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Cover Illustration: This depiction of an American Bison, engraved by David Humphreys, was first published in Hughes Kentucky Reports (1803). It was adopted as the symbol of the Legal History and Rare Books Special Interest Section in 2007.
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## BOOK REVIEW

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This issue of Unbound is dedicated to Michael Widener who recently retired from his position as Rare Book Librarian and a Lecturer in Legal Research at Yale Law School. Mike had served as the Rare Book Librarian at the Lillian Goldman Law Library since 2006. He previously served as Head of Special Collections at the Tarlton Law Library, University of Texas at Austin. Many of us have fond memories of his Rare Book School class, "Law Books: History & Connoisseurship," a class he began teaching in 2010.

We hope that Mike will enjoy his retirement and will remain in touch with his rare book colleagues!
Gustavus Schmidt and *The Louisiana Law Journal*

Warren M. Billings

I first ran across the name Gustavus Schmidt in archives of the Supreme Court of Louisiana and in runs of the *Louisiana Reports*. From details that emerged, it was obvious that Schmidt was a sought-after litigator who fit in with the coterie of attorneys that dominated appellate practice in the Court before the Civil War. But he was more. During a forty-year career he taught law, collected books, wrote them, and created the state’s first legal periodical, which was one of the earliest in the United States. Short-lived though it was, *The Louisiana Law Journal* made lasting contributions to the state’s legal order. It provided a calm, professional alternative to news about the bench and bar not to be found in the noisy, highly partisan newspapers of the day. Additionally, Schmidt opened the pages to articles from advocates for law reform. As such they afford insights into the movement for constitutional revision not seen elsewhere. *The Louisiana Law Journal* and its founder are the subjects of this article. It begins with a short biographical sketch that explains who Schmidt was and sets him in the context of his day. Then it explores the journal’s origin and discusses the nature of legal publishing in mid-nineteenth-century New Orleans. The set piece of the essay is an analysis of the contents of the four issues that comprised the journal.

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* AB, College of William & Mary; AM, University of Pittsburgh; PhD, Northern Illinois University. Distinguished Professor of History Emeritus, University of New Orleans and Bicentennial Historian of the Supreme Court of Louisiana. Thanks are due Georgia Chadwick and Florence M. Jumonville for their assistance. An appreciation is due Michael Widener, Rare Books Librarian at the Lillian Goldman Law Library, Yale University. I am also indebted to Carol D. Billings for her close reading and editorial suggestions.

1 Schmidt has no biographer. However, M.H. Hoeflich and Louis de la Vergne, “Gustavus Schmidt: His Life & Library,” *Roman Legal Tradition*, 1 (2002): 112-22 is the best available sketch. It is based on some of Schmidt’s papers in the Gustavus Schmidt Family Papers at Tulane University.
Much as a magnet, antebellum New Orleans attracted seasoned attorneys and would-be lawyers like so many iron filings. Drawn by the prospect of wealth, place, and power or the chance to escape misfortunes, they haled from across the nation and abroad. Those graced with superior skill and talent achieved high reputations as leading advocates at the bar and legal thinkers, and they contributed to the making of Louisiana’s courts and its distinctive mixed jurisdiction. A native of Sweden, Gustavus Schmidt (1795–1877) was one of them. Named for Sweden’s celebrated seventeenth-century warrior king Gustavus II Adolph, Schmidt was born into a prominent family with links to the Swedish government and its judicial branch. He received a classical education before the smell of blue water drew him to a stint with the Swedish navy in 1811. Four years later he quit and beached up in New York City, but he soon removed to one of the towns (Annapolis?) in Ann Arundel County, Maryland, and tutored its young people for several years. By 1823 he was living in Gloucester County, Virginia, after having been naturalized in Baltimore five years earlier. Now a U.S. citizen, he resettled again, this time to study law in Richmond. As was typical then, he apprenticed with an established attorney until he felt sufficiently versed in the law of the commonwealth to sit his examination before a panel of Virginia high court judges. He passed with no difficulty and won his license. The name of his mentor is uncertain but it could have been John Wickham, who was a close friend of Chief Justice John Marshall. Schmidt’s cases in the federal circuit court drew him to its presiding judge, Marshall, and he became Marshall’s protégé. That connection proved insufficient to overcome the stiff competition from other young lawyers who struggled against him to establish profitable practices. He gave up trying in 1829 and decamped for New Orleans.

2 Gustavus II Adolph (1594–1632) transformed Sweden into a major power that took a leading part in advancing the Protestant cause during the Thirty Years War. He was a brilliant military strategist and a fearless field commander who was killed at the battle of Lützen.

3 Certified transcript of Schmidt’s registration as foreign national and his naturalization, 12 [ . . . ]ber? 1823, John Minor Wisdom Papers, Tulane University. The original transcript was filed in the records by the clerk of the Gloucester County Court. It no longer exists because it was in the county archives that were transferred to Richmond for safekeeping during the Civil War only to be destroyed in the fire of 3 April 1865. The loss prevents any possibility of tracing Schmidt’s activities while he lived in Gloucester.

Unlike the situation Schmidt left behind in Richmond, he arrived in the Crescent City advantaged in ways his potential competitors were not. His admission to the Virginia and federal bars automatically assured that he would be admitted in Louisiana with little delay. Not only was he skilled in Anglo-American common law, but he knew European civil law quite well, and he had fluency in Spanish, French, German, Russian, and Latin, as well as his native tongue. It is very likely that he also carried letters of introduction and/or recommendation from Richmonders to their friends in New Orleans. Given this background it is no stretch to say that in his day he was among the strongest applicants ever to present himself to the Supreme Court, which is evident from the speed with which the judges licensed him within months of his alighting in town.⁵

A personable chap, Schmidt did not want for companionship as he settled down. He socialized easily, attended balls and concerts, gambled, and like other men on the make, he married well when he wed Melanie Seghers in 1831. She was a daughter of Dominque Seghers, a rich attorney and real estate speculator, who gifted her with a substantial dowry that included a French Quarter residence and several young slaves.⁷ They had four children before she died in 1836, which suddenly left their care to him.⁸ As a single father

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⁵ At the time members of the Court were constitutionally styled “judges,” rather than “justices.” The latter style was adopted in Article 4 of the Constitution of 1845.
⁶ The license was granted on 28 Dec. 1829. See Supreme Court Minute Book No. 4, 1829–34, 58, Supreme Court of Louisiana Collection, 1813–1921, University of New Orleans.
⁷ Segher’s French Quarter holdings are described in the Collins C. Diboll Vieux Carré Digital Survey housed at The Historic New Orleans Collection. Under Louisiana law of the day Segher’s gift was deemed “paraphernalia,” meaning that they remained under a bride’s control, although her husband might manage the assets for her. See Thomas Gibbes Morgan, ed., Civil Code of the State of Louisiana: With the Statutory Amendments, From 1825 to 1853, Inclusive And References to the Decisions of the Supreme Court of Louisiana to the Sixth Volume of Annual Reports (New Orleans, 1861), Art. 2360-2363.
⁸ One of the children died in infancy, which led in 1838 to Dominique Segher’s lawsuit to reclaim a quarter of Melanie’s dowery on the ground that a dead minor could never inherit. The suit wound up in the Supreme Court, where Schmidt won its dismissal. See Branch W. Miller and Thomas Curry, comp., Reports of
he did what other prosperous widowers often did in the moment. He engaged a young woman called Estelle Marie Mascey to run his house and nanny the children. In time she became his second wife, and he fathered four more children with her.9

Estelle Marie’s supervision of the household spared Schmidt from the daily concern for its domestic affairs. He concentrated on the law practice and pursuing his other intellectual interests, one of which was book collecting. In the absence of centralized law libraries as Schmidt’s practice expanded, book collecting became a necessity, and he built one of the larger private law libraries in the city.10 (When the collection was broken after his death the sale catalogue listed over a thousand titles).11 His library also supported the research for his publications and The Louisiana Law Journal, which came out in 1841.

The magazine folded after only four issues appeared. Schmidt lost interest and never revived it.12 Instead Schmidt continued his practice. He wrote weekly reviews of Supreme Court decisions for the New Orleans Daily True Delta and worked on The Civil Law of Spain and Mexico, with Notes and References (New Orleans, 1851).13 Lecture series on the civil law that he offered between 1842 and 1845 were precursors to the classes he taught at a fore-runner of the Tulane University Law School. His only try for elective politics occurred in 1853 when he ran unsuccessfully for seat

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9 Estelle Marie Mascey (1819–1871) was a daughter of Jean Mascey and Roaslie Fossier. Middling city dwellers, they resided in a house at the foot of Esplanade Avenue. I am indebted to Georgia Chadwick for this information.


12 In 1875, the New Orleans publishers B. Bloomfield & Co. launched a monthly magazine they called The Louisiana Law Journal. It had no discernible connection to Schmidt. It ceased publication in 1877. See New Orleans Times-Picayune, 30 Dec. 1875.

on the Supreme Court. He picked up where he left off, continuing to teach and practice but his activities during the Civil War and Reconstruction are obscure. For certain his classes ended when Louisiana seceded. His law practice abruptly ceased after New Orleans fell to Union forces in April 1862. It did not resume for a decade which suggests his support for the Confederacy because he was debarred for being a rebel. Estelle Marie died in 1871. Vigorous and active to the end, he passed away six years later.

Turning to The Louisiana Law Journal, it was an early example of an American legal magazine, the number of which started to grow in the 1830s. No matter where they popped up around the country, they were all more or less alike. Their founders were lawyer-scholars like Schmidt or law printers both of whom sought to cash in on rising demands for American books about American law by American authors. The contents were similar, containing as they did, articles devoted to legal history, legal theory, book reviews, reminiscences, letters, obituaries, unofficial summaries of recent court decisions, and advertisements. Some were quarterlies, while others came out semi-annually or annually. A few, such as the American Jurist and Law Magazine, reached a broad national readership, although most were more regional in scope. No matter the reach, they tended to be produced in big cities like New Orleans where legal printers and publishers thrived.

Printers first arrived in New Orleans during the colonial era. They could publish only documents the government sanctioned. That restraint disappeared after the Louisiana Purchase, which spurred an influx of printers into Louisiana after 1803. As their numbers and their publications flourished, New Orleans rapidly grew into the publishing hub of the lower South. Being the capital of the state, the city also advantaged printers who specialized in printing a range of legal materials. Indeed, the income they derived from their regular offering of government documents, acts of the legislature, law reports, codes, digests, treatises, foreign-language texts, and the like offset the expenses incurred in publishing non-legal

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14 Schmidt announced his intention to run in an advertisement that appeared in the New Orleans Daily Picayune on 11 Feb. 1853.
16 For the source text, I used a digital version that is available via the HeinOnLine Law Journal Library.
work and sustained them during the boom-and-bust economic cycles of the 1820s and the 1830s. All in all, they contributed to raising up a vibrant legal print culture that existed in Schmidt's day, and they offered various possibilities when Schmidt sought a publisher for *The Louisiana Law Journal*. He might have approached Benjamin Levy, who specialized in law book publishing. Instead, he engaged the now-obscure but then well-known music publisher Emile Johns.\(^{18}\)

At first glance, Johns (ca. 1798–1860) seems a curious choice, given his origins and interests. Born in Krakow, Poland, he appears to have received a musical education in Vienna before he emigrated to the United States in 1820. Two years later he was in New Orleans touting himself as a piano teacher, composer, and concert pianist. Concertizing was lucrative because of its many opportunities for private and public performances that also gave him chances to play his own compositions. In 1830 he quit performing and turned his musical interests into a business that sold imported sheet music, stationery, and his consequential line of law books.\(^{19}\) The number and range of the latter offerings were on a par with other legal publishers, which was surely a reason why Schmidt sought him out. There were others that were more personal.\(^{20}\)

Himself an inveterate concert goer, Schmidt would have first met Johns at one of his performances. Apart from music, they would have been drawn to one another by a shared interest in Russia. Johns was the Russian consul general, and his diplomatic access enabled him to apprise Schmidt of the latest happenings in Russian politics and law which were topics of keen interest to the attorney. Schmidt handled some of Johns’s legal affairs, and those

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\(^{20}\) His law titles are listed throughout Florence M. Jumonville, *Bibliography of New Orleans Imprints, 1764–1864* (New Orleans, 1989).
encounters led to associations that eventually turned into a working friendship. For his part, Johns would have seen a financial opportunity in taking on Schmidt’s project. His competitors were experiencing financial dislocations caused by the Panic of 1837 and labor unrest, even though he had recently recovered from a fire. Or, considering the outcome of the project, Johns may have just been foolhardy.

The contract they agreed is missing, though one of its stipulations would have been common to any publishing agreement of the time. It dealt with funding the project. Publication would not happen unless and until Johns had in hand sufficient capital to cover the costs of printing Schmidt’s work. Typically some of the money would have come out of Schmidt’s purse, but the bulk of it would have been raised through advance subscriptions. Johns circulated a prospectus that touted the purpose of the proposed magazine and its potential value to its recipients.\footnote{21} It would be a quarterly, and an annual subscription would cost six dollars, payable in advance. The initial ask was successful enough by January 1841 for Johns to announce the impending \textit{The Louisiana Law Journal} that would “embrace the whole history of jurisprudences in our State and every subject of connecting interests.” He also appealed for more subscribers.\footnote{22}

Johns relied wholly on Schmidt for a clear manuscript from which type was set. His printers did the design work, they selected the production materials, they chose the typography, they set type, and they bound copies. They would have consulted with Schmidt because he was a knowledgeable book man, and he probably would have made last-minute corrections to the page proofs too. The printing done, Volume 1, Issue 1 became available in May 1841. An accident prevented the timely delivery of paper, and that delayed the second issue until the following August. Issues 3 and 4 bore publication dates of January and April 1842 respectively, although they were actually released months behind schedule. Then the magazine abruptly folded.\footnote{23}

Why?

One answer lies in the fact that a short life was characteristic of most early American legal periodicals. Although \textit{The Louisiana Law
Journal’s failure was similar to the others there were home-grown reasons for its swift demise. The timing was bad. Schmidt and John miscalculated a market that was much smaller than they envisioned. Subscriptions lagged. Accidents and supply shortages got in the way. Schmidt was slow to prepare his manuscripts. All of which leads to the conclusion that at bottom Schmidt overestimated his authorial abilities, and Johns was not the best of businessmen. Nevertheless, Johns was someone whom Schmidt trusted. He would try to rescue the company from bankruptcy in 1844, but it was liquidated and sold to W.T. Mayo who became the city’s chief publisher of sheet music and other musical paraphernalia. Afterwards, Johns dabbled as a cotton factor before he moved back to Paris, where he died and was buried in 1860.24

In the absence of any day books and subscriber lists, it is impossible to determine the size of the press runs, the subscribers’ names, who they were, and whether there were additional copies for sale to customers who dropped in to shop at the Johns store.25 On the other hand, the physical features of the journal tell how a nineteenth-century reader would have viewed Issue 1 as he beheld it and thumbed through it for the first time. Soft wrappers covered the text block that was set in a Bell typeface and impressed on white paper.26 The title page was set in capitals of differing sizes, and the title read “The Louisiana Law Journal, Devoted To The Theory And Practice Of Law, Edited By Gustavus Schmidt, Counsellor At Law.” Beneath the title were the facts of publication. A free leaf preceded a table of contents, an editorial note, contents, and an errata page. Issue 1 and the others ran about one hundred and fifty-pages long and contained half a dozen articles.

25 Johns sent the Yale copy of the prospectus to George and Charles Merriman, who were Massachusetts law book publishers. In another advertisement Johns reckoned the number of subscribers at more than four hundred. See New Orleans Daily Picayune, 5 Feb. 1842.
26 The text block measured 21 cm. by 13 cm. It was set in an American version of a font designed by the London publisher and bookseller, John Bell (1746–1831). After Bell fonts fell out of favor in the United Kingdom they remained widely popular in the U.S. with magazine publishers. That Johns used wove paper made from rags rather than wood pulp is a plausible assumption given that it is still in pretty good condition, limber, and not brittle. These characteristics rely on information about the copy at the Lillian Goldman Law Library at Yale University that Michael Widener sent to me.
On perusing the editorial note in Issue 1, the reader would have learned Schmidt’s purpose, which was to concentrate on “the science of jurisprudence, including every thing, which has a tendency to illustrate its progress; and to exhibit its present condition.” Rather than “wander at random,” he promised to publish articles that threw light on “the present state of the law in Louisiana” and showed its contrasts and similarities with the other states and foreign nations. Because “Jurisprudence, like every other science,” was both theoretical and practical, he aimed at practical lawyers and laymen. Therefore he welcomed “members of the Louisiana bar, and elsewhere” as contributors, providing they followed his fourteen-point set of guidelines that embraced the history of jurisprudence in Louisiana, the nation and abroad, and to articles “within the scope of the Journal, and which may be deemed of general utility.” Finally, because Schmidt regarded freedom of discussion as the foundation to the search for truth, he vowed not to exclude submissions merely because he disagreed with an author’s viewpoint.27

Schmidt prepared all of the items in Issue 1. One was a two-part essay about the history of Louisiana jurisprudence.28 He followed that with reviews of the 1810 Brussels edition of Fredrich Carl von Savigny’s *Traité de la Possession, d’après les Principes du Droit Romana*, par Mr. Fr. Ch. de Savigny and the 1841 edition of Joseph Story’s *Commentaries on the Conflicts of Law, Foreign and Domestic*.29 Next was his memoir of his mentor Chief Justice John Marshall. He rounded out the issue by including copies of what he styled “Celebrated Trials in Foreign Countries,” a comment on legal reform in Russia, and reports of recent Louisiana Supreme Court rulings and a trial in the criminal district court of Orleans Parish.30 He made two contributions to Issue 2. The first was the continuation of his history of Louisiana’s jurisprudence; the other was a discussion of the longstanding legal wrangling about the ownership of the alluvial land that fronted the New Orleans levee at low tide on the Mississippi, which was known as the batture.31 Issue 3 contained his lengthy assessment of the Napoleonic Code and its relationship with Louisiana law.32 His final pieces are in Issue 4. One replied to a letter from a reader; another reviewed Joseph Story’s recent *Commentaries on the Laws of Partnership* (Boston, 1841). A

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27 “To the Reader,” Issue 1, iii-iv.
28 Ibid., 1-46.
29 Ibid., 46-80.
30 Ibid., 80-153.
31 Ibid.
third was his translation of the Russian laws of bills of exchange, the fourth was his outline of the history of Roman law, and the last was his appraisal of the current condition of the state Supreme Court.33

A twenty-first century reader cannot be but impressed with Schmidt as a scholar and a prose stylist. His command of sources and the extent of his research compare favorably with present-day standards. That they do is noteworthy because he wrote when such standards were only beginning to be formalized in America. Schmidt’s writing style exhibits a fondness for words and long sentences, joined together with commas and semicolons, that can take up an entire page or more; but it is easy to follow. One also appreciates the essays for the pioneering studies that they were. The Marshall memoir was not only Schmidt’s personal remembrance; it was an early biographical sketch replete with new details about the Chief Justice. Similarly, the history of Louisiana jurisprudence and the batture broke new ground, whereas the review of da Savi- gny’s book and the outline of the history of Roman law were intended to make his fellow Louisianians aware of the relevance of an ancient strand in their law.

My discovery of The Louisiana Law Journal closed some gaps in my own research for a book that I am writing about the origins of the Louisiana State Bar Association. Schmidt put the magazine together at a pivotal moment in the evolution of Louisiana’s organic law, the bar, and the state Supreme Court. The Court was under attack for its slothful ways and its inability to clear its monumental backlog of appeals or manage admissions to the bar. The literate public railed against what seemed to them a denial of speedy justice. Younger lawyers chafed at the unwillingness of the judges to adapt, and they were equally agitated at anyone’s inability to force change via legislation or by constitutional amendment. They and other law reformers raised the volume of clamor for a new constitution and a new term-limited Supreme Court to such a pitch that the Legislature finally gave way and called the convention that drafted the Constitution of 1845.34

Schmidt had ties to the reformers, and he was sympathetic to their concerns, many of which were his. But until the 1840s Schmidt had always shied away from involving himself in the political fray, so the Journal became his tool for effecting change. To that end,

he opened is pages to three high profile, vocal attorneys Isaac Edward Morse, E.A. Canon, and Solomon W. Downs. Morse railed against the Court’s constant neglect of the western supreme court district and demanded a remedy.\(^{35}\) Canon pitched the need for a court to take criminal appeals.\(^{36}\) A noted criminal lawyer, Downs argued for modernizing the state’s criminal law and for the creation of a means to hear criminal appeals.\(^{37}\)

Schmidt reinforced these critiques with his own searching dismantling of the Court that he published in Issue 4. The Court’s jurisprudence was a mess in large measure because the statutes, decisions, and codes on which it rested were a muddle too. The judges were elderly, cranky, and increasingly unable to cope, but they would not retire nor could they be legally forced into retirement. Neither would they adjust their leisurely work schedule to dispatch appeals more timely. Judges’ salaries were problematic. They were entrenched in the Constitution of 1812 and could not be raised by statute, a fact which kept all but rich individuals off the high bench. Beyond the salary angle, Schmidt questioned the “expediency of appointing persons, who have figured long and actively in political life because they knew less about law than politics. And while he was not averse to the idea of the existing Supreme Court hearing criminal appeals, he maintained that “those who can already do only half the work they perform annually, would be able to progress at all, if you increased their labor.” In other words he came down foursquare behind the position of another reformer, George Eustis, who favored a new term-limited Supreme Court with a designated chief justice as its administrator.\(^{38}\)

\(^{35}\) Isaac Edward Morse, “Observations on the Present Judiciary System in the Western Districts of the State of Louisiana,” Issue 4, 18-22. By a provision in the Constitution of 1812, the state was divided into two appellate jurisdictions, one in New Orleans, the other in the rest of the state. Morse’s complaint turned on the fact that the judges often failed to muster the necessary number for them to conduct business.


\(^{38}\) George Eustis (1796–1858) had briefly been on the Court after the Legislature added two judges to the bench in 1839. His clashes with cranky old Chief Judge François-Xavier Martin caused him to leave and become a staunch advocate for a new Court with term limits and a chief justice. After the Constitution of 1845 came into force he became the first Chief Justice of Louisiana.
The articles by Canon and Downs were partly responsible for encouraging the Legislature to establish a court of errors and appeals in criminal cases in 1843. That court eased the transition to the Supreme Court’s assumption of criminal jurisdiction after 1845. Schmidt’s rebuke found its way into the political maneuvering that led to the second Louisiana constitution and a reformed Supreme Court that resembled the shape and purposes of other supreme courts across the nation.

Gustavus Schmidt and *The Louisiana Law Journal* are important examples of early American legal editors and their periodicals, and for that reason they are worthy of consideration. The pity is that little more can be learned about either one beyond the discussion in this brief essay. But then that is a fate common to other editors of the period and their magazines.

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THE LOUISIANA LAW JOURNAL,
DEVOTED TO THE THEORY AND PRACTICE OF THE LAW,
EDITED BY GUSTAVUS SCHMIDT, COUNSELLOR AT LAW.

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NEW ORLEANS,
1841.
Pirates on the Hudson: Copyright Broadsides in the pre-Civil War Law Book Trade
John D. Gordan, III

The importance of *Wheaton v. Peters* (1834), the first copyright case heard in the Supreme Court of the United States, has tended to obscure the fact that the Court decided three other copyright cases concerning the publishing of law reports in the forty years which followed, each involving the reporting of decisions of courts of the State of New York. This article analyzes those three decisions – and particularly *Little v. Hall*, which concerned early reports of the newly-formed New York Court of Appeals. Two features are common to these decisions and immediately striking. First, the outcomes are unsatisfactory – generally speaking, the wrong party won for the wrong reason at the wrong time. Second, all of these cases, and others which did not reach the Supreme Court, involved a single, litigious law book publishing firm which dominated American legal publishing for over a century.

Introduction

Scholarly treatments of the early history of federal copyright litigation tend to focus, sometimes exclusively, on the first copyright case to reach the Supreme Court of the United States, *Wheaton v. Peters*, a dramatic contest between the incumbent Reporter of its decisions and his immediate predecessor.¹ When scholars have


addressed other Supreme Court decisions – and very occasionally lower court cases – before the Civil War, the discussion has normally been brief, frequently only in passing, and often just introductory to the consideration of much more recent authorities.  

What seems to have been unnoticed previously is the dominance on the Supreme Court’s early copyright docket of cases involving the publication of collected reports of judicial decisions. Of the other five “cases implicating copyright law at the Supreme Court” listed in Professor Hamilton’s article between Wheaton v. Peters in 1834 and 1877, two are effectively the same case, dealing with the copyright in a map. The other three – thus half of the first six the Supreme Court heard – involve the reporting of judicial decisions of New York state courts: Backus v. Gould in 1849, Little v. Hall in 1855 and Paige v. Banks in 1871.
Moreover, in those three cases at least one of the parties, and in one case all of the parties, were law book publishers, and the same law book publisher, or members of that partnership or its successors, were parties to each of the three cases. The partners in that publisher typically litigated with competitors or reporters of judicial decisions or their widows, and when not doing that, they litigated with each other. They litigated in the state courts as well as the federal courts. Moreover, their successors in interest kept litigating well after 1877 – they were in the Supreme Court of the United States in a leading case in 1888 and again in 1911.\textsuperscript{6} What is also striking about these cases is their seemingly unpredictable and unsatisfactory outcomes and, in the litigation of primary focus, the surprising career paths of the once and future judges involved.

Just as scholars of early copyright litigation history do not give full credit to the contribution of litigious law book publishers, scholars of early legal publishing do not always recognize the aggressive trench warfare in which at least some the law book publishers engaged in those days. There remains a need for “[a] study documenting the patterns associated with the publication and sale of legal volumes...” during the pre-Civil War period.\textsuperscript{7} Although generalists in the field of publishing have written entire books on the negative atmospherics of the publishing industry of the time,\textsuperscript{8} the leading and most recent text devoted to pre-Civil War legal publishing largely disregards it, briefly supporting an assertion in passing that “[i]t seems that American law bookselling had become quite cutthroat by the 1850s” with a single instance of the false advertising by a competitor of Little, Brown & Co., questioning the latter’s intention to continue publishing a series of reports.\textsuperscript{9}

\textit{A Precis of the Little v. Hall Litigation}

This article aspires to fill some portions of the legal and historical gaps. While providing a vignette of the first of the post-\textit{Wheaton v.}

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\textsuperscript{8} E.g., Michael J. Everton, \textit{The Grand Chorus of Complaint – Authors and the Business Ethics of American Publishing} (Oxford 2011).

\textsuperscript{9} M. H. Hoeflich, \textit{Legal Publishing in Antebellum America} (Cambridge 2010), 129-130.
\end{footnotesize}
Peters cases, Backus v. Gould, it focuses on the second: the two cases comprising the Little v. Hall litigation in the United States circuit court for the northern district of New York and the Supreme Court of the United States from 1851-1855 – or, to use the full caption of the second, Edwin C. Little and Oliver Scovill [doing business as Little & Co.] v. Levi W. Hall, Anthony Gould, David Banks, William Gould and David Banks, Jr. – which concerned the contested publication of the third and fourth volumes of the reports of decisions of the New York Court of Appeals.\(^\text{10}\) In brief outline, in April 1850 Little & Co. made a five-year contract with the State of New York and the State Reporter, George F. Comstock, to publish his reports of decisions by the New York Court of Appeals, starting with the third volume. After Gould, Banks & Gould threatened to publish a competing edition of Volume III, in mid-January 1851 Little & Co. applied for, and at the end of February obtained, a preliminary injunction from District Judge Alfred Conkling, sitting alone in the United States circuit court for the northern district of New York.\(^\text{11}\) Defendants’ motion to dissolve the injunction was subsequently denied by Justice Samuel Nelson of the Supreme Court of the United States, sitting in the circuit court – but whether sitting alone or with Judge Conkling does not appear.\(^\text{12}\) There were no further proceedings with respect to Volume III.

In late January, 1852, Little & Co. commenced another proceeding in the same court for an injunction, this time with respect to Volume IV. Once again, on February 23, 1852, Judge Conkling

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\(^{10}\) Originally, the Supreme Court was New York State’s highest court; its individual members held trials on circuit, and their decisions were reviewed by the Supreme Court sitting \textit{en banc}. Those judgments were, in turn, reviewable by the Court for the Trial of Impeachments and the Correction of Errors, the Lieutenant Governor its presiding officer and its membership consisting of the Senators, the chancellor, and the judges of the Supreme Court. After some minor adjustments under the Constitution of 1821, the Constitution of 1846, supplemented by the Judiciary Act of 1847, led to the creation of a New York Court of Appeals as the highest court of New York State, composed of a mixed bench of four Court of Appeals judges elected statewide and four senior Supreme Court judges assigned annually, to review the judgments of a reorganized Supreme Court. Francis Bergan, \textit{The History of the New York Court of Appeals, 1847-1932} (New York: Columbia Univ. Press), 18-45

\(^{11}\) 15 F. Cas. 604 (No. 8,394)(C. C. N.D.N.Y., February 27, 1851).

\(^{12}\) 15 F. Cas. 612 (No. 8,395)(C. C. N.D.N.Y., April 2, 1852).
granted the preliminary injunction. This time, however, there was a full trial of the matter in the circuit court at the June 1853 term, on the pleadings and the proofs, before Justice Nelson and District Judge Nathaniel K. Hall, who had succeeded Judge Conkling in the summer of 1852. On December 26, 1853, the court dismissed Little & Co.’s bill. At its December 1855 term, the Supreme Court of the United States unanimously affirmed the circuit court’s judgment in an opinion by Justice McLean.

The Dramatis Personae
The Publishers

A leading text on pre-Civil War publishing neatly – if not wholly accurately, as will be discussed below – introduces the antagonists:

The first lawbook publisher in America was Stephen Gould, who began doing business in New York City in 1790. Not long after, one of his relatives, William Gould, opened the first retail lawbook store in Albany, at 104 State Street. Like those that filled the needs of doctors and clergymen, Gould’s store, over which he lived, was open in the evening to accommodate the lawyers who visited it from all over the state...He took as partners in 1804 a cousin, Anthony, a nephew who was his namesake, and his brother-in-law, David Banks. The firm then became Gould, Banks & Co. It had stores in Albany and New York City.

This was the foundation of one of the largest and oldest lawbook firms in America. The partnership

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13 Judge Conkling’s opinion is not officially reported but was printed in pamphlet form and can be read on Google Books. Opinion of the Hon. Alfred Conkling, District Judge of the United States for the Northern District of New York, Sitting in the Circuit Court of the United States; upon the Question of Copyright in Manuscripts, in the case of Little and Company against Hall, Goulds and Banks, Respecting the Fourth Volume of Comstock’s Reports (Albany 1852). The trade dress of this pamphlet is discussed infra, at n. 47.

14 The case file contains a lengthy handwritten opinion by Judge Hall, with occasional marginal notes between Judge Hall and Justice Nelson, which is reproduced in the appendix. No printed version of the opinion has been identified, and how it reached parties is unknown.

15 59 U.S. 165.
was dissolved in 1857, after William, Sr., and Anthony died, followed by the retirement of Banks and the junior William Gould. Three sons, David, A.B[leecker] and Charles Banks, then organized the new firm of Banks & Brothers. It was an enterprise which lasted until 1895, when a second dissolution permitted the New York firm to continue as the Banks Law Publishing Co. and the Albany base to go on as Banks & Co. ...\textsuperscript{16}

A trade publication from 1854 describes the Gould, Banks firm thus:

In the department of Law, one of the leading publishing houses in this country is Banks, Gould & Co., No. 144 Nassau Street. A capital of probably $1,000,000 is invested in their business; and as they confine themselves exclusively to the publication of legal works, their collection comprises much that is rare and curious, as well as valuable. They import largely from Europe, but their activity is

\textsuperscript{16} John Tebbel, A History of Book Publishing in the United States – Volume I The Creation of an Industry 1630-1865 (New York: R. R. Bowker 1972), 457. Some correction and elaboration is provided in Edwin C. Surrency, A History of American Law Publishing (New York: Oceana Pub. 1990), and, later, in M. H. Hoeflich, supra n.9, 36-41, 47-48, which, although reliant on Tebbel and Surrency, provides substantial additional information about the career of Stephen Gould, the founder. See also “The Oldest Law Publishing House in the United States”, The Green Bag 22 (1910): 323-326. While for a time the firm in New York City was known as Gould, Banks & Co., there were in fact two firms, the one in Albany known for a time first as William Gould & Co., then William & A. Gould & Co., and during the early 1850s – the relevant period here – as Gould, Banks & Gould, while the firm in New York City was known as Banks, Gould & Co.; whether there was a variation in the membership of these two interrelated firms is unclear. This paper occasionally uses the shorthand reference “Gould, Banks” to the firm in all its iterations. More recently, Banks Law Publishing Co. was acquired by Baldwin Law Publishing Co. in Cleveland in 1919 and merged to become Banks-Baldwin Law Publishing Co. in 1933, later acquired by the West Publishing Co., which is now part of Thomson Reuters. Banks & Co. was merged into Matthew Bender & Co. about 1911, The Publishers’ Weekly (March 6, 1915), 665-666, and presumably continues a twilight existence as part of Reed Elsevier.
chiefly in the department of English and American law, in which they are not excelled by any house in the world. Theirs is the oldest law publishing firm in the United States. It was established in 1810, and was first composed of William Gould, David Banks and Stephen Gould. During the war of 1812 they were familiarly and jocosely known as “Scarcity, Plenty and Scarcity.” The concern always had two large houses – one in New York and the other in Albany. It was originally, and for many years, known as the firm of Gould, Banks & Gould, New York, and William Gould & Co., Albany. In 1829 William Gould associated with him at Albany Anthony Gould. That branch of the concern was under the style of Wm. & A. Gould & Co. In 1851 Mr. Banks took two of his sons, David and Charles, into the partnership. Since then the firm has been Banks, Gould & Co. in New York and Gould, Banks & Co., Albany. Besides their large stock of books, they have an immense amount invested in stereotype plates, comprising all of the Law Reports of the State of New York and other works of great value. They have several printing offices, as well in Saratoga, Springfield, and West Brookfield as in New York and Albany; and in New York several powerful steam presses are kept constantly employed. Considering the dry, abstruse and technical nature of their publications, and the limited class for which they are designed and by whom alone they can be appreciated, the mass of printed matter issued and sold by this house annually is almost incredible. But they have not obtained their present extended reputation, great wealth and enlarged usefulness without talent, industry, energy and perseverance. ... It is only after years of patient labor, united to habits of temperament and strict integrity, that they find themselves occupying the preeminence they now hold in the field of business to which they have most assiduously devoted themselves. ¹⁷

What these accounts omit is the dissolution of the original partnership doing business as Gould, Banks & Gould in New York and William Gould & Co. in Albany, respectively, and the fifteen years or more of spiteful litigation that ensued between Stephen Gould,

on the one hand, and David Banks and William Gould on the other. According to Stephen Gould’s petition in chancery dated June 2, 1821, to appoint receivers for the partnership, he held a fifty percent interest, the other two partners each held 25%. The partnership was dissolved in 1817, but the partners could not agree on the allocation and collection of outstanding $20,000 in receivables in Albany and $15,000 in New York; an arbitration was held but Banks and Gould refused to abide the outcome. Stephen Gould asserted that Banks and Gould owed him money, refused him access to the partnership books and were collecting money due the partnership and pocketing it themselves. He obtained an injunction against further collections by Banks and Gould in October 1820, and on June 7, 1821 Chancellor Kent appointed different receivers in each location. Whatever progress the receivers made, it did not stanch the flow of litigation between these parties and sometimes their debtors as well over the allocation of collections made by Stephen Gould.

W. C. Little & Co., the antagonist of Gould, Banks & Gould in more than just *Little v. Hall*, is described by Tebbel as follows:

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19 *W. Gould, Banks and S. Gould v. Ogden*, 6 Cowen 52 (Supreme Court, August 1826); *Hopkins v. Banks, Impleaded with William and Stephen Gould*, 7 Cowen 650 (Supreme Court, October 1827); *William Gould against Stephen Gould*, 8 Cowen 168 (Supreme Court, February 1828), aff’d, 8 Cowen 263 (Court for the Trial of Impeachments and Correction of Errors, December 1830). The quarrels of the former partners over a compromise they had reached in 1819 with respect to the delivery of notes for the printing of Day’s *Reports* (of Connecticut cases), the alleged failure of Banks and Gould to make timely delivery to Stephen Gould of Volume 8 of Johnson’s *Reports*, his later rejection of a smaller tender on the grounds that they were unmerchantable, and a dispute over the defendants’ obligations arising from their printing of a second edition of Phillip’s on Evidence was still live 13 years later, *Gould v. Banks & Gould*, 8 Wendell 562 (Supreme Court, January, 1832)(reversing for a new trial), and may have served as their introduction to Justice Samuel Nelson of the New York Supreme Court, who would be dealing with them again in more than twenty years later in *Little v. Hall* as a Justice of the Supreme Court of the United States.
Probably the second most important lawbook firm in Albany was W.C. Little & Co., founded in 1827, when Weare C. Little began a general publishing firm that soon began to specialize in lawbooks, which had become the largest part of the business. After the war, Little took in his son Charles W. as a partner, changing the name to W.C. Little & Co.\(^{20}\)

The internal confusion in the quotation from Tebbel is matched by the reality: during this period both Little & Co. and W.C. Little & Co. carried on business from 53 State Street in Albany at the same time. They appear to have been different partnerships interrelated in commerce and, one supposes, by blood, rather than a single partnership whose name was sometimes abbreviated; the relationship of Edwin C. Little to Weare C. Little has not been ascertained, nor has further information about Oliver Scovill been located.\(^{21}\)

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\(^{20}\) Supra n. 16, at 457. Tebbel’s paragraph about W.C. Little & Co. omits the fact that, during the period of the *Little v. Gould* litigation, the firm – if it was the same firm – seems also to have been known simply as Little & Co.: in his magisterial compendium, *Bibliography of Early American Law* (Hein 1998, 2003), Morris Cohen records twenty-six publications by W.C. Little & Co. between 1832 and 1860, while Little & Co. is credited with eight, and just between 1850 and 1855. Throughout the litigation here, the partners in Little & Co. are claimed to be Edwin C. Little and Oliver Scovill; Weare C. Little’s sworn testimony described himself as having “been in the employ of the … complainants for three years past” and having “acted as agent of Little & Co., and hav[ing] had the principal charge of the publication of their legal works during the last three years...” However, Tebbel is confirmed by contemporaneous sources: “The firm of W.C. Little & Co. was established in Albany, in 1828, by W. C. Little, a native of Bangor, Me., born in 1805, who engaged in the publication and sale of law books as successor of E. F. Backus, who, in a small way, began the business here. Mr. Little was very successful in the trade, and became widely known.” “Law Book Publishers” in *History of the County of Albany, N.Y. from 1609 to 1886*, 2 (New York: W. W. Munsell & Co. 1886), 702. This source also introduces, following the 1857 dissolution, an Albany firm between 1867 and 1885, not mentioned elsewhere – William Gould & Son – succeeded by William Gould Jr. & Co.

\(^{21}\) The later sources offer no assistance on these issues. Hoeflich devotes a sentence to an advertising technique “[in] the 1860s, [by] W.C. Little of New York City.” See, supra, n. 9, at 102-103. Supercy, supra n. 16, omits any mention of the Littles in any of their permutations.
The Reporter

George F. Comstock, appointed to a three-year term on December 27, 1847 as Reporter of Decisions of the New York Court of Appeals, and Alfred Conkling, United States district judge for the northern district of New York, are the other crucial figures in the Little v. Hall. Comstock, who reported the opinions in the first two volumes of decisions by the Court of Appeals as well as those in the two subsequent volumes in suit, in November 1855 was elected a judge of the Court of Appeals and ended his tenure on the Court as Chief Judge in 1860-1861.  

The Judge

Alfred Conkling, born in 1789, appointed to the federal bench in 1825 on the recommendation of Governor De Witt Clinton, had served for twenty-five years when he rendered his first decision in

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22 A recent admiring biographical sketch of Comstock omits any discussion of his conduct in connection with Volume 4 of his reports, which is central to the Little v. Hall litigation. Thomas M. Kernan, “George Franklin Comstock”, in The Judges of the New York Court of Appeals: A Biographical History, Albert M. Rosenblatt, ed. (Fordham University Press 2007), 56. It also omits his dissent in the Lemmon Slave Case and his no longer acceptable behavior, after his defeat in 1861 for re-election to the Court of Appeals, in appearing as lead counsel for one of the parties in an action in which he had written the initial opinion for the Court of Appeals while on the bench. See John D. Gordan, III, “The Lemmon Slave Case”, Judicial Notice 4 (2006), 1; ibid., “The New York and New Haven Railroad Stock Fraud Cases – How Alexander Hamilton’s nephew swindled his investors”, Judicial Notice 10 (2015), 28. Comstock campaigned against Abraham Lincoln’s re-election in 1864, in a public speech accusing Lincoln of treason, calling him an “anarchist” and supporting this position as follows:

In proof of the revolutionary design of Mr. Lincoln, I refer to the most authentic and imposing records of his administration. The first great act which signalized his betrayal of the Constitution and of the principles and pledges under which the country had united in his support, was the Proclamation of Emancipation....”

Little v. Gould in 1851. Judge Conkling was no stranger to legal publishing or to the parties before him, as he was the prolific author of two substantial legal treatises, *A Treatise on the Organization, Jurisdiction and Practice of the Courts of the United States* and *The Jurisdiction Law and Practice of the Courts of the United States in Admiralty and Maritime Causes*. The former was first published in 1831 in 538 octavo pages, then in a second edition with a more elaborate title in 1842 in 634 quarto pages and, reverting to its original title, in a third in 1856 in 926 quarto pages, with two further editions to come in 1864 and 1870; the first two editions were published by William & A. Gould & Co. and Gould, Banks & Co. in New York City, the last three by W. C. Little & Co. of Albany. The first edition of Judge Conkling’s admiralty treatise was published in two volumes in 1848 by W. C. Little & Co. in Albany and Little, Brown & Co. in Boston; a second edition, published by W. C. Little & Co. alone, appeared in 1857.

In the summer of 1852, a year before the trial in *Little v. Hall*, Judge Conkling resigned from the bench and began a troubled one-year tour of duty as United States Minister to Mexico, followed by eight years’ residence and law practice in the then-frontier city of Omaha, Nebraska. Judge Conkling was in his early 70’s when he returned to upstate New York.

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24 The 1848 edition of the admiralty treatise in the author’s possession contains a Little & Co. law book catalogue of at least four years after the publication date. The second edition of the jurisdictional treatise contains a Banks, Gould & Co. law book catalogue at least two years after the publication date.

The Lawyers

Many of the counsel in various segments of the case were prominent in their time, a few even in ours. Little & Co. was represented in both proceedings in the circuit court by lawyers of the first rank: Peter Cagger, Nicholas Hill, Jr., who had served as State Reporter under the pre-1846 regime, and John K. Porter, a future judge of motives. Thurlow Weed later hinted to Hamilton Fish that the judge was possibly the victim of a political intrigue." The offer of the post in Mexico may have been the consequence of Daniel Webster’s dissatisfaction with Judge Conkling’s attitude in fugitive slave rescue cases: “I regret exceedingly to see that Judge Conkling differs from the other judges, on the subject of these forcible rescues of fugitive slaves.” (Daniel Webster to President Millard Fillmore, October 22, 1851 in Fletcher Webster, ed., The Private Correspondence of Daniel Webster, Vol. 2 (1875), 482.

It is difficult to understand what precisely upset Webster. It is true that at the end of August, 1851, Judge Conkling had freed a fugitive slave whose rendition a United States Commissioner had ordered, on the grounds that the Fugitive Slave Act of 1850 had not been enacted at the time the slave had fled and did not operate retroactively; however, although there was a hostile crowd outside the Commissioner’s office in Buffalo, there had been no attempt to rescue the slave. Ex Parte Davis, 7 F. Cas. 45 (No. 3,613)(N.D.N.Y. 1851). Given the date of Webster’s letter, he was probably referring to Judge Conkling’s decision, two days earlier, at a preliminary hearing in the “Jerry Rescue” case in Syracuse. United States v. Cobb, 25 F. Cas. 481 (No. 14,820)(N.D.N.Y. October 20, 1851). Although Judge Conkling did make some tentative negative comments about human slavery, he also denounced the rescuers before him, whom he bound over, as “[b]igots and fanatics” who had fallen into “grave error” and had “broken the public peace, set the law at open defiance, and with deadly weapons assaulted and wounded its officers while executing its mandates.” Id. at 482. In the event, by November 19, 1851, the federal grand jury indicted 26 people, one of whom was convicted but who died while his case was on appeal, one was acquitted, two had hung juries and the charges against the rest were dropped. Jayme A. Sokolow, “The Jerry McHenry Rescue and the Growth of Northern Antislavery Sentiment during the 1850s”, American Studies, 16 (1982): 427, 437 n. 38. The deputy United States Marshal who had arrested McHenry was prosecuted for kidnapping in the New York Supreme Court, represented by George F. Comstock, but acquitted on the trial judge’s instructions. Trial of Henry W. Allen, U.S. Deputy Marshal, for Kidnapping (Syracuse 1852).
the New York Court of Appeals (1865-1867), then in partnership in Albany; in addition, Little & Co. retained as counsel John C. Spencer, son of “the Dictator”, Ambrose Spencer, nephew of De Witt Clinton, member of the New York State Assembly and later its Senate, Congressman and successively Secretary of War (1841-43) and Secretary of the Treasury (1843-44) under President Tyler. In contrast, the Gould, Banks interests were represented in the first proceeding by Otis Allen, one of their authors, and a second lawyer named Azor Taber, “deservedly entitled to more fame than he had.” In the second, the Gould, Banks interests were initially represented by Peter Outwater, Jr., and Charles Baldwin Sedgwick, both of the Syracuse bar, perhaps because of the presence in that proceeding of their co-defendant, Levi W. Hall of Syracuse; their counsel at trial in June 1853 was Hiram Denio, a prolific reporter of New York decisions shortly to be elevated to the Court of Appeals, of which he was later Chief Judge. 26

In the Supreme Court at the December 1855 term counsel were different. John C. Spencer had died earlier in the year and was replaced by William H. Seward, then a United States Senator from New York, former Governor of the state, and soon to be Abraham Lincoln’s Secretary of State. The Gould, Banks interests were represented by Solomon K. Haven,27 a sometime Mayor of Buffalo and Congressman formerly in partnership with then- future President Millard G. Fillmore and Nathaniel K. Hall, Judge Conkling’s successor and author of the decision reviewed by the Supreme Court.

Reporting of New York Judicial Decisions up to the Constitution of 1846

Printed reports of individual judicial proceedings in New York began with the trial of Jacob Leisler in in 1691; by the end of 1800 there had been some thirty such separately-published reports of


27 L.B. Proctor, Bench and Bar, supra n. 26, 692-713.
one or more cases. The first volume resembling a modern case report of multiple cases was William Coleman’s *Cases of Practice in the Supreme Court of the State of New-York. Together with the Rules and Orders of the Court, from October Term 1791, to October Term 1800*, published in 1801. Thereafter, as Judge Conkling explained in his 1852 opinion:

> In 1804, an act was passed authorizing the justices of the supreme court, from time to time, to appoint by license, under the hand and seal of the chief justice, during the pleasure of the court, a person as a reporter, whose duty it should be to report the cases decided by them and by the court for the trial of impeachments and the correction of errors…and to cause the same to be printed and published as soon as conveniently might be after the expiration of each term; and that the said reporter was to receive a salary of eight hundred fifty dollars per annum.

In 1823 the power to appoint the reporter was vested in the president of the Senate, the chancellor and the chief justice. In 1825, similar authority was vested in the chancellor to appoint a reporter for the decisions of his court.

All these acts were silent as to the copy-right of the reports, and the well-known practice of reporters under them was to secure the copy-right for their own emolument. This furnished an apology, though certainly not an adequate justification, for the exac-

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29 The salary was subsequently raised to $1200. The reporter was obliged to furnish copies of his reports *gratis* to the courts and other state offices. The first such reporter was George Caines, who was soon replaced by James Kent’s close friend William Johnson, who reported those decisions from 1806 to 1823; he was also the first Chancery reporter. His successors were Ezek Cowen, whose reports covered the years 1823-1828 and who became a justice of the court, and John L. Wendell, whose reports covered the period 1828-1841. John William Wallace, *The Reporters Arranged and Characterized with Incidental Remarks* (4th ed. Boston 1882), 579-580; John H. Langbein, “Chancellor Kent and the History of Legal Literature”, *Columbia L. J.* 93 (1993): 547, 571-584; William D. Popkin, *Evolution of the Judicial Opinion – Institutional and Individual Styles* (N.Y.U Press 2007), 212-218.
tion of exorbitant prices for the volumes of the reports as they successively appeared, and which every legal practiser was obliged to purchase at whatever cost... One means was still wanting, and that was, the cheap publication of such decisions. This defect had long been the subject of complaint, and within the last few years strenuous efforts have been made to supply the deficiency.

It was in this legal context that the first of the New York legal publishing cases to reach the Supreme Court of the United States arose.

**Case No. 1. E.F. BACKUS v. WILLIAM GOULD AND DAVID BANKS, 48 U.S. 798 (1849).**

As noted above, Eleazer F. Backus had started the law publishing industry in Albany and sold his business to Weare C. Little in 1828. But Backus did not leave the industry: he started again in Philadelphia and in 1838 published there *A Digest of the Cases Decided and Reported in the Superior Court of the City of New York, the Vice Chancellor’s Court, the Supreme Court of Judicature, the Court of Chancery, and the Court for the Correction of Errors of the State of New York; from 1823 to Oct. 1836.* As the incumbent New York State reporter, John L. Wendell, had published in Albany two years before *A Digest of Cases Decided and Reported in the Supreme Court of Judicature and in the Court for the Correction of Errors of the States of New York; from May 1828 to May 1835,* litigation was inevitable, particularly since Wendell’s publishers from the beginning of his tenure were David Banks and William Gould.30

As explained in the headnote to the Supreme Court’s opinion, Gould and Banks initiated the litigation in the United States circuit court for the northern district of New York as a *qui tam* action “for an alleged invasion of the copyright in nine volumes of Cowen’s..."
Reports and the first three volumes of Wendell’s Reports”, an archaic remedy – first borrowed in Section 2 of the Copyright Act of 1790 from British antecedents and carried forward to Section 6 of the February 3, 1831 amendatory copyright statute – which divided equally between the proprietor of the book and the government the proceeds of a per page statutory penalty of fifty cents from the infringer “for every sheet which shall be found in his or her possession, either printed or printing, published, imported or exposed to sale...” and forfeiture of copies of the infringing work. The trial was held in October 1843 before Judge Conkling, Justice Smith Thompson being ill, and judgment was deferred until July 1845, after Justice Thompson had died.

At trial, Gould and Banks proved their copyright in three of the volumes of Cowen’s Reports and one of Wendell’s, and that “from the above volumes the defendant had transferred, literally, one hundred and forty-two and a half pages; and they proved a sale by the defendant of five hundred copies of his work.” The jury awarded $2069.75 in damages.

In the Supreme Court Backus’s counsel’s attack focused primarily on faulting Judge Conkling’s resolution of the issue Wheaton had not expressly addressed: since the opinions of the judges were not subject to copyright by anybody, was there any portion of a volume of case reports to which the reporter’s copyright could apply? This issue had already been addressed on circuit by Justice Story: “But it was as little doubted by the court, that Mr. Wheaton had a copyright in his own marginal notes, and in the arguments of counsel as prepared and arranged in his work.” The remand ordered by the Supreme Court “would have been wholly useless and nugatory, unless Mr. Wheaton’s marginal notes and abstracts of arguments could have been the subject of a copyright... .”

The Supreme Court took up none of these issues. Instead, it considered only Backus’s ninth claim of error – an assertion that over objection Judge Conkling had instructed the jury to apply the statutory per page penalty, not just to sheets found in the defendant’s possession, but “for every sheet of such matter which had been published or been procured to be published, by the defendant,

31 In addition, “[o]n the trial, the affidavit of John L. Wendell was read, stating that he, the deponent, was the real plaintiff, and that Gould and Banks were merely nominal plaintiffs.” 48 U.S. at 797. Wendell argued the case in the Supreme Court for himself and Gould and Banks.

whether the same were proved to have been found in defendant’s possession or not...”33 This was an obvious misconstruction of Section 6 of the 1831 Copyright Act, and Justice John C. McLean, writing for a unanimous court, reversed the judgment and remanded the case for a new trial.

Seven years later, this outcome brought forth a howl of outraged amour propre from now former Judge Conkling, speaking of himself in the third person, in the 1856 edition of his volume on federal jurisdiction:

There is one other reported case, deciding a point, it is true, about which it seems strange that any doubt should have been entertained, but to which, nevertheless, I deem it proper to advert, partly as an act of justice to the District Judge of the Northern District of New-York, before whom, sitting alone in the Circuit Court, the cause was tried: The only point decided by the Supreme Court, of the nine points presented by the bill of exceptions, is that the penalty of fifty cents imposed by the sixth section of the act on the unauthorized publisher of a book “for every sheet found in his possession,” does not attach to sheets not found in his possession. Of course it does not; nor did the judge decide otherwise. No such point was ever raised or suggested. The amount for which, if for anything, the verdict was to be rendered, was a mere matter of commutation between the counsel, acquiesced in by both parties, and announced to the court. There were six questions raised, and no more, as conclusively appears by the minutes of the trial, carefully made by the judge, and the one on which the case turned in the Supreme Court is not one of them. How, without the knowledge of the judge, it found its way into the bill of exceptions, it is unnecessary to trouble the reader by explaining.34

**William Gould and David Banks v. Hiram P. Hastings**

*Backus* was not the only such case in federal court before the 1846 Constitution. In 1840 in the United States circuit court for the southern district of New York, Gould and Banks obtained an injunction against Hastings, a New York lawyer, who had announced

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33 48 U.S. at 801.
34 See *Treatise*, text on page 29, supra, at 163 n.(a).
an intention of publishing condensed versions of the Cowen and Wendell reports. A preliminary injunction was granted by Justice Smith Thompson and District Judge Samuel Rossiter Betts, and the case was referred to William Kent, son of James Kent, for a report. Upon the filing of the report, Hastings moved to dissolve the injunction, admitting the facts alleged but arguing as a matter of law that, as public officers compensated by a salary, reporters have no right to a copyright; that no copyright may be obtained for judicial opinions, and a reporter’s peripheral contributions are insufficient to entitle him to a copyright; and that what Hastings proposed to do would not infringe a copyright if valid.

The court held that, while the opinions of the courts could not themselves be copyrighted, the extent to which Hastings had appropriated the reporters’ contributions was a matter of proof and continued the injunction to the following term. What occurred thereafter is unreported, but no such reports were ever published by Hastings.35

**Case No. 2. LITTLE et al. v. HALL et al., 59 U.S. 165 (1855)**

**The 1846 New York State Constitution and Subsequent Legislation**

Section 22 of Article VI of the New York State Constitution of 1846 required that “[t]he Legislature shall provide for the speedy publication of all statute laws, and of such judicial decisions as it may deem expedient. And all laws and judicial decisions shall be free for publication by any person. “ Initial provisions in An Act in relation to the judiciary (Act of May 12, 1847, Section 73) established the office of State Reporter at a salary of $2000.00 per year (Act of December 27, 1847), to which George F. Comstock was appointed on December 27, 1847 for the statutory three-year term.

The Legislature superseded this initial arrangement the following year with a legislative scheme that nullified Wheaton’s message. Under the replacement for Section 73 passed in the Act of April 11, 1848 – an Act to provide for the publication of reports of the Court of Appeals – the appointment of the State Reporter for a three-year term was vested in the governor, lieutenant-governor and attorney general. The reporter was to publish reports of decisions in pamphlet form as often as he had material on hand for 250 pages. The Reporter could have no financial interest in the reports, which were to be published under a contract made by the Reporter with the Secretary of State and the comptroller at a price not to exceed

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$3.00 per volume of 500 pages. Section 3 provided: “It shall not be lawful for the reporter or any other person with this state, to secure or obtain any copy-right for said reports, notes or references, but the same may be published by any persons.” In his 1852 opinion in Little v. Gould, Justice Nelson analyzed the commercial consequences of this provision, which he characterized as “absurd”.

Given the dog-eat-dog morals of legal publishing in Albany at the time, the result was predictable:

The first contract for the publication of the reports was made with Little & Co. at two dollars and fifty cents per volume, they being the lowest bidders, and the first volume published under the contract (Comstock Reports, Vol. 1) was issued in June, 1849.

As soon as Little & Co. published the first and second volumes of Comstock’s Reports they were immediately reprinted by Gould, Banks & Co. … . Little & Co. had no remedy, for the law of 1848 was entirely inadequate to accomplish the object for which it was passed. The contract was a farce. There could be no copyright for any portion of the book, and hence no protection.  

In addition, dissatisfaction with the Reporter manifested itself in the form of a resolution of the New York State Assembly on February 23, 1850, following the publication of his first volume of reports, leading to Comstock’s insertion of a preface, dated March 2, 1850, at the front of the second volume:


Although the competing Volume 1 published by Gould, Banks & Gould remains available, despite considerable effort no copy of Volume 1 published by Little & Co. has been located. Little & Co. did advertise the sale of Volume 1, among other listed law books, but without identifying itself as publisher. The New York Court of Appeals holds a copy of Volume 1 published by L. W. Hall, who figures mysteriously in the litigation over Volume 4. A comparison of the Hall Volume 1 and the Gould, Banks Volume 1 establishes that, with the exception of the title page, they are identical and were printed from the same plates with the same defects. I am very grateful to Frances Murray, then Librarian of the New York Court of Appeals, for allowing me to inspect its copies of Comstock’s Reports.

37 The resolution provided:
A resolution of inquiry directed to me has recently been passed in the Assembly of the State, implying that I have been charged with improperly delaying the publication of my reports. I have heard this allegation from other quarters; and it is perhaps due to myself to say a few words about the matter on the present occasion.

The first volume of my reports was published early in June, 1849, and brought the decisions of the court down to December, 1848. It also contained some cases of practice decided in January, 1849. A period therefore of about five months intervened between the announcement of the decisions and the appearance of the volume; and it should be mentioned that for the last two months of the period the volume complete, so far as I was concerned, was in the hands of the printer and publisher. My second volume, now presented to the profession, brings the decisions down to December, 1849, and includes a number of cases decided in January, 1850, the opinions in which were not placed in my hands more than ten days ago. It contains also other cases, the opinions in which have been delivered to me since the adjournment of the court in January last. Indeed, it will be seen, that half the volume is made from cases decided in October, December and January last. In short, the volume follows not more

Resolved, That the State Reporter be and he hereby is requested to report to this House what amount of the reports of the court of appeals he has prepared for publication that have not been published, the number of pages of the usual size of law reports the same will make, including notes and references, from what date the reports of said court remain unpublished, what amount of money has been received by him, including that received by persons in his employ, for copies of the opinions of said court, also the amount of salary received by him since his appointment, the number of volumes he has prepared and caused to be published, and whether any of said reports have been published in pamphlet form that are not bound in the first volume.

than sixty days in the rear of the decisions it contains. I venture to say that no reporter in this State has ever followed the decisions so closely in point of time as I have done; and I have taken some pains to produce this result. My immediate predecessor in office, Judge Denio, is conceded to have been a diligent and faithful reporter. He has brought out in all five volumes; and all of them came at least a year behind the decisions they embraced. His last volume was published in February, 1850, while it contains no decision later than June, 1848. It has never been said of the present reporter of the Supreme Court (Mr. Barbour) that he is wanting in diligence. His last volume was published in January, 1850, but contains no decision of a later date than November, 1848. I will leave it then for others to say with what justice or fairness I have been criticised in this respect.

Here I might stop; but I think the occasion a proper one to state in few words some reasons why the reports must always be somewhat in the rear of the decisions. It is a custom of the Judges (I am speaking of the Court of Appeals,) at the commencement of each term to go into consultation upon the cases argued at the previous term. The opinions which have been written during the vacation are then read, and in thorough discussions which take place, what has been written is quite likely to undergo more or less modification. At the close of the term the decisions are announced, and the Judges usually take their opinions home with them for revision. Some of them are sent to the reporter in the ensuing vacation, others are delivered at the next term, and others are frequently not received by him until a still later day. It must also, as everyone will perceive, sometimes occur that the opinion which has been written in a given case, will be overruled by a majority of the Judges; and such a case is not in a condition to be reported until the Judgment of the court is written out after the decision is announced. From these and other causes it has happened and always must happen, that the reporter is not in possession of the materials for publication until some months after the decisions are actually made. I mention these facts because they do not seem to be generally understood. I am sure I need say no more on this
subject. The restless and unreasonable will not be satisfied, but with that I must be content.

The act of the Legislature providing for “publication of the Reports of the Court of Appeals” requires them to be published in pamphlet form as often as half a volume is prepared. That has not been done in respect to the matter contained in the present volume. This omission is embraced in the resolution of inquiry before mentioned, and has, I believe, at least in some quarters, been imputed as a fault to me. A very few words will place me right in this respect. I beg the profession to remember that the reporter is allowed by law no pecuniary interest whatever in the reports. He therefore can have no personal concern in the question whether they shall or shall not be published in pamphlet form. It is made his duty, in conjunction with the Secretary of State and the Comptroller, to contract for their publication. The publishers who have the contract are to furnish them to the profession at a price specified in the agreement. The contract being made, it is the duty of the reporter to prepare the sheets for the press and to correct the proofs; and there his duty and power both end. From that time he has no more control or interest in these reports than any other citizen. In the present instance the reporter framed the contract with the publisher and bound them explicitly to comply with all the provisions of the law. That was as far as he was bound to go, and as far as his power extended. But he went farther, and at the proper time called upon the publishers to issue a number or pamphlet according to the requirement of the act. He pretended not to judge the wisdom of the law, but in the most unambiguous manner required its observance. Here I think I may leave this matter. I do not feel called upon to explain or vindicate the conduct of other persons…

38 Comstock’s apologia was liberally and extensively paraphrased, and his expedition praised, in comments in the May 1850 issue of the United States Monthly Law Magazine, Vol. 1, 409, 496: speaking of the Gould, Banks & Co. edition, the review ends with the statement: “We can not understand how this book of 625 pages can be afforded for $2 50, the price at which it is sold.” However, Comstock’s explanation was disingenuous. Subsequent publications by Nathan Howard, Jr., Clerk of the Court of Appeals during
On April 9, 1850, the Legislature passed a statute amending Section 3 of the 1848 Act to limit the prohibition against copyrighting the reports just to the text of the “reports of the judicial decisions of the court of appeals” themselves, and providing that “[t]he copyright of any notes or references made by the state reporter to any of said reports shall be vested in the secretary of state for the benefit of the people of this state.”

Following this alteration of the legislation, on April 20, 1850, Little & Co. entered into a five-year contract with the State and the State Reporter to print his reports of decisions of the Court of Appeals, the State’s copyright in the Reporter’s work product being assigned to Little & Co. by the contract and perfected by filing of the statutory copyright notice by the Secretary of State with the Clerk of the United States district court. On April 18, 1850, virtually the eve of the signing of the contract, Little & Co. published the following advertisement in the Albany Argus:

An Appeal to the Bar of the State

The subscribers, in conformity to contract with the State, have stereotyped and published, in the best manner, an Official Edition of the

REPORTS OF THE COURT OF APPEALS.

The MSS. are furnished by the State through the State Reporter, and the subscribers pay all the expenses of stereotyping, printing and publishing the work. They also supply the State with sixty-four copies free of charge, for distribution, and ten copies to the Reporter for exchanges, according to law, and covenant to keep the work at all times for sale at a price not exceeding $2.50 per volume.

Another publishing house, of large resources, drawn from the legal profession of this State by selling similar books at $4, $6 and $7 per volume, now advertise to reprint upon us at a less price even than $2.50, hoping thereby to prevent the sale of the authorized edition. This is a course generally considered dishonorable by booksellers. That their object is to drive low prices from the field, that they may reinstate the old order of things, is manifest in their

Comstock’s tenure as reporter, expose numerous decisions of the Court of Appeals omitted from Comstock’s volumes, including full opinions published by Howard such as: De Peyster v. Winter (June 1848 Term) in 4 Howard’s Practice Reports 449 (2d ed., Albany: Gould, Banks & Gould 1852), and Platt v. Cathell (November 1847 Term) and Moehring v. Thayer (January 1848 Term) in 1 Howard’s Cases in the Court of Appeals of the State of New York, 230, 502 (New York: Diossey and Co. 1855).
declining our proposition to supply them with half the edition at cost.

OLIVER SCOVILL & EDWIN C. LITTLE

Then, on October 16, 1850, apparently not long before Little & Co. issued the first part of Volume III of Comstock’s Reports, Gould, Banks & Gould sent the following letter to the Governor, Hamilton Fish, and to the Secretary of State:

Gentlemen:

We have commenced printing, and are about to publish an edition of the work in two hundred and seventy six pages, entitled “Reports of Cases argued and determined in the Court of Appeals of the State of New York, with Notes, References and an Index, by George F. Comstock, Counsellor at Law – Vol. III”. We intend to insert in our edition certain notes and additions, but the whole original matter will be retained precisely as contained in the edition lately issued by Little & Co. of Albany, Law Booksellers, including the Synopsis, Syllabus, Notes, References and Index &c, made by the Reporter.

This notice is given to the end that you may resort to any legal measures for the purpose of restraining our action which you may be advised to take – and in case you omit so to do forthwith upon the receipt of this notice, we will give the same in evidence on any motion you may subsequently make for an Injunction or other process against us.39

39 The timing of the release of Volume III by its rival publishers is not entirely clear. The Gould, Banks October 16 letter described the Little & Co. Volume III as “lately issued”. The deposit of the Little & Co. copy – this time the statutorily prescribed partial pamphlet, totaling 276 pages – in the Smithsonian Institution required within three months of publication by Section 10 of 9 Stat. Ch. 178 (Aug. 10, 1846) was made by the Secretary of State on November 12, 1850. Fifth Annual Report of the Board of Regents of the Smithsonian Institution to the Senate and House [of] Representatives (Washington D.C. 1851), 246. In his opinion of February 27, 1851, infra n. 40, Judge Comstock referred to “…the first part of volume 3 of Comstock’s reports, this being all that I have seen….” The Albany Argus for February 28, 1851, the day after Judge Conkling’s opinion is dated, advertised both the Little & Co. and Gould, Banks
Edwin C. Little and Oliver Scovill v. Anthony Gould, William Gould and David Banks

On January 11, 1851, Edwin C. Little and Oliver Scovill, “composing the firm of Little and Company”, filed a bill in equity in the United States circuit court for the northern district of New York demanding the forfeiture of any such copies, an accounting for any sales, and an injunction against any further sales. The bill pleaded the statutory structure, the appointment of Comstock as reporter, the vesting of his interests in the State, the contract that Little & Co. had with the State and its assignment to them of its copyright interest in the reports, their compliance with the requirements of the copyright laws, and the infringing activities of the defendants. The bill called for the defendants to respond to interrogatories presenting the factual and legal basis for Little & Co.’s claim. It was accompanied by a motion for an injunction and a copy of the letter Gould, Banks & Gould had sent to the Governor in October.

The Gould, Banks defendants responded on January 27 that until they were served with the papers on January 13 they were unaware of any objection to their publication of the reports and that after writing to the Governor they had “devoted labor and incurred expense in the publication of one number or first part of the volume in question”; that if an injunction issued it would thwart their publication and that Little & Co. could be made whole by receiving the profits of sales which would be recorded on the books of Gould, Banks; that Comstock was not lawfully appointed the Reporter and that Little & Co. had no contract with the State whereby they “became the legal assigns secured by the alleged copy right”; and that the Gould, Banks defendants publication was made “in good faith and in the full belief that they have the constitutional, legal and equitable right to publish the decisions of the courts published and to be published in the third volume of Comstock’s reports in question in the same manner as the same are published by the complainants, and that the defendants had or have no intention of piracy in their publication of the same...”.

editions of Volume III, but the former offered a book for $2.50 “ready, complete and bound in calf,” while the latter reported that “the subscribers will issue their edition of the third volume of Comstock’s Reports, as soon as practicable at the above price of $1.50...”
On February 27, 1851, sitting alone in the circuit court, Judge Conkling granted a preliminary injunction. The principal argument apparently advanced for the Gould, Banks defendants was that the 1850 statute vesting a copyright in the Secretary of State in reports by the State Reporter was a violation of the New York State Constitution, which provided that “all…judicial decisions shall be free for publication by any person.” According to Judge Conkling, if “all” meant “all” in the sense the defendants argued, it would apply to any judicial decision, not just those to which the 1850 statute applied, but to any judicial decision whatever, and thus would be “repugnant to the constitution and laws of the United States” as an interference “with the rights of private persons.” Instead, Judge Conkling chose to interpret the provision in the New York Constitution as follows:

The just view of the subject appears to me to be this. The first part of the section having peremptorily enjoined the speedy publication of the more authoritative and important judicial decisions of which it most concerned the public to be speedily apprised, the rest was left to private enterprise; but, lest some impediment should be thrown in the way, (not by the claim on the part of the author to copyright, which was beyond the power of the convention,) but by the legislature or the courts, or in some other way not easily divined, it was, by the second part of the section, ordained that no such restriction should be imposed, and it was made the duty of the legislature, if necessary, to see that this should not be done. In other words, it was declared, not that when one person had performed the labor of preparing, and incurred the expense of printing from manuscript, a volume of reports, any other person should be at liberty, in spite of the author or his assignee, to intercept and appropriate, or destroy, the just rewards of the enterprise, by rapaciously seizing upon the book and re-printing it, but that the right to engage in such original enterprises should remain common to all.

He then proceeded to reject the defendants’ claim that “notes or references” copyrightable by the Secretary of State under the 1850 statute could be only “such original notes or references as the state

40 Little et al. v. Gould et al., 15 F. Cas. 604 (No. 8,394)(C.C.N.D.N.Y. 1851).
41 Ibid. at 607.
reporter might see fit, of his own accord, to superadd to what would otherwise be in themselves complete reports of the cases by him reported”, holding instead that these words also embraced “the summary of the points decided by the court, which immediately follows the title of the case reported, and the footnotes...” as well as “the arguments of counsel.”

Finally, Judge Conkling decided it was appropriate to issue an injunction:

…

[S]uch reasons might easily be found in the demerits of the defendants. There can be no injustice in assuming that they have acted with full knowledge of all the facts detailed in the bill of complaint. Their extraordinary letter, already mentioned, shows this. They are chargeable, therefore, not only with a wilful and apparently very discreditable encroachment upon the rights of the plaintiffs, but with openly arraying themselves against the supreme authority of the state. There may possibly be circumstances, growing out of a spirit of rivalry between the parties, affording some palliation for conduct apparently so unjust and audacious; but of this I know nothing, and it may at least be safely assumed that they can furnish no shadow of justification to the defendants.

On June 2, 1851, the Gould, Banks defendants filed a formal answer and responses to interrogatories that had been contained in the bill. They elaborated on the arguments Judge Conkling had already rejected and insisted that the right of copyright claimed by the Secretary of State under the statute and assigned to Little & Co. by contract, “including the matters written and composed by [Comstock] as specified in said bill of complaint”, which were “component parts of complete reports of decisions of the court of appeals, ” in fact, under the New York State Constitution, were “dedicated to the public at large... [and] free for publication by any person.” They also attacked the formalities of the contract between Little & Co. and the Secretary of State and the steps perfecting of the State’s copyright and, although admitting that the plaintiffs were a partnership of booksellers, “Defendants believe and therefore charge that one Weare C. Little or some other person or persons also is or are members of said firm of Little & Company.”

42 Ibid. at 609.
43 Ibid. at 611.
The filing of the answer must have been an accompaniment to the Gould, Banks defendants’ application to vacate the preliminary injunction, made in the circuit court in Utica, apparently in July 1851.\(^{44}\) Justice Nelson filed an opinion denying the motion the following April, holding:

The right of the plaintiffs rests exclusively upon the act of congress, which confers a copyright upon authors, and also upon their assignees, who have complied with its provisions. The right is derived under this act, and is not at all dependent on or affected by the provision of the state constitution. If the plaintiffs are the assignees of the volume in question, by title derived from the author, they have a right to the protection of this court, and no provision of the state constitution can deprive them of it... .The interest of the plaintiffs in the copyright, as derived under the contract with the state officers, whether regarded as a legal or as an equitable interest in the same, is sufficient to entitle them to the remedy claimed.

But whether presciently or not, Justice Nelson added: “If they are not such assignees, then the act of congress has no application in this case, and, consequently, this court has not jurisdiction in this case.”\(^ {45}\)

_Edwin C. Little and Oliver Scovill v. Levi W. Hall, Anthony Gould, David Banks, William Gould and David Banks, Jr._

Careful readers of the _Albany Argus_ may have been bemused by seeing in the same column of the paper the following two classified advertisements:

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\(^{44}\) Affidavit of Weare C. Little, sworn January 23, 1852, in _Little v. Hall._

**4th Volume Comstock’s Reports** – Reports of Cases argued and determined in the Court of Appeals of the State of New York, with Notes, References, and an index, by George F. Comstock, Counsellor at Law. Just received and for sale by


and –

**Comstock’s Reports, Volume 4.**
**NEARLY READY, the official edition “Reports of the Court of Appeals of New York”,** by the State Reporter, with Notes and References. A volume of over 600 pages, bound in calf in the best manner. Price $2.50.

This is the only legal edition published in conformity to law, by contract with the state.

Little & Company
Law Booksellers, 53 State St., Albany

In the same column, separating these rival advertisements, was the following:

**LITTLE & CO.,**
**LAW BOOKSELLERS.**

The subscribers, in conformity to contract with the State, have stereotyped and published, in the best manner, an Official Edition of the

**Reports of the Court of Appeals.**

The MSS. are furnished by the State, through the State Reporter, and the subscribers pay all the expenses of stereotyping, printing and publishing the work. They also supply the State with sixty-four copies free of charge, for distribution, and ten copies to the Reporter for exchanges, according to law, and covenant to keep the work at all time for sale, its price not exceeding $2.50 per volume.

Another publishing house, of large resources, drawn from the legal profession of this state by selling similar books at $5, $6 and $7 per volume, have advertised and are selling an illegal edition of the 4th volume, price $3.50, hoping thereby to prevent the sale of the authorized edition. They pursued the
same dishonest course with the 3d volume, for which an injunction was issued against them. That their object is to drive low prices from the field, that they may reinstate the old order of things, is manifest.

Oliver Scovill & Edwin C. Little

In the front of the edition of Volume IV sold by Gould, Banks beginning in January 1852 was the following “Publishers’ Note”:

It is known to the legal profession that the term of office of Mr. Comstock, as State Reporter, expired about the time when the third volume of his Reports was published. Since then he has ceased to act in an official character. The present volume has been prepared by him since the expiration of his term, chiefly from cases and opinions then in his hands. In respect to the previous volumes officially published, the labors of the Reporter were compensated in the salary provided by the State, and the copyright cost nothing to the Publisher. This circumstance will sufficiently explain to the profession the somewhat enhanced price of this volume. It is furnished, however, at the lowest price of Reports where the Publisher is obliged to obtain the copyright at his own cost.

Little & Co. started a second proceeding in the circuit court against Gould, Banks and Levi W. Hall, the ostensible publisher, to obtain an injunction with respect to Volume IV of Comstock’s reports at the end of January, 1852, relying – in much the same way as it had in the earlier proceeding involving Volume III – on its contract with the State and the statutory structure behind it. Judge Conkling granted a preliminary injunction in a lengthy opinion dated February 23, 1852. Little & Co. had the entire text of the injunction

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46 *Albany Argus*, February 28, 1852.
47 See fn. 13, supra. The bibliographical dress of the pamphlet containing the opinion is unusual, to say the least. The imprint on the title page reflects that its printer and publisher was Joel Munsell, a prolific and cultivated printer in Albany used by Weare C. Little & Co. David S. Edelstein, *Joel Munsell: Printer and Antiquarian* (Columbia Univ. Press 1950), 153, 165-166. However, as issued, it had a bright yellow cover showing Little & Co. as the publisher and advertising on the back cover that firm’s publications, including Comstock’s *Reports.*
printed in full in the March 6, 1852 issue of the Albany Argus, adding a concluding comment:

The above order for an injunction relates to the FOURTH VOLUME OF COMSTOCK’S REPORTS, for which Gould & Co. demand $3 50 for their surreptitious edition – the State having provided by law for the publication by contract with us, at $ 2 50 per volume.

This is the second Injunction for the second illegal encroachment on our rights. The first injunction was for the 3rd volume, which remains in full force, after a hearing of counsel on both sides, on a motion to dissolve, before the Hon. Judges Conkling and Nelson.

However, as suggested by the “Publishers’ Note”, the factual circumstances and legal issues before Judge Conkling on this application were entirely different from what they had been the year before. Apart from the bill, all that remains of the record before him is an affidavit of George F. Comstock, sworn January 27, 1852; his opinion makes reference to the submission by Comstock of “a written argument in behalf of the defendants” and “Mr. Spencer’s reply”, neither of which has been located in the court file or elsewhere. The same is true of two affidavits by Levi Hall, and one by William Gould denying that his firm was in any way involved in the publication of Volume IV. As a much fuller factual record was established for the trial than was available on this preliminary motion, what follows is derived from both Comstock’s January 27, 1852 affidavit and from the trial record, in which his deposition appears.

According to Comstock’s affidavit and subsequent oral examinations, having been commissioned State Reporter for three years under the statute on December 27, 1847, he was not reappointed at the expiration of his term on December 27, 1850. Instead, during the January term of the Court of Appeals, Henry R. Selden presented a certificate of his appointment as State Reporter, dated January 17, 1851. Comstock challenged the validity of Selden’s

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48 The record before the Supreme Court has been reprinted as Little v. Hall in the Gale MOML Print Editions and contains the trial record from the circuit court.

49 Selden later served as a judge of the New York Court of Appeals from 1863-1865, succeeding his brother Samuel L. Selden, and
appointment and claimed to continue in office until his successor had been validly appointed. On January 21, Comstock and Selden presented the issue for resolution to Chief Judge Bronson of the Court of Appeals, who reported the following day that the judges believed Selden’s appointment to be valid. But since Comstock already had some materials in hand from which to prepare a fourth volume of reports, Selden reluctantly acquiesced in Chief Judge Bronson’s suggestion that Comstock be allowed to receive a sufficient number of opinions yet to be rendered at the current term of court to permit him to complete and publish that volume, a proposal which Comstock also seems to have accepted.

On that understanding Selden immediately took office as State Reporter. However, despite this apparently cordial resolution of the matter, Comstock continued to pursue a quo warranto proceeding against Selden’s appointment and his own restoration to the office. According to Selden’s deposition in October 1852, the case had been referred to Samuel Beardsley, a practicing lawyer and former Chief Justice of the New York Supreme Court, who had concluded that Selden’s appointment was invalid.50

With respect to Comstock’s future publication of the fourth volume of reports, Selden testified that he believed that Comstock was obliged to publish the opinions in cases argued or submitted during his tenure and that “... I supposed they would be published by him as State Reporter; it did not occur to me that they would be published by Mr. Comstock, otherwise than as State Reporter”; as to those remaining cases that had not been heard and decided in January 1851, Selden said that “I considered him performing my duty.” That point of view was supported by a certificate included in the trial record from Court of Appeals Judges Charles Ruggles, Addison Gardiner and Freeborn Jewett, stating that they supposed thereafter as counsel to Susan B. Anthony in her federal prosecution for voting. See Frances Murray, “Henry Rogers Selden” in Rosenblatt, supra n. 22, 84.

50 A search for the record of the quo warranto proceeding has been unsuccessful. Judge Nathaniel K. Hall’s opinion in the circuit court disposing of Little v. Hall after trial suggests that Comstock’s objection was based on the absence of the Governor’s signature on Selden’s certificate of appointment: “Mr. Selden having obtained from the Lieutenant Governor & Attorney General a certificate of appointment in which it was assured he was appointed by them at a full meeting of the board authorized to make such appointment (which consisted of those officers with the Governor)...”.
the opinions they had provided to Comstock pursuant to the arrangement worked out by Chief Judge Bronson were to be included in a volume “published by him as State Reporter.”

Comstock took the opposite position: that he had not begun any work on the fourth volume while he was in office and that, as he was no longer State Reporter in title or salary, he was subject to neither the statutory nor the contractual constraints applicable to the office, and most particularly to the contract which Little & Co. had to publish the reports of the Court of Appeals prepared by the State Reporter. Accordingly, a few days after the resolution with Chief Judge Bronson, Comstock reported to Weare C. Little that he “should make the volume in his individual capacity... should take out a copyright for the volume for himself when the volume was prepared, and should offer it for sale...” According to Little’s testimony, Comstock dismissed Little’s doubts about Comstock’s right to the copyright with the assertion that “no matter how he came by the decisions, whether furnished to him or he found them, or even if they were stolen, if he done the labor he was entitled to a copyright, and that if he was getting nothing from the State, he ought to be paid.”

Under date of September 8, 1851, Comstock sent a letter to local booksellers, including Little & Co., soliciting “propositions for the purchase of the copyright of vol. 4 of Comstock’s Reports.” Finally, on October 8, Comstock sold the copyright of Volume 4 to Levi W. Hall of Syracuse for $2505.00 plus reimbursement for the $2000 Comstock had expended for stereotyping of the volume; according to Judge Conkling’s gloss on one of Hall’s affidavits, his total costs for the two thousand copies he printed were about $5000. While Little & Co. did publish its own Volume IV of Comstock’s Reports,

As earlier noted, Hall’s involvement is mysterious. Research establishes that there was a L. W. Hall in Syracuse at the time, who for two years until 1850 was the publisher of The District School Journal for the State School Department; in 1849 he also published Charles Northend’s School dialogues; being a collection of exercises particularly designed for the use of schools. During this period Hall attended the annual conventions of the Diocese of Western New York of the Protestant Episcopal Church, representing a church in Syracuse; so did George F. Comstock. A Levi W. Hall was one of the founders of the Onondaga County Savings Bank in 1855. In 1865 a Levi W. Hall was District Attorney of Onondaga County; at some point in his career he was a law partner in Syracuse with William J. Wallace, an early United States Circuit Judge for the Second Circuit. Whether this Levi W. Hall is the same person as the publisher has not been determined.
it received no text from Comstock at any time and had to use a copy of Hall's edition bought after its publication.

Judge Conkling was offended by Comstock's behavior:

[No state reporter, for the purpose of enriching himself, can lawfully use advantages derived from his official position, in a manner inconsistent with the letter or spirit of the laws whence his official powers and privileges were derived; – that would be to violate a clearly implied fundamental condition of his appointment; and no court would uphold him, whether as plaintiff or defendant, in the assertion of colorable rights thus acquired.

Has the late reporter, by the line of conduct he has seen fit to adopt, placed himself within the just scope of this principle? I think he has. He received from the judges of the court of appeals and from its clerk, original papers which they were bound by law to deliver to him, and to him alone, constituting the main elements of the succeeding volume of reports required at the hands of the state reporter; and then, instead of preparing them without delay, as it was his duty to do...he retained them in his possession during the whole remainder of his official term, and until three months after, when he deliberately converted them to his private use, by preparing them for publication, and selling the volume so compiled for a large sum of money; to the utter defeat (if the device shall be successful) of the laws by which his duty as reporter is prescribed; to the dishonor of the state, by a breach of its solemn engagements, and to the great injury of the plaintiffs.  

52 One issue that was before Judge Conkling on a hearsay basis he did not address. As it had in the proceedings a year earlier, Little & Co. asserted in its bill that, pursuant to the 1850 statute, the Secretary of State had perfected the State’s copyright interest in the portions of Volume IV generated by the State Reporter; in an affidavit filed in opposition to the application for a preliminary injunction, Hall asserted that Henry Randall, the Secretary of State, had not filed the copyright in this instance because he wished no involvement in the controversy and for the same reason refused to make an affidavit to that effect. In October 1852, at his oral examination before trial, Weare C. Little produced a certificate from the Clerk of the district court for the northern district of New York of
Judge Conkling did not have the benefit of Justice Nelson’s reminder six weeks later on the limited basis for federal jurisdiction and left the bench for Mexico before the trial on the merits “on the pleadings and proofs” – that is, the record of the earlier oral examinations of the witnesses but no live courtroom testimony – at the June 1853 term of the circuit court. On December 22, 1853, Justice Nelson and District Judge Nathaniel K. Hall, Judge Conkling’s successor, directed the Clerk to enter judgment dismissing the bill in a lengthy opinion by Judge Hall which has never been reported. In a straightforward analysis, the court said that, as composer of the manuscript of Volume IV, Comstock:

was therefore the author and original proprietor unless the facts established in this case are sufficient in their legal effect to cast the authorship or proprietorship upon the State of New York; or upon the complainants as the legal assigns of Mr. Comstock, or of the state, in whose service it is claimed he was at the time he composed wrote and prepared the matter in question.

The circumstances so clouded the capacity in which Comstock prepared Volume IV – “there is no evidence from which to draw any satisfactory conclusion in reference to the intentions or understandings of Mr. Comstock at the time of the arrangement between him, his successor and the judges of the Court of Appeals was consummated “, no contract, no arrangement for compensation, no legal obligation on Comstock’s part to prepare the reports– that the court felt forced to conclude that the property in the manuscript for Volume IV, prepared after he left office and without any compensation for his labors, vested in Comstock, even though he used materials he had obtained while State Reporter; the opinion fortified this conclusion by pointing out that, had Comstock chosen to

“Henry S. Randall, Secretary of State, having taken out a copyright of the same volume iv. of Comstock’s Reports, as proprietor in trust for the people of the State of New York...”. However, Randall, no longer in office, subsequently testified that he did not file for a copyright for the volume nor authorize anyone to apply for it in his name; he had been approached by Weare C. Little to do so, but did not wish to become involved in the controversy.

It is reproduced in the appendix.
destroy his manuscript after preparing it, neither the State nor Little & Co. could have sued him for destroying its property.\textsuperscript{54}

Echoing Justice Nelson’s jurisdictional admonition from the year before, perhaps to justify the arguably unpalatable outcome, the opinion emphasized: “In this court the relief which is sought in this case must be granted upon the grounds of authorship or ownership or not at all, and equities founded upon other rights cannot be made the basis of an action” (emphasis in original). On appeal from the judgment of the circuit court, a unanimous Supreme Court, in an opinion by Justice McLean, said much the same thing in affirming the circuit court:

The entire labor of the work was performed by Comstock, not as reporter, but on his own account. It is, we think, not a case for a specific execution of his contract; and, in effect, that is the object of the bill. This result has not been brought about by the acts of Comstock. He may have been imprudent in extending his contract unconditionally beyond the term of his office. But in doing so he has an apology, if not an excuse, by being associated in making the contract with two high functionaries of the State. Under the changed relations of the parties, the plaintiffs cannot be considered as the legal owners of the manuscript for purposes of the contract under the copyright law.

Whatever obligation may arise from the contract under the circumstances as against Comstock must be founded on his failure to furnish the manuscripts to the plaintiffs, and of such a case we can take no jurisdiction as between the parties on the record.\textsuperscript{55}

\textit{Case No. 3. Paige v. Banks, 80 U.S. 608 (1871)}

This case, and one nine years earlier before Justice Nelson which did not reach the Supreme Court,\textsuperscript{56} concerned the impact of the 1831 copyright act on existing copyright assignments. The original

\textsuperscript{54} For that reason, the court found it unnecessary to reach the issue posed by then- Secretary of State Randall’s refusal to register the State’s copyright in Volume IV.

\textsuperscript{55} 59 U.S. at 172.

\textsuperscript{56} \textit{Cowen v. Banks}, 6 F. Cas. 669 (No. 3,295)(C.C.S.D.N.Y. 1862), an action brought by the widow of Ezek Cowen with respect to his reports.
1790 copyright statute gave the author a fourteen-year term of copyright protection, with an additional fourteen-year right of renewal if the author was then still living and complied with the statute’s formalities. The 1831 copyright act provided two additional benefits to an author: first, the initial term of fourteen years was retroactively increased to twenty-eight years for all authors living at the time the 1831 act took effect; and, second, the right of extension for the second term of an additional fourteen years at the end of the first was expanded from then-living authors to the widows and children of deceased authors (but not the author’s assigns).

In 1828 Alonzo Paige, the reporter of New York Chancery Court decisions, had entered into a five-year contract with Gould & Banks to provide them with reports to publish, assigning the copyright to the firm in perpetuity; the first such volume was published in 1830. In 1858, the two fourteen-year terms provided by the 1790 statute in force when the contract was made having run their course, Mr. Paige purported to renew the copyright for the extension period under the 1831 act. In response, he received a typically pugilistic letter from Gould & Banks that the right to the additional fourteen years was theirs, that they were exercising it, and that they would “hold him liable for all damages consequent on the infringement of their rights.” Alonzo Paige was sufficiently intimidated to drop the matter for the remaining ten years of his life, and it fell to his executors a dozen years later to try to revive his claim.

In a brief unanimous opinion by Justice David Davis, the Supreme Court had no difficulty in construing the original agreement between Paige and Gould & Banks as conveying “a full right of property... an absolute interest” in his reports, including the additional fourteen-year period which did not then exist. To do so, they dismissed Justice Nelson’s contrary construction of Ezek Cowen’s contract with Gould & Banks in Cowen as not “maturely considered” because he went on to reform the contract to reflect Justice Cowen’s testimony, in 1840 in Hastings, discussed above, that he had intended to convey his entire interest in the copyright to his reports.

**Unsatisfactory Outcomes**

The wrong parties won each of these cases for the wrong reason at the wrong time.

The first and the last Supreme Court cases discussed above may be disposed of without extended discussion. It is hard be comfortable with Backus if one takes at face value Judge Conkling’s later
cri du coeur, quoted above, that the Supreme Court reversed on a point never contested at trial, which the parties had reserved to agreement between themselves, and with respect to which the trial court made no ruling, much less committed an error. Paige’s judicial construction of an assignment to include an author’s interest in the fourteen-year extension added to the existing copyright period by the Act of 1831 – three years after the assignment was made – is exceedingly difficult to reconcile with the “authors’ rights” justification advanced by the Supreme Court in rejecting the claim that Congressional retrospective extensions of existing copyrights violate the Copyright Clause, Eldred v. Ashcroft, 537 U.S. 186, 215 (2003), and particularly with its reliance on the legislative history of the 1831 statute at issue in Paige, a decision Eldred never mentions:

Congress’ consistent historical practice of applying newly enacted copyright terms to future and existing copyrights reflects a judgment stated concisely by Representative Huntington at the time of the 1831 Act: “[J]ustice, policy and equity alike forb[id]” that an “author who had sold his [work] a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of [the] act.” Id. at 204 (citation omitted).

Change “a week” to three years, and that seems to be exactly what happened to Alonzo Paige.57

However, the case which is hardest to stomach is Little v. Hall. In its full course, the decisions in that case (1) rewarded Comstock’s duplicitous behavior, which (2) deprived Little & Co. of the benefits of its exclusive contract with the State, while (3) an injunction – which the Supreme Court was to hold that the circuit court had no jurisdiction to grant – allowed Little & Co. a two-year monopoly on the sale of Volume IV, (4) keeping the most recent decisions of the Court of Appeals out of the hands of the Bar and the public for two months, while prohibiting Gould, Banks from selling what remained of the two thousand copies which Hall had already printed.

57 Well before Eldred, it was possible for a commentator on Paige to write that: “The alienability of the renewal term and the effect of attempted alienation on the author and the others enumerated in the Copyright Act has been the subject of much controversy.” Sidney J. Brown, “Renewal Rights in Copyright”, Cornell L.Q. 28 (1943): 460, 462 & n.13.
As *Little v. Hall* turned out, Comstock pocketed two thousand five hundred dollars from selling his manuscript of Volume IV, when as State Reporter he was not entitled to any financial interest in his reports. To be sure, while preparing Volume IV he was not recognized as the State Reporter or receiving the Reporter’s salary, having stepped aside on Chief Judge Bronson’s resolution of the matter, but he was pursuing, apparently successfully, a *quo warranto* proceeding for reinstatement in which he maintained that he remained the State Reporter. Despite the pendency of that proceeding, at the same time he chose to effect a private sale of public property as if it were his own, to the detriment of Little & Co.’s contractual rights. The explanation in his testimony was that, until he made the sale to Hall, had the *quo warranto* proceeding been decided in his favor, he would resumed his office and delivered the manuscript of Volume IV to Little & Co. But apparently with the passage of time, the attraction of an immediate payment of cash in an amount greater than a year’s salary as State Reporter overcame his righteousness.

Those ultimately to blame for that conundrum are the judges of the New York Court of Appeals who imposed the extralegal compromise in January 1851, when Comstock chose to contest his replacement as State Reporter. Because Comstock was not State Reporter when he prepared Volume IV, the circuit court and the Supreme Court ultimately determined that neither the foundation for Little & Co.’s five-year publication contract with the State under New York’s constitution and laws nor federal copyright jurisdiction applied to its publication. However, from late February, 1852, when Judge Conkling enjoined Hall and Gould, Banks & Gould from selling Volume IV as printed by Hall in favor of Little & Co.’s sales of its own edition, until late December 1853, when the bill was dismissed by the circuit court, Little & Co. enjoyed the financial benefits of a monopoly based on its inapplicable contract, imposed by a court without jurisdiction. Even so, despite its advertisement in the *Albany Argus*, Little & Co. had yet to print its own edition – which had to be done from a copy of Hall’s, according to Weare C. Little’s testimony – and so the Little & Co. volume was not ready until April 1852, hardly serving the Legislature’s overriding purpose of the prompt availability to the profession and the public of the decisions of the highest court of the state.

The injunction left Hall, out of pocket some five thousand dollars, with some portion of the two thousand copies in his hands, unable to sell them from the end of February 1852 until dismissal of the bill in late December 1853, with no recompense: as reflected in the last lines of its December 1853 opinion, the circuit court awarded
nothing to the defendants from Little & Co. for the defendants’ injury in being foreclosed from the market during the pendency of the injunction.

To evaluate that consequence one first has to speculate about exactly how Hall fits in. His affidavits on the preliminary injunction motion are missing except as paraphrased in Judge Conkling’s opinion; there is really very little about Hall in the record other than his affidavit’s reported statement that he was a publisher and bookseller in Syracuse and Comstock’s testimony about his selling Volume IV to Hall, whom he described as “a bookseller at Syracuse and sold law books.”

But what seems to be new information is that the Court of Appeals, at a minimum, has a Volume I also showing Hall as the publisher, printed from the same plates as the version of Volume I published by Gould, Banks & Gould. Clearly the early 1852 advertising in the *Albany Argus* seems to demonstrate an intention on the part of Gould, Banks & Gould to sell Volume IV at a time when Hall’s Volume IV was the only edition there was; the existence of facially competing editions of Volume I suggests that they were working together and that in both instances Hall was probably “fronting” for Gould, Banks & Gould, a practice of the London book trade when the true publisher had a motive to hide his identity.58

Assuming that Gould, Banks and Hall were in league, both were indispensable participants in Comstock’s conversion of Volume IV to his private use, to the detriment of Little & Co. Nevertheless, as the case was finally decided, Gould, Banks should never have been enjoined from selling Hall’s edition of Volume IV to begin with, much less been kept out of the market for nearly two years. With regard to the earlier Volume III, given the firm’s conduct, particularly its aggressive letter to the Governor, there is no question that the injunction in *Little v. Gould* was appropriate; perhaps the outcome as to Volume IV, in overall context, was Biblical justice: “for all they that take the sword shall perish with the sword.”59 Yet in appraising the effrontery of that letter, and possibly Gould, Banks’s attitude regarding its publication of Volume IV, one needs consider the business environment in publishing at the time the letter was written.

The period of time covered by the publication of the four volumes of Comstock’s Reports and the litigation that grew out of it was one

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59 Matthew 26: 52 (KJV).
of great ferment in the publishing industry because of the efforts of British authors, notably Charles Dickens, to obtain copyright protection for their works in the United States, where copyright protection for foreign authors was unavailable by law; parallel efforts were also being made in Britain for American authors at the same time. The American publishing industry, by and large, was implacably opposed to any such protection, as it would impose limits on their opportunistic printing of foreign-source books and at the same time increase their costs. The printing of foreign-source books unprotected by copyright was known as “re-printing”, which was claimed to be “a recognized calling in the United States.”

Supporters of re-printing claimed that one-fourth of the publishing in the United States was in reprinting foreign books. Keeping uncopyrighted publications “open to all” was considered a centerpiece of an economic model ensuring free enterprise and the widest diffusion of knowledge. Diplomatic negotiations between the United States and Great Britain led to agreement in 1854 on a treaty which would have protected foreign authors for works printed in the United States, but the treaty was never given advice and consent by the Senate, and no treaty protecting foreign authors was ratified until 1891. The “open-to-all” dogma behind the rhetoric of the Gould, Banks letter to the Governor, as articulated in its defense to the Little v. Gould litigation, seems much the same attitude.

63 The so-called “Chace Act”, 26 Stat. 1106 (March 3, 1891). Barnes, supra, n. 62, 216-262; Spoo, supra n. 60, 60.
64 Given the volume of English reports and treatises still in common use in American courts during this period, Gould Banks was a self-acknowledge reprinter. For example, their nearly 300-page *A General Catalogue of Modern Law Books, Including the Old Reports* (1852), begins with an “Advertisement” stating: “We are now re-publishing the English Chancery Reports without abridgment or alteration in a style superior to the original, and at a very modest cost.”
Later Cases – The Battle Continues

That said, the experience of five years of litigation with Little & Co. over Comstock’s Reports did nothing to diminish the Gould, Banks firm’s enthusiasm for bare-knuckle litigation with those in its industry, particularly Little & Co.\textsuperscript{65}

David Banks, Jr., et al. vs. Oliver Banks, and others

Perhaps emboldened and enlightened by the decision of the U.S. Supreme Court in \textit{Little v. Hall} on the problems of federal copyright jurisdiction, two years later Gould, Banks brought a virtually copycat lawsuit in the Supreme Court for New York County to enjoin Little & Co. from publishing Volume 25 of Barbour’s Supreme Court Reports, alleging that in selling Little & Co. the copyright, Barbour violated a contract he had made with the Gould, Banks firm in 1847.\textsuperscript{66} The caption is complicated by the withdrawal and addition of partners to the Gould, Banks firm in 1851, some of whom in consequence apparently had to be joined as defendants, for Barbour, also sued, asserted in his defense that the contract was not with the plaintiffs. In what must have been a galling defeat for the Gould, Banks plaintiffs, Justice Ingraham denied the injunction on grounds that had gotten nowhere with Judge Conkling: that any infringement could be remedied in damages, which would avoid depriving the courts and the public of the use of the reports until the case was resolved; he also accepted that Little & Co. was unaware of the contractual arrangement between Barbour and the Gould, Banks firm, which seems hardly likely given that the Gould, Banks had been publishing these reports for twenty years.\textsuperscript{67}

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\textsuperscript{65} Nor was Gould, Banks alone, and Little seems to have been occasionally either exasperated or humorous in addressing such litigation. Having been preliminary enjoined, evidently without notice, from publishing a form book prepared by John L. Tillinghast, Little’s sworn affidavit in response to Tillinghast’s unsuccessful application for a permanent injunction was “substantially that he never saw the book..., never had anything to do with it...[and] was willing that all the world be enjoined from selling the book.” \textit{Tillinghast v. Weed, et al.}, (New York Times, July 12, 1865).

\textsuperscript{66} Opinion of Judge Ingraham denying motion for an injunction in \textit{David Banks, Jr., et al. v. Oliver Banks and others} (August 28, 1858), \textit{Hunt’s Merchant Magazine}, 39 (October 1868): 455-57; the case is not otherwise reported. Regrettably, the file in this matter falls within a six-year period for which the Supreme Court files are missing from the Hall of Records in Manhattan.

\textsuperscript{67} The ultimate outcome of the case is not known, but no Little & Co. edition has been located.
Weare C. Little v. A. Bleecker Banks, 85 N.Y. 258 (1881)

Having found a friendlier place than the United States circuit court, Weare C. Little retaliated in kind. With Gould, Banks now the publisher of the New York Court of Appeals reports by contract with the State, Little brought an action to recover the $100 penalty imposed by that contract for each of the six occasions upon which he had ordered reports and been refused. The contract also allowed the State to terminate the contract for breach of any of its conditions and to collect $5000.00 in liquidated damages, which perhaps were even more inviting consequences from Little’s perspective than the six hundred dollars for which he was suing. Representing Gould, Banks, Rufus W. Peckham, soon to be a judge of the New York Court of Appeals and from 1895-1908 a justice of the Supreme Court of the United States, 68 was unable to persuade the New York Court of Appeals that the State had no authority to fix by contract liquidated damages payable to a third party, or that that third party could not collect them without showing proof of actual injury.

Appendix

Manuscript Opinion of District Judge Nathan K. Hall, with notes by Justice Samuel Nelson, evidently handed down on December 26, 1853

10. Hall District Judge

Crossed out matter:

The [illeg. word] diligence and research of the very eminent counsel who appeared for the [illeg. word] parties in this suit, resulting in the orderly arrangement and citation of the adjudged cases which were supposed to bear directly or remotely on the legal questions involved, and their elaborate and able arguments made at the hearing, had so materially abridged the necessary labor of the court that a decision would have been pronounced at a much earlier day had it not been deemed desirable that an opinion should be carefully prepared

by the presiding judge of this court. This, it is now known, his multiplied and pressing engagements will prevent, and it has therefore been determined not longer to postpone the decision.

In pencil in the margin: “Shall this be retained or stricken out? Or shall it be modified? I would strike it out. SN”

The bill in this case prays an injunction to restrain the infringement of an alleged copy-right in the notes, references and other matter (exclusive of the opinions delivered by the judges) contained in the 4th volume of “Comstock’s reports of cases argued and determined in the Court of Appeals of the State of New York”, and for an account, and for general relief.

It claims that the complainants were the proprietors and legal assigns of the exclusive right (during the period prescribed by the copy right law) of printing, publishing and selling the original manuscript matter written and composed by George F. Comstock, and printed and published by the defendant Hall, as set out in the bill, and that the complainants are consequently entitled to the interposition of this court under the ninth section of the act entitled, “An act to amend the several acts respecting copy rights”, approved February 3, 1831. The Bill also alleges that 11. on the 13th day of January 1852 the complainants having the exclusive right to such manuscript matter, deposited in the Clerk’s office of the District Court of the United States for the Northern District (they being then citizens of the United States resident in that district), a printed copy of the title of the said volume, that they were then printing said volume with all the expedition in their power, and that they had thusly obtained the exclusive right to print & publish such volume, under the said act, as the proprietors of the copy right obtained by such deposit.

Pencil note next to paragraph below: “In respect to the Report of title by Secretary of State, see p. cont. of Chap 18 & first of 19 – near close of the opinion.”

The 9th section of the act above referred to declares “that any person or persons who shall print or publish any manuscript whatsoever without the consent of the author or the legal proprietor first obtained as aforesaid,” (that is in writing signed in the presence of two credible witnesses,) “if such or author or proprietor be a citizen of the United States or a resident therein, shall be liable to suffer and pay to the author or proprietor, all damages occasioned by such injury, to be discovered by special return on the case founded upon this act in any court having cognizance thereof; and the several courts of the United States empowered to grant injunctions to
prevent the violations of the right of authors and inventors, are hereby empowered to grant injunctions in like manner, according to the principles of Equity, to restrain the publication of any manuscript as aforesaid.”

By the first and other sections of the same act any citizen or citizens of the United States or resident therein, who shall be the author or authors of any book, &c, and the executors, administrators or legal assigns of such person or persons “(author or authors) may obtain the exclusive copy right thereof by depositing in the Clerk’s office of the District Court of the United States for the proper district a printed copy of the title of such book &c and complying with the other requisitions of that act.

12. It will be perceived that the consent to be obtained under the 9th section before referred to is that of the “author or legal proprietor”; that the damages given thereby are only recoverable by the “author or proprietor”; and that the other sections of the act secure the privileges of copy right only to the “author or authors” and to “the Executors, administrators or legal assigns” of such author or authors; and that those persons only are authorized as “authors or proprietors” to deposit the printed copy of the title of the book, and thus, and by the observance of other provisions of said act, to secure to themselves the exclusive copy right for the term mentioned in the Act of Congress.

It is only under these provisions that the complainants can have relief in this court, for it appears by the pleadings that the parties complainants and defendants are all citizens of the United States and residents of the State of New York. The character or rather citizenship of the parties, therefore, forbids the exercise, by this court, of any jurisdiction other than that which depends upon the right conferred by the copy right act; and if the complainants fail to sustain their right to a decree under the provisions of that act, this court can consider none of the other rights or equities alleged. If any such exist they are the proper subjects of the jurisdiction of the state courts.

It therefore becomes necessary to determine whether the complainants, at the time of the alleged infringement of their rights, or at the time of filing this bill, were the “author or legal proprietor” of this manuscript of the matter which is now the subject of controversy and also whether at the time they deposited the printed copy of the title of the volume mentioned in the pleadings, they were the “authors” or “legal assigns of the author” of the matters contained in such volume in respect of which a copy right could be properly
obtained under the copy right act. And if these questions are determined in the negative the bill must be dismissed.

13 It will not be claimed that the complainants are in any just sense the “authors” either of the manuscript or of the printed matters contained in the volume in controversy in respect to which the copy right is claimed and whether they are the “legal proprietors “ of the former, or the “legal assigns” of the matter of the latter, depends upon the same facts & legal principles and may therefore be considered and determined as a single question.

The rights of property in the manuscript, and the exclusive copy rights which are intended to be protected by the act of Congress are founded upon the literary labor by which the original manuscripts are produced. The property in the manuscript and the right to obtain the exclusive copy provided by the Act of Congress is therefore prima facie in the author, and in him alone.

The provisions in the constitution under which Congress exercises the power of legislation upon the subject mentions “authors” only, and it is for their benefit that the rights which they are enable to secure are protected in the hands of their “legal assigns”.

It is conceded that the manuscript and matter in controversy was composed written and prepared for publication by George Comstock. He was therefore the author and original proprietor unless the facts established in this case are sufficient in their legal effect to cast the authorship or proprietorship upon the State of New York; or upon the complainants as the legal assigns of Mr. Comstock, or of the state, in whose service it is claimed he was at the time he composed wrote and prepared the matter in question.

It may be safely assumed that the manuscript composed, & prepared by Mr. Comstock in his capacity of State Reporter while he held that office belonged to the state as the sole proprietor thereof; and that the state might, by a proper conveyance, transfer clear title to such manuscript to the complainants so as to make them the legal proprietors of the manuscript and thereby then within the provisions of the ninth section of the copy right act: but it may possibly be doubtful whether the state, while it remained the proprietor of the manuscript, could have secured a copy right under the other sections of the act.

14 But the allegations that the manuscript, the right to which is in controversy in this suit was prepared by Mr. Comstock as State Reporter under and in pursuance of his employment as such, is denied in the answer, which alleges that it was prepared by him
after the termination of his office after his successor had been duly admitted into that office and entered upon the discharge of its duties, and that it was so prepared by Mr. Comstock in his private individual character and for his own personal benefit.

The proofs relating to this question of fact have not been such as to settle it beyond controversy and it therefore became necessary to refer to these proofs, presuming that the onus probandi upon this question is upon the complainants.

Mr. Comstock’s term of office expired on the 27th day of December 1850, but by the law of the state, he held on and continued in office until his successor was appointed and qualified. His successor (Mr. Selden) having obtained from the Lieutenant Governor & Attorney General a certificate of appointment in which it was assured that he was appointed by them at a full meeting of the board authorized to make such appointment, (which consisted of those officers with the Governor) and having filed such certificate & his oath of office in the office of Secretary of State on the 21 of January 1837 [sic] on that day claimed the office. This claim was resisted by Mr. Comstock on the ground of irregularity in Mr. Selden’s appointment and the question which of the claimants should be recognized as Reporter by the Court of Appeals was, in an amicable and friendly way, submitted by the claimants to the Judges of that court. They decided in favor of allowing Mr. Selden to take his seat as State Reporter; and he took his seat as such, and has ever since continued to act as Reporter and to receive the salary.

The motive and precise terms of this arrangement are left in doubt and indeed it seems to have been resolved upon without inquiry or reflection, and without any understanding between the parties in respect of the character in which Mr. Comstock was to prepare the
volume of reports, or in regard to the persons or parties to be ben-
efitted by its preparation. The complainants insist that he was to
prepare it as State Reporter and that they were entitled to the ben-
efits to be derived from its publication, while the defendants allege
that he was to prepare it in his individual and not official character
and for his own personal benefit.

It is proved that Mr. Comstock had not, at the time this arrange-
ment was made, commenced the preparation of the 4th volume and
that its preparation was not commenced until the succeeding April.
Indeed it was not shown that he had taken the slightest notes or
memoranda of the arguments and proceedings in the causes ar-
gued while he was State Reporter, or that such notes or Memo-
randa were used in the preparation of the volume which is now the
subject of controversy.

The fact that he had not commenced the preparation of this volume
was probably unknown to his successor and to the Judges of the
Court of Appeals at the time of the arrangement alluded to, and
they probably supposed that a portion, at least, of the volume had
already been prepared. If so, nothing was said by Mr. Comstock,
at that time, which was likely to correct their misapprehension, nor
was anything said by any of the parties indicating a purpose to
discuss, much less to settle, whether Mr. Comstock was to prepare
the volume for the state, or in the capacity of 15/2 state reporter;
or in his individual capacity, for his own benefit. No contract or
agreement was then made. There was no declaration or express
understanding that he was to finish or prepare a volume for the
State as state Reporter; and no mode of making compensation for
his labor was discussed.

Notwithstanding, the complainants ask the court to infer an agree-
ment or understanding that the work was to be done for the state,
without compensation; and upon this inference, or upon the
ground that Mr. Comstock was bound to prepare a publication
(even after his term of office had expired) [of] the reports of cases
argued during his continuance in office; to base a decree that the
labor of Mr. Comstock, in preparation of the volume in controversy,
was performed for the state, and that the property in the product
of that labor belonged to the complainants as the assignee of the
State under their contract.

The complainants have furnished no satisfactory evidence of any
such agreement or understanding. Indeed, there is no evidence
from which to draw any satisfactory conclusion in reference to the
intentions or understandings of Mr. Comstock at the time of the
arrangement between him, his successor and the judges of the Court of Appeals was consummated.

Starting here a line is drawn in the margin all the way down to the paragraph on 15.3 beginning “In the absence of proof of any such understanding...” and in the margin is written: “Is it best to retain this? I have serious doubts. Will Judge Nelson determine whether it shall be stricken out or modified. Retain it. SN”

The evidence of Mr. Comstock in respect to the conversation which he had with Mr. Weare C. Little, the general agent of the complainants not as many as four days after the arrangement with the judges and Mr. Selden is certainly suggestive of an expectation or intention which might possibly have been entertained by Mr. Comstock – that of preparing the volume and making a satisfactory sale of the manuscript and copy-right to the complainants who held the copy right of the volumes already prepared by the State Reporter. The existence of such an intention at the time of the arrangement with the judges & Mr. Selden is not by any means established by the evidence but it is not so entirely inconsistent with that evidence as to authorize us to say affirmatively that such an intention could not have existed. Mr. Comstock states that in the conversation 15.3 referred to he told Mr. Little that he should make another volume of reports in his private capacity – that Mr. Little asked him to give the work to him (Mr. Little,) for the complainants for the same price any other person would offer for it; saying that he, (Little) thought he was entitled to it in consequence of his connection with the official reports – that he (Comstock) thought so too and agreed to Mr. Little's proposition. And Mr. Comstock further says that subsequently, and when he invited similar proposals from other publishers, he addressed a letter to, “Little & Co”, the complainants, inviting proposals from them for the purchase of the manuscript to which letter the complainants intentionally omitted to reply. It is true, as before [illeg. word], that this evidence does not show any intention or understanding at the time of the arrangement under which Mr. Comstock was allowed to retain and receive the cases, points and opinions used by him in the preparation of the reports in controversy but it is equally true that there is not more evidence of any other intention or understanding the existence of which, at the time referred to one or the other of the parties has deemed material to a determination of this suit.

Crossed out:
“After the agreement, or no understanding to that effect having been established by the evidence, I am unable to convince myself”
In the absence of all proof of any such understanding or agreement and where it is quite apparent from the testimony that the arrangement was made without the question of Mr. Comstock’s further compensation or the character in which his future labors as a reporter were to be performed being at all considered by the parties to the arrangement we are not at liberty to presume a binding contract obliging Mr. Comstock to complete or prepare another volume of reports for the state.

If it had been conceded by Mr. Comstock that he had not been diligent in his office and that the reports of the cases previously argued and subsequently contained in the volume in controversy ought to have been previously prepared for publication & if he had in consideration of such a want of diligence agreed to prepare the additional volume for publication, the case would have been very different. But no such want of diligence was conceded, or is now sufficiently proved, and certainly no such agreement was made. Nor was any such want of diligence or neglect of duty then suggested and under these circumstances I am unable to convince myself that Mr. Comstock was under any obligation to labor without compensation, for several months, after his office and his salary had been given to another, and to give to the state, or to the complainants, the fruits of such labor.

Nor do I think the doctrine of confusion of property or of relation apply to this case if, as it is fully shown in the testimony, Mr. Comstock prepared nothing for the 4th volume and had not in any way commenced its preparation, prior to his retirement from office. Unless he then had some property of the State, some manuscripts which were inseparably mixed and confused with the matter subsequently prepared, the doctrine of confusion cannot be applied and unless the preparation of the manuscript had been at least commenced it is difficult to conceive on what ground the doctrine of relation is to aid the complainants.

It was very strongly and ably argued that the cases, points and opinions used by Mr. Comstock in preparing his fourth volume were delivered to him as the agent and transferee of the state and with a view to the performance of a specific duty in relation thereto – that these were in his hands materials for a public & specific purpose – that they belonged to the state, his principal; and that having received such materials confessedly as agent, for such specific purpose, he could not then apply them to his own use, especially when such application was calculated to defeat the very purpose for which he was entrusted with them.
It may be that a court of equity might under certain circumstances feel called upon to interpose in a case of this character if it were clear that the purposes and policy of the statute providing for the appointment of a state reporter were to be defeated by the publication of a volume of reports compiled by one who had been the state reporter from materials received by him in that capacity, but the state or its assigns would in such a case be required to pursue their remedy in a state court. It would not be a case under the copyright law and this court would not be competent to grant relief.

In this court the relief which is sought in this case must be granted upon the ground of authorship or ownership or not at all, and equities founded upon other rights cannot be made the basis of an action. Crossed out: *This remark will apply to some other of the grounds upon which the learned counsel for the complainants sought to sustain their claim for relief.* In the margin is written: *I think this had better be omitted. Had it not? No objection to it. SN*

It was also argued on behalf of the complainants that although Mr. Comstock might not be bound to go on after the expiration of his office and prepare reports of cases argued during his continuance in the office of State Reporter, yet having voluntarily prepared them, with the assent of his successor and the judges, he must be held to have prepared them in his capacity of State Reporter and that the right of property in the manuscript so prepared was therefore in the State or in the complainants as its assignee.

This is perhaps the strongest ground upon which the complainants can base their claim for relief, and as the notes references and history of each case as contained in the printed volume which is the subject of the present controversy were undoubtedly prepared from the cases, Proofs, points and opinions, many and perhaps most of which were received by Mr. Comstock in his capacity as the State Reporter, there is consequently much force in the argument that he ought not to be permitted to used the manuscripts prepared by them and to defeat the policy of the statute under which he was originally appointed or to the injury of the complainants who under the contract are entitled to the benefits, as publishers, of the official labors of the Reporter.

But we are driven to the inquiry whether the complainants had any right of property in the manuscripts thus voluntarily prepared by Mr. Comstock. There was no property in those manuscripts – they may not even have been in existence until their preparation long after Mr. Comstock left his office and if he was no longer the paid servant of the state and under no obligation to prepare them for the benefit of the State or its assigns it would seem to follow that
the property in them must, as soon as they were created, vest in him by whose labor they were created.

18. That he ought not in equity be allowed to publish them to the injury of the complainants and contrary to the policy of the statute under which he had accepted an office and received a salary would not necessarily vest the property in the State or its assigns. There are many cases in which a party will in Equity be restrained from a particular use of his own property to the injury of another and in violation of the other’s equitable rights, but the existence of such an Equity, if it existed in this case, could not enable a transfer of the property from its original and true owner.

Perhaps we may be also able to present this view of the case in a stronger light if we suppose the question of property present under different circumstances but still depending upon the same facts (so far as the question of title is concerned). Suppose for instance that after the manuscript had been fully prepared for the press and after Mr. Comstock had offered to sell it to the complainants – the price to be [illeg. word] for his own benefit [crossed out: “and that offer had been declined”] he had committed the manuscript to the flames instead of selling it to the defendant Hall; and that thereupon the complainants and the state had brought separate actions against Mr. Comstock to recover damages for the destruction of the manuscript on the ground that the manuscript was their property – could either of them have sustained such an action? Most clearly not, and if so it must necessarily follow that the complainants had no legal title to the manuscript and therefore can have no relief in this court.

The claim based upon the allegation that the Secretary of State deposited in the Clerk’s office of the proper district a printed copy of the title of the volume in controversy has not been separately considered because this claim is necessarily disposed of if I am correct in the conclusion stated. Nor is it necessary to examine 19. the other questions raised upon the argument for the objections to the complainants’ title to relief which have been discussed and held to be well taken strike at any foundation upon which alone the complainants could sustain their claims to relief in this court.

As the Presiding Judge concurs in the result of this opinion, the Bill must be dismissed with costs.

“Yes. S.N”

“Must there be any direction in respect to the damages (if any) occasioned by the injunction?
None can be given. S.N”
Alfred’s Domboc: The Anglo-Saxon Foundations of Magna Carta

Christopher Collins*

Abstract

King Alfred the Great issued his Domboc, England’s first comprehensive compilation of legislation, toward the end of the Ninth Century. Alfred’s Domboc became the foundation of all subsequent English law to the present day, yet it has been eclipsed by Magna Carta and fallen into relative obscurity. The Domboc, though, is at least as worthy of study as Magna Carta. This paper aims to dust off the Domboc and preserve a bit of its memory in the pantheon of English constitutional history.

After the Norman Conquest, the Norman and Angevin kings sought not to destroy native English law and custom, but rather to establish continuity between Anglo-Saxon and Norman/Angevin rule. The new kings used this continuity, and Anglo-Saxon law itself, to legitimate their rule. It was not only the new kings who emphasized continuity with traditional law—even Alfred did so by linking his Domboc to earlier Anglo-Saxon kingdoms. After a brief comparison of Alfred with King John, who begrudgingly issued Magna Carta, this paper will discuss some ways Magna Carta sought to ameliorate ills of the day caused by John’s conflict with the barons and the rolling back of some of the few laws brought from Normandy. Finally, this paper will discuss four topics in Magna Carta with direct links to Alfred’s Domboc: customs and immigration; widows and marriage rights; the idea that the king must be rule by consent and be bound by the law; and the concept of due process and the law of the land.

* Research & Emerging Technologies Librarian and Adjunct Professor of Law, Western New England University School of Law. B.A., Georgia State University, 2009; J.D., University of Alabama School of Law, 2019; M.L.I.S., University of Alabama, 2020. The author thanks Paul Pruitt Jr. for his guidance and friendship.
Introduction

Magna Carta might be misunderstood, but far worse is that King Alfred’s Domboc is so neglected. A.E. Dick Howard wrote that Magna Carta “became and remains today one of the great birthrights of men who love liberty.” But on June 15, 1215, it had nowhere near the significance it has assumed over the past few hundred years—its force of law declined over the next several centuries. J.C. Holt even opened his magnum opus on the Charter with the statement that “Magna Carta was a failure.” And yet we know it as Magna Carta—the Great Charter; but it was less an act of greatness than a preservation of the status quo and perhaps even a bad-faith baronial power grab.

Much of Magna Carta’s influence derives from the fact that it was thought for many centuries to be the oldest extant consolidated written statement of English law. Even after the rediscovery of the old Anglo-Saxon laws, Magna Carta continued nearly worshipped as “a sacred text, the nearest approach to an irrepealable ‘fundamental statute’ that England has ever had.” King Alfred’s Domboc, however, is the oldest extant consolidated written statement of English law, and it is time to rediscover it as the true founding document of Anglo-American legal heritage.

This article aims to show that while Magna Carta is rightfully revered as “a foundation stone of English and American legal rights,” it is not the origin of our liberty-loving rights. Magna Carta

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3 J.C. Holt, Magna Carta 33 (3d ed. 2015).
4 See, e.g., Id. at 72-76.
5 Austin Lane Poole, From Domesday Book to Magna Carta 479 (2d ed. 1955).
6 1 William Blackstone, Commentaries *85.
8 Even the well-known Black’s Law Dictionary has not realized that Alfred’s laws are still with us. Instead, it states that “[t]he code existed until the reign of Edward IV, when it was lost.” Doombook, Black’s Law Dictionary (10th ed. 2014).
is rather a later stone placed upon an Anglo-Saxon legal foundation started by Alfred’s compilation of laws, the Domboc. King Alfred compiled these laws toward the end of the ninth century.\textsuperscript{10} He consolidated longstanding customs and practices from the Anglo-Saxon kingdoms and added Biblical authority.\textsuperscript{11} Alfred’s goal in promulgating his Domboc aimed at and accomplished uniting the English amid existential threats. And the English kings seemed to base their authority partly on continuity with their predecessors—the legitimate king preserved the traditions of his predecessors, and this is the topic of Part I of this paper.

Kings Alfred and John actually had a great deal in common, as will be discussed in Part II, though history has been kind to the former and critical of the latter. Both were unlikely kings, favored by their fathers and dutiful to their brothers. But Alfred inherited a kingdom on the verge of annihilation whereas John would be crowned king of an efficient and almost automated governing apparatus.\textsuperscript{12} This apparatus owed much to the reforms of John’s father, Henry II, but the system itself was built on the works of Alfred and the laws of his Domboc.

Parts III and IV will discuss Magna Carta and the Domboc. Part III will mention two fields that show no Anglo-Saxon precedent: the Charter’s “immediate use” provisions and the introduction of environmental law into the realm of English legislation. Part IV will discuss four common threads that show a continuum between Magna Carta and Alfred’s Domboc. These threads involve the regulation of customs and immigration; the rights of widows and the freedom of marriage; the idea that the king is not above the law and his need to seek counsel from his subjects; and the idea of due process and the equal application of the law of the land.

Every influence English law encountered, including Norman influence, has left an imprint on its character, but the Conquest merely

\textsuperscript{10} Probably around 890 A.D. H.G. Richardson & G.O. Sayles, Law and Legislation from Æthelberht to Magna Carta 17 (1966) [hereinafter Richardson & Sayles, Law and Legislation].


\textsuperscript{12} Henry II had left his children, Richard and John, with a “superb administrative machinery of government” that could function “in the king’s absence ... in war or in peace ... under the strain of repeated, heavy financial demands.” Arthur R. Hogue, Origins of the Common Law 45 (1966).
wove itself into the established Anglo-Saxon fabric.\textsuperscript{13} England did not begin anew when William and his Normans conquered the island.\textsuperscript{14} The Anglo-Saxon system persisted and continued to provide the matrix within which English law would grow.\textsuperscript{15} Magna Carta, like many famous tapestries from the Norman and Angevin era, is made of intricate stitching. The first stitches to Magna Carta were not Norman or Angevin—they were Alfred’s.\textsuperscript{16}

**Legitimacy Through Continuity with Earlier Law**

Magna Carta was reactive, as opposed to proactive, in the sense that it aimed to address acute grievances with King John’s rule\textsuperscript{17}—though many of these issues had arisen under John’s bother’s and father’s reigns.\textsuperscript{18} Among these grievances were “arbitrary judgment[,] abuses of relief, wardship, and marriage[,] testamentary disposition[,] liability for service abroad[,] scutage[,] forestation[,] debts to the Jews[,] and security of life and limb for killing game[;]” as well as the destructive presence of foreign mercenaries during the battling between the barons and King John.\textsuperscript{19}

Like other English law codes before it, Magna Carta reached backward in time for legitimacy. King Henry I’s Coronation Oath adopted and restored the old Anglo-Saxon laws of King Edward the Confessor.\textsuperscript{20} Before him, Henry’s father, William the Conqueror,
adopted Edward the Confessor’s laws as those of his newly-conquered realm. For Edward the Confessor’s part, his legislation was itself a revival of King Alfred’s laws. Even King Alfred’s Domboc was a reach backward in time. The Domboc drew from the Bible and from the dooms of the kings Æthelberht, and Offa of Wessex, Kent, and Mercia, respectively. But Alfred’s Domboc was the first consolidated and comprehensive law code in the continuum between the Anglo-Saxon era and the present day.

Alfred’s Domboc was, of course, a reaction to the ills of his day, but it was also part of the vehicle by which he would keep order in his kingdom. It would always have been a struggle to end blood feuds. And as Asser describes, Alfred struggled with frequent and violent disagreements at the lower court assemblies presided over by Alfred’s reeves and ealdormen. But Alfred was trying to build order in a kingdom nearly ruined by war and invasion.

England had been under constant Viking attack since 835. When Alfred became king in 871, uniting a disheartened populace, many of whom having never known peace, was a formidable task. And he must have struggled his whole life to keep the kingdom together in the face of invasions that would outlive his nearly thirty-year reign.

Alfred’s Domboc may have drawn from past law codes, but his code was designed to cause enduring peace and stability in his realm—“to rebuild,” as Blackstone put it, “on a plan that should endure which my father [William the Conqueror] improved it by the counsel of his barons.”

21 POLLOCK & MAITLAND, supra note 7, at 88.
22 4 BLACKSTONE, supra note 6, at *412.
24 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (1881); see also TOM LAMBERT, LAW AND ORDER IN ANGLO-SAXON ENGLAND 224-27 (2017) (Much effort was made to “keep[] the enmity contained” when feuds erupted. Anglo-Saxon legislation sought to minimize feuds’ damage by “encouraging properly targeted vengeance killings.”).
26 STENTON, supra note 14, at 241.
27 Id. at 243, 249-50.
28 Id. at 269.
for ages... to form one uniform and well-connected whole.” And his laws marked “the beginning of a continuous era of legislation” that would maintain its continuity all the way through Magna Carta and beyond. Alfred’s laws reflect his struggle. With Alfred’s Domboc he did something that had not been done before in England. He took the various laws of his struggling kingdom and taped them together as carefully as he could to keep the whole apparatus from falling apart long enough to rebuild. And because of his efforts, succeeding generations were able to return to his laws in times of need. Kings would reissue them. Subjects would demand them. They became a powerful tool, and those who put forward Alfred’s laws were rewarded with stability. John, however, waited until it was too late to legislate, and Alfred’s laws became a tool used against him.

A Brief Word on the Two Kings and Their Times

It is important to know a bit about the two kings who issued these laws. One, Alfred, issued his Domboc proactively and, undoubtedly, enthusiastically. The other, John, had fought hard against the barons’ demands, and only by force agreed to sign the Charter. At the same time, there was much in common between the two kings. Notably, each was the youngest son of a king and would never have expected (or been expected) to become king himself. Alfred’s father was King Æthelwulf and John’s was King Henry II. Both princes got special treatment from their fathers. John was his father’s favorite son. Alfred got to go twice to Rome, once with his father for an entire year while his brothers stayed behind tending

29 4 BLAKESTE, supra note 6, at *411.
31 It is possible that Alfred produced different versions of his Domboc for Wessex, Kent, and Mercia. The version of West Saxon king Ine’s laws would have been for use in Wessex. Under this theory, a version of the Domboc appended with Offa’s laws would have been sent to Mercia and another with Æthelberht’s to Kent. See BENJAMIN THORPE, Preface to Ancient Laws and Institutes of England, at x (1840).
32 The barons might even have simply been looking for an excuse to overthrow King John, thinking that he would not cooperate with the Charter. POOLE, supra note 5, at 479.
33 ALFRED THE GREAT, supra note 25, at 62; POOLE, supra note 5, at 212, 329.
34 POOLE, supra note 5, at 344-45.
to the serious affairs of government and defending the realm against Vikings.35

Both Alfred and John had older brothers who conspired and rebelled to overthrow their fathers. In Alfred’s case, his brother, Æthelbald, barred their father, Æthelwulf from returning to Wessex as king, retaining the kingdom for himself.36 Henry II’s sons rose up against him in open rebellion and warfare—with some prodding from their mother, Eleonor of Aquitaine.37 In both cases, the brothers were essentially forgiven. Æthelbald was allowed to remain king of Wessex until his death several years later.38 And nearly all of Henry II’s sons and co-rebels were spared prison and pardoned, though their mother, Eleonor of Aquitaine, spent most of the rest of Henry II’s life locked up.39

After their fathers died, both helped their king brothers defend and keep order in their new kingdoms. Alfred, if the records do not misguide, was a faithful sibling and fought many battles against Viking marauders alongside his brother Æthelred.40

John did not act with quite the same good faith to his brother, Richard, that Alfred did to his. John did wield considerable power while Richard was off crusading as an absentee king. Prince John had six counties where he was the de facto ruler, and also acted as “lord of Ireland.”41 Prince John also played a part in securing his brother’s freedom by raising a formidable ransom to extract his brother from Holy Roman Emperor Henry VI’s clutches.42 But John was conspiring against his brother at the same time, though in the end they reconciled.43

Princes and Kings Alfred and John, cradle to grave, lived their lives through times of constant warring. But their similarities largely end there. While there was never another king named Alfred or

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35 Asser, supra note 25, § 11 at 69-70.
36 Asser, supra note 25, § 12 at 70.
37 Poole, supra note 5, at 332-37.
38 Asser, supra note 25, § 13, 18 at 70-71, 73.
39 Poole, supra note 5, at 337-38.
41 Poole, supra note 5, at 348.
42 Id. at 362-68 (Richard had been captured on his return from the Crusades).
43 Id. at 368.
John, Alfred lives on as “The Great” while John’s name has gone down the royal toilet.44

How could it be that Alfred the Great’s laws have faded into obscurity while Magna Carta lives on as The Great Charter—foundation of the common law systems? Alfred’s Domboc had a far greater influence as a foundational document than did Magna Carta. And, excepting the few exceptionally wise professors who teach the Domboc, American legal and historical education has unwisely omitted it from our legal pantheon.

**Parts of Magna Carta Without Anglo-Saxon Precedent**

**The “Immediate Use” Provisions**

In a fairly narrow sense, Magna Carta was a single-use document regarding many of its provisions—it was “restorative.”45 The disposable magic-wand provisions were several. There were those causing the release of any English and Welsh hostages that had been taken over the course of the struggles between the barons and King John.46 Another provision pardoned the “ill-will, wrath, and malice” that had been brought against the king throughout the rebellion.47 Other provisions purported to return any lands that had been taken by either side in the hostilities in both England and Wales.48 One section promised to remove certain undesirable functionaries associated with Gerard de Athyes whom the barons were fed up with.49 And lastly the king promised to expel of all of the mercenaries who had come to England from abroad to fight in the conflict between John and the barons.50

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44 See ROBIN HOOD: MEN IN TIGHTS (20th Century Fox 1993) (Patrick Stewart’s classic King Richard metes out justice to Prince John in Mel Brooks’s masterpiece: “Brother, you have surrounded your given name with a foul stench. From this day forth, all the toilets in this kingdom shall be known as Johns.”).

45 POLLOCK & MAITLAND, supra note 7, at 172.

46 Magna Carta §§ 49, 58 in HOWARD, supra note 1, at 48, 51.

47 Id. at § 62.

48 Id. at §§ 52, 56.

49 Id. at § 50.

50 Id. at § 51.
A New Field of Regulation: Environmental Law

One new facet of law that did arise after the Conquest involved the much-hated forest laws.\textsuperscript{51} Prior to the Conquest, any landowner could hunt game on his own land.\textsuperscript{52} But the Norman and Angevin kings considered all game animals their own, and as such prohibited \textit{any} game hunting without their permission, punishable by death.\textsuperscript{53} Norman and Angevin kings could also punish, by blinding and castration, offenders who hunted in royal forests.\textsuperscript{54} While this had no pre-Conquest antecedent, the Norman and Angevin kings tried to justify the change with appeals to “apocryphal” laws of credible predecessor kings like Cnut.\textsuperscript{55} The forest laws’ “cruel and insupportable hardships”\textsuperscript{56} show that the English would not tolerate such extreme divergence from their pre-Conquest laws and rights. With King John in a poor bargaining position, the barons took the opportunity to revoke the “evil customs” of the forest laws that had been foisted upon them in the prior post-Conquest generations.\textsuperscript{57}

In a way, the forest laws were some of the earliest forms of environmental regulation. The Normans and Angevins had established an entire forest jurisdiction, which, before Magna Carta, seemed to have expanded to the point that it could exercise jurisdiction over people who did not actually live in the forests.\textsuperscript{58} And like the modern ability to create protected forest lands, the Angevin kings seem to have performed that liberally enough throughout England to the point that the barons saw fit to revoke all new royal forests created during John’s reign.\textsuperscript{59}

\footnotesize{\textsuperscript{51} King Cnut had created some royal forests, but their laws and administration were benign compared to the Angevin forest laws. \textit{See infra} note 53 and accompanying text. 
\textsuperscript{52} 2 BLACKSTONE, \textit{supra} note 6, at *414-15.
\textsuperscript{53} \textit{Id.} at *415-16.
\textsuperscript{54} \textit{See} RICHARDSON \& SAYLES, \textit{Governance}, \textit{supra} note 13, at 446.
\textsuperscript{55} RICHARDSON \& SAYLES, \textit{Law and Legislation}, \textit{supra} note 10, at 128; \textit{see} The Laws of King Cnut § 81 \textit{in} THORPE, \textit{supra} note 31, at 421 (“I will that every man be entitled to his hunting, in wood and in field, on his own possession.”).
\textsuperscript{56} 2 BLACKSTONE, \textit{supra} note 6, at *416.
\textsuperscript{57} Magna Carta, \textit{supra} note 46, §§ 44, 47, 48.
\textsuperscript{58} \textit{Id.} at § 44 (The section provides that people who did not live in a royal forest no longer had to appear before the forest justiciars to answer general summonses. This must mean that some had been required to do so before the Charter.)
\textsuperscript{59} \textit{Id.} at § 47. But Holt put forward that the bulk of the royal forest creation was Henry II’s work and that by the end of King John’s}
Related is the regulation of fish trapping in England’s rivers. John had either expressly allowed fishweirs in rivers or, upon signing Magna Carta, was compelled to exercise a latent power to prohibit those bulky fish traps from the rivers. Either way, we see a king using his powers to regulate the use of rivers in conjunction with the power to regulate rights-of-way and commerce, something not often seen before the Norman Conquest—at least not since England had been part of Rome’s Empire.

And likewise we see that the sovereign had been exercising power to take natural resources like wood from his subjects. The Anglo-Saxon kings likely could have taken timber from a subject if they really needed it. The impressive part here, and with all of what we call “environmental” laws of the era, is that they are fairly original and not seen in prior Anglo-Saxon codes unless to give a murderous fallen tree that had killed a man over to his surviving family or to the king.

But these new Norman laws were the exception that proved the rule. They were so unacceptable that they had to be thoroughly and immediately purged. What remains of the rest of Magna Carta’s sections is largely a return to old Anglo-Saxon law and practice. The common threads that connect Alfred’s laws with Magna Carta are not fine, delicate threads that could have broken easily. They are sturdy threads that withstood William’s Conquest of the island, and 150 years later those threads still had force enough to restrain King John and force him into submission. Those threads even steady Anglo-American law to this day, keeping it from being swept from its foundation by new technology and a rapidly-changing culture.

reign, much of those forest lands had already been sold to local lords and communities. Holt, supra note 3, at 76-77.

60 See generally Gonzalo E. Rodriguez, Protecting Inland Waterways: From the Institutes of Gaius to Magna Carta, 10 Unbound 1 (2018).

61 Magna Carta, supra note 46, § 33.

62 Second-Century Roman law seemed to provide both for private diversion of river water and the alienation of servitudes to that water. Eventually Justinian would more clearly define which types of waters would be reserved for public use and which could be privately alienated. Rodriguez, supra note 60, at 4-9.

63 Magna Carta, supra note 46, § 31.

64 See Laws of Alfred, § 13 in Bill Griffiths, Early English Law: An Introduction 63-64 (1995); see also Holmes, supra note 24, at 18-19, 24-25.
Common Threads of Continuity from the Domboc to Magna Carta  
Customs and Immigration

Related to the consequences of blocked rivers and restricted trade, Magna Carta’s proto-immigration provisions have threads tied back to Alfred’s dooms. Section 40 of Magna Carta allows for free movement of merchants. Over 300 years earlier, Alfred’s Domboc had ordered the English not to “harass visitors from abroad.” While not harassing visitors is a vague exhortation, Alfred actually had a fairly comprehensive customs and immigration procedure in place.

When merchants would come in from abroad to engage in commerce, they would check in with the king’s reeve wherever they might land. They would notify the reeve of who they were and what they came to do. Merchants were not allowed to bring more help inland than was absolutely needed, and even then they would have to provide surety that they would cause no trouble.

Alfred’s treaty with Guthrum shows a similar regulation of trade, immigration, and the border. Section 5 of the treaty shows that, after they negotiated their peace, the two sides decided to allow their subjects to cross the borders (with permission) and engage in commerce, provided hostages were left as surety. Like Alfred’s other laws, these trade, transit, and proto-immigration sections were essential to preventing order and stability from slipping from his grasp.

England would have desperately needed commerce during the Viking invasions, and war is bad for business. Alfred needed a way to maintain the flow of trade without putting his kingdom at risk of further invasion by opening his doors to marauders. His customs and immigration protocol allowed him to accomplish both of those objectives. The barons forced John to promise to let merchants come and go, so it must be the case that he had restricted their

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65 HOWARD, supra note 1, at 45.
66 Preface to the Laws of Alfred, supra note 64, § 33.
67 Laws of Alfred, supra note 64, § 34.
68 Id.
69 Id.; STENTON, supra note 14, at 528.
70 Treaty Between Alfred and Guthrum § 5 in ALFRED THE GREAT, supra note 25, at 171.
71 Id.
movement during his reign. Naturally, the barons would have buckled under such a hindrance on their ability to acquire resources from abroad, and John's possible logic to choke the rebel barons' finances and manpower obviously backfired. And it was not only foreign merchants who must have been restricted, because the barons also felt the need to demand a broader freedom-of-movement provision. Section 42 stated that “in the future it shall be lawful... for anyone to leave and return to Our kingdom safely and securely by land and water, saving his fealty to Us.” John must have closed his borders to many of his subjects to provoke such a wording.

**On Widows and the Freedom to Marry**

Likewise, Magna Carta’s protections of widows didn’t just pop out of the ether either. Magna Carta’s seventh section allowed widows unconditionally to have their dowers, and quickly. Compare this with Henry I’s Coronation Oath whereby the widow “shall have her dower and marriage gift.” Magna Carta’s eighth section states that “no widow shall be compelled to marry.” Compare this with Henry I’s promise that he “shall not give [a widow] except in accordance with her wish.” Alfred, too, emphatically legislated the protection of widows. “Do not harm widows,” his Domboc commands, “[or] I will ensure that your wives shall be widows.”

At first glance, these provisions might seem like an early example of women’s freedom to marry. It seems, though, that the earlier precedent might come from practices among Germanic women where they tended not to marry at all after the death of their husbands.

Tacitus wrote of Germanic tribes where women took “one husband only, just as one body and one life.” This custom would have led over the centuries to an established practice of not forcing widows to get married again. And if they were not expected to remarry after

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72 Magna Carta, *supra* note 46, § 41.
73 *Id.* at § 42.
74 HOWARD, *supra* note 1, at 38.
76 HOWARD, *supra* note 1, at 38.
78 Preface to the Laws of Alfred, *supra* note 64, § 34.
a husband’s death, the Norman overlords would have caused considerable outrage by forcing Anglo-Saxon women to marry after they had done their time, as it were. It was this safety to stay unmarried, rather than the freedom to choose whom to marry, that Alfred sought to protect when he commanded widows not to be mistreated.  

Rule from Below the Law

It is Magna Carta’s more structural aspects that have left the lasting impression. But even those were not necessarily new expressions of law. Take, for example the impressive declaration that Magna Carta established that the king was not to be above the law, but instead “forced to agree to this declaration of rights and liberties[,] set[ting] an example that could never be erased.” But English kings already had ancient checks on their powers, and that had been the case in England for a long time before the Conquest.

Even over a thousand years before Magna Carta, centuries before the Angles and the Saxons migrated from the continent to England, Tacitus wrote that the Germanic kings’ powers were “not unlimited or arbitrary.” While the kings and chiefs could take charge unilaterally of smaller decisions, more important issues had to be taken by the community at large. We can see this limitation conjured in Magna Carta in the provisions calling for the common counsel of the kingdom when undertaking important issues. And, arguably, John had actually consulted his barons on important issues—their gripe was that he merely had not done so when raising

80 King Cnut’s laws represent a middle ground, both in substance and in time, where a widow was allowed to marry whomever she wanted, but only after waiting a year after her husband’s death. More impressive is that women were not to be forced to marry men they disliked. The Laws of King Cnut, supra note 55, §§ 74-75.
81 HOWARD, supra note 1, at 23.
82 The assertions by Pollock and Maitland, taken together, that Magna Carta was both “restorative” as well as a statement “that the king is and shall be below the law,” must mean that the kings of England had not been above the law before 1215. Restoring that the king be not above the law means that the king was not formerly above the law. POLLOCK & MAITLAND, supra note 7, at 172-73.
83 TACITUS, supra note 79, at 7.1.
84 Id. at 11.1-2.
85 Magna Carta, supra note 46, §§ 12, 14.
taxes. Magna Carta’s common counsel sections were thus absolutely not new or novel. Instead, they demonstrate what had been the steadily and severely weakening power of the common counsel of the realm, which would only begin to regain its strength with the growth of Parliament after John’s death. This longstanding Germanic tradition was found among the Anglo-Saxons in the form of the witan.

In Anglo-Saxon times, a king would not normally be recognized, crowned, or obeyed without the consent of “the great council of the realm, the witenagemot.” This tradition “kept alive the principle that the king must govern under advice.” The Normans were of Germanic stock too, but they spoke a dialect of French and had adopted many of the French customs and governing practices. So while the descendants of Hrolf and his band of Northmen were not entirely French, the Norman dukes still managed to shake much of the Germanic tradition of rule by consent. To their English subjects, it must have seemed a gross injustice to dispose of the practice. But the English absolute monarch was a fiction in 1215, as it had been for centuries, though John clearly thought otherwise when he mused “Why do not the barons, with these unjust exactions, ask my kingdom?”

Due Process and the Law of the Land

Furthermore, the idea that all are to be protected by the due process of law was not spontaneously spawned in 1215 either. Magna Carta had three important sections concerning the rights of men to justice. No trial would be brought without at least some credible accusation by a witness. No detention or punishment would be

86 Richardson & Sayles, Governance, supra note 13, at 145-46.
88 Stenton, supra note 14, at 236-37.
89 Id. at 550-54.
90 Id.
91 Pollock & Maitland, supra note 7, at 66.
93 While the Norman dukes did convene councils, they seemed more to operate as a rubber stamp rather than to provoke serious deliberation. And they met much less frequently than their Anglo-Saxon counterparts. Stenton, supra note 14, at 555-56.
94 Howard, supra note 1, at 7-8.
95 Magna Carta, supra note 46, § 38.
permitted on any “free man” except “by the law of the land.”96 And there should be no selling, denying, or delaying of justice to anyone.97

Compare this with Alfred’s Domboc, which states that the law should be the same for rich or poor, friend or foe.98 Alfred’s laws also prohibit that any innocent man be held or punished.99 There is continuity between these Magna Carta sections and Alfred’s laws. Equally so, it must be emphasized again that the point is to raise Alfred’s Domboc, rather than lower Magna Carta. The equal and just application of law is essential to a free society, and Magna Carta deserves every bit of respect and honor it gets. But the important takeaway is that so much of Magna Carta is a reincorporation of Alfred’s laws that persisted over the centuries and continue to persist today.

This was not a situation where the barons were suddenly the first in England to conceive of the idea that the law should be predictable and fairly applied. Alfred used that very same idea as the glue that kept his kingdom together when the world was falling apart around and within it. In this context, Magna Carta becomes “of far greater political interest than of legal interest.”100 Magna Carta created very little new law. It was, however, a powerful use of the existing ancient custom that the king was to rule by consent.

In England, the practice of a king’s subjects subjugating him to their will tended not to be tested because rival kings were the ones to overthrow neighboring kings. And uprisings from within were crushed or settled. So it is a shame history never got to see the aftermath of making King John submit to the common counsel of the realm. With the Pope’s annulment of the Charter, John would surely have rebelled against his barons. Would the barons have made him submit again? Would they have installed their own king by the old ways of electing him? We must be content that John’s successors went on to reissue many of the same ancient laws he had [begrudgingly] signed, just as Henry I, William I, Edward the Confessor, Cnut, and all the way back to Alfred had done before him.

96 Id. at § 39.
97 Id. at § 40.
98 Preface to the Laws of Alfred, supra note 64, § 43.
99 Id. at § 35.
100 RICHARDSON & SAYLES, LAW AND LEGISLATION, supra note 10, at 151.
Conclusion

Magna Carta, like Alfred’s dooms, cannot really be said to contain many new, groundbreakingly original expressions of law. It was rather only one part of a continuity with our past and a reflection of the conflicts that raged throughout those periods, a stitch in a greater tapestry that we continue to weave today. But its pattern was set in place by Alfred to provide stability in a kingdom crumbling under invasion, deprived of knowledge and learning, and wary of trusting and uniting. Alfred himself did not create much in the way of new law either. Instead of wiping the slate clean, Alfred reached back in time and grasped for anything that could normalize life in Wessex and in England in lawless times.

To do so, Alfred took what had worked to unite prior groups of Angles and Saxons and many other Germanic tribes over the centuries. He took their ancient customs and he established them as rights and responsibilities belonging to all in common. Several of these customs were noted by Tacitus, but more had probably gone unnoticed for time immemorial. But Alfred established that they would continue.

Next, he took the Bible’s laws as that of his kingdom, giving spiritual and moral credibility to his Domboc and preventing his Christian subjects from feeling torn between what is law and what is moral. This was a wise way to stitch together a demoralized Christian society beset by never-ending waves of pagan invaders, poverty, and violence.

Finally, Alfred took the laws of the great Anglo-Saxon kingdoms and wove them into one contiguous law code. Doing so allowed subjects of each kingdom to feel that they were not subjugated by a new king (why bother, in that case?) and instead to feel like they were part of a greater whole: English, rather than Mercian, West Saxon, or Kentish. Without this sense of unity, there would have been no surviving the Viking invasions, and the world would look a much different place today. Instead, Alfred deserves every bit of his name and sobriquet: King Alfred the Great. By weaving together the ancient Anglo-Saxon customs, the various kingdoms’ historic law codes, and the unifying authority of the Bible, Alfred created the great Domboc. The Domboc deserves recognition as England’s first consolidated law code and the lattice pattern into which all subsequent law stitched.

101 Excepting the “environmental” topics concerning forests, resources, and rights-of-way discussed supra notes 51-64 and accompanying text.
We are surely right to revere Magna Carta, but it is a mistake to consider it the sole origin of our rights and liberties. Magna Carta is immortal and will stand forever for the time that the common counsel of the realm pushed back and refused the wiping away of its historic customs and institutes. But we should recognize, raise, and revere the earlier contribution of Alfred who wove together the many threads of law and tradition into the legal tapestry that we have only added to, but never replaced.

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BOOK REVIEW


Richard Ovenden began working at the Bodleian Library at Oxford University in 2003 as the Keeper of Special Collections and Western Manuscripts. He became Bodley’s Librarian, director of the Bodleian Libraries, in 2014. Prior to that time, he worked in the Durham University Library, the House of Lords Library, the National Library of Scotland, and at the University of Edinburgh. In 2018, after witnessing the deportation of members of the Windrush generation, British subjects who had arrived in the UK before 1973 from Caribbean countries, because the Home Office had deliberately and systematically destroyed the landing records that could have provided proof of citizenship, Ovenden was motivated to write Burning the Books: A History of the Deliberate Destruction of Knowledge.

In Ovenden’s own words, the book is about the “social importance of preserving knowledge seen through the lens of how organized bodies of knowledge in the form of libraries and archives have been targeted through history.”1 His book is “intended to take that long view and to examine the motivations of those who sought to eradicate the past and deny the truth.”2

The book lays out a series of case studies, selected stories arranged chronologically, intending to drive home the importance of libraries and archives to the preservation of knowledge. Through the course

of time, the formats used to record what was known have changed dramatically. Libraries have held and organized cuneiform inscribed clay tablets, illustrated manuscripts, printed documents and monographs, and digital media. Ovenden recounts stories of attempts to erase history through neglect or malice and the herculean efforts made, not always successfully, to ensure the preservation of records, documents, and literature.

In one very personal example of the positive effect of a great book, Ovenden tells of his own relationship with the Bodleian’s copy of The Romance of Alexander. He says, “Even after seventeen years at the Bodleian, this volume still sends a shiver of delight down my spine – the sensory pleasures of the glimmering gold leaf, and the rich pigments brightening the page in combination with the beauty of the script, and the heavy sound that the large sheets of parchment make as you turn the pages. It is one of the world’s great cultural treasures.” He goes on to describe the influence that this same book had on William Morris, “one of the most influential artists, designers, writers and political thinkers of the nineteenth century,” As an undergraduate at Oxford, Morris had a reckoning with the book very similar to Ovenden’s experience and it provided a continual source of inspiration for his life’s work.

Ovenden presents another example of a cultural icon that might be closer to the hearts and minds of law librarians. The Magna Carta is a document that holds an importance that echoes through time. Lest we forget the importance of the physical object, Ovenden reminds us. “If the power of the actual documentary remains of the thirteenth-century Magna Carta is doubted, one of the seventeen surviving copies was sent to America in 1941 by Winston Churchill as a totem for ensuring American engagement in the Allied cause in the Second World War.”

The losses described in Burning the Books include the demise, through fire and neglect, of the Great Library of Alexandria in the first century of the Common Era, the destruction of Duke Humphrey’s library at Oxford in an effort to remove all traces of Roman Catholicism during the Reformation, and the burning of the Library of Congress by the British in 1814 in an effort to weaken the state’s ability to function. In 1992, Sarajevo’s National Library was burned to the ground during a siege led by Bosnian Serbs, and three million books were lost. Libraries and archives have been continuously targeted throughout history, even while librarians
understand “the ethos that knowledge holds great power, that the pursuit of gathering and pursuing it is a valuable task.”\textsuperscript{6}

Why is this book important to the custodians of legal history? Strategic planning is a consideration. The work might be classified in our office collections which include professional material. Stories in this book can be used to bolster arguments to the outside world, and convey a sense of urgency to decision makers in the parent organizations which fund our libraries, or to potential allies who might need to understand the seriousness of any threat to libraries and archives. Ovenden chose to write this book to give an historical overview of how and why libraries have survived, providing us with hope and tools. The book contains an elegant argument for the preservation of physical objects (books and ephemera) and physical space (libraries to house the physical objects), while ever expanding the concept of preservation of knowledge to include the digital realm.

Barbara Schneider
Retired Head Law Librarian
Massachusetts Trial Court
Berkshire Law Library
Pittsfield, MA

\textsuperscript{5} Id. at 75.
\textsuperscript{6} Id. at 37.