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## The Washington Supreme Court Reports

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# COMMENT

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## THE WASHINGTON SUPREME COURT REPORTS

The purpose of this paper\* is to discuss what might be termed the mechanics of reporting, that is, the machinery whereby the decisions of our Supreme Court are made available to bench and bar in the form of weekly Advance Sheets and bound volumes. And I would not venture to inflict upon this convention such a dry and technical subject if it were not that, as will presently appear, the matter is of considerably more than academic interest to all of us. I realize that the average practitioner regards the reports somewhat in the same light as the housewife regards the morning milk—an article which is important, if not essential, but to which no attention is paid unless the milkman is late or the milk, for some reason, has gone sour. This attitude is well expressed by Mr. Rosbrook, Deputy New York Supreme Court Reporter, in his treatise upon "The Art of Judicial Reporting," which appeared in the *Cornell Law Quarterly* for February, 1925. Said he: "The profession, generally, knows very little about the actual work done by reporters, and it is only when errors are found in the reports that the existence of the reporter is recalled."

As a further illustration of this attitude, I might mention an encounter which took place a year or so ago between the reporter and an eminent member of the bar, who has been signally honored by this Association. The member wrote to the reporter to call attention to an alleged error in the reporting of a case in which he represented the prevailing parties, who were husband and wife. In his opinion, the reporter had been guilty of a decided blunder in using the term "*et al.*" instead of "*et ux.*" in referring to the wife in the title of the case. The reporter responded by pleading precedent and the fact that other states, including California, used the term "*et al.*" in the same manner. This touched off a spirited correspondence, not to say battle, in which Latin definitions, quotations from the classics and other missiles flew back and forth, with the judge who wrote the opinion as an appreciative onlooker. Both sides stuck by their guns, and the battle might still be raging were it not for the wife of the member, who, when appealed to, gave it as her judgment that both sides were wrong—that the name of the wife should be given in full in all cases. This pronouncement abruptly terminated the battle of "*et ux.*" versus "*et al.*"

To understand fully the present method of reporting decisions of the court, it is necessary to glance for a moment at the early history of that profession. In its inception, more than six hundred years ago, it was purely a matter of private enterprise; and in England it has remained

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\* An address delivered at the Washington State Bar Association Convention, September 16, 1943.

so down to the present time (although the fact that reporting is done through the medium of a Council of Law Reporting appointed by the different law societies, gives the work a quasi-official status). In this country, as the courts of last resort of the different states were organized, the matter of reporting their decisions was likewise a matter of private enterprise. At an early date, however, reporting began to change from unofficial to official. Gradually the elimination of unofficial reports progressed, until at the present time all the courts in this country have official reports, prepared in somewhat different styles and with varying degrees of effectiveness. It is, of course, with the reports of the State of Washington that this paper is concerned.

In this state, the supreme court reporter is a constitutional officer. Article 4, section 18, provides as follows: "The judges of the supreme court shall appoint a reporter for the decisions of that court, who shall be removable at their pleasure. He shall receive such annual salary as shall be prescribed by law."

Pursuant to this provision, the state legislature at its first session in 1889 passed two acts relating to the office of supreme court reporter. The first one, which has remained virtually unchanged to date, prescribes the duties of the reporter with reference to preparing the decisions of the supreme court for publication.

The other act of the 1889 legislature dealing with the work of the reporter had to do with the publication of the reports. While this act was subsequently superseded, the system which it established has since been followed in substance, and I shall accordingly give a brief sketch of its provisions.

Under the act, the reports were to be published under the supervision of the court and reporter by contract to be entered into by the reporter, secretary of state, and attorney general with the person or persons who should agree to publish and sell them for a period of five years, the price not to exceed \$2.50 per volume and the work to be done in the state by the lowest responsible bidder. The secretary of state was to purchase for the use of the state three hundred copies of each volume. The publisher was required to make stereotype plates of the pages of each volume. The volumes were to contain not less than 700 pages each, and the only requirement with reference to style, paper and binding was that they should be equal in quality to Vol. 3 of the Washington Territory reports.

The act of 1905, which superseded this act and which, with minor amendments, continuing in force until repealed by the 1943 legislature, followed the main outline of the system already established. The term of the contract was increased to ten years, and the officers awarding the contract were the Chief Justice and the reporter, instead of the reporter, secretary of state and attorney general.

For the first time, provision was made for the publication of the

Advance Sheets of the reports. (For a very interesting dissertation on the early history of the Advance Sheets, the bar is referred to the article on "Selected Legal Materials of Washington," by Dr. Arthur S. Beardsley, Law Librarian of the University of Washington, appearing in the *Washington Law Review* of April, 1943.) The price ceiling of \$2.50 per volume was retained, with the additional provision that not to exceed \$3.00 should be charged for the volume plus the Advance Sheets. The amendments to this act have been of a minor character. In 1917, the publisher was permitted to use paper weighing 45 pounds to the ream, in place of the 60 pounds specified in 1905. In 1919, the printing of a subject index with each issue of the Advance Sheets was authorized, and in the same year the publisher was authorized to have the reports bound in buckram instead of sheep.

In 1943, the legislature scrapped the existing machinery for the publication of the reports, and adopted an entirely new system. Before taking up that important subject, however, it might be well to go back a moment to 1905, when the system of publishing the reports by ten-year contract was first inaugurated. The successful bidder for the first period and, incidentally, for each succeeding period, was Bancroft-Whitney Company, the pioneer law publishing company of San Francisco.

It will be recalled that there has always been a provision in the law to the effect that the reports must be printed in the State of Washington. Clearly, therefore, it was necessary for Bancroft-Whitney Company to employ a firm in this state to do the actual printing of the reports. Its choice fell upon the state printer, also designated as the "Public Printer," acting in his private capacity. Undoubtedly this choice was prompted by the fact that the plant of the public printer was located in Olympia, and also that it was equipped with an adequate bindery.

Prior to 1933, the office of state printer was somewhat anomalous. Perhaps the best description of it was given by Judge Tolman in the case of *State ex rel. Hamilton v. Thomas*, 176 Wash. 544:

"In practical effect, the public printer was not an officer in the constitutional sense, but was a contractor who undertook to do certain work at rates fixed by the legislature, and it is equally clear that the law did not guarantee him any profit or compensation therefrom or therefor, but left him by the exercise of skill and ability to make a profit if he could."

It follows that the public printer could and did engage in private business and perhaps the biggest piece of such business was the printing of the reports under contract with Bancroft-Whitney Company. Nor was this situation changed by the acquisition of the printing plant by the state in 1933. For the act providing for such acquisition and changing the status of the public printer to that of a salaried state officer, authorized him to print the Washington Reports for the

publishers thereof under a contract approved in writing by the governor.

To obtain a clear picture of the system under which the reports have been published since 1905, it might be well to visualize a triangle, the three points of which consist of the reporter, Bancroft-Whitney Company as publisher, and the state printer. The reporter, acting for the state, had contractual relations with Bancroft-Whitney Company, which in turn had contractual relations with the state printer. There have been no official relations, contractual or otherwise, between the reporter and the state printer. Theoretically, any problem in connection with the printing of the reports would have to be taken up by the reporter with Bancroft-Whitney Company in San Francisco, which, in turn, would issue the necessary instructions to the state printer. It is needless to point out that such a procedure would be clumsy and unworkable, as technical problems are constantly arising during the printing of a volume of the reports. In actual practice, the reporter has taken a short cut—has taken up routine problems direct with the state printer; this, of course, with the full consent and approval of Bancroft-Whitney Company. And the result has been that the work of printing the reports has proceeded smoothly and efficiently.

The chief credit for this happy state of affairs should go to a man who is practically unknown to the bench and bar of the state. His name appears nowhere in the reports; and yet, to him, more than to anyone else, is due the high technical standard of the Washington Reports. I refer to Mr. E. J. Leavelle, superintendent of the state printing plant. He assumed that position in 1911 and has held it ever since, a record which it would be difficult to parallel. And as those doing business with the printing plant today can testify, his mind is as alert and his grasp of typographical problems as keen now as it ever was. While state printers have come and gone, Mr. Leavelle has remained on the job, and has furnished that continuity which is essential to efficient performance. Mr. Leavelle has always taken a deep interest in the Washington Reports, and in working out the technical problems which frequently arise, he has been of invaluable assistance. As one who is under deep obligation to him, the writer is glad to take this opportunity of paying this deserved tribute.

And, in this connection, it is proper to say that the present state printer, Mr. O. H. Woody, has also shown every disposition to cooperate in this important service. During his comparatively brief tenure of the office, he has obtained a thorough grasp of the problems involved, and he has already demonstrated his fitness for a place on the commission organized pursuant to the 1943 law, hereinafter discussed.

However, it is true that there is one serious drawback in connection with the printing of the reports by the state printer. The state printing plant is admirably equipped to take care of routine state jobs, including

the printing of the reports. However, it is not equipped, and could not reasonably be expected to be equipped, to take care of such routine matters and at the same time handle the enormous flood of work incident to the biennial meeting of the state legislature. [This flood starts the preceding fall, with the printing of various biennial reports and the governor's huge budget. Promptly upon the convening of the legislature comes a torrent of bills introduced by the members, each one of which must be printed. After the session, the session laws and journals take precedence. The facilities of the state printing plant are taxed to the utmost, and the work of printing the Washington Reports necessarily suffers. The Advance Sheets are issued regularly, but the work on the bound volumes is practically suspended.]

Recognizing this recurrent condition, it has always been the practice of the reporter's office to minimize the delay as much as possible. Work on volumes in course of preparation is rushed, to get them out of the way before the legislature convenes. During the "legislative rush," as we call it, routine jobs are taken care of and headnotes are prepared for future volumes. And when the rush is over, every effort is made to get reasonably caught up. In this way, past legislative sessions have not seriously delayed publication of the reports.

This year, however, another factor has entered into the picture—a factor which has extended its malign influence into every walk of life. I refer, of course, to World War II. All industries not essential to the war effort have been badly hit, but none, perhaps, more so than printing. The ranks of the printers have been decimated by the draft. Many of those not subject to induction have been lured away by the higher wages paid in the war industries, more particularly in the shipyards. The result is that every printing plant in the state has had to operate short-handed, and among them, of course, is the state printing plant. In spite of the efforts of the state printer and his superintendent, that plant, struggling under adverse conditions, has been unable to speed up the work involved in transforming the volumes of Advance Sheets into volumes of permanent reports. The result is that the publication of the bound volumes is at present further behind than at any time since I entered the reporter's office more than twelve years ago.

I realize fully the inconvenience suffered by the bench and bar of the state in being compelled to rummage through several volumes of Advance Sheets in order to locate recent decisions of the supreme court. This state has always ranked high in the matter of prompt publication of its reports, and it has been a matter of pride with me to keep it there. However, the present condition is one over which no control can be exercised. I can only offer the assurance that it is only temporary, that it is receiving the anxious consideration of all who are engaged in the publication of the reports, and that the state printer

and his superintendent are cooperating in every way to bring the bound volumes of the reports up to date at the earliest possible moment.

We now come to a very essential matter—the price which the lawyers pay for the Washington Reports. It will be recalled that from statehood the legislature has fixed a ceiling price of \$2.50 per volume on the bound volumes of the reports. When the Advance Sheets entered the picture in 1905, the ceiling price of \$3.00 was fixed for the bound volume and the Advance Sheets thereof. Presumably a demand arose for the Advance Sheets alone, as in 1919 the publisher was authorized to charge \$4.00 per year for the Advance Sheet service. These ceiling prices continued until 1943.

The first contract under the 1905 law is not available, and I am therefore unable to state the prices fixed therein. However, the 1915 contract still remains in the state archives. It provides that, for the first five years, the publisher will charge \$1.75 per volume, or \$2.00 with the Advance Sheets. For the last five years, the price is to be \$1.60 per volume, or \$1.85 with the Advance Sheets.

Evidently, increased costs of publication due to the first World War caused the publisher to ask the legislature for relief, as in 1921 an act was passed authorizing the modification of the contract to permit the publisher to charge \$2.25 per volume, or \$2.75 with the Advance Sheets, for the remainder of the term of the contract.

The following prices were fixed in the 1925 contract: \$2.25 per volume for the 300 volumes purchased by the state; \$2.40 per volume or \$2.90 with the Advance Sheets to the members of the bar. It will be noted that this represents a slight increase over the prices theretofore charged, but that the prices are 10 cents under the ceiling fixed by statute.

During the ensuing ten years, two factors operated to increase the cost of publishing the reports. The first was the drop in sales, due to the depression; the second was the increase in costs of labor and material, due to the well-meant efforts of the Administration to abolish the depression. The result was that by 1935, when the contract expired, Bancroft-Whitney Company was publishing the reports at a net loss. Nevertheless, the contract was renewed for another ten years. As a representative of the company explained to me, it disliked to lose the contact with the lawyers furnished by the publication of the reports; moreover, it was believed that the peak of the printing costs had been reached, and that, with the return of prosperity, the subscription lists would be increased to a point which would enable the publisher at least to break even.

This belief, however, was not borne out by subsequent events. Printing costs continued to increase, and while additional subscriptions were obtained, they were not sufficient to offset such increase. The entry of the United States into the second World War aggravated the situa-

tion. By 1943, the losses of the publisher on the contract were running into thousands of dollars a year.

This was the situation when the 1943 legislature convened. The urgent need for overhauling the machinery for the publication of the reports was called to its attention, and accordingly an act was passed dealing with the matter, which appears in the 1943 Session Laws as chapter 185.

By the terms of this act, a commission to supervise the publication of the reports was created, to consist of the Chief Justice of the Supreme Court, who shall be the chairman, the reporter, the state law librarian, the public printer, and a representative of the State Bar Association to be appointed by the president thereof. This commission was given broad powers, both to determine the specifications as to material, workmanship, etc., of the reports and to fix the price at which they shall be sold, which price shall be fixed at an amount equal to the cost of publication and expenses incidental thereto. The commission was further empowered to enter into contracts for the publication of the reports, and to modify or terminate, with the consent of the other party, any existing contract. The laws theretofore governing the publication of the reports were repealed.

This act became effective June 9, 1943. Shortly thereafter, a meeting of the commission was called by the Chief Justice. The personnel consisted of the Chief Justice, Honorable George B. Simpson; the reporter, Solon D. Williams; the state law librarian, Mark H. Wight; the state printer, O. H. Woody; and Thomas L. O'Leary, of the Olympia bar, who had been appointed as the representative of the State Bar Association. Mr. Wight was elected the secretary of the commission.

After consultation with a representative of Bancroft-Whitney Company, the contract of 1935 was abrogated, and a new contract was executed, effective July 1, 1943. Specifications governing future volumes of the reports were also drawn up and approved.

The new contract is for a period of one year, subject to renewal. Under it, Bancroft-Whitney Company agrees to publish the reports according to the specifications referred to, and at a price to be determined by the commission on the basis of total cost of publishing, plus reasonable cost of sale and distribution, beginning with Volume 16, 2nd Series, of the Washington Reports, and Volume 118 of the Advance Sheets. This price is to be determined not later than six months after delivery.

The specifications are intended to increase the number of decisions in each volume and thereby reduce the over-all charge as much as possible. The size of type is to remain unchanged—in fact, any such change is prohibited by the 1943 act—but the length of the volume is to be increased to a total of approximately 1,000 pages, the weight of



the paper used is to be reduced from 50 pounds to the ream to 45 pounds, the running heads are to be simplified, and the amount of printing on each page is to be increased both as to length and width.

The future cost of the reports cannot, of course, be determined at this time. That the price per volume will be increased, goes without saying. However, with the increase in the number of opinions in each volume, and with the economies effected in other ways, such as the elimination of the stereotype plates, it is expected that the net increase over a period of, say, one year will not be material. And, in any event, both the 1943 law and the contract executed pursuant thereto contemplate that the lawyers of this state shall be furnished with the reports at cost, and you may be sure that the commission and the publisher, Bancroft-Whitney Company, will see to it that this is done.

The chief merit of the 1943 act is its flexibility. The commission feels that the contract and specifications executed pursuant to the act represent the best system possible under present conditions; however, it may be that in actual practice modifications may be desirable. If so, they may be put into effect without undue delay. And the commission will not hesitate to adopt any changes or modifications which will assist in carrying out the purposes for which it was created—the delivery of the Supreme Court reports to the bench and bar of the state at as low a cost as is possible without impairment of the quality of the volumes.

SOLON D. WILLIAMS.