195 Ala 467; Kid vs Borum, 61 Sou 100; 181 Ala 144; Stokely vs Connor, 68 Sou 452; 69 Fla 412. Layton vs Campbell, 46 Sou 775; 155 Ala 220; 130 Am. St. Rep. 17. Oliver vs Williams, 50 Sou 937; 163 Ala 376; Sibley vs McMahon, 98 Sou 805; 210 Ala 598; Turner vs Turner, 81 Sou 17; 202 Ala 515; Wisener vs Trapp, 114 Sou 196, 216 Ala 595

45. Adverse possession against one cotenant by grante of another cotenant. Fitch vs Parslow, 60 Sou 343; 64 Fla 279; Short vs DeBardeleben, 208 Ala 356; 94 Sou 285; Weaver vs Blackmon, 212 Ala 681; 103 Sou 889.

46. Open, notorious, hostile, and exclusive possession as notice of the adverse character of the possession of a cotenant. Cramton vs Rutledge, 50 Sou 900; 163 Ala 649.

1912 T. J. Vickery p. 124
1911 T. J. Vickery p. 132
1910 T. J. Vickery p. 131
1913 T. J. Vickery p. 140
1914 T. J. Vickery p. 106
1915 Dr. Wm. Bloomer p. 148
1916 Dr. W. M. Bloomer p. 97
1917 Allen Furn. Co. p. 101
1918 S. S. Allen p. 160
1919 Mrs. S. S. Allen p. 141
1920 Mrs. S. S. Allen p. 143
1921 Mrs. S. S. Allen p. 186

1922 Mrs. S. S. Allen p. 170
1923 Mrs. S. S. Allen p. 111
1924 Mrs. S. S. Allen p. 139
1925 Mrs. S. S. Allen p. 131
1926 Mrs. S. S. Allen p. 134
1927 Mrs. S. S. Allen p. 161
1928 Mrs. O. D. Street p. 138
1929 Mrs. O. D. Street p. 132
1930 Mrs. O. D. Street p. 123
1931 Mrs. O. D. Street p. 173



VERNON : IN CIRCUIT COURT

vs : BIBB COUNTY, ALABAMA

MRS.O.B.STREET : 1938

Prove:

1. When Mr.Allen went into possession - about December, 1916.

2. Prove actual enclosure by fence and its continuous maintenance.

3. Prove that all these years Mr.Allen and Mrs.Street have been claiming it as their own.

3½. Prove Mrs.Street was widow of Mr.Allen.

4. Show where Mrs.Vernon has been living and that she must have known of the adverse claim of Mr.Allen and Mrs.Street.

5. Show how many of the descendants there are of Mr.Vickery.

6. Prove character and value of improvements put on the place by Mr.Allen and Mrs.Street.

7. Prove that Mr.Allen and Mrs.Street had no children.

8. Prove possession by Dr.Bloomer and claim by him. Who put Bloomer in possession? Probably Mr.Vickery.

9. Prove payment of taxes by Dr.Bloomer in 1915, and 1916. By Mr.Allen in 1917 and 1918, and by Mrs.Street ever since 1919 to 1961.

10. Find record of deed of Vickery to Dr.Bloomer, evidently subsequent to March 11, 1915, as on that date Vickery mortgaged lot to West Blocton Savings Bank.

Jerome T. Fuller Notebook
Leaf V-5, Recto
Bounds Law Library

Hugo L. Black
Bounds Law Library

HUGO L. BLACK NOTEBOOK*

The Black Notebook is a small three-ring binder in green cloth. Roughly half of the leaves are ordinary notebook paper; the rest are onionskin or carbon paper. The text is predominantly typescript, though there are many manuscript annotations, insertions, and corrections, a number of which are identifiably in Black's handwriting. Carbon paper leaves duplicate many of the leaves typed on notebook paper. The latter contain most of Black's annotations and corrections.[1]

The presence of numerous duplicate leaves indicates that the Black Notebook was compiled from more than one source—arguably from an original and carbon copies made for the use of law clerks or colleagues.[2] The contents of the Black Notebook are varied, but chiefly consist of excerpts from court reports, the *Congressional Record*, and other official sources. Internal evidence shows that these

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* Three-ring binder, 155 leaves. Compiled c. 1938-1940. Covered in green cloth, 15 x 23 cm. Cited hereinafter as Black Notebook. Following this introduction is a transcription of leaves 88 through 90.

[1] Three pages are entirely written in Black's hand. They are the verso of leaf 20 (two lines, the only text not written on the recto of leaves), the recto of leaf 32 (eighteen lines) and the recto of leaf 34 (twenty-eight lines).

[2] Professor Glenda Conway of the University of Montevallo has found, in the William O. Douglas Papers in the Library of Congress, stapled pages (headed "No. 195—O.T. 39 Chambers v. Florida"), one of which resembles in size and format the sheets of the Black Notebook. Douglas was Black's contemporary and ally on the Court. For more materials pertaining to *Chambers v. Florida*, see Black Notebook, leaves 73-102.

materials were compiled to support opinions Black was writing or considering in 1939 and 1940, just a few years into his notable career on the United States Supreme Court.

President Franklin D. Roosevelt had nominated U.S. Senator Black of Alabama as Associate Justice amid controversy. During Roosevelt's reelection campaign of 1936, the leading issues concerned the Court's invalidation of nearly all the New Deal programs Congress had enacted over the preceding three years to alleviate the Great Depression.[3] Although he won a landslide victory, Roosevelt subsequently failed to gain congressional support for a plan to "pack" the Court with liberals; he nonetheless achieved his goal when the conservative justices opposing the New Deal resigned one after another beginning in 1937. In that same year Black became Roosevelt's first liberal appointee. Notwithstanding revelations that he had been a member of Alabama's Ku Klux Klan during the 1920s, Black went on to become one of the most significant justices of the modern Supreme Court.[4] If for no other reason, the Black Notebook is valuable because it suggests how Black

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[3] The leading cases invalidating the early New Deal are: *Schecter* v. *U.S.*, 295 United States Reports 495 (1935); *U.S.* v. *Butler*, 297 United States Reports 1 (1936); *Carter* v. *Carter Coal Co.*, 298 United States Reports 238 (1936). The leading cases affirming a "constitutional revolution" are *West Coast Hotel* v. *Parrish*, 300 United States Reports (1937); *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 United States Reports 1 (1937); *Steward Machine Co.* v. *Davis*, 301 United States Reports 548 (1937); *Palko* v. *Connecticut*, 302 United States Reports 219 (1937); *U.S.* v. *Carolene Products Co.*, 304 United States Reports 144 (1938); *Missouri ex rel. Gaines* v. *Canada*, 305 United States Reports 337 (1938) *U.S.* v. *Darby Lumber Co.*, 312 United States Reports 100 (1941).

[4] Roger K. Newman, *Hugo Black: A Biography* (New York: Pantheon Press, 1994); Virginia Van der Veer Hamilton, *Hugo Black: The Alabama Years* (Baton Rouge: Louisiana State University Press, 1972); Tony Freyer, *Hugo L. Black and the Dilemma of American Liberalism* (Glenview, Illinois: Scott Foresman, 1990).

adapted to the new role of Justice.[5] It also provides insight into the institutional workings—certainly the work habits—of the Court.[6]

Although the Supreme Court is among the nation's most powerful constitutional institutions, its internal operation remains obscure. Periodically, members of the Court themselves offer what are usually opaque descriptions of their work. On other occasions, clerks have published accounts about their temporary tenure of service—usually no more than a year or two—at the court. On the whole, these clerks abide by a code of restricted disclosure, which has been breached episodically, most notably with the publication of Bob Woodward and Scott Armstrong's *The Brethren* (1979), which relied on controversial interviews with some of the justice's former law clerks.[7] Historians and other researchers, by contrast, often examine the personal papers of the justices located at archives such as the Library of Congress.[8] These works undoubtedly reveal much about the Court's inner being, though they necessarily possess the perspective of their individual subject and rarely extend to

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[5] It seems likely that the use of a source notebook was typical only of Black's early years on the Court. In letters and conversations, two former clerks (who began service in 1952 and 1954, respectively) recalled nothing about such a notebook.

[6] For an example of the types of documents and arguments Black considered, see Black Notebook, leaves 26-35 (handwritten notes on 34-35) for material collected for Black's opinion in *U.S.* v. *Sponenbarger,* 308 United States Reports 256 (1939). *Sponenbarger* concerned numerous questions arising from the Mississippi Flood Control Act of 1928. These issues took on added significance as a result of the New Deal's Tennessee Valley Authority (TVA), which engendered massive damage claims on waterways. The Supreme Court affirmed TVA in *Ashwander* v. *TVA*, 297 United States Reports 288 (1936), but *Sponenbarger* dealt with the subsidiary impact of TVA and other New Deal environmental policies.

[7] Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979).

[8] The Library of Congress contains the Hugo L. Black Papers.

other members of the Court. Hugo L. Black's notebook fits into this latter category: it represents the sort of personal material researchers encounter when seeking to reconstruct a justice's confidential working life.

Confronting public criticism associated with Roosevelt's Court Packing plan, as well as privately expressed skepticism by some colleagues that he lacked the intelligence and skill to be an effective justice, Black steadily mastered the theories, precedents, and doctrines underlying the issues arising from the liberal constitutional revolution that began in 1937.[9] Topics covered in the Black Notebook concern some of the same subject matter as lesser-known but significant New Deal policies, including: federal and state court precedents pertaining to the bankruptcy law of 1938 (the most important such legislation enacted between the first permanent federal act of 1898 and the leading revisions of 1978); federal procedures associated with the path-breaking Federal Rules of Civil Procedure, also instituted in 1938; patents (which at the time were emerging as a problem incident to international cartels); the commerce clause or taxing power underlying antitrust and other regulatory authority over insurance companies operating on an interstate basis; and even questions regarding the interstate implications for federal jurisdiction of divorce in Nevada.[10] Where Supreme Court decisions

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[9] Newman, *Hugo Black*, 247-299; Freyer, *Hugo L. Black*, 72-87.

[10] For the importance of these topics, see David A. Skeel, Jr., *Debt's Dominion: A History of Bankruptcy Law in America* (Princeton: Princeton University Press, 2001), 71-128, 230; Gerald T. Dunne, "Justice Hugo Black: Craftsman of the Law," in Tony Freyer, editor, *Justice Hugo Black and Modern America* (Tuscaloosa: University of Alabama Press, 1990), 273-278; Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America, 1880-1990* (New York: Cambridge University Press, 1992), 224-229; Tony Freyer, *Harmony and Dissonance: The Swift & Erie Cases in American Federalism* (New York: New York University Press, 1981), 120-122 and *passim*; Tony Freyer and Timothy Dixon, *Democracy and Judicial*

are presented, the notebook often records the opinions, especially the dissents, of those recognized as progressive or liberal justices, such as Oliver Wendell Holmes, Louis D. Brandeis, or John Marshall Harlan.[11] The New Deal constitutional revolution conformed to a notable tradition, namely that liberal or progressive dissenting justices often paved the way for what subsequently became prevailing constitutional interpretations. Clearly, Black saw himself as performing the same reformist role.

The notebook also suggests Black's particular reliance on lawyers' advocacy as a means for achieving liberal reform. Black's small-town southern background—epitomized by his becoming Alabama's leading trial lawyer during the 1920s—led him to trust in the ability of plaintiff's attorneys to tap the communal spontaneity of jury trials and local court culture.[12] Thus, the notebook reveals an unusual ability to adapt precedents, doctrines, and issues to the imperatives of appellate advocacy, but with the ultimate goal of providing guidance for trial lawyers who were willing to challenge the established order. Two examples from the notebooks suggest Black's purpose. The topic-section entitled "Confessions, Third

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Independence: A History of the Federal Courts of Alabama, 1820-1994 (Brooklyn: Carlson, 1995), 181-183, 192, 206; and Newman, *Hugo Black*, 324-354; see also *U.S.* v. *Southeastern Underwriters Associations,* 322 United States Reports 533 (1944). For relevant materials in the Black Notebook, see leaves 36-38 (bankruptcy), 126-131 (civil procedure), 138-139 (patents), 111-125 (Commerce Clause), 143-152 (insurance), and 103-107 (divorce).

[11] For transcriptions or citations of the justices named, see Black Notebook, leaves 7 (Harland), 10, 15, 55 (Brandeis), and 11, 15 (Holmes).

[12] Freyer, *Hugo L. Black*, 43-42; Tony A. Freyer, book review [of Edward A. Purcell, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (New Haven: Yale University Press, 2000)], *Constitutional Commentary*, 18 (2001), 267-289, especially at 279-82.

Degree" (excerpted below)[13] provides revealing new context for Black's eloquent opinion for a unanimous Court in *Chambers v. Florida* (1940), which overturned a state jury's murder verdicts based on confessions coerced from four black tenant farmers. Recognized by Justice William J. Brennan and others as a "great opinion," *Chambers* was indicative of Black's leading role in making the protections of the Bill of Rights apply to all Americans through the due process clause of the Fourteenth Amendment.[14] The notebook documents the sort of evidence Black drew upon from the United States, Great Britain, and other nations to expand these protections.

A second example concerns voting rights. In a series of decisions culminating in *Grovey v. Townsend* (1935) the Court maintained that southern primaries that prohibited blacks from voting did not violate the Fifteenth Amendment, holding that the amendment's constitutional protection did not apply to private political activities such as the Democratic party's primary.[15] One of Black's notebook topic-sections concerns voter registration (and "grandfather clause") materials, indicating that Black was working toward a constitutional argument to undermine such voter discrimination early in his tenure on the court.[16] Indeed, this notebook material foreshadows two cases that were argued in 1940: *U.S. v. Classics* (1941), which eroded the earlier precedents, and *Smith v. Allwright* (1944) that

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[13] Overall, see Black Notebook, leaves 73-102.

[14] *Chambers v. Florida,* 309 United States Reports 227 (1940); Justice William J. Brennan, Jr. "Remarks on the Occasion of the Justice Hugo L. Black Centennial," in Freyer, editor, *Hugo Black and Modern America*, quote at 182.

[15] *Grovey v. Townsend*, 295 United States Reports 45 (1935); Freyer, *Hugo L. Black*, 96-97.

[16] Black Notebook, leaves 132-137.

overturned *Grovey*.[17] In both cases Black voted with the new liberal majority favoring equal voting rights under the Fifteenth Amendment. Thus, the evidence from the notebook documents how Black used his ability to think like a lawyer to fashion a historic career of constitutional lawmaking on the Supreme Court.

[17] *U.S. v. Classics*, 313 United States Reports 299 (1941); and *Smith v. Allwright*, 321 United States Reports 649 (1944); see also Freyer, *Hugo L. Black*, 84, 97.

Transcription, Hugo L. Black Notebook*

1 Confessions—Third Degree

"The law is well settled that when an extra judicial confession is made in conformity with the rule above stated it is admissible, though it may not be the spontaneous utterance of the accused. The fact that the confession was obtained by questioning the prisoner will not alone exclude it, even though some of the questions be leading and assume guilt, if the confession in fact emanates from the free will of the accused and is without inducement of hope, fear or other illegal influence. - - - When considering such a confession, however, trial courts should exercise great diligence to ascertain whether such questioning was so repeated and persistent and applied under such attending circumstances of intimidation or of inequality between the interrogator and the accused as to impair the freedom of will of the latter and thereby amount to compulsion. The effect as well as the form of the compulsion should be carefully weighed and considered, for a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion. Siang Sung

* The following is a transcription of the first three leaves of Black's notes on "Confessions—Third Degree" (leaves 88 through 90). The Notebook contains both "original" and carbon copy versions of these notes. The former were chosen for transcription. For the carbon copy version, see leaves 73-75. This transcription reproduces Black's underlining (typed and hand-drawn underlinings are reproduced here without distinction) and his handwritten passages (the latter in italic type). The Arabic numeral footnotes are original to the document. Citations in text and footnotes are unchanged, as are mistakes in punctuation. This transcription also reproduces, roughly, the typography and paragraph structure of the original, though the page breaks and typed page numbers are not preserved.

Wan v. United States, 266 U.S. 1, 69 Law. Ed. 131, decided October 13, 1924.
"See also Bates v. State, 78 Fla. 672, 84 So. R. 373.

"Because of the great probability that the confessions, if made at all, were not freely and voluntarily made and because of it appearing that the verdict of the jury was probably largely influenced by the admission in evidence of the alleged confessions the judgment should be reversed and it is so ordered."

Rowe et al. v. State, 98 Fla. 98, 100, 101.

"THE THIRD DEGREE.- An examination of the decisions of appellate courts during the past decade or so[1] discloses a striking number of cases where there was evidence of the use of so-called third degree methods by police or private individuals in an effort to extort confessions from suspected criminals.[2] It is significant that these decisions come from twenty-nine states and from five federal circuits.[3] When it is remembered that with few exceptions[4] none of the cases in which the trial court has excluded the confession, and none of the cases in which the prosecution has refrained from offering confessions because of their obvious inadmissibility can reach courts of appeal, one is driven to the conclusion that the third degree is employed as a matter of course in most states, and has become a recognized step in the process that begins with

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[1] For some earlier cases, see Note (1922) 8 Va. L. Rev. 527

[2] This does not include the innumerable cases where the appellate court merely mentioned that there was a dispute as to the admissibility of the confession and that the trial court correctly decided the issue.

[3] Namely, the Fourth, Fifth, Eighth, and Ninth Circuits, and the Court of Appeals of the District of Columbia. The cases from the state courts represent every section of the country.

[4] One exception is the rare case of a civil suit against the officers. Only one has been found where the facts were proved. Karney v. Boyd, 186 Wis. 594, 203 N.W. 371 (1925). For similar cases where the facts do not appear, or where a demurrer was interposed, see infra notes 53, 54.

arrest and ends with acquittal or final affirmance.[5] In sharp contrast is the practice in England,[6] where not one case showing evidence of third degree methods has been found in the past twenty years.[7]"

43 Harvard Law Review (1929-1930) at 617.

"In other words, the court may submit to the jury a confession affirmatively shown to be prima facie admissible; but where the evidence on behalf of the state fails to show that there was no inducement offered the prisoner, or leaves that question in doubt, the state has failed to make a prima facie case, by that witness at least, and his testimony should be withdrawn from the jury. - - - The statement of the accused contained in the testimony of the witness to whose evidence objection was offered was made in the jail of Muscogee county, and, as testified by this witness, 'at the time he made the statement Mr. H.M. Adair, city detective, Sheriff C.C. Layfield, of Muscogee County, Mr. Reese, and Mr. Cummings, the assistant jailor, were all present.' The accused was not accompanied by counsel or a single friend or relative. The statement of the accused under

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[5] Cf. 2 WHARTON, CRIMINAL EVIDENCE (10th ed. 1912) [sec.] 622f; (1926) 30 LAW NOTES 164.

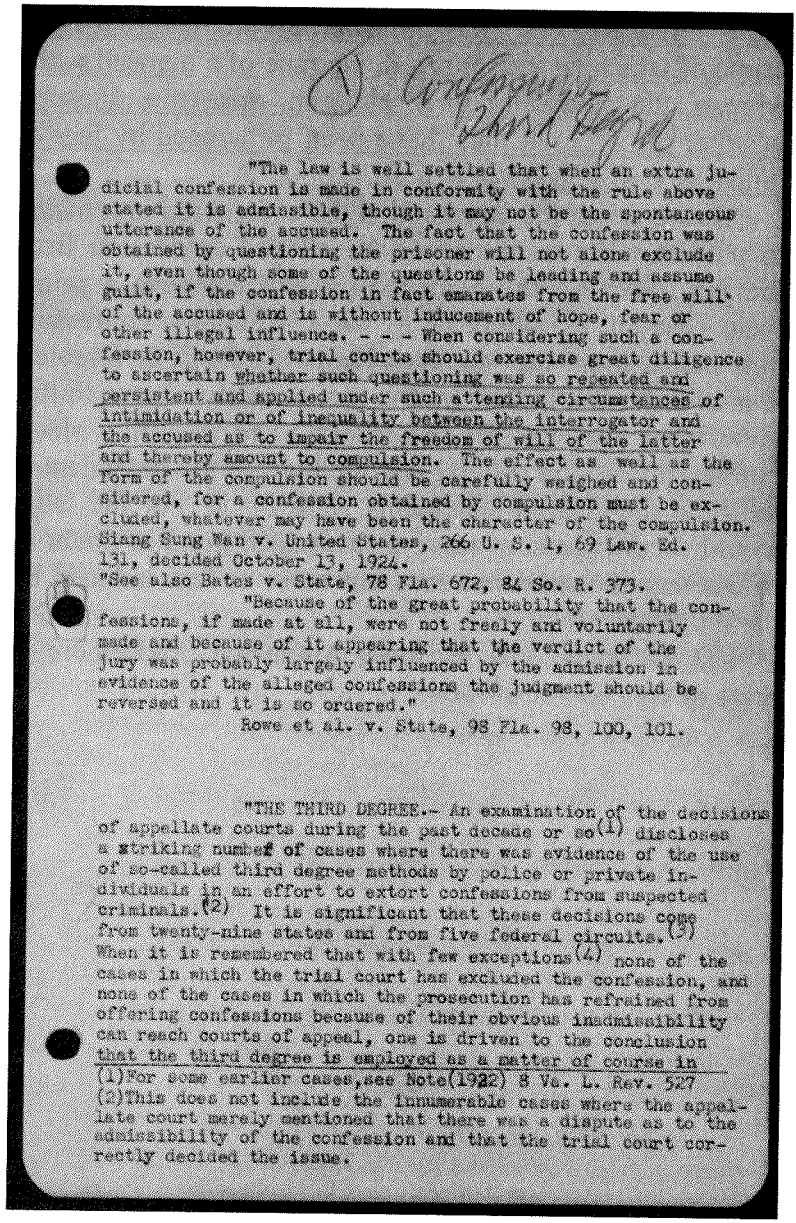
[6] The only case seems to have been that of Miss Savage, who was questioned by police officers for several hours. But this would hardly be considered a case of third degree in this country; after the questioning had proceeded for some time, tea was served. See London Times, July 14, 1928, at 8, 9. In England, it is very doubtful if any statements made after arrest as a result of questions by an officer will be admitted in evidence. Cf. Rex v. Best, 2 Cr. App. R. 30 (1909); Rex v. Booth & Jones, 5 Cr. App. R. 177 (1910); Ibrahim v. The King, [1914] A.C. 599; Rex v. Gardner & Hancox, 11 Cr. App. R. 23 (1919); Rex v. Grayson, 16 Cr. App. R. 7 (1921); Rex v. Turner, 19 Cr. App. R. 171 (1926).

[7] An investigation of lawless methods of law enforcement in this country has been undertaken by a special committee appointed by the National Commission on Law Observance and Enforcement. See N.Y. Times, Oct. 16, 1929, at 33.

these circumstances, and considering the nature of the crime of which he was charged, the rape of a married white woman, the mother of three children, raises the question whether the accused must have been influenced by fear of injury as well as hope of benefit.

"So we are of the opinion that the court erred in refusing to withdraw the testimony of the alleged confession from the jury, because the evidence did not establish a prima facie case of its admissibility as a voluntary confession obtained without the 'slightest hope of benefit or remotest fear of injjry [sic],' and we the more readily concur in this view when we consider the record as to the time, place, circumstances, and official surroundings of the defendant at the time the alleged statements were made. For the latter would seem at least to leave a reasonable mind in doubt as to whether the statement was not more or less induced by these influences."

102 American Law Reports, Annotated, McLemore v. State of Ga., 634 at 640, 641.



"The law is well settled that when an extra judicial confession is made in conformity with the rule above stated it is admissible, though it may not be the spontaneous utterance of the accused. The fact that the confession was obtained by questioning the prisoner will not alone exclude it, even though some of the questions be leading and assume guilt, if the confession in fact emanates from the free will of the accused and is without inducement of hope, fear or other illegal influence. - - - When considering such a confession, however, trial courts should exercise great diligence to ascertain whether such questioning was so repeated and persistent and applied under such attending circumstances of intimidation or of inequality between the interrogator and the accused as to impair the freedom of will of the latter and thereby amount to compulsion. The effect as well as the form of the compulsion should be carefully weighed and considered, for a confession obtained by compulsion must be excluded, whatever may have been the character of the compulsion. Siang Sung Wan v. United States, 266 U. S. 1, 69 Law. Ed. 131, decided October 13, 1924.

"See also Bates v. State, 78 Fla. 672, 84 So. R. 373.

"Because of the great probability that the confessions, if made at all, were not freely and voluntarily made and because of it appearing that the verdict of the jury was probably largely influenced by the admission in evidence of the alleged confessions the judgment should be reversed and it is so ordered."

Rowe et al. v. State, 98 Fla. 98, 100, 101.

"THE THIRD DEGREE.- An examination of the decisions of appellate courts during the past decade or so(1) discloses a striking number of cases where there was evidence of the use of so-called third degree methods by police or private individuals in an effort to extort confessions from suspected criminals.(2) It is significant that these decisions come from twenty-nine states and from five federal circuits.(3) When it is remembered that with few exceptions(4) none of the cases in which the trial court has excluded the confession, and none of the cases in which the prosecution has refrained from offering confessions because of their obvious inadmissibility can reach courts of appeal, one is driven to the conclusion that the third degree is employed as a matter of course in

(1)For some earlier cases,see Note(1922) 8 Va. L. Rev. 527

(2)This does not include the innumerable cases where the appellate court merely mentioned that there was a dispute as to the admissibility of the confession and that the trial court correctly decided the issue.

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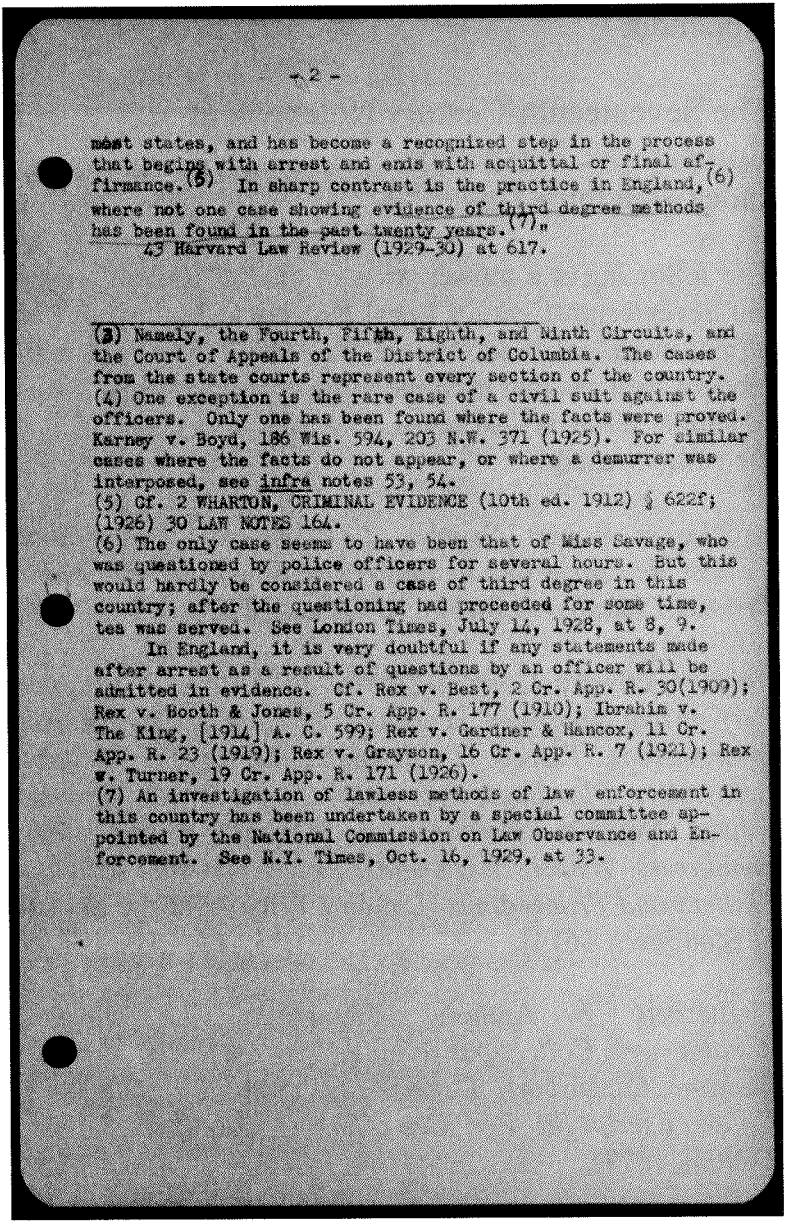

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most states, and has become a recognized step in the process that begins with arrest and ends with acquittal or final affirmance.(5) In sharp contrast is the practice in England,(6) where not one case showing evidence of third degree methods has been found in the past twenty years.(7)"
43 Harvard Law Review (1929-30) at 617.

(3) Namely, the Fourth, Fifth, Eighth, and Ninth Circuits, and the Court of Appeals of the District of Columbia. The cases from the state courts represent every section of the country.
(4) One exception is the rare case of a civil suit against the officers. Only one has been found where the facts were proved. Karney v. Boyd, 186 Wis. 594, 203 N.W. 371 (1925). For similar cases where the facts do not appear, or where a demurrer was interposed, see infra notes 53, 54.
(5) Cf. 2 WHARTON, CRIMINAL EVIDENCE (10th ed. 1912) § 622f; (1926) 30 LAW NOTES 164.
(6) The only case seems to have been that of Miss Savage, who was questioned by police officers for several hours. But this would hardly be considered a case of third degree in this country; after the questioning had proceeded for some time, tea was served. See London Times, July 14, 1928, at 8, 9.
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(7) An investigation of lawless methods of law enforcement in this country has been undertaken by a special committee appointed by the National Commission on Law Observance and Enforcement. See N.Y. Times, Oct. 16, 1929, at 33.

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Appendix I

The Seventeenth-Century Notebook in Comparative Perspective: Index Headings Under "A"

The following is a transcription of the "A" index terms of the Seventeenth-Century Legal Notebook. Following most terms, in square brackets, are "see also" listings of early modern treatises that used the same indexing terms; the use of similar terms is also noted. The following codes identify the editions used:

Brooke = Robert Brooke, *La Graunde Abridgement: Collect & Escrie per le Iudge Tres-Reuerend Syr Robert Brooke, Chiualier* (London: R. Tottel, 1573).

Coke = Edward Coke, *A Booke of Entries: Containing Perfect and Approued Presidents of Courts, Declarations, Informations, Pleints, Inditements, Barres, Replications, Reioynders, Pleadings, Processes, Continuances, Essoines, Issues, Defaults, Departure in Despite of the Court, Demurrers, Trialls, Iudgements, Executions, and All Other Matters and Proceedings* (London: Printed for the Societie of Stationers, 1614).

Fitzherbert = Anthony Fitzherbert, *La Graunde Abridgement, Collect par le Iudge Tresreuverend Monsieur Anthony Fitzherbert, Dernierment Conferre Ouesque la Copye Escript et Per Ceo Correct* (London: Richardi Tottelli, 1577).

Rastell = William Rastell, *A Collection of Entries: Of Declarations, Barres, Replications, Reioinders, Issues, Verdits, Iudgements, Executions, Proces, Continuances,*

Essoynes, & Diuers Others Matters, Newly Augmented & Amended (London: John Streeter, James Fletcher, and Henry Twyford, 1670).

Rolle = Henry Rolle, *Un Abridgment des Plusiuers Cases et Resolutions del Common Ley, Alphabeticalment Digest Desouth Severall Titles* (London: A Crooke, *et al.*, 1668).

Index Terms, leaves 52, recto, through 63, recto. Spellings, abbreviations retained.

Abbe & Prior [Brooke, Fitzherbert,[1] and Rastell.]

Abatemt [Coke and Rastell.]

Abeyance

Abbettors [Brooke[2] and Rastell.]

Abiuration & exile [Brooke, Coke, and Rastell.[3]]

Abridgement [Brooke and Rastell.[4]]

Acceptance [Brooke.]

Accessary [Rastell.[5]]

Action Populer [Brooke[6] and Rastell.]

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[1] Fitzherbert, "Abbe" only.
[2] Brooke, "Abbetor."
[3] Brooke, "Abiuration" only; Rastell, "Abjuration."
[4] Rastell, "Abridgement de dower."
[5] Rastell, "Accessory."
[6] Brooke, "Accion populer."

Action Sur le Case [Brooke,[7] Fitzherbert, Coke, Rolle,[8] and Rastell.]

Action de debt

Action sur le Statute [Brooke,[9] Fitzherbert, Coke, and Rastell.]

Accompt [Brooke,[10] Fitzherbert, Coke, Rolle, and Rastell.[11]]

Accord & Concord [Brooke,[12] Fitzherbert, Rolle, and Rastell.[13]]

Acquitall [Brooke and Rastell.[14]]

Additions de homes & villes [Brooke, Fitzherbert, and Rastell.[15]]

Adiournement [Brooke, Fitzherbert, Coke, Rolle, and Rastell.[16]]

Admeasuremt de pasture dower etc. [Brooke, Fitzherbert, Coke, Rastell.[17]]

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[7] Brooke, "Accion sur le case."
[8] Rolle, "Action sur case."
[9] Brooke, "Accion s[ur] lestatut."
[10] Brooke, "Accompte."
[11] Rastell, "Account."
[12] Brooke, "Accorde" only.
[13] Fitzherbert, Rolle, and Rastell use "Accord" only.
[14] Brooke, "Acquital"; Rastell, "Acquitalle."
[15] Fitzherbert and Rastell use "Addition" only.
[16] Brooke and Coke, "Adiornement"; Rolle, "Adjournment del Terme"; and Rastell, "Adjornement."

Admirall [Brooke, Rolle, and Rastell.[18]]

Administrators [Brooke, Fitzherbert, Coke, and Rastell.[19]]

Ad quod dampnum [Brooke[20] and Rastell.]

Advowson [Brooke, Rolle, Rastell.[21]]

Age [Brooke, Fitzherbert, Rolle, and Rastell.]

Agreement and disagreemt [Brooke.[22]]

Aide [Brooke, Fitzherbert,[23] Coke, Rolle, and Rastell.]

Aide del roy [Brooke, Fitzherbert, Rolle, and Rastell.[24]]

Alien [Brooke,[25] Rolle, and Rastell.]

Alienaconl & license a aliener etc. [Brooke.[26]]

Amendement [Brooke, Fitzherbert, and Rolle.[27]]

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[17] Brooke, "Admeasurement de dower & pasture, & h[uius]m[od]i, etc."; Fitzherbert, "Admeasurement"; Coke and Rastell, "Admeasurement de pasture."
[18] Brooke, "Admiraltie"; Rastell, "Admiralty"; Rolle, "Admiraltie" under "Court."
[19] Brooke, "Administrators & Administrat."; Rastell, "Administers."
[20] Brooke, "Ad qd damnum."
[21] Brooke, "Aduouson"; Rolle, see "Advowson" under "Parson"; Rastell, "Avowson."
[22] Brooke, "Agrement & disagrement."
[23] Brooke, Fitzherbert, "Ayde."
[24] Fitzherbert and Rastell, "Ayde de roy"; Rolle, "Aide del Roy" is in text but is not indexed.
[25] Brooke, "Alien nee."
[26] Brooke, "Alienacions & alienacions sans licese, et licences le roy pur alienacions & h[uius]mo[d]i, etc."

Amerciament [Brooke, Fitzherbert, Coke, Rolle, and Rastell.[28]]

Annuity [Brooke, Fitzherbert, Coke, and Rolle.[29]]

Appeale [Brooke, Coke, and Rastell.[30]]

Appendant & parcel etc. [Brooke, Rolle, and Rastell.[31]]

Apporcionement [Brooke and Rolle.[32]]

Appropriation [Brooke,[33] Rolle, and Rastell.]

Arbitrement [Brooke, Fitzherbert,[34] Coke, Rolle, and Rastell.]

Array [Brooke.]

Arrerages [Brooke and Rastell.]

Assets per discent [Brooke, Fitzherbert, Coke, Rolle, and Rastell.[35]]

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[27] Rolle, "Amendment."
[28] Fitzherbert, Rolle, and Rastell, "Amercement."
[29] Fitzherbert, Coke, and Rolle, "Annuitie."
[30] Brooke, "Appele"; Coke, "Appeale de mayhem" and "Appeale de murder"; Rastell, "Appels."
[31] Brooke, "Appedt appurtent etc."; Rolle and Rastell use "Appendant" alone, but Rolle also has "Common Appendant ou oppurtenant [appurtenant]."
[32] Brooke, Rolle, "Apportionment."
[33] Brooke, "Appropriations etc."
[34] Fitzherbert, "Arbiterment."
[35] Fitzherbert, "Assets par discent"; Coke, Rolle, and Rastell, "Assets" alone.

Assets enter maines [Brooke.[36]]

Assignee & Assignement [Brooke.[37]]

Assise [Brooke, Fitzherbert, Coke, Rolle, and Rastell.]

Assurances [Brooke.]

Attachement [Brooke, Fitzherbert, Rastell.[38]]

Attainder [Brooke,[39] Coke, and Rastell.]

Attaint [Brooke,[40] Fitzherbert, Coke, Rolle, and Rastell.]

Attornemt [Brooke, Fitzherbert, Rolle,[41] and Rastell.]

Attorney [Brooke, Fitzherbert, Rolle,[42] Rastell.]

Audita querela [Brooke, Fitzherbert, Coke, Rolle, Rastell.]

Averremt [Brooke, Fitzherbert, Coke, and Rastell.[43]]

Auncient demesne [Brooke, Fitzherbert, Rolle, and Rastell.[44]]

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[36] Brooke, "Assets entermains."
[37] Brooke, "Assigne & assignement."
[38] Rastell, "Attach."
[39] Brooke, "Atteinder."
[40] Brooke, "Attaynt."
[41] Brooke, Fitzherbert, Rastell, "Attornement"; and Rolle, "Atturnement."
[42] Rolle, "Atturney ou Garden" and "Atturney a faire liverie."
[43] Brooke, "Auerments"; Fitzherbert, "Auerement"; Coke, "Auerrment"; and Rastell, "Averment."
[44] Brooke and Rastell, "Auncien demesne"; Rolle, "Auntient Demeasne."

Avowry [Brooke, Fitzherbert, Rolle,[45] and Rastell.]

Authority [Rolle.[46]]

Summary:

In all, the compilers of the manuscript index used 53 "A" terms. For these, the number of matches is as follows:

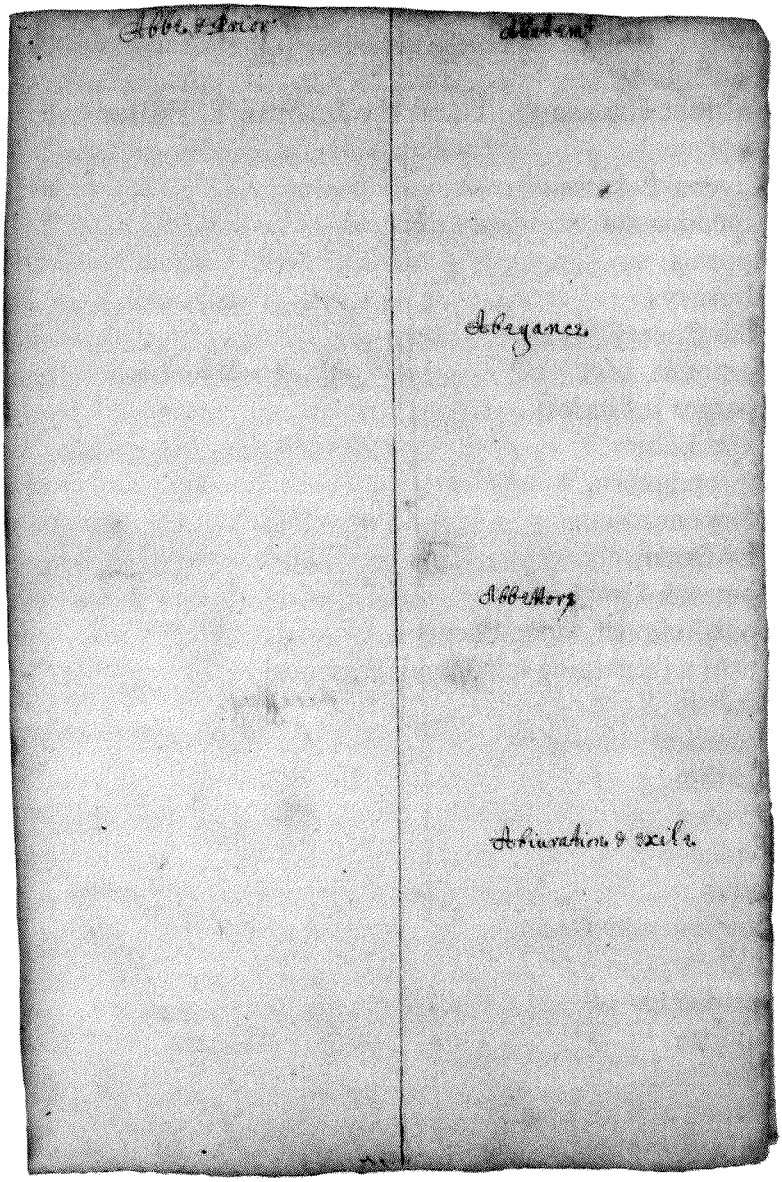
Brooke, 48
Rastell, 40
Rolle and Fitzherbert, 26 each
Coke, 19

In several instances, matches for terms were found in only one treatise. This was true of seven terms found in Brooke, and of one each in Rolle and Rastell. Six additional terms were found in both Brooke and Rastell but nowhere else.

No matches were found for the terms "Abeyance" and "Action debt," in the treatises surveyed.

These comparisons support the image, derived from the existing literature, of law students deriving commonplace materials both from printed sources and their own experiences. Even an alphabetical index allowed for personal choices, and arguably, personal vision.

[45] Brooke, "Auowry"; Fitzherbert, "Auowre"; and Rolle, "Avowrie."
[46] Rolle, "Authoritie."



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Appendix II

Subject Headings[1] Used By Jerome T. Fuller

Adverse Possession
Amendments
Appeals
Attorneys
Bibb County
Certiorari
Charges [of juries]
Child Labor
Chiropractors
Compensation
City Bonds
Common-Law Liens
Constitutional Amendments
Custom [regarding telephone messages]
Decrees
Desertion
Distilling
Divorce
Evidence
Jurors
Landlord and Tenant
Liquors
Mandamus
Motions
New Trial
Normal School Loans
Officers [police]
Pleading
Pool Rooms
Railroads—Fire

[1] This list does not include Fuller's case-specific entries.

Special Venire
Stock Law Election
Street Cars
Statutes of Limitations—Plea
Timber—Timber Deeds, Contracts—Logs and Logging
V.P.L.[2] [Violation of Prohibition Laws]
Workman's Compensation

[2] "V.P.L." is early twentieth-century legal slang, now largely obsolete. For a late example of its use, see the case at 40 Alabama Appellate Reports 322-323 (1959).

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THE JOHN C. PAYNE SPECIAL COLLECTIONS of the Bounds Law Library, University of Alabama School of Law, is named for the late Professor John C. Payne. Its mission is to collect books and archival materials relating to the history of the School of Law, the school's alumni and faculty, the history of the bench and bar of Alabama, and other topics of legal history.

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Silas

1785	
Dec. 6	To Riding One Load
Do. 9	To Riding One Load of
1786	
Feb. 14	To two Days Sawing at
Nov. 28	To 82 ℔. of Beef at
	To 3 ℔. 3 Oz of Lifts
1787	
March 8	To 2 ℔. 14 Oz. of Sole
1788	
Apr. 11	To an Order Given By
1789	
June 27	To Riding a load of Staves