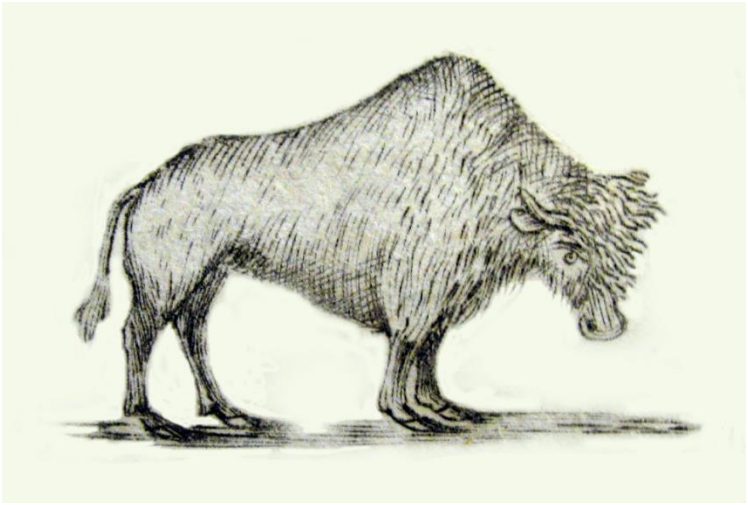
UNBOUND

A Review of Legal
History and Rare Books



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UNBOUND

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Articles on legal history and rare books are both welcomed and encouraged. Contributors need not be members of the Legal History and Rare Books Special Interest Section of the American Association of Law Libraries.

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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.

BOARD OF EDITORS

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From the Editor

In the Spring of 2023 I finished editorial layout on what I had thought was my final issue of *Unbound: A Journal of Legal History and Rare Book*s, Volume 14, numbers one and two. Fifteen years earlier I had been founding Editor of *Unbound.* I thought it was time to pass the Editor-in-Chief position on to another.

A little over two years later, I am back—at least temporarily—as Editor-in-Chief. We are working to bring this dormant Phoenix back from the ashes.

When I agreed to return as Editor, multiple articles and reviews that had been awaiting publication were forwarded to me. My apologies to those who had submitted material that remained unpublished for far too long.

I extend sincere thanks to our editors, Noelle M. Sinclair, Kurt X. Metzmeier, and Ryan Greenwood. Without their assistance this issue would not have come together.

Hopefully we will get a Fall/Winter issue out in December or January. Please send me your articles and reviews for inclusion in that issue! It was also suggested that our 2026 issues should have a Semiquincentennial theme. I think that is a great idea!

I hope that you all will enjoy this issue of *Unbound.*

Mark W. Podvia

ARTICLES

The Steal Revealed: Joost De Damhoudere's *Praxis Rerum Criminalium* (1554) and the History and Reception of a Plagiarism

Bruno Debaenst*

Introduction

In the history of legal publishing, perhaps the most vividly illustrated doctrinal law book is Joost De Damhoudere's 1554 work of criminal law, *Praxis Rerum Criminalium*. This extraordinary handbook and guide to Flemish-Roman criminal law and procedure remained popular for more than a century throughout the Low Countries and northern Europe, where it had enduring interest and value for legal practitioners and students in various printed editions. The distinctive images of the *Praxis*, depicted in more than fifty fine woodcuts, graphically illustrate the crimes that are the book's main subject and provide a series of visual aids to the material at hand. This wide array, including depictions of grave robbing, murder, mutilation, fraud, slander and other crimes, stimulated the imaginations of generations of readers. The woodcuts and the useful, compendium-style treatment of the subject help to account for the work's outstanding commercial success in several languages and the fame that De Damhoudere accrued for centuries through its popularity.

This remarkable book, however, has a much less visible "dark secret". Joost De Damhoudere (1507-1581) essentially plagiarized the *Praxis* from a manuscript written by an earlier Flemish lawyer, Philips Wielant (1441–1520). This surprising aspect of the book's history accounts for De Damhoudere's varying fortunes in nineteenth and twentieth-century continental legal history, particularly in Belgium, where De Damhoudere has been at times lionized as a

* I am currently Associate Professor of Legal History at Uppsala University (Sweden). During the Spring semester of 2022, I served as a Visiting Professor at the University of Minnesota Law School. I would like to express my gratitude to Ryan Greenwood, who introduced me to the copies of Praxis Rerum Criminalium housed in the Stefan A. Riesenfeld Rare Books Research Center at the University of Minnesota Law Library. These volumes provided the original inspiration for this article.

jurist of the first importance. It is notable that De Damhoudere certainly knew that he plagiarized the *Praxis* and perhaps knew that his plagiarism was based on Wielant's manuscript. Yet De Damhoudere both claimed the work as his own and took steps to prevent others from selling and profiting from the book. His actions suggest the deeply commercial motives that informed its publication, though in an atmosphere of humanism in which the added value of its illustrations made the work into an object that was more than a 'mere' law book.

The early modern period provided no modern protections of intellectual property, yet this did not preclude authors' moral indignation over stolen literary productions. Despite an appreciation of the book today among modern collectors and those who study legal iconography, the work and its history of plagiarism is not well known, particularly in North America, in part because significant scholarship has appeared in Dutch rather than English. The purpose of this article is thus first to introduce the *Praxis Rerum Criminalium* to an English-language audience, to discuss the plagiarism behind it, to examine the reception of the text, and to reconstruct the discovery and subsequent appreciation of its "dark secret" by later generations of scholars.

Wielant, De Damhoudere, their Works and the Plagiarism

The true author of the text, Philips Wielant, was born on May 14, 1441, in the city of Ghent within the County of Flanders.[1] He studied *artes* at the University of Paris and civil law at the University of Leuven, where he obtained his law degree on December 5, 1464. Wielant enjoyed a brilliant career in the highest echelons of the Burgundy and Habsburg Netherlands. He was councillor to the dukes of Burgundy, member of the Council of Flanders (the highest court of the County of Flanders), member of the Parliament of Mechlin (the highest court of the Burgundian Netherlands) and member and vice-president of its successor the Great Council of Mechlin (the highest court in the Habsburg Netherlands). He was also a mayor of the Liberty of Bruges and a diplomat. At the end of his life, he produced a number of important legal texts. Between 1511 and 1519, he wrote the *Recueil des antiquités de Flanders*, an

[1] The most complete and up-to-date biography on Wielant and his works can be found in Jos Monballyu, *Filips Wielant. Verzameld Werk. I. Corte Instructie in Materie Criminele* (Brussels, 1995) 7-27. Further references in Dutch and French can be found in footnote 3. Unfortunately, there is no extensive biography of Philips Wielant in English.

overview of the ancient rights and privileges of the county of Flanders, which he needed as a diplomat in his negotiations with the French King. In addition, Wielant authored a manual on civil procedure, *Corte instructie in materie civile* or *Practycke civile*, in versions written between 1508 and 1519.[2] In 1558, the Antwerp publisher Hans de Laet made use of one of those manuscripts to publish an abridged version.[3] In 1573, another publisher, Hendrik van der Loe, used two of Wielant's manuscripts to publish a more elaborate version of this manual, which was frequently reprinted later.[4] Finally, Wielant also wrote a manual on criminal procedure, *Corte instructie in materie criminele* or *Practycke criminele*, in three different versions in 1510, 1514-15 and 1519.[5] This work remained in manuscript until 1872.[6] Wielant died on March 2, 1521.

Joost De Damhoudere is born on November 25, 1507 in the city of Bruges in the County of Flanders.[7] He studied law in Leuven (1524-

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[2] On the first redaction from 1508, see Jos Monballyu, "De eerste redactie van de corte instructie omme de jonghe practisienen in materie civiele van Filips Wielant (1508)," in *Handelingen van de Koninklijke Commissie voor de uitgave der oude wetten en verordeningen van België*, 43 (2002): 95-99. For an older analysis of the Wielant's manual on civil procedure, see Herbert Paul Schaap, *Philips Wielant en diens corte instructie omme jonghe practisienen in civile zaken* (Haarlem, 1927).

[3] For a description of this 1558 edition, see Herbert Paul Schaap, *Philips Wielant en diens corte instructie omme jonghe practisienen in civile zaken* (Haarlem, 1927): 111. In 1968, Strubbe published it again: Egied Strubbe, *Philips Wielant. Practijke Civile* (Amsterdam, 1968).

[4] See Jos Monballyu, "De eerste redactie van de corte instructie omme de jonghe practisienen in materie civiele van Filips Wielant (1508)," in *Handelingen van de Koninklijke Commissie voor de uitgave der oude wetten en verordeningen van België*, 43 (2002): 96-97. For an analysis of the later reprints in 1598, 1606, 1613, 1622, 1642 and 1646, see Schaap, 112-114.

[5] Jos Monballyu, *Six Centuries of Criminal Law: History of Criminal Law in the Southern Netherlands and Belgium (1400-2000)* (Leiden/Boston, 2014): 17.

[6] Auguste Orts, *Practijcke criminele van Philips Wielant, naar het eenig bekende handschrift* (Ghent, 1872). The quality of this edition was rather poor. In 1995, Jos Monballyu published a more scientific edition. Jos Monballyu, *Filips Wielant. Verzameld Werk. I. Corte Instructie in Materie Criminele* (Brussels, 1995).

[7] For a biography and further references on Joost De Damhoudere, see Jozef Dauwe & Jos Monballyu, *Practycke ende handbouck in criminele zaeken, verchiert met zommege schoone figuren ende*

1528) and Orléans (1528-1531).[8] After his return to Bruges, he first practised law and then became active as adviser of the city magistrate. In 1544, he published a study on the guardianship of minors (*Patrocinium pupillorum, minorum atque prodigum*), and in 1546 another study on public auctions (*Subhastationum compendiosa exegis*). At the end of May 1550, De Damhoudere was appointed clerk of the criminal court in Bruges. Around that time, most likely, he decided to publish a study of criminal law. This would become the *Praxis*, which was ready for publication by the end of 1551. However, it was not until 1554 that the book was in fact published, due to a delay in the completion of the extensive, detailed woodcuts that De Damhoudere had commissioned for the work. His book finally appeared in Leuven as *Enchiridion rerum criminalium* and in Antwerp as *Praxis rerum criminalium*. In the same year, he also published a French translation, and in 1555 a shortened Dutch version was released. By 1551, De Damhoudere had been appointed a member of the Financial Council, a position he would hold until 1576. During these years, he continued publishing, including a book on civil procedure, *Praxis rerum civilium*, in 1567. He died on 22 January 1581 in Antwerp.

De Damhoudere's *Praxis rerum criminalium* is without question his most ambitious work, and (apart from the plagiarism) may be considered his "masterpiece." An immediate commercial success, it was reprinted many times in the Netherlands, Lyon, Venice, Cologne and Wurzburg. Damhoudere himself revised it in 1562, 1570

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beilde ter materie dienende, door Joos de Damhouder. Anastatische herdruk naar de editie Leuven 1555 (Roeselare, 1981). In English, see Harald Maihold, "Damhouder, Practical Handbook on Criminal Matters," in Serge Dauchy, Georges Martyn, Anthony Musson, Heikki Pihlajamäki & Alain Wijffels (ed.), *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing* (New York, 2016): 99-102.

[8] Many biographers of De Damhoudere claim that he also studied in Padua. For a recent example, see Harald Maihold, "Damhouder, Practical Handbook on Criminal Matters," in Serge Dauchy, Georges Martyn, Anthony Musson, Heikki Pihlajamäki & Alain Wijffels (ed.), *The Formation and Transmission of Western Legal Culture. 150 Books that Made the Law in the Age of Printing* (New York, 2016): 99-102. There is, however, no historical proof about this. This was already brought forward by Jean-Jacques Haus in 1871: Jean-Jacques Haus, "La Pratique criminelle de Damhouder et les ordonnances de Philippe II," *Bulletins de l'Académie Royale des sciences, des lettres et des beaux-arts de Belgique*, 31 (Brussels, 1871): 420. See also Egied Strubbe, "Joos de Damhouder als criminalist," *Tijdschrift voor Rechtsgeschiedenis*, 38 (1970): 5.

and 1576-1581. The book earned him a reputation as criminalist that would last for several centuries, even though the sterling reputation was rather ill-deserved. In fact, Damhoudere failed to recognize his dependence on Wielant again in his later work, *Praxis rerum civilium*.

Yet it is too much to call *Praxis rerum criminalium* a work of pure plagiarism. De Damhoudere did the work to translate the *Praxis* into Latin. He also made numerous additions, ranging from scholarly comments and references to legal literature, to completely new chapters. The Latin language and the scholarly format not only gave *Praxis rerum criminalium* a more scientific look, but also made it accessible to lawyers outside of the Low Countries. The same arguments, however, do not apply to the French and Dutch versions of the *Praxis*. De Damhoudere presented the latter as a Dutch translation of the *Praxis rerum criminalium*, while in fact more than ninety per cent of the text was copied from Wielant. This did not prevent De Damhoudere from asserting in the introduction that it was the fruit of his own personal study. Yet he went to great lengths to hide the true origins of the work. As one of the most telling instances of his deceit, De Damhoudere systematically replaced all the references to Ghent with references to his own hometown of Bruges.

One important question that may be asked is why the plagiarism went undetected. It seems that contemporary lawyers and city officials did not notice the plagiarism, or said nothing about it. One explanation of this is that Wielant's work was available in a limited number of manuscripts, so that very few if any people living in the 1550s knew about it. Indeed, many of the manuscripts did not mention Wielant's name. It is in theory possible that even De Damhoudere himself did not know the author of the manuscripts he possessed and that this would explain why he did not give Wielant credit. But even in this case, the fact remains that De Damhoudere knowingly presented someone else's work as his own.

Egied Strubbe, who studied De Damhoudere's work extensively, suspected that the book's publishers were also involved in covering up the truth.[9] De Damhouder's criminal manual first appeared in Dutch in 1555. One year earlier, in 1554, publisher Hans De Laet published a treatise authored by Wielant on feudal rights. In 1558, the same printer also published Wielant's manual on civil proce-

[9] Egied Strubbe, "Die Stellung Damhouders in der Rechtswissenschaft. Wielant – De Damhouder," *Przewodnik Historyczno-Prawny*, 1 (Lviv, 1930): 219-226.

dure. Most likely, De Laet was also in possession of Wielant's manual on criminal procedure, but he decided not to publish it, because De Damhoudere had beaten him to it and also because De Laet had received the rights to sell De Damhoudere's manual on criminal procedure.[10] In other words, De Laet did not have an incentive to publish Wielant's version. At the same time, the publication of Wielant's manual on civil procedure by De Laet did prevent De Damhoudere for publishing his own manual on civil procedure in Dutch, because the plagiarism would have been obvious. But De Damhoudere did dare to publish a Latin translation of that work in 1567, and a French one in 1572.

The Afterlife of the Plagiarism

In the seventeenth and eighteenth centuries, Joost De Damhoudere was known across Europe as the great Flemish criminalist of his time, due to the many reprints of his *Praxis rerum criminalium*. Philips Wielant unfortunately did not enjoy the same reputation, though he was not completely forgotten. In 1624, Antonius Sanderus devoted two pages to him in his book on learned scholars from Ghent, and even mentioned his manual on criminal procedure.[11] Around one hundred and fifty years later, in 1769, Jean-Noël Pacquot wrote ten pages about Wielant.[12] He also mentioned the *Pratique Criminelle* among Wielant's works, so we know that this manuscript was still known at that time.[13] Pacquot further pointed out that De Damhoudere had been using Wielant's "*[p]ratique, manière, & stile de procèder suivant les dispositions du Droit écrit en matière civile*" to write his own text of the *Pratique civile*:

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[10] "*Schon ein Jahr vorher, in 1554, hatte H. De Laet zu Antwerpen, die Abhandlung von Wielant überdas Lehnrecht herausgegeben. Veilleicht hatte dieser Verleger, der alle juristischen Schriften Wielants veröffentlicht hat, das Vorhaben gehabt auch Wielants Darstellung des Strafprozesses herauszugeben. Jedoch nach der Ausgabe der flämischen "Praxis" Damhouders muss er davon Abstand genommen haben, umso mehr als er vom Verleger Damhouders den Mitvertrieb des Buches dieses letzteren bekam und es daher für ihn gar keine Interesse mehr hatte die Schrift Wielants zu verlegen.*" Strubbe, "Die Stellung Damhouders" (1930): 222.

[11] "sicut nec *tractatus Ordinis Indiciarij in causis criminalibus* ab ipso etiam compositus", Antonius Sanderus, *De Gandavensibus eruditionis fama claris* (Antwerp, 1624): 115-116.

[12] Jean-Noël Pacquot, *Mémoires pour servir à l'histoire littéraire des dix-sept provinces des Pays-Bas, de la principauté de Liège et de quelques contrées voisines, volume XV* (Leuven, 1769): 48-57.

[13] Pacquot: 57.

"*Josse de Damhoudere n'a souvent fait que la paraphraser pour composer la sienne.*"[14] In other words, Damhoudere's dependance on Wielant was known, at least as far as his manual on civil procedure was concerned.

For most of the nineteenth century, De Damhoudere was celebrated as the most important "Belgian" lawyer.[15] Jacques Britz, for instance, wrote in 1847 that the *Praxis rerum criminalium*, his main work, earned him rightful praise from lawyers of all times and all places.[16] He stated that De Damhoudere was "*one of our greatest and most productive legal scholars*".[17] Similarly, in 1864, Jean-Servais-Guillaume Nypels considered De Damhoudere the Belgian legal scholar with the greatest reputation.[18] His works were circulated widely in Europe and he was cited often, as much as the noted jurists Julius Clarus, Farinacci or Carpzov. In 1870, Edmond Poullet called him "*notre premier criminaliste de profession*".[19]

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[14] Ibid.

[15] Belgium as an independent country only came into existence after the Belgian revolution of 1830-1831.

[16] *"En 1554, il publia sa Pratique du droit criminel, son ouvrage capital qui lui acquit les justes éloges des jurisconsultes de tous les temps et tous les pays.*" Jacques Britz, "Mémoire en réponse de la question suivante: Les Anciens Pays-Bas Autrichiens ont produit des jurisconsultes distingués, qui ont publié des traités sur l'ancien droit Belgique, mais qui sont, pour la plupart, peu connus ou négligés. Ces traités, précieux pour l'histoire de l'ancienne législation nationale, contiennent encore des notions intéressantes sur notre ancien droit politique; et, sous ce double rapport, le jurisconsulte et le publiciste y trouveront des documents utiles à l'histoire nationale", in *Académie royale des sciences, des lettres et des beaux-arts de Belgique, Mémoires couronnés et mémoires des savants étrangers*, XX (Brussels, 1847): 87.

[17] *"Damhoudere est un de nos grands et de nos plus féconds jurisconsultes.*" Ibid.: 89.

[18] *"De tous les jurisconsultes belges, DAMHOUDER est celui dont le nom a été le plus célèbre. Ses ouvrages étaient répandus dans toute l'Europe civilisée, on les invoquait partout, à l'égal de ceux de Julius Clarus, de Farinaccius et de Carpzow.*" Jean-Servais-Guillaume Nypels, *Bibliothèque choisie du Droit criminel* (Brussels, 1864): xcvi.

[19] Edmond Poullet, *Histoire du droit pénal dans le Duché de Brabant, depuis l´avènement de Charles-Quint jusqu'à la réunion de la Belgique à la France, à la fin du XVIIIe siècle, 1870 (Mémoire en réponse à la deuxième question du concours de 1869 de la Classe des lettres de l'Académie royale de Belgique, et couronne dans la séance publique du 11 mai 1869*): 44.

On 15 Octobre 1852, the *procureur général* (attorney general) Charles-Victor De Bavay held his *mercuriale*, an opening lecture at the beginning of the judicial year, on De Damhoudere.[20] It was not uncommon for such lectures to treat famous Belgians in order to glorify the country, which existed in their eyes long before Belgian independence (1830-1831).[21] De Bavay explained that the French had introduced a new legal system, with the result that the older literature was no longer consulted.[22] Nevertheless, the name De Damhoudere was included. What followed was a mixture of humorous anecdotes – always useful to maintain the audience's attention – and true admiration for De Damhoudere and his significance.[23]

Many principles he articulated were still valid in De Bavay's time, and through De Damhoudere's work historians could learn about the customs and morals of the "*brillante époque de Charles-Quint*".[24] German scholars admitted that De Damhoudere had a huge influence on criminal law all over Europe.[25] In short, when De Damhoudere died in Antwerp on 22 January 1581, he had reached a life goal: through his works, he had achieved fame.[26]
Not long after De Bavay's lecture, however, De Damhoudere's reputation was called into question. In 1867, August Orts, a Brussels lawyer, historian and liberal politician, published an article on

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[20] Charles-Victor De Bavay, *De Damhouder. Conseiller es domaines et finances de Charles V et Philippe II. Discours prononcé par M. le procureur général De Bavay, à l'audience de rentrée de la Cour d'appel de Bruxelles, le 15 octobre 1852* (Brussels, 1852): 16.
[21] For an analysis of the *Mercuriales* in Belgium in the nineteenth century, see Aude Hendrick, *"Des mots de circonstances". Les discours de la haute magistrature belge au XIXe siècle* (Brussels, 2012).
[22] For an explanation about this, see Bruno Debaenst, "An introduction to Belgian Legal Culture" in Sören Koch, Jörn Öyrehagen Sunde (ed.), *Comparing Legal Cultures* (Bergen, 2020): 431-469.
[23] De Bavay for instance referred to witchcraft (p. 7) or to the list of items that were acceptable to give to a judge, without being considered a bribe: "hares, canines, capons, partridges, herrings, bars, starlings, salmon and all kinds of wines and beers" (p. 9).
[24] De Bavay: 11.
[25] E.g., De Bavay (p. 8): "on le reconnaît en Allemagne, exercé une grande influence sur le droit criminel dans toute l'Europe" (cfr. H.J. Rosshirt, *Geschichte und System des deutschen Strafrechts* (Stuttgart, 1838), vol. 1: 287).
[26] "… et il mourut à Anvers le 22 janvier 1581, après avoir atteint, croyons-nous, le but de toute sa vie, celui, comme il le disait : de "*prouver au monde par ses œuvres, qu'il avait vécu en ce bas être*" (p. 16).

Philips Wielant in *La Belgique Judiciaire*, the leading Belgian legal journal of the time.[27] He pointed out that De Damhoudere had paraphrased Wielant's *Pratique civile*. He even suspected that the lawyer from Bruges based his European reputation as criminalist on the "annexation" of Wielant's *Pratique criminelle*, which had remained in manuscript.[28] Unfortunately, Orts could not prove this contention, since there was not a trace of the manuscript. But he predicted that whoever was lucky enough to find it would "add a curious chapter to the collected volume of literary deception."[29] The next year, in 1868, Orts' claim was joined by Albéric Allard in his *Histoire de la justice criminelle au XVIe siècle.*[30] When discussing De Damhoudere's *Praxis Rerum Criminalium*, Allard simply stated that De Damhoudere relied heavily on Wielant's manuscript, without giving further proof or references.[31]

Not everyone was convinced of the plagiarism. On 10 May 1871, Jacques-Joseph (sometimes called Jean-Jacques) Haus, law professor at Ghent University, held a public lecture for the *fine fleur* of the Belgian intelligentsia at the Royal Academy for Science and the Arts in Brussels. His topic was De Damhoudere's *Praxis rerum criminalium* and the *Ordonnances* of King Philip II. The published text contains typical praise of De Damhoudere's genius: Haus called him hard-working, modest, firm and with an independent character; he even attributed to him the virtues of the Roman censors, especially Cato.[32] Not a word was added about Wielant or the potential plagiarism. Yet Haus did know of the possibility, as is clear from his next lecture on the topic. On 7 August 1871, he addressed

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[27] Auguste Orts, "Philippe Wielant," *La Belgique Judiciaire*, 25 (1867): 1393-1401.

[28] "*Nous soupçonnons même quelque peu le juriste brugeois d'avoir basé sa réputation européenne de criminaliste sur l'honnête système d'annexion appliqué à la Pratique criminelle de Wielant, demeurée manuscrite*." Ibid: 1394.

[29] "*Il y a là, pour qui sera assez heureux de retrouver l'ouvrage, la matière d'un curieux chapitre peut-être à ajouter au recueil des supercheries littéraires*." Ibid.

[30] Albéric Allard, *Histoire de la justice criminelle au XVIe siècle* (Ghent, Paris, Leipzig, 1868).

[31] "*J'ajoute qu'il a grandement profité d'une Pratique criminelle, laissée en manuscrit par Philippe WIELANT,*
président du conseil de Flandre , puis membre du grand-conseil de Malines, décédé au commencement du XVIe siècle." Ibid: 466.

[32] Jean-Jacques Haus, "La Pratique criminelle de Damhouder et les ordonnances de Philippe II," *Bulletins de l'Académie Royale des sciences, des lettres et des beaux-arts de Belgique*, 31 (Brussels, 1871): 426.

the claim that De Damhoudere had profited from Wielant's manuscript of the *Pratique criminelle*.[33] He began by expressing doubt that this "lost manuscript" überhaupt had existed – "*si ce manuscrit que l'on dit perdu, a réellement existé*" – and continued by saying that even if it existed he was still convinced that De Damhoudere did not make any use of it – "*nous sommes convaincu que Damhouder n'en a pas tiré profit*". After all, the "*conscientious magistrate*" always gave full references and even indicated the opinions of his own professors. Thus, he would have mentioned Wielant's manuscript if he had made use of it.[34]

Then, in 1872, came a *coup de théatre*. The same Auguste Orts, who had accused De Damhoudere of plagiarism five years earlier, uncovered a smoking gun. After years of intensive research, he had finally tracked down a manuscript of the long-lost treasure in the rich collection of the late professor Constant-Philippe Serrure.[35] With the publication of Wielant's manuscript of the *Practijcke criminele*, he considered his point proven. Where Haus had referred to the "*conscience*" of De Damhoudere, Orts replied by saying that it was already proven many times that De Damhoudere had used Wielant's *Practijcke civile* without ever recognizing his source. He showed a degree of empathy for De Damhoudere, however, since it was admittedly a common practice in the fifteenth and sixteenth centuries to plagiarize: "*The sin of De Damhoudere was the sin of his time.*"[36] Nevertheless, it was obvious to Orts that De Damhoudere's sterling European reputation as a great criminalist was not legitimate. True to his occupation as a lawyer, he provided a long

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[33] Jean-Jacques Haus, "La Pratique criminelle de Damhouder et les ordonnances de Philippe II," *Bulletins de l'Académie Royale des sciences, des lettres et des beaux-arts de Belgique*, 32 (Brussels, 1872): 92.

[34] "*En effet, le consciencieux magistrate qui, pour chaque proposition qu'il ne peut revendiquer comme sienne, a soin de citer, avec l'exactitude la plus scrupuleuse, l'auteur auquel elle appartient, qui indique même les opinions enseignées par son professor, Jacques Robert, à l'université d'Orléans, n'aurait certainement pas manqué de faire mention du manuscript de Wielant, s'il lui avait fait des emprunts.*" Ibid.

[35] Orts (1872): v. Constant-Philippe Serrure (1805-1872) was a Belgian historian and professor at Ghent University. He was a founding member and contributor of the *Maetschappy der Vlaemsche Bibliophilen*, which also published the *Practijcke criminele* by Wielant.

[36] "*De zonde van Damhoudere is dus de zonde van zijnen tijd.*" Orts (1872): viii.

list of facts and arguments showing that De Damhoudere had used Wielant's text.

Orts's view was recognized quickly, at least in the Netherlands. In the next year, Jacobus Anthonie Fruin, law professor at the University of Utrecht, published a contribution in *Nieuwe bijdragen voor regtsgeleerdheid en wetgeving*, on a municipal code for Haarlem, written by Philips Wielant.[37] In this study, he accepted all the arguments put forward by Auguste Orts. He wrote that it was already well-known that Damhouder had plagiarized Wielant's *Practijcke civile*. Thanks to Orts and his publication of the manuscript from the library of professor Serrure, it was clear that the same had happened to the *Pracktijcke criminele*. Moreover, when Fruin compared the two *Practijckes* with the *Instructie* for the city of Haarlem, there was no doubt that they all derived from the same hand – Philips Wielant's – which added further proof to Orts's claim.[38]
In France and Germany, however, it appeared to take much longer for the new understanding to be accepted. Albert Du Boys, in his 1874 *Histoire du droit criminel de la France, depuis le XVIe jusqu'au XIXe siècle*, penned twenty pages on "*un célèbre criminaliste néerlandais, Damhouder*", without mentioning Wielant or plagiarism.[39] The same occurred in 1876, when Steffenhagen published an entry

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[37] Jacobus Antonie Fruin, "Een Wetboek, voor Haarlem ontworpen door Philips Wielant," in B.J.L De Geer & J.A. De Fruin, *Nieuwe Bijdragen voor Regtsgeleerdheid en wetgeving*, 22, (Amsterdam, 1873): 377-446. The next year, in 1874, Fruin published the same text as a book: *Jacobus Antonie Fruin, Instructie, voor de stad Haarlem ontworpen door Philips Wielant* (Amsterdam, 1874).

[38] "De overeenkomst tusschen WIELANT's Practijcke Criminele en de Criminele Practijcke van DAMHOUDERE is zoo groot, dat Orts het noodig heeft geacht opzettelijk te bewijzen, dat het handschrift, hetwelk hij heeft uitgegeven, werkelijk den tekst van de eerste, en niet een min volledigen tekst der laatste bevat. Door de uitgave der Instructie wordt de laatste twijfel op dit punt weggenomen. Die het Haarlemsche wetboek met de Practijcke Criminele vergelijkt, heeft geen bewijs meer noodig, dat beide van dezelfde hand afkomstig zijn." Ibid.: 431.

[39] Albert Du Boys, *Histoire droit criminel de la France depuis le XVIe jusqu'au XIXe siècle* (Paris, 1874): 346-365. However, Du Boys does write that the *Praxis rerum criminalium* was largely a resume of earlier criminalists (p. 348) – "Ce n'était pourtant en grande partie qu'un résumé des ouvrages composés par les plus illustres criminalistes qui l'avaient devancé" – but when one looks at the footnote, it turns out to be others: "Il cite très-souvent Angelus Aretinus ou Ange de Gambiglioni, Hippolyte de Marsigli, etc." Not a word on Wielant.

for "Damhouder, Joost de" in the *Allgemeine Deutsche Biographie*, in which there was no mention of the controversy. The authors may be excused because they may not have been aware of the newest findings.[40] On the other hand, some appeared more dismissive. Professor Jean-Jacques Haus did not mention a word on the controversy in his manuals on Belgian criminal law published in 1874, 1879 and 1885.[41] He might not have wanted to admit that he had been wrong about De Damhouder's plagiarism.[42]

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[40] Du Boys seems to have based his Damhouder chapter mostly on the following book from 1870: Edmond Poulet, "Histoire du droit pénal dans le duché de Brabant," in *Académie royale des sciences, des lettres et des beaux-arts de Belgique, Mémoires couronnés et mémoires des savants étrangers*, XXXV (Brussels, 1870). The most recent reference in Steffenhagen's publication are the 1871 lectures given by Haus.

[41] Jean-Jacques Haus, *Principes généraux du droit pénal belge* (Ghent, 1874): 9: "*Le premier système de droit criminel, publié hors de l'Italie, eut pour auteur un des praticiens les plus habiles de son temps, Josse Damhouder. Sans doute, le livre du légiste belge laisse beaucoup à désirer sous le rapport scientifique; mas son traité de procédure criminelle qui forme la partie la plus importante de son ouvrage, a exercé une influence considérable sur la jurisprudence des tribunaux et sur la législation dans le Pays-Bas et en Allemagne.*" In footnote 12, Haus only refers to his own study from 1871. In the 1879 and 1885 editions, the text is literally the same, on page 8-9. See Jean-Jacques Haus, *Principes généraux du droit pénal belge* (Ghent, 1879); Jean-Jacques Haus, *Principes généraux du droit pénal belge* (Paris, 1885). Not surprisingly, the Italian translations remain equally mute: Jean-Jacques Haus, *Principii generali di diritto penale belgico* (Napoli, 1874 & 1877), both on p. 26.

[42] In 1913, the University of Ghent published a *Liber memorialis* on its professors, with a lemma on Jean-Jacques Haus by Auguste Rolin. Rolin mentions the 1871 lectures on Damhouder as a model for this kind of academic work. He adds that it was only a pity that Haus made a mistake regarding the true authorship, but he could not know at the time, because the manuscript was only discovered afterwards: "*Mais Haus ne pouvait le savoir et la fraude n'apparut que grâce à un manuscript de Wielandt trouvé dans les combles de l'Hôtel de Gand.*" Auguste Rolin, "J.-J- Haus," in *Université de Gand. Liber memorialis. Notices biographiques. Tome I. Faculté de philosophie et lettres. Faculté de droit* (Ghent, 1913): 293-306 (excerpt on p. 303). Even if this is completely true, it is a bit curious that Haus never seems to have admitted his mistake. Would it really have hurt to add a footnote in his manual? Moreover, the fact that this mistake is mentioned in the *Liber memorialis*, more than

Others went further by calling Orts's findings into question. In 1876, Jean-Joseph Thonissen, law professor at the Catholic University of Leuven, published a lemma on De Damhoudere in volume five of the Belgian national biography series, the *Biographie Nationale*.[43] It was an old-fashioned hagiography, describing De Damhoudere as "*un jurisconsulte hors ligne*", whose "*véritable gloire*" was being the first to have devised a complete system of criminal law. Thonissen did not ignore the controversy around De Damhoudere's alleged plagiarism, but found it hard to believe. He first repeated the argument, from Haus, that De Damhoudere always gave an abundance of references and thus would not have omitted reference to Wielant. Further, if De Damhoudere indeed plagiarised Wielant, how was it possible that this accusation was only formulated in the later nineteenth century, after so many earlier scholars had reviewed De Damhoudere's work? According to Thonissen, the reality was different. The manuscript that Orts had published was not from Wielant. It was simply a shortened version of De Damhoudere's work, written by an anonymous lawyer from Ghent, who had substituted "Bruges" for "Ghent" in each instance. Thonissen braced his far-fetched hypothesis by arguing that the text edited by Orts carried the date of 1552, while the first edition of the *Praxis* had already been published in 1551. With a simple "*Quoi qu'il en soit*", Thonissen waived the plagiarism charges away, concluding that *Praxis rerum criminalium* had turned out to be a tremendous success. Thonissen even rejected the (by then generally accepted) fact that De Damhoudere had plagiarized Wielant's *Pratique civile*. Again, why had no contemporary ever said anything about this? Moreover, in Thonissen's eyes, the "*traité insignifiant*" of Wielant had nothing to do with the "*ouvrage approfondi*" of De Damhoudere, except for some inevitable similarities due to the fact that they both dealt with the same subject matter.

In 1881, Ferdinand Vander Haeghen, the librarian of Ghent University, published an overview of all the works of Wielant and De Damhoudere.[44] He considered the opinion of Thonissen inadmissible.[45] Later in the decade, Adolphe Du Bois, a lawyer, magistrate, politician and amateur historian, decided to settle the matter once

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40 years later, shows that the whole story must have made quite a stir at the time.

[43] Jean-Joseph Thonissen, "De Damhoudere (Josse)," in *Biographie Nationale*, V (Brussels, 1876): 59-70.

[44] Ferdinand Vander Haeghen, *Œuvres de Philippe Wielant et de Josse De Damhoudere. Extrait des livraisons XI et XII de la Bibliotheca Belgica ou bibliographie générale des Pays-Bas* (Ghent, 1881).

[45] "L'opinion de Mr Thonissen nous semble inadmissible". Ibid.: V 16.

and for all. In 1889, he published two contributions in the *Messager des sciences historiques ou archives des arts et de la bibliographie de Belgique*.[46]

This ended the scholarly battle and brought victory to those who believed that De Damhoudere plagiarized Wielant. Because of the extended controversy, the plagiarism had become well-known to Dutch and French-speaking scholars,[47] but the rest of the world seems to have remained largely unaware of it. This changed in the first half of the twentieth century. In 1925, Malcolm Letts wrote an article in English on the administration of criminal law in Flanders, chiefly during the fifteenth century.[48] When he arrived at Philips Wielant, he summarized the plagiarism case as follows:

> *We possess also his* Practijcke Civile*, which served as a model for the work of the Bruges jurist, Josse de Damhouder, which bears the same title. Wielant's work on criminal law,* Practijcke Criminele*, as we have seen, was not printed until 1872 and was long believed to have been lost. It was, how-*

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[46] Adolphe Dubois, "Ph. Wielant et J. De Damhoudere," *Messager des sciences historiques* (1889): 301-317; 380-398.

[47] Some examples are the following: "Later is gebleken dat het aldus door Damhouder onder zijnen naam verspreide werk zoo goed als geheel was de 'Practijcke crimineele' van den Gentschen rechtsgeleerde Philips Wielant …", Gerardus Antonius Van Hamel, *Inleiding tot de studie van het Nederlandsche strafrecht* (Haarlem, 's Gravenhage, 1889): 51, footnote 29. "Dans une excellente étude sur Wielant et son plagiaire Damhoudere, …" Ernest Nys, "L'esclavage noir devant les jurisconsultes et les cours de justice," *Revue de droit international et de législation comparée*, 22 (1890): 57-69 (63). "Parmi les auteurs du 16ième siècle on cite Jodocus Damhouder, quoiqu'il ne le mérite pas, car celui-ci n'a fait que copier l'ouvrage du jurisconsulte Gandois Philippe Wielant…", Oncko Quirijn Van Swinderen, *Esquisse du droit pénal actuel dans les Pays-Bas et á l'Etranger* (Groningen, 1891): 26. "Enfin, Wielant a terminé en 1519 une *Pratique criminelle*. Elle n'a été imprimée qu'en 1872, grâce à M. Orts, qui eut la bonne fortune de mettre la main sur un manuscrit que possède la bibliothèque de l'université de Gand. M. Orts s'est attaché à démontrer que la *Pratique criminelle* de de Damhoudere n'est qu'un audacieux plagiat de l'oeuvre de Wielant". Raymond Janssens, *Philippe Wielant et l'instruction criminelle* (Brussels, 1907): 3.

[48] Malcolm Letts, "Administration of criminal law, chiefly in the fifteenth century," *The Law Quarterly Review*, XLI (1925): 32-51; also reprinted in *South African Law Journal*, 43 (1926): 381-403.

> *ever, at one time in the possession of Damhouder, who incorporated practically the whole of it without shame and without acknowledgment into his work on criminal law. The famous Bruges jurist, who achieved a European reputation by this work, was a plagiarist of the first order. He took the trouble to substitute the name of Bruges for that of Ghent wherever it appeared and made certain other minor alterations, but it is possible to read page after page of Damhouder's work without discovering a single original remark. Damhouder's treatise achieved great popularity. It was translated by him into French and Latin, and was frequently reprinted. Wielant's work remained unknown.*

Most likely it was Letts's friend, Professor Egied Strubbe, who had pointed him to the Damhoudere issue.[49] In his first footnote, Lett expressed extensive gratitude to his friend from Bruges for help he had provided.[50] Moreover, Strubbe also worked on the issue. In 1930, he wrote an article on it in German in a Polish journal.[51] Providing numerous examples, Strubbe not only gave full proof of the plagiarism, but also gave his unvarnished opinion about De Damhoudere: "*If Wielant would not have lived, De Damhoudere would never have earned the reputation of a great lawyer. Moreover, through his own writings, he proved not to deserve the reputation that rightfully belongs to Wielant.*"[52]

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[49] Egied Strubbe (1897-1970) was professor of legal history at Ghent University. See John Gilissen, "In Memoriam Egied I. Strubbe*," Tijdschrift voor Rechtsgeschiedenis*, 40 (1972): 1-42.

[50] "I desire at the outset to express my grateful acknowledgments to my friend Mr. Egied I. Strubbe, Advokaat, of Bruges, who has encouraged and assisted me in the preparation of this article in ways too numerous to be mentioned. Mr. Strubbe has guided my investigations and corrected my deductions. He has placed his learning freely at my disposal, and has allowed me to make unrestricted use of his notes. Without his assistance this article, commenced some time ago, could scarcely have been finished."

[51] Egied Strubbe, "Die Stellung Damhouders in der Rechtswissenschaft. Wielant – De Damhouder," *Przewodnik Historyczno-Prawny*, 1 (Lviv, 1930): 219-226.

[52] Our own free translation of: "*Obige Darlegung berechtigt wohl zur Behauptung, dass, wenn Wielant nicht gelebt, Damhoudere niemals den Ruf eines grossen Juristen erworben hätte. Ausserdem darf man hinzufügen, dass Damhouder durch seine eigenen Schriften bewiesen hat, nicht den Ruhm zu verdienen, der Wielant rechtens gebührt.*" Egied Strubbe, "Die Stellung Damhouders in der Rechtswissenschaft. Wielant – De Damhouder," *Przewodnik Historyczno-Prawny*, 1 (Lviv, 1930): 226.

By 1930, Damhoudere's plagiarism was documented in French, Dutch, English and German. As a result, he fell from his scholarly pedestal in Europe and beyond. In 1942, De Monté Verloren published a book on the history of the science of criminal law and criminal procedure in the Northern Netherlands prior to codification. In it, he deliberately left De Damhoudere off of a list of seventeen important lawyers. A South African reviewer of the book accounted for this remarkable omission by noting that De Damhoudere had borrowed his work almost completely from Wielant and therefore was a plagiarist.[53] In 1954, when W.C. van Binsbergen published his book on the Criminal Code for the Kingdom of Holland, he mentioned Wielant but not De Damhoudere. Another South African reviewer, J.P. Verloren van Themaat, explained that it had become clear that De Damhoudere had mainly "plundered" his work from Wielant.[54] Afterwards it became common practice to add a disclosure statement every time De Damhoudere was mentioned. This sometimes occurred in a footnote – "*Joost Damhoudere's famous Praxis Rerum Criminalium has been shameless copied without recognition of the work of Wielant,*"[55] or sometimes between brackets in the text: "*Damhoudere (die plagiaris van Wielant se werke).*"

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[53] "Opvallend is dat Joost de Damhoudere nie afsonderlik behandel word nie omdat Damhouder se werk vrywel in sy geheel aan Wielant ontleen is; hij was 'n naskrywer." D. Pont, "Boekbespreking. J. Ph. De Monté Verloren, Geschiedenis van de Wetenschap van het Strafrecht en Strafprocesrecht in de Noordelijke Nederlanden voor de Codificatie, N.V. Noord-Hollandsche Uitgevers Mij, Amsterdam, 1942," *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 9 (1945): 255-257 (excerpt on p. 254).

[54] "Dit staan nou vas dat Damhouder in sy werk hoofsaaklik van Wielant geplunder het." J. P. Verloren van Themaat, "Mr. W. C. Van Binsbergen, Algemeen karakter van het Crimineel Wetboek voor het Koninkrijk Holland. Met een voorwoord van Prof. Mr. W. P. J. Pompe. Utrecht, 1950, 135 blds.," *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 17 (1954): 321-326 (excerpt on p. 324).

[55] "Joost Damhouder se beroemde *Praxis Rerum Criminalium* is skaamteloos sonder erkenning van Wielant se werk afgeskryf." See p. 213, footnote 32 of the following: C. H. J. Badenhorst, "Die oorsprong en betekenins van inhoudgewin aan die algemene begrip misdaad in die Suid-Afrikaanse strafreg," *Journal of South African Law*, 3 (1982): 209-219. Another example: "Damhouder, a 16th-century Roman-Dutch writer (who plagiarised the work of an earlier author, Wielant) was the most important criminal lawyer of his time and exerted an enormous influence on later jurists." Gardiol van Niekerk, "Criminal Justice at the Cape of Good Hope in the

[56] Other authors referred to the discussion without taking a stand themselves: "*Let us first consider Damhoudere. Leaving aside the issue of how much Damhoudere does or does not owe to Wielant ….*"[57]

The gradual, then more sudden, decline of De Damhoudere's reputation went hand-in-hand with the step-by-step rehabilitation of Wielant. The book written by Schaap in 1927 on "Philips Wielant en diens corte instructie omme jonghe practisienen in civile zaken" offers a good example.[58] The work creates a colourful image of Filips Wielant as an important public official, politician, legal scholar and writer. Schaap discusses Wielant's work and especially his *Corte instructie in civile zaken*, as the *Practijcke civile* originally was called. The author points out that he must also address the relationship between the works of Wielant and De Damhoudere.[59] According to Schaap, De Damhoudere did not deserve a better reputation than Wielant due to the former's shameless plagiarism. Schaap took offense in particular at the *Biographie nationale de Belgique*: not only had they left out Wielant, but Thonissen's lemma on De Damhoudere was a disgrace.[60] To set the record straight, Schaap gave a number of random examples to show how De Damhoudere had simply copied Wielant's text on civil matters.[61]

Egied Strubbe also contributed to the rehabilitation of Filips Wielant. In 1938, he published a lemma on him in Volume 27 of the

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Seventeenth Century: Narratives of Infanticide and Suicide," *Fundamina* 11, no. 2 (2005): 135-154 (excerpt on p. 140, footnote 31).

[56] See Johan Scott, "Lever v Purdy 1993 3 SA 17 (A)," *De Jure* 26, no. 2 (1993): 435-443 (excerpt on page 439).

[57] M. L. Hewett, A Case or Two in Point, 5 *Fundamina* 130 (1999) p. 134.

[58] Herbert Paul Schaap, *Philips Wielant en diens corte instructie omme jonghe practisienen in civile zaken* (Haarlem, 1927).

[59] Schaap: 68.

[60] To cite the words of the famous Belgian legal historian Francois L. Ganshof in his review of Schaap's book: "Les arguments produits en sens contraire par J.J. Thonissen dans la Biographie Nationale, v De Damhouder (t. V, col. 65-66) sont d'une singulière faiblesse." François-Louis Ganshof, "Philips Wielant en diens Corte Instructie omme jonghe practisienen in civile zaken*," Revue belge de philologie et d'histoire*, 7 (1928): 1650-1655 (cited excerpt on p. 1652, footnote 3).

[61] Schaap: 70-75.

Biographie nationale[62], and reprinted the 1573 edition of Filips Wielant's *Practijcke civile* in 1968.[63] Others followed in his footsteps. At the end of the 1970s, a research team of the University of Leuven led by Jos Monballyu, started systematically studying all the legal manuscripts preserved in the libraries and archives of the province of East-Flanders.[64] Their biggest discovery was a series of manuscripts with the work of Wielant. In 1982, the Legal History Committee of the Royal Flemish Academy of Belgium for Science and the Arts decided to support the publication of the *opera omnia* (collected work) of Wielant.[65] Jos Monballyu, once described as "*le champion incontesté de Wielant*",[66] edited and commented on the first volume, *Filips WIELANT, Verzameld Werk, I, Corte Instructie in materie criminele*, published in 1995.[67] The second volume, "*Briève instruction en causes civiles*", appeared in 2009, this time with L.H.J. Sicking and C.H. van Rhee as editors.[68] It is fair to say that Wielant today has received the recognition he deserves.

Finally, in 1970, Strubbe revisited De Damhoudere, publishing an elaborate study in the *Legal History Review* on him as a criminalist.[69] Four decades had passed since his 1930 German article in the Polish journal, and it is interesting to compare the young Strubbe with the elder one. His substantial 1970 piece is without doubt the best study available on the life and work of Joost de Damhouder. Of course, Strubbe again addressed the plagiarism, which he called "shameless". Even if plagiarism was a current practice in the late Middle Ages and Renaissance, Damhouder had lifted it to a new level in his *Practijcke ende handbouck in criminele*

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[62] Egied Strubbe, "Wielant (Philippe)," in *Biographie Nationale*, 27 (Brussels, 1938): 279-298.
[63] Egied Strubbe, *Philips Wielant. Practijke Civile* (Amsterdam, 1968).
[64] Laurent Waelkens, "Chronique," *Revue historique de droit français et étranger*, 74 (1996): 621.
[65] Dirk van den Auweele, "Chronique. Comité Rechtsgeschiedenis van de Koninklijke Academie voor Wetenschappen, Letteren en Schone Kunsten van België," *Tijdschrift voor Rechtsgeschiedenis*, 50 (1982): 442.
[66] Laurent Waelkens, "Chronique," *Revue historique de droit français et étranger*, 74 (1996): 621.
[67] Jos Monballyu, Filips Wielant. *Verzameld Werk. I. Corte Instructie in Materie Criminele* (Brussel, 1995).
[68] Louis H.J. Sicking & Cornelis Hendrik van Rhee (ed.), *Filips Wielant. Verzameld werk. II. Briève instruction en causes civiles* (Brussels, 2009).
[69] Egied Strubbe, "Joos de Damhouder als criminalist," *Tijdschrift voor Rechtsgeschiedenis*, 38 (1970): 1-66.

zaeken by copying Wielant's *Practijcke criminele* verbatim. At the same time, he carefully hid its origin by presenting it as his own work. He did admit that De Damhoudere had some merits. Not only had he translated Wielant's text in Latin, he also had added many references and even a few of his own chapters. In this way, he had transformed a manual for untrained jurists into a work with a more scientific cast.

Yet Strubbe remained highly critical. He judged De Damhoudere's Latin translation to be rather poor. Further, De Damhoudere on many occasions had simply misread Wielant. Strubbe gives the following great example.[70] In his *Corte Instructie in materie criminele*, Wielant says that someone can be excused from appearing in court when sick, adding that the death of a child, the disease of a wife or another malfortune, cannot be used as an excuse.[71] In Chapter 25, nr. 18 of the *Praxis*, De Damhoudere has translated this into "*aegritudines ex acrimonia vini, mors prolis, aliaque similia infortunia*".[72] Strubbe rightfully wonders where this hangover caused by wine suddenly came from? This becomes clear when one reads De Damhoudere's Dutch and French versions: "*siecte van wijne, doot van kinderen of een ander ongeval*" – "*maladie de vin, mort de ses enfants ou autres accidents*". Here De Damhoudere simply misread the Dutch word "*wijve*" (= "*wife*") as "*wijne*" (= "*wine*"), based on a similar manuscript letter formation. To make matters worse, De Damhoudere even managed to find learned literature to support this, illustrative of his *modus operandi*.[73] Strubbe argued that adding citations to Roman and canon law to someone else's text was

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[70] Strubbe: 38-39.

[71] In the 1515-16 version, this can be found in Chapter 25, nr. 15: "*Maer ziecte van wyve, doot van kinderen of andere ongheval en maect gheen excusacie in materien criminele, tenwaere dat den juge anders dochte, of [hy] ooc eenighe andere openbaere sinne hadde dan hier gheexpresseert zyn."* Strubbe makes a mistake here, when he writes on page 38 that it can be found in chapter 24. See Jos Monballyu, *Filips Wielant. Verzameld Werk. I. Corte Instructie in Materie Criminele* (Brussels, 1995), also to be found online: https://kulak.kuleuven.be/facult/rechten/Monballyu/Rechtlagelanden/Vlaamsrecht/Wielantteksten/Wielantprcr1515.htm last consulted on 30 September 2022.

[72] See Joos De Damhoudere, *Praxis rerum criminalium* (Antwerp, 1570): 56 and 57.

[73] "Ad praedicta possent adaptari ea quae notat D. Matthaeus de Afflictis in suis decisionibus Neapolitanis, decisione 289, atque Felinus in c. Accedens, 2 Extra, ut lite non contesta., quae omnia atque singula videre poteritis."

unorthodox. It could only be meant to impress the reader by making the text seem more scientific. Finally, he was also critical of the paragraphs and chapters De Damhoudere wrote himself. Strubbe even detected another plagiarism: his chapters 155 and 156 were copied from the *Praxis criminis persequendi* by Johannes Millaeus.[74]

The next generation of legal historians seems to have been more benevolent towards De Damhoudere. For instance, in 1981, Jozef Dauwe and Jos Monballyu decided to reprint the 1555 edition of De Damhoudere's *Practycke ende handbouck in criminele zaeken*.[75] In the epilogue, they admitted that De Damhoudere had made a mistake by plagiarising Wielant, but he also had his merits. It was thanks to De Damhoudere that Wielant's masterpiece finally had been printed, so that it could be widely used in the criminal practice of the sixteenth and seventeenth century. It obviously met a demand because many legal practitioners lacked legal schooling and needed a clear and practical manual. In 1999, Jos Monballyu and Jozef Dauwe published another facsimile, this time of the 1626 edition of Damhoudere's *Practycke in civile saeken*.[76] This time they were even more positive about De Damhoudere. He had done much more than just plagiarize Wielant: he had translated the text into Latin, added personal experiences from his own legal practice, provided legal reflections based on his own study, made numerous references to the scientific literature and he had updated Wielant's text. In their view, by modern standards, this made De Damhoudere rather a co-author than a sheer plagiariser. The discovery of his plagiarism in the nineteenth century had pushed all his merits into the dark.[77]

Last but not least, Posteriority has to thank Damhouder, and only him, for the beautiful illustrations in his works. In recent years, these illustrations have received more attention. They starred for instance at a beautiful exhibition from 28 October 2016 through 5 February 2017 in the Groeningemuseum of Damhouder's beloved hometown of Bruges, titled "*the Art of Law. Three centuries of justice*

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[74] Egied Strubbe, "Joos de Damhouder als criminalist," *Tijdschrift voor Rechtsgeschiedenis*, 38 (1970): 59.

[75] Jozef Dauwe & Jos Monballyu, *Prackycke ende handbouck in criminele zaeken, verchiert met zommege schoone figuren ende beilde ter materie dienende, door Joos de Damhouder. Anastatische herdruk naar de editie Leuven 1555* (Roeselare, 1981).

[76] Jozef Dauwe & Jos Monballyu, "Joos de Damhouer en zijn 'Practycke in civile saecken'," in Jozef Dauwe & Jos Monballyu, *Practycke in civile saecken* (reproduction) (Ghent, 1999): 1-23.

[77] Dauwe & Monballyu: 9-10.

depicted". In the exhibition manual with the same title, Jos Monballyu wrote a chapter on "*Joos De Damhouder, an internationally influential jurist from Bruges*."[78] According to Monballyu, "*The international acclaim with which* Praxis rerum criminalium *was received was not only due to the quality of the text but equally to the fact that it was so richly illustrated*."[79] Two years later, Felix Jäger had a closer legal iconological look at Damhouder's illustrations.[80]

Conclusion

Joost De Damhoudere and his *Praxis Rerum Criminalium* have been in the spotlight from 1554 until today. The *Praxis* first earned De Damhoudere an international reputation as one of the most important criminal jurists in Europe and remained influential for several centuries. In 1867, August Orts for the first time put forward the claim that De Damhoudere had plagiarized the work of Filips Wielant. What followed was a furious scholarly debate which lasted several years. The scholarly proof of De Damhoudere's plagiarism caused his reputation to plummet and rightly led to the rehabilitation of Filips Wielant. Successive generations of legal historians have been fascinated by this story. Egied Strubbe for instance remained invested in it over his whole academic career. He considered Wielant a true legal genius and De Damhoudere an imposter who had gained his reputation only thanks to Wielant. More recent generations of legal historians have taken a more nuanced approach, acknowledging that De Damhoudere also has his merits. They do not consider him as a pure plagiarist, but rather as a co-author who played a vital role in spreading the work of Wielant. His decision to illustrate his Praxis with woodprints was not only instrumental to its success, but gave the world a treasure trove of legal iconography.

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[78] Jos Monballyu, "Joos de Damhouder, an internationally influential jurist from Bruges," in Stefan Huygebaert, Georges Martyn, Vanessa Paumen & Tine Van Poucke (ed.), *The Art of Law. Three Centuries of Justice Depicted in the Groeningemuseum, Bruges* (Bruges, 2016): 107-117.

[79] Monballyu: 113.

[80] Felix Jäger, "Framing the Law: Joos de Damhouder and the Legal Iconology of the Grotesque," in Stefan Huygebaert, Georges Martyn, Vanessa Paumen, Eric Bousmar & Xavier Rousseaux (ed.), *The Art of Law. Artistic Representations and Iconography of Law and Justice in Context, from the Middle Ages to the First World War* (New York, 2018): 223-244.

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Thomas Bacon and the *Laws of Maryland*

Warren M. Billings, PhD*

In 1765 Jonas Green published Thomas Bacon's *Laws of Maryland at Large, With Proper Indexes. Now First Collected into One Complete Body and Published from the Original Acts and Records, Remaining in the Secretary's-Office of the Said Province. Together With Notes and Other Matters, Relative to the Constitution Thereof, Extracted from the Provincial Records. To Which is Prefixed The Charter With an English Translation*. Commonly referred to as Bacon's *Laws*, the book was the latest in a series of Maryland legal imprints that dated from the first years of the eighteenth century. Because of its comprehensiveness it was superior to the earlier collections. Yet, it was unlike any of those volumes. It differed as well because its compiler/editor was no lawyer or General Assembly clerk. Instead, Bacon, [1] was an Anglican divine and a painstaking scholar who was also a chaplain to the Lord Proprietary. Jonas Green was the provincial printer; so it followed that he published Bacon's *Laws*. But compiler and printer shared other close ties. Death and changing times meant there would never be a second edition. Their book fell

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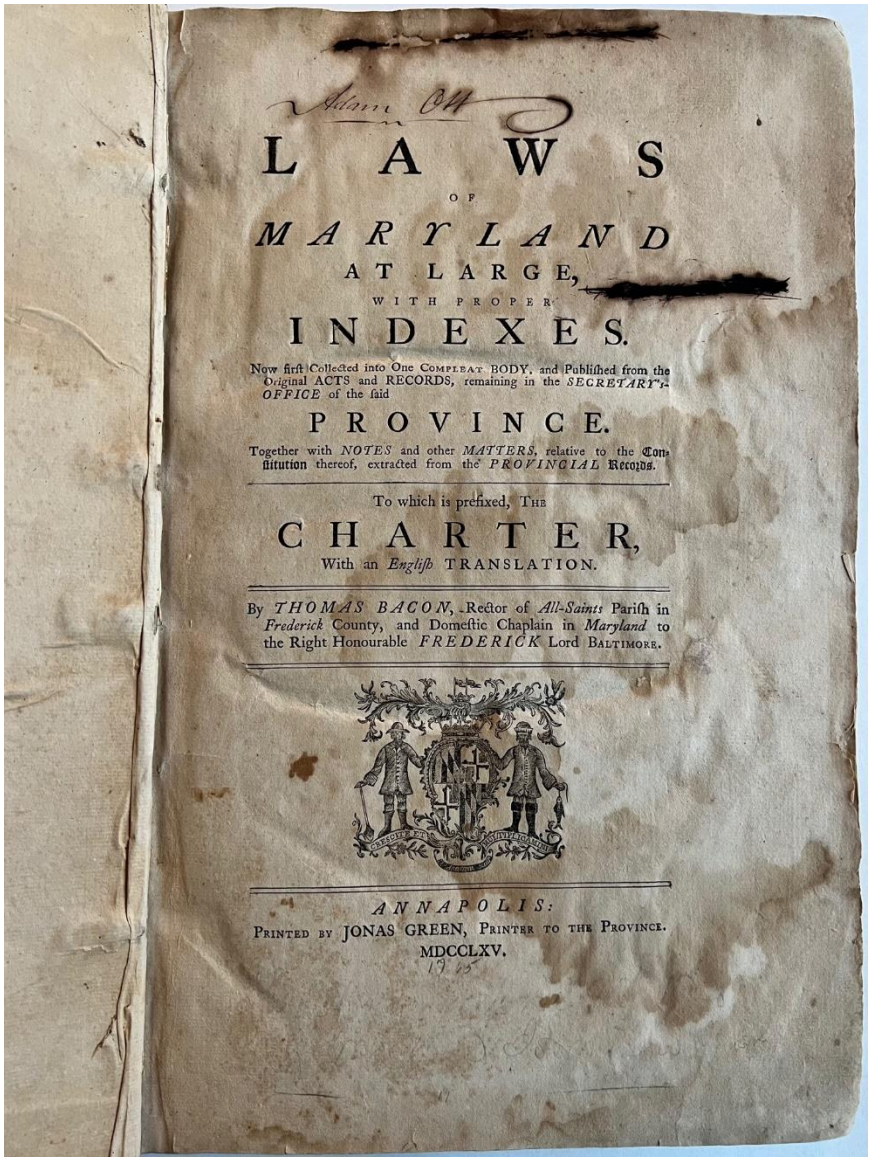
[1]Bacon has no biographer, but see the sketches by Ethan Allen, "Rev. Thomas Bacon 1745–1768, incumbent of St. Peter's Talbot Co. and All Saints, Frederick Co., Maryland" [*American Quarterly*] *Church Review* 17 (1865): 430-51; Lawrence C. Wroth, *A History of Printing in Colonial Maryland 1689–1776* (Baltimore, 1922); and J.A. Leo Lemay, *Men of Letters In Colonial Maryland* (Knoxville, Tenn., 1972). Allen's sketch is flawed with mistakes, but it gives a lengthy, close reading of Bacon's activities as a clergyman. Lemay's rendering corrects errors in Allan and Wroth, and it draws on documentary evidence that was unavailable to them. Similarly, Green has no biographer, but there are fairly detailed treatments in Roth and Lemay.



LAWS
OF
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WITH PROPER
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Now first Collected into One COMPLEAT BODY, and Published from the Original ACTS and RECORDS, remaining in the *SECRETARY's OFFICE* of the said

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To which is prefixed, THE

CHARTER,

With an *Engliſh* TRANSLATION.

By *THOMAS BACON*, Rector of *All-Saints* Pariſh in *Frederick* County, and Domeſtic Chaplain in *Maryland* to the Right Honourable *FREDERICK* Lord BALTIMORE.

ANNAPOLIS:
PRINTED BY JONAS GREEN, PRINTER TO THE PROVINCE.
MDCCLXV.

Image Courtesy of Erin Allbritton

into obsolescence after the Revolution, but it remained useful until later compilations that reflected changes wrought by Independence and statehood rendered it an artifact from the colonial era. Throughout the nineteenth century copies were discarded while others gradually came to rest in private collections or in research libraries where they occasionally catch the scholarly eye.[2]

Therefore, this article introduces another early American law book to readers of *Unbound*. It draws attention to Thomas Bacon, Jonas Green, and legal publishing in mid-eighteenth century Maryland. Next, it discusses the making of *The Laws of Maryland*. Then, it describes physical traits and content of the book. Finally, it comments on the importance of the volume to colonial print culture, Maryland, and its legal history.

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Including *The Laws of Maryland*, Thomas Bacon published more titles than any other colonial Marylander. Contemporaries regarded him as the most learned person in the province and praised him for his versatility. And, in the words of the historian Leo Lemay, he was "a poet, letter-writer, composer, musician, political essayist, compiler of laws, and minister, [who] importantly contributed to colonial Maryland's intellectual life."[3] But who was he?

Thomas Bacon was born in 1711. He was one of three offspring of a mariner, William, and his wife Elizabeth Richardson Bacon. Because of letters he exchanged with some Manxmen, his people are supposed to have been natives of the Isle of Man. But that is doubtful. There is no mention of them in this correspondence, although the family lived there from time to time. Well educated, curious, and scholarly, he read widely and voraciously all his life. Living in Dublin he married an unnamed widow and managed vessels in the coal trade before his appointment as a royal customs functionary.

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[2]Surviving copies are housed at the Maryland State Law Library, the Maryland Historical Society, the Virginia Museum of History and Culture, the Swem Library at the College of William & Mary, the University of Virginia, the Library of Congress, and the British Library among other research institutions. An electronic copy may be viewed in Volume 75 of *The Archives of Maryland Online*. (Go to https://msa.maryland.gov and click on "Search the Archives Website." Many university research and law school libraries also hold digital versions.

[3]Lemay, *Men of Letters in Colonial Maryland*, 313-14.

In 1737 he published his first book, the five-hundred page *A Compleat System of the Revenue of Ireland, in its Branches of Import, Export, and Inland Duties, Containing I. An Abridgment of English and Irish Statutes Relating to the Revenue of Ireland II. The Former and* Additional *Book of Rates Inwards and Outwards, etc. III. A View of the Duties which Compose the Revenue of Ireland, etc. IV. The Method of Making Entries, etc.* The book, which was an immediate hit, consolidated all aspects of the customs service and its Irish responsibilities to the Crown, and it earned Bacon the Freedom of the City.[4]

Four years later he was printing books, publishing two newspapers, selling books, doing job printing, and running a coffee house. An inner call to ministry stirred him so he abruptly quit his businesses. Returning to the Isle of Man he studied for the priesthood at the direction of a Church of England ecclesiastic, the Rt. Rev'd Thomas Wilson, Bishop of Sodor and Man. Wilson ordained him deacon in September 1744 and consecrated him a missionary priest in the spring of 1745. That summer he, second wife, and son John ("Jacky") emigrated to Talbot County on Maryland's Eastern Shore and was named curate at St. Peter's Church, Talbot. He was immediately popular with the parishioners who warmed to his kindness and the excellence of his sermons. After the incumbent died, the parish vestry nominated Bacon to Governor Thomas Bladen for induction as their next priest, and Bladen concurred. Bacon continued at St. Peter's until he moved to All Saints, Frederick, where he remained until his death.[5]

Bacon was not only a diligent parish minister; he was actively involved in the affairs of the larger colonial church. He clerked at clergy meetings and intervened politically to moderate an especially hostile disagreement between an intemperate Rev'd Thomas Chase and Governor Horatio Sharpe.[6] He had the ear of Sharpe and other provincial political figures because he was the residential chaplain to the Lord Proprietary, Frederick Calvert, sixth baron Baltimore. His lordship would be instrumental in the creation of *The Laws of*

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[4]Ibid.; Wroth, *History of Printing in Colonial Maryland*, 96-97.

[5]Lemay, *Men of Letters in Colonial Maryland*, 314-17. Copies of Bacon's certificate of ordination and Bladen's letter of induction are printed in Oswald Tilghman, ed., *History of the County of Talbot, Maryland 1661–1861*, 2 vols. (Easton, MD, 1861), 1: 278.

[6]Lemay, *Men of Letters in Colonial Maryland*, 325-28. Samuel Chase, an Associate Justice of the Supreme Court of the United States who was impeached in 1802, was the son of the Rev'd Mr. Chase.

Maryland, and he also supported Bacon's perennial efforts to raise money for the schooling youngsters in St. Peter's Parish and for the religious education of enslaved black Marylanders. Bacon accepted slavery as God-given and preached on its moral worth. Himself a slave trader and a slaveholder, he believed that enslavers were morally bound as Christian gentlemen to educate their slaves and treat them gently. Jonas Green published his sermons, several reprinted in London, that warned the planters of serious consequences if they neglected that duty. As an encouraging example he started his own school for slaves. However, he never saw any contradiction between his school and another that he opened to children of whatever race, sex, or social status.[7]

A Manxman, Henry Callister resided near the Bacons, and an abiding friendship soon linked the two families. Henry Callister described his friend as "a very agreeable Companion, and a sober and learned Man" and "the worthiest Clergyman I ever knew." Apart from those characterizations, his letters afford insights into the private Bacon. He owned a large, diverse collection of books, papers, and scientific instruments that he carefully arranged throughout his home. The house was furnished with fine things, and Bacon set a grand table for his frequent entertainments. He was an outstanding musician, well versed in the European repertoire and American songs, composing music that came to be performed in America, Ireland, and England. Callister described him as a superior string player, remarking how the two of them frequently played together.

A man of influence, Callister widened Bacon's social/political circle when he brought him into the Tuesday Club at Annapolis. Founded by Doctor Alexander Hamilton, a Scots physician and Maryland litterateur, it drew men such as Jonas Green, the Rev'd Alexander Malcom, William Lux, and Daniel Dulany, Jr. who could meet, eat, drink, entertain, debate, and present their poems and plays in the privacy of the club house. Hamilton gave each participant a club name; Bacon's was "Signoir Blandini." Signoir Blandini composed intricate musical pieces that he and others performed. He read his poetry, including a poem that he addressed to Henry Callister which intimated his intention of compiling Maryland's laws.[8]

Bacon's private life had its sad moments. Surely saddest of all was the loss of his son Jacky. John Bacon showed such promise that

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[7]Lemay, *Men of Letters in Colonial Maryland*, 320-22.
[8]Ibid., 213-36, 330; Elaine G. Breslaw, *Dr. Alexander Hamilton and Provincial America: Expanding the Orbit of Scottish Culture* (Baton Rouge, La., 2008).

he too was invited into the Tuesday Club. Doctor Hamilton christened him with the club name "Sir John Gabble" and designated him the club's champion to fight the French in the Seven Years' War. Actually, "Sir John" was a second lieutenant in the Independent Maryland Company that came to a terrible end. In September 1754 he and his men decamped from Annapolis and marched west for Fort Cumberland. Short of their rendezvous, they were attacked, Jacky was scalped, and his dismembered corpse was scattered. The remains were never recovered. His father learned of his fate in April 1755 but only after Henry Callister sent him a newspaper account of the fight.[9]

Bacon remarried over a year after his second wife passed away. The marriage proved nettlesome, not because they were incompatible, but because he hastily married without publishing the banns or receiving Governor Sharpe's permission. That mistake netted Bacon a fine of 5,000 pounds of tobacco, although Sharpe asked Lord Baltimore to give back his share of the penalty. Bacon also fell foul of the Proprietary and the governor after he performed the marriage of a clergyman. He was charged with failure to publicize and certify the marriage, but the prosecution was dropped. He grew downhearted and fed up working on the laws. "The Laws," he wrote to Henry Callister, "are my only Employment and Amusement; yet they are a dry sort of Stuff and sometimes apt to stick in the Throat." His health failed after he finished the *Laws* and Jonas Green died in April 1767. In July 1767, Governor Sharpe informed Lord Baltimore that Bacon was now quite aged and declining. That summer Bacon took the cure at Warm Springs, Virginia. The waters were briefly beneficial, if at all. In the spring, Sharpe was told that the old man was dangerously ill and soon to leave this world. On May 26, 1768, John Cary wrote Walter Dulany from Frederick "Our worthy, our good, and sincere friend, The Rev'd Mr. Bacon is now no more; he departed this life about ten minutes ago (i.e., 3:15 AM), Sincerely lamented by all honest men here."[10]

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Printing arrived in Virginia and Maryland in fits and starts. In Virginia there was occasional clamor for a press during Governor Sir William Berkeley's administration, but he always stifled it. While Thomas Culpeper, second baron Culpeper of Thoresway, governed, a merchant planter and sometime member of the House of Burgesses, John Buckner, brought William Nuthead and his press to

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[9]Lemay, *Men of Letters in Colonial Maryland*, 333-34.
[10]Ibid., 335-36, 341-42.

Jamestown.[11] Before Nuthead got very far with his intended edition of acts of the General Assembly of 1680–82, he and Buckner were hauled into the Council of State, compelled to post good behavior bonds, and forbidden to publish. Nuthead promptly went to St. Mary's City and started over. King Charles II expressly forbade Culpeper's successor to sanction printing in the colony. Charles's prohibition remained good law until 1730, when Governor Sir William Gooch set it aside and lured William Parks to set up his press in Williamsburg.[12]

A century ago Lawrence C. Wroth wrote *A History of Printing in Colonial Maryland 1689–1776*. The book is still unsurpassed for its insights into the domain of Maryland legal publishers as well as its bibliography of their imprints. It is also useful for its timeline and the sketches of every printer from William Nuthead to William and Mary Goddard. Wroth highlighted the importance of William Parks and Jonas Green—Parks for his compilation of the Maryland acts and his *Maryland Gazette* and Green for his *Maryland Gazette* and for Bacon's *Laws of Maryland*.[13]

Lawrence Wroth and Leo Lemay depicted Green from somewhat different vantage points. Wroth saw Green more as a printer and political figure whereas Lemay viewed him as a printer and literary figure, but both of them emphasized the relationship Green shared with Thomas Bacon. Taken together, their sketches are the only detailed snapshot of Green.[14]

A native-born colonial, Jonas Green descended from a family of Massachusetts printers who emigrated to the Bay Colony in the

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[11]The loss of the Gloucester County records prevents knowing how and when Buckner recruited Nuthead.

[12]Copy of Order-in- Council, Feb. 21, 1682/83, Colonial Office Papers, America and West Indies Original Correspondence [1606–1807], Class 5, vol. 51, fol. 42 (Virginia Colonial Records Project, Library of Virginia, Richmond); memoir of same, H.R. McIlwaine, ed., *Executive Journals of the Council of Colonial Virginia June 11, 1680–June 22 1699* (Richmond, Va., 1925), 39; Additional Instructions to Francis Howard, fifth baron Howard of Effingham, Dec. 3, 1683, Warren M. Billings, ed., *The Papers of Francis Howard, Baron Howard of Effingham 1643–1695* (Richmond, Va., 1989), 44.

[13]Wroth, *History of Printing in Colonial Maryland*. In *William Parks Printer and Journalist of England and Colonial America* (Richmond, Va., 1926) Wroth developed what is still the longest biographical treatment of Parks.

[14]Wroth, *History of Printing in Colonial Maryland*, 75-94; Lemay, *Men of Letters in Colonial Maryland*, 193-212.

1630s. His grandfather Samuel printed at Cambridge, Massachusetts for forty years. Timothy Green, Jonas's father printed in Boston before moving to New London, Connecticut where he was that colony's public printer. Mary Flint Green birthed Jonas in December 1712. Jonas Green grew up in New London with ink under his finger nails and black hands as he mastered the printing business and some education. Like Thomas Bacon, his desire for liberal learning was varied and lifelong. He expressed his artistic abilities in his writings and his designs for his imprints.

During the 1730s, Green worked for a Boston printery before he independently published the earliest American imprint in Hebrew, a Hebrew grammar. By 1736, he had settled in Philadelphia where he was working as a journeyman printer for Andrew Bradford, who once employed Benjamin Franklin. Then too, Green evidently was collecting books, because he was among the list of subscribers to Thomas Prince, *A Chronological History of New England* (Boston, 1736). Sometime toward the latter part of November, 1737, Green printed his first work for Maryland after Dame Fortune smiled on him. He had learned that Governor Samuel Ogle was having to rely on William Bradford for a large batch of proclamations because William Parks had gone to Williamsburg. Ogle's agent sent drafts of those proclamations to Philadelphia for printing. Seeing a chance to set up his own business, Green got Bradford's okay to print the proclamations under his own name as an example of his skill. The gambit succeeded, and in 1738, he was appointed to succeed Parks as Maryland's public printer.

Shortly before he resettled in Annapolis, he wed Anne Catherine Hoof, a childhood Dutch émigré, in Christ Church, Philadelphia. Seven months after the marriage his first child, John, came into the world. Anne Catherine bore five more sons and eight daughters. Three of the sons reached manhood; the other ten children died as infants.

Unlike William Parks who was an established printer with his own shop before he alighted in America, Jonas Green had to begin in Annapolis from scratch. His business built slowly. Even though his official publications came out on time, his bills were not honored promptly, and until the shop was financially stable, he borrowed money to sustain it. His most important loan enabled him to found his *Maryland Gazette*. In 1745 he bought new type and paper and used the first issue of the *Gazette* as an advertisement. Green claimed that readers would benefit from his newspaper because it would publicize "whatsoever is useful and entertaining, at home or abroad." It would contain "a Weekly Account of the most remarkable Occurrences," principally "to such Articles as nearest concern

the American Plantations in general, and the Province of Maryland in particular." If no such news were available, he would print "the best Materials" he could gather, including contributions from literary authors and friends. To them he said "We take this opportunity of making Application to our Learned Correspondents, whose ingenious Productions, if with such we shall at any Time be favoured, will ever find a Place in this Paper, and lay the Printer under the greatest Obligations; provided whatsoever is transmitted of this Kind, be consistent with Sobriety and good Manners." Should readers subscribe in sufficient numbers, he could continue publication. Ending, he informed readers that subscriptions would cost "Twelve Shillings, Maryland Currency, per annum, unsealed; or Fourteen Shillings if sealed and directed."[15] The *Gazette* and Bacon's *Laws* were his outstanding achievements as a printer.

Green ran the *Gazette* for two decades before he quit. Those were fraught years encompassing the shifts in provincial politics, the Seven Years' War, and the Crown's postwar attempts at taxing the colonies. Green used his editorial voice to question the Two Penny Act and to oppose the Stamp Act. That stance not only led to a brief suppression of the paper, but it also stood him apart from the Lord Proprietary and Thomas Bacon.

As provincial printer Green routinely associated with Baron Baltimore, the governor, legislators, and other leaders. None of them disdained him for blackened hands or ink-stained clothes. Quite the opposite, they encouraged his civic activities as a French horn player, alderman, postmaster, vestryman, auctioneer, lottery manager, and other commitments in local matters. Men of letters took to him too. Dr. Hamilton named him "purveyor, punster, punchmaker General, printer, and poet" of the Tuesday Club, where he was known by his club name "P.P.P.P.P." His poems showed his not inconsiderable flair as a poet and writer. They were for the delight of the members as they dined or were otherwise entertained. None was ever printed, but Dr. Hamilton recorded them in his history of the club. Dr. Hamilton also likened the companionable Green to a "gentleman . . . of a middle Stature, Inclinable to fat, round-faced." Thick set and bright eyed, he had "a good sizeable belly." He also claimed he had never seen the always smiling, witty Green frown.[16]

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[15]*The Maryland Gazette*, Jan. 17, 1744/45, microfilm copy *Archives of Maryland Online*. Green kept a newspaper morgue that has survived largely intact and is now housed at the Maryland State Library.

[16]Quoted in Lemay, *Men of Letters in Colonial Maryland*, 202.

When Jonas Green died, his obituary said nothing of Thomas Bacon or the making of Bacon's *Laws*. It simply regretted "the Loss of him, in the various Stations of Husband, Parent, Master and Companion." [17]

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In the 1750s Maryland lawyers, legislators, and merchants still lacked complete, modern printed collections of their written law. There were rising complaints around the province and from outsiders too. Now the Proprietary and the General Assembly were also being pressed from London, which threatened the Crown's further intrusion in Maryland affairs. The most immediate threat appeared to come from the Board of Trade. Led by its aggressive president, George Montagu Dunc, second earl of Halifax,[18] the board intended to impose stricter royal authority over all the Crown's North American plantations. To Halifax an effective tool for that purpose was to impose uniform laws that were consistent with the laws and practices of England. Maryland presented Halifax a problem. It was a proprietary province. He could not do there what he had done in Virginia when he merely overrode much of the Revisal of 1748.[19] Instead, he had to negotiate with the Proprietary, and that allowed Lord Baltimore wiggle room. Even so, Baltimore and other provincial leaders recognized the importance of careful delay while actually starting a compilation. And that was why Bacon came into the picture.

The lawyer in Jonas Green was as frustrated as anyone by the situation, so he resolved to change it. He saw in his friend Bacon a scholar gifted with the necessary talent and determination to do the project, and he encouraged Bacon to take it on. It also seems that Bacon was willing and had actually contemplated such an undertaking. That supposition comes from a suggestive hint in the satirical poem that he read at the Tuesday Club at its meeting in March 1752.[20] A year later, Green published a disparaging speech from New York governor James De Lancey that provoked Green's sharp editorial comment. "There is not," he wrote," "perhaps, a Province, or Colony, in all his Majesty's Dominions, where the Laws

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[17]*The Maryland Gazette*, April 16, 1767.
[18]W.A. Speck, "George Montagu Dunc, second earl of Halifax," *Oxford Dictionary of Biography Online*; Andrew D. M. Beaumont, *Colonial America and the Earl of Halifax, 1748–1761* (Oxford, 2005).
[19]Warren M. Billings, *Statute Law In Colonial Virginia Governors, Assemblymen, and The Revisals That Forged The Old Dominion* (Charlottesville, 2021), 113
[20]Lemay, *Men of Letters in Colonial Maryland*, 330.

of the Province, or Colony, so much want Revising, as in Maryland (where not a compleat Body is to be purchased at any Price)".[21] The comment was meant to publicize the project which Bacon was just beginning and to spur the priest on.

In November 1753 Bacon approached the Talbot County Court for permission to use its printed collection of laws so that he might "form a complete abridgment of all the laws in force in this Province, digested alphabetically under proper heads, in the same manner as he formerly abridged the Laws of Revenue in Ireland." This needed to be done because "printed copies of the several Acts of Assembly are so scarce, that [he] cannot without the assistance of the public procure a perfect collection of them." To strengthen his request, he said he had "the approbation of his Excellency Horatio Sharpe, Esq., Governor," and was "thereunto encouraged by several eminent lawyers, and other gentlemen." He hoped that the justices would judge the work of such public value that they would grant his petition. They did, only forbidding him from removing any records from the clerk's office.[22]

Thirteen years waxed and waned before he was done. Three contingencies account for that span of time: locating and editing the statutes, difficulties with the General Assembly, and other his other responsibilities.

A comparison between Bacon and his contemporary Virginia compilers is instructive for what it shows about the difficulties and complexities of his task. With the assistance of George Webb, William Parks edited *A Collection of All the Acts of Assembly Now in Force in the Colony of Virginia* (Williamsburg, 1733). Since the revised code of 1662 had abolished or reincorporated all legislation enacted prior to that date, all they needed to do was to prepare the texts of the enrolled manuscript statutes shelved in the Secretary of the Colony's office for printing. The General Assembly agreed to purchase copies for all public officials, but it would not defray printing costs. Parks had to find the money. He raised it from two hundred-fifty subscribers who received copies too. His design was typical for law books of his day; it was more utilitarian than beautiful, although it had its artistic embellishments. Parks worked on the book for four years before it came out. A decade later, when a committee wrote the Revisal of 1748, they followed similar steps,

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[21]*The Maryland Gazette,* Oct. 11, 1753, Archives of Maryland Online.

[22]Quoted in Tilghman, *History of the County of Talbot*, 1: 288.

and while their task was simpler than Parks's, even they weren't done for two years.[23]

Frustrating as they were at times, the Virginians' labors were far less trying than the Marylander's. His precise editorial methods are unknown. They probably went like this, although not necessarily in this exact order. Starting in Talbot County, Bacon would have searched across the colony. He would have scoured the records of all the General Assembly sessions (150) between 1637 and 1763. Next, he would have noted acts he could not find or were mentioned somewhere only by their titles. Then he would have collated manuscripts with all the printed session laws he had on hand. Lastly, he would have transcribed his collections into fair copies that were filed away until such time as Jonas Green could print them.

In 1758, Bacon advertised his forthcoming edition of "the Laws of the province." He claimed that he "did apply to the General Assembly, at their last session for encouragement to publish a "*Body of Laws* by authority, together with an Abridgment (i.e., index) thereto annexed, the Charter of the Province, and other useful matters, which being referred to the consideration of a committee was, by a particular accident, necessarily postponed." (The "particular accident" was a veiled reference to resistance in the House of Delegates.) Then he solicited "Such Persons as are Inclined to Subscribe . . . to send or give in their Names" to a group of strategically situated friends who would receive their subscriptions.[24]

His solicitation wrought meagre results. The week before his advertisement appeared, a Baltimore lawyer called James Bisset announced the forthcoming publication of his *Abridgment and Collection of the Acts of Assembly of the Province of Maryland, At Present in Force* (Philadelphia, 1759). His announcement soon siphoned off the largest number of the subscribers Bacon had expected to attract.[25] Jonas Green attempted to save Bacon's project. In the October 30, 1760 number of *The Maryland Gazette* he ran a front-page copy of a bill that praised Bacon for his "great Pains and Application." It nominated a committee of eleven to inspect Bacon's collection, and if the General Assembly approved, then Bacon could proceed to printing and publication. Additionally, the Assembly

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[23]Billings, *Statute Law In Colonial Virginia*, 55-70, 101-18. William Hunter published the Revisal of 1748 as *The Acts of Assembly, Now in Force in the Colony of Virginia* (Williamsburg, 1752).
[24]*The Maryland Gazette*, June 29, 1758.
[25]Ibid., June 22, 1758.

would advance £300 in current money for eighteen copies to distribute to officials. The bill failed.[26]

Despite the bill's failure and his irritation, Bacon pressed on. Now he was assisted by Reverdy Ghiselin, who did much of the legwork. He was nearly finished in July 1762 when he appeared in the Frederick County Court to swear an affidavit "on the Holy Evangels of Almighty God" that the six manuscript volumes he showed the justices were his and that he had collated the transcripts with all the original documents he had located. His oath was legally necessary because the book wasn't sanctioned by the General Assembly or yet vouchsafed by Lord Baltimore [27] The volumes went to Jonas Green, who set them as *The Laws of Maryland*. Green's costs were borne by fifteen subscribers, the Proprietary, Governor Sharpe, Upper House members Benjamin Tasker, Samuel Chamberlaine, Edward Lloyd, Benedict Calvert, Daniel Dulany, Stephen Bordley, and John Ridout, and six of the colony's other leading political figures. Lord Baltimore pledged £100; the others put up £50 in current money apiece.[28]

How large was the press run? Who received copies? Were copies offered to the public? The press run is unknown because Green's production records are lost. For sure copies went to the named subscribers and Bacon. Other copies may also have gone to the eighteen unidentified officials in the bill the House of Delegates defeated in 1760, as well as to unknown subscribers, but nothing confirms those possibilities. *The Maryland Gazette* didn't advertise copies for sale, although Londoner John Worrall did. Worrall (fl.1730s–1770s) was a major London bookseller who marketed British and American law books to clients on both sides of the Atlantic. His relationships to Bacon or Jonas Green are obscure, but whatever they were, he obtained a number of copies that he valued at £1-2*s* each. So, answers to the questions are little more than guesswork.[29]

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[26]The difficulties with General Assembly are discussed in Carl F. Everstine, *The General Assembly of Maryland 1634–1776* (Charlottesville, 1980), 408-13.

[27]Wroth, *History of Printing in Colonial Maryland*, 106. Bacon included a copy of the affidavit in the *Laws* at the end of the acts of 1762.

[28]Bacon, *Laws of Maryland*, Preface.

[29]There is no bibliography for colonial Maryland similar to W. Hamilton Bryson's classic *Census of Law Books in Colonial Virginia* (Charlottesville, 1978). The nearest thing to it is Joseph T. Wheeler, "Book Sellers and Circulating Libraries in Colonial Maryland," *Maryland Historical Magazine*, 34 (1939): 111-38. On the Worrall offer,

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Bacon was an experienced book designer, but no evidence argues for his influence on the design of *The Laws of Maryland*. The plan, as Lawrence Wroth demonstrated, was wholly Green's.[30] Although the book bears the imprint date 1765, Green didn't actually have it ready for distribution until 1766. Its materials and its dimensions say why. The materials were procured from Europe especially for it. Green imported a finely laid Dutch rag paper, an assortment of new attractive English types, and a durable leather that could have been procured locally.[31] The format is an outsized folio that measures 15-3/4" by 9-1/2" by 3."[32] Stout boards are covered in tan brown reverse calf. The spine has six highly raised bands that cover large cords that hold the gathers and lace the cover to the book block. Embellishments on the leather covering are minimal. Blind fillets decorate it, and a red lettering piece with words "LAWS OF MARYLAND" set in gold fills the space in the second compartment. Given its size, the book is arguably one of the largest books ever printed in England's North American provinces. And one would not disagree with Lawrence Wroth, who regarded it as the most important legal publication in colonial Maryland and a "specimen of typography not exceeded in dignity and beauty by any production of an American colonial press."[33]

Inside the book are free leaves front and back. After them are 736 leaves, or 1472 unnumbered pages, of words. The title takes up most of its page. Beneath it Bacon is identified as "Thomas Bacon, Rector of All-Saints Parish in Frederick County, and Domestic Chaplin to the Right Honourable Frederick Lord Baltimore." Below that is a printer's device that depicts the Proprietary's coat of arms, which is followed by the facts of publication. Next are the Dedication, Preface, Charter, Acts, Index, and Errata.

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see Edward Brooke, ed., *Bibliotheca Legum: Or a Catalogue of the Common and Statute Law Books of This Realm, And some others relating thereto From the First Publication, to Easter Term, 1772* (London, 1777), 134. Worrall has no biographer so his connections with Bacon and Green cannot be established.

[30]Wroth, *History of Printing in Colonial Maryland*, 79.

[31]Lemay, *Men of Letters in Colonial Maryland*, 210. Green first revealed them on the front page of the July 29, 1762 issue of *The Maryland Gazette*. They were, he informed his readers, "new English," "new small pica," and "new long pica." See also Wroth, *History of Printing in Maryland*, 79.

[32]The foregoing description is based on what I observed of an anonymous owner's original copy.

[33]Wroth, *History of Printing in Colonial Maryland*, 95.

The page layout is appealing. Green's design is akin to the designs he learned when he worked with William Parks, although it is more attractive. Font sizes and styles vary according to their uses. Running heads tell the meeting year, who was the incumbent Proprietary, and who was governor. Each meeting has a legend that says when it convened, when it rose, and whether the Proprietary and/or the governor attended. Acts are arrayed by title only, they are summarized, or they are rendered in full. Every act is titled and numbered sequentially in the order of its adoption. Amplifying information appears in glosses set right. Two and a quarter inch right hand and bottom margins allow an owner generous space to annotate his copy as he saw fit.[34]

Green created an elegant Dedication page and set the words in striking, bold type. The book is offered to Frederick, Lord Baltimore in these words "My Lord, The following Collection of the Provincial Laws of Maryland, Enacted and Ordained under the Authority which your Lordship and Noble Ancestors derive from the Royal Charter, is most humbly Presented and Inscribed to your Lordship, by your Lordship's most obliged and dutiful Servant and Chaplain, Thomas Bacon." Opening the Preface, Bacon writes "At length, thro' a great Variety of Difficulties and unforeseen Delays, the following Collection emerges into public View, in such Form as it is hoped will render its Appearance both useful and agreeable." He goes on to justify the need for his compilation and his editorial methods as well as to excuse the inevitable errors that will have crept into so large a book. That apologia is followed by his survey of lawmaking from 1635 to his day. He thanks Governor Horatio Sharpe for his support. Finally, he acknowledges the subscribers who he lists by name and contribution.

Lord Baltimore's Charter is presented on facing pages in Latin and English. Including it was important because it was the single written grant that distinguished Maryland constitutionally from Virginia. It framed the Proprietary's authority, governance, and popular rights and obligations. Virginians had no such charter. Its constitution was unwritten in the sense that no single document comprised it. Instead, it consisted of an oft-times confusing agglomeration of royal commissions, instructions, orders, parliamentary statutes, and English common law guarantees.[35]

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[34]The anonymous owner's original copy is replete with such marginalia. Mostly the annotations relate to provincial legislation enacted after 1765 or to state law adopted after Independence.

[35]Brent Tarter, *Constitutional History of Virginia* (Athens, Ga., 2023).

With regard to the Acts, Bacon had to choose which of them to print by title only, which to summarize, and which to publish in full. He printed a majority of the acts adopted prior to the Crown's seizing the colony during the Glorious Revolution by title only and synopsized the rest, one of which was the the religious toleration law of 1649.[36] Nowhere did he explain those editorial decisions. Likely he chose them because the early statutes were out of date and not the best examples of legislative draftsmanship. Nevertheless, in every instance, he cited the official manuscripts in the record books that were kept at the statehouse. Acts adopted after the start of the eighteenth century appear in full, although some are also listed only by title or in summary. Again, there are the citations to original manuscript volumes.

The Index is actually two documents. The larger of them is the principal tool for navigating one's way through the Acts in search of information. Rather than being a list of contents or a table of names and words, this index is what eighteenth-century Marylanders knew as an abridgement or a digest. It contains synopses of all the subjects that Bacon devised and organized alphabetically by topic. Beginning with "Abatement," it ends with "Yearly Meetings." Every subject has a cross reference. (For example, under "Branding" the references are to "Blasphemy," "Coin," "Negro," and specific sections of the relevant acts.) The smaller document is a name index of people, parishes, and towns that are referred to in the acts with their titles and sections. Developing both indexes demanded an incredible amount of thought, attention to detail, and not least of all, time. It is reminiscent of the excruciating detail that was so noticeable in the *Complete System of the Revenues of Ireland*. Its preparation had to have been one of Bacon's most tedious tasks; so it is understandable when he complained to Henry Callister that the work was dry and stuck in his throat.

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Bacon's *Laws* was a masterpiece that epitomized printing in colonial Maryland at its zenith. When he produced it, Jonas Green relied on equipment, materials, and techniques of composition that scarcely differed from those Johannes Gutenberg had devised when he introduced Europeans to moveable type printing in the mid-fifteenth century. However, that print culture would change after 1776. Independent Americans would tailor their colonial legal

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[36] David W. Jordan, "'The Miracle of This Age': Maryland's Experiment in Religious Toleration, 1649–1689," *The Historian*, 47 (1984): 338-59.

inheritances into distinctly American bodies of law. A rising clamor for all kinds of books of an American invention would contribute to new means of production in Maryland and elsewhere in the new nation. The demand would be met by a new class of producer, the publisher.

Jonas Green had been an independent printer; publishers were entrepreneurs. They raised capital, they hired or employed in house job printers, and they invested in modern print technologies that cut production costs and raised output. Advertisements for their products ran locally, regionally, and nationally in distribution networks that put their books within reach of eager buyers. By the early decades of the nineteenth century, publishers verged on monopolizing almost every facet of legal printing from authors to type design, composition, presses, press work, to manufacture and marketing. The result was standardized books that were cheaply made, low-priced, unattractive, and readily available to eager consumers. How these changes progressed in post-Revolutionary Maryland, and who pioneered them is a tale yet to be recounted.[37]

[37]Although it mainly concentrates on developments in the Northeast, Michael Hoeflich, *Legal Publishing in Antebellum America* (Cambridge, 2010) could serve as a model of what such a study might look like.

Sources of Law Found, Sources of Law Understood: An Annotated Bibliography of Rare Law Book Reference Sources

John L. Moreland*

Frederick C. Hicks, one of the great pioneers in law librarianship, was among the first academic law librarians to teach legal bibliography as a part of the law school curriculum. In a series of experimental lectures at Columbia University Law School during the fall semester of 1915, Hicks taught legal bibliography rather than instructing on the methods of using law books. That is, he identified and discussed books which documented various aspects of the law, but he did not tell his students how to use them. He traced the development of the various classes of Anglo-American law books from their beginnings in England to the contemporary descendants in the United States. The first lecture was intended to be an overview of the earliest classes of law books, while the remaining lectures dealt with early English law reports, early American law reports, statutes and session laws, and secondary sources such as treatises.

The relation of legal bibliography and the use of law books was abundantly clear to Hicks. For him, "One has not 'found the law' until one understands it; and one cannot search intelligently for the law without a substantial basis of legal acquirement."[1] In other words, a bibliographical exploration into law books leads to a greater textual, historical, and analytical understanding of the development of law, and thus improves one's ability to speak and write convincingly about the context of the legal text itself.[2]

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[1] Frederick C. Hicks, *Instruction in Legal Bibliography at Columbia University Law School*, 9 LAW LIBR. J. 121-25, 125 (1916).

[2] *See* Douglas W. Lind, *Legal History Learned as Legal Bibliography Well Told: The Case for Rare Book Courses in the Law School Curriculum*, 109 LAW LIBR. J. 309, 311 (2017).

While Hicks felt that those aspiring to be lawyers in the early twentieth century needed to be familiar with legal bibliography, some might argue that this is no longer the case in a world dominated by digital legal research tools and databases. On closer examination, however, the underlying principle of systematically describing books according to subject, class, period, author, country, or publisher are still applied by those in the world of rare law books today. In fact, there has been a growing interest in rare law books and law book history in recent years, especially among early-career law librarians. This is evident not only in continuing education opportunities such as the Rare Book School, but also in law school courses that examine law books through object-based learning and material analysis.[3] In this environment, scholars, dealers, collectors, and others interested in rare law books need reference sources that not only provide physical descriptions of law books, but also discuss their rarity, value, and historical significance as well.

This annotated bibliography is designed to help scholars, law librarians, legal bibliographers, book dealers, collectors, and anyone else interested in the history of the law book. It covers specific topics in the field and provides comprehensive overviews. The reference sources included in the bibliography were selected because they provide quick access to specific facts or information or offer an overview of a particular topic. While there are numerous seminal monographs that present in-depth analyses of the treatment of the material aspects of law books, they are not "reference sources" in the truest sense.[4]

The bibliography is arranged in three broad categories: introductory surveys, English law, and American law. Within each category,

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[3] *See e.g.*, Kathryn James, Mike Widener, and Ryan Greenwood, *C-85. Law Books: History & Connoisseurship*, Rare Book School; Joel Silver, *The Role of Rare Books in Law Libraries*, 20 LEGAL REFERENCE SERVICES Q. 85 (2001); Lind, *supra* note 2; Melissa M. Hyland, *Like Sand from the Pyramids: Using Rare Books and Manuscripts to Facilitate Object-Based Learning in the Law School Classroom*, 12 UNBOUND: A REVIEW OF LEGAL HISTORY AND RARE BOOKS 28 (2020); Nicholas Mignanelli and Kathryn James, *Legal Information & Book History Workshop*, Yale Law School's Lillian Goldman Law Library.

[4] *See e.g.*, FREDERICK C. HICKS, MEN AND BOOKS FAMOUS IN THE LAW (1921); ERWIN C. SURRENCY, A HISTORY OF AMERICAN LAW PUBLISHING (1990); MICHAEL H. HOEFLICH, LEGAL PUBLISHING IN ANTEBELLUM AMERICA (2010); JOSEPH L. GERKEN, THE INVENTION OF LEGAL RESEARCH (2016); THOM GOBBITT, LAW BOOK CULTURE IN THE MIDDLE AGES (2021).

the materials are either listed by their publication date, as is the case with the introductory surveys, or by their historical period under British law and American law. Because English law, and therefore American law as well, borrowed heavily from Canon and Civil law, many of the reference sources listed in the bibliography contain these early influential foundations of our legal system. For example, the *Catalogue of the Library of the Law School of Harvard University* contains a significant number of rare volumes on Roman and Canon law. Other non-Anglo-American legal sources including international and foreign materials can be found in works such as *Sweet & Maxwell's Complete Law Book Catalogue* which covers the law books of Australia, New Zealand, Fiji, and the Western Pacific.

This is not an exhaustive list of rare law book reference sources. There are numerous other reference sources that contain law related topics, such as Howes's *U.S.iana* and Lowndes's *Bibliographer's Manual of English Literature*, but are presented in the context of Americana and British literature. Yet, this bibliography reflects part of the enormous universe of reference sources relied upon by those in the field. If one were to peruse any rare law book catalog, many of the following standard sources would be frequently cited. Where possible, subsequent editions have been accounted for. The user should be aware that some of the reference sources are 30, 50, or even 100 years old, but this does not negate their value as bibliographical tools. Nevertheless, supplemental reference sources should always be used.

Reference sources for rare law books have varied over the course of their existence, whether written as bibliographies, checklists, or catalogs. Annotated bibliographies have consistently given researchers the tools to identify individual titles and have provided detailed descriptions of their physical attributes, production, dissemination, and reception. This annotated bibliography, then, serves as an introductory guide to early English and American law book reference sources and, in the spirit of Frederick Hicks, seeks to help those in the field "find the law" by first understanding it.

Introductory Surveys:

Pollock, Frederick and Frederic William Maitland. *The History of English Law Before the Time of Edward I.* 2d ed. Cambridge: Cambridge University, 1898.

Pollock and Maitland's two-volume set, originally published in 1895, is a standard legal reference work. It looks at the genesis and

evolution of English common law, society, and the development of individual rights. Volume I first deals with Anglo-Saxon law, the changes in law after the Norman invasion, the Age of Glanvill during the 12th century and the first compilation of English laws and customs, and then the Age of Bracton. Volume II, titled "The Doctrines of English Law in the Early Middle Ages," focuses on specific legal topics such as land tenure, marriage and wardship, fealty, ranks of free and unfree men, excommunicates, women, the Church, and the King.

This is a very useful and accessible foundational reference tool for anyone in the world of rare law books. It contains copious footnotes and cross-references throughout and shoulder notes. Reprinted in 2008 and 2014, it is widely available on the market and is also available through HathiTrust, which requires a login from an institution that owns a physical copy of the work.

Zumbalen, Joseph H. *Law Books, Their Purposes and Their Use*. St. Louis: Washington University School of Law, 1920.

In this series of lectures, Zumbalen, law professor at Washington University from 1918-1928, provided a bibliographical approach to teaching legal research. Students were led through the sources of law, classes of law books (both English and American), the development of the National Reporter System, treatises and commentaries, encyclopedias, digests, and Sheppard's Citations. A second section is dedicated to finding the law using the standard classification scheme used in West's American Digest System.

This collection of lectures is particularly valuable to the rare law book researcher in that it contains detailed and thorough tables of Regnal Years and law terms, and short descriptions of English courts. Also included is a full list of the reports of the English courts, showing the period covered by each reporter, and the abbreviated citation to them. Nominative and regional reporter information is provided for both American federal and state courts. It is available in HeinOnline.

Holdsworth, William Searle. *Sources and Literature of English Law*. Oxford: Clarendon Press, 1925.

This reference book was based on six lectures delivered by legal historian William S. Holdsworth at Oxford University in 1924. Its purpose is to serve as an introductory reference source for reading original statutes, case reporters and other authoritative texts, the historical sources of their development, and the jurists who played a significant role in that development. The book begins with an

analysis of the decline of the Normans, the evolution of Parliament, and the development of English law. It also addresses the development of caselaw, reporters, abridgments, and the English court system.

Holdsworth's reference book is clearly and succinctly written, making it useful for those just beginning in the rare book trade and requiring a foundational and contextual understanding of the sources on the market. Footnotes are sparse, however. It is available in HathiTrust and *The Making of Modern Law*, a subscription-based database. It is also available for free in Google Books.

Winfield, Percy. *Chief Sources of English Legal History*. Buffalo, N.Y.: W.S. Hein, 1983.

This reference source is also based on a series of lectures. Delivered at Harvard Law School from February to June 1923 by Percy Winfield, Fellow and Law Lecturer of St. John's College, Cambridge, the purpose of these lectures was to assist students who wished to take up the study of English legal history. This source is not a bibliography, as noted by the author, but rather a guide to the primary sources of English legal history. In this respect the chapters are strategically divided in an accessible and easy to read manner. His opening chapter titled, "Equipment for Research" is a brief overview on the methods and strategies of conducting research in the field. The next eight chapters include bibliographical guides, sources of Anglo-Saxon law, the influence of Roman law on English law, statutes, public records, caselaw, abridgments, and legal textbooks.

The majority of the reference book is narrative in form, but each chapter is followed by a bibliography of books that were discussed in the preceding pages. The description of each book varies in detail, from author, title, and publication year to a full description including collation, content analysis, and edition number. Footnotes to other reference sources and a subject index make this work accessible and useful for beginner dealers and collectors of rare law books. The original 1925 edition and 1972 edition are available in HathiTrust. The original 1925 edition is also available in HeinOnline.

Adamiak, Richard. *The Law Book Price Guide: A Market Value Reference for Antiquarian, Out-of-Print and Rare Law Books and Documents and Other Law-Related Materials*. Chicago, Il: Richard Adamiak, 1983.

The purpose of this reference source is to provide the most recent (as of its publication) market values of rare, antiquarian, and out-

of-print law books. It contains the catalogs of major specialist dealers in the field and the format provides significant bibliographical information that is both convenient and accessible. Its coverage is extensive but not comprehensive. Catalogs span the years 1975 to 1982 and include established law book dealers such as Frognal, Blackwell, Lake, Rubin, and Adamiak. An author and title index are provided, along with a currency conversion table from U.S. dollars to British £s.

This guide is useful to collectors, booksellers, law librarians, special collections librarians, scholars, and law book specialists. It is especially useful for appraisers and auctioneers. Although it has not been updated since 1983, Adamiak's reference book provides a window into the scarcity and value of law books one-hundred years ago. Originally published in 1917 for the Lenox Club, it was reprinted in 1971 under AMS Press.

Hines, W.D. et al. *English Legal History, A Bibliography and Guide to the Literature*. Garland Publishing Co., 1990.

Like Winfield, this short reference book provides an introduction to conducting research in English legal history and the resources typically used in the research process. Each chapter is dedicated to a particular time period or topic. One chapter covers writings on the medieval period, another on English legal history from 1485 to 1815, another on periodicals and periodical indexes, and another on legal history bibliographies. Each of these chapters explains the source, its contents, and its utility in legal history research.

This reference book is not easy to read due to its 1990s computer processor typeface and spatially condensed lines and paragraphs. The subject index does not refer back to page numbers, but rather item numbers from the bibliography. The legal history bibliography itself simply contains citations to the listed sources with no other bibliographical descriptions. Hines is most useful as a supplement to Winfield or Holdsworth.

Hall, Kermit L. *The Oxford Companion to American Law*. Oxford University Press, 2002.

A one-volume reference source containing five hundred entries arranged alphabetically, *The Oxford Companion to American Law* is another standard legal reference work and serves as a comprehensive guide to virtually every aspect of American law. It underscores the argument that law cannot be studied in a vacuum, and therefore cannot be separated from other aspects of society. The entries

are divided into broad categories including biographical essays, legal concepts such as property, contracts, and current issues in the field. The contributors consist of historians, law professors, judges, and legal scholars. This reference source is a useful tool for rare law book dealers and collectors seeking to understand how the law and its texts have developed in response to societal changes.

Hall's reference work clearly and succinctly explains technical legal jargon in ways that laypersons would understand. The entries span either several paragraphs or several pages and vary in their level of detail. Each entry also contains a list of suggested readings for further research. There are copious cross-references and a topical index to allow for easy access to persons, concepts, and places mentioned throughout the book. While cases have been mostly excluded from the list of entries, there is a case index that guides readers to the article or articles where the case is discussed. It is available in print and online through *Oxford Reference*, a subscription-based database.

Baker, John. *An Introduction to English Legal History*. Oxford University Press, 2019.

Considered the most authoritative introduction to the history of the English common law, Sir John Baker's classic text examines the development of the principals of English legal institutions and doctrines from the early medieval English era to the present day. This nearly 600-page tome covers the development of the jury system, the various English courts, legislation, judicial review, and the main pillars of the common law: property, contracts, torts, criminal law, and procedure.

Of particular interest to the bibliographer is an entire chapter dedicated to the development of legal literature from *Glanvill* and *Bracton* to reports of cases to treatises. At the end of each chapter is a "Further Reading" section that contains supplemental sources divided into the categories discussed in the chapter. Like Hall, this book serves as a detailed and comprehensive reference source on how the law and its texts have developed over the course of history—in this case English legal history.

Friedman, Lawrence M. *A History of American Law*. Oxford University Press, 2019.

This reference source can be seen as a companion to Baker's *An Introduction to English Legal History*. Originally published in 1973, it is a general survey of the development of the legal system of the United States. The nearly 790 pages are divided by time period into

four parts: American law in the colonial period, from the Revolution to the middle of the Nineteenth Century, to the close of the nineteenth century, and finally the Twentieth Century. Particular attention is given to law and the economy, the development of the legal profession in America, criminal law, torts, property, and the rise of the regulatory state.

Like Baker, this reference source dedicates an entire chapter to the development of legal literature from territorial reports to treatises to legal periodicals and casebooks. The chapters are well footnoted but do not contain a "Further Reading" section that is found in Baker. This source is useful for gaining historical background information on law books, treatises, and literature, and how those legal materials fit into the larger evolution of American law.

English Law (15th century to 18th century):

Beale, Joseph Henry. *A Bibliography of Early English Law Books*. Boston: Harvard University Press, 1926; reprinted, Dennis & Co., 1966).

----*Supplement*. By Robert B. Anderson (Harvard University Press, 1943).

A widely and often cited reference book, Beale's bibliography contains early English law books taken mainly from the Harvard Law School Library. It is also important to note that Beale, Royall Professor of Law at Harvard, was not a trained librarian or bibliographer. Because of this fact, the entries contain very little bibliographical description. The first three chapters, dealing with statutes, decisions, and treatises, provide title and some collation information, but exclude size, format, and content information. However, there are references to the books' devices as described in McKerrow's "Printer's and Publishers' Devices in England and Scotland." An appendix of significant woodcuts not found in McKerrow can be found in this reference work. The fourth chapter covers printers and the law books they published.

A supplement to Beale's bibliography was published in 1943 by Robert B. Anderson for the purposes of correcting the errors in Beale's volume. Anderson noted that even Beale himself admitted to "sins of omission and of commission" in his reference book. The supplement also served to include acquisitions of the Harvard Law School Library since Beale's original publication. Of note is part

two of Anderson's supplement which provides bibliographical variances between copies in the law library and the one's described by Beale.

This reference source serves members of the rare book community mainly as a checklist, rather than an in-depth bibliography. However, its organization and division by material type provides a clear and detailed overview of the rare books typically found on the market. It is an indispensable reference source and should be found on every dealer, collector, and scholar's bookshelf.

Maxwell, Harold W. and Leslie F. Maxwell, *Sweet & Maxwell's Complete Law Book Catalogue*. London: Sweet & Maxwell, 1925.

Sweet and Maxwell's six volume catalog is primarily a checklist, and therefore contains very little bibliographical descriptions. It does provide edition, collation, and format information, however. Volumes 1-3 cover English Law exclusively, volume 4 covers Irish Law, volume 5 covers Scottish Law, and volume 6 covers the laws of Australia, New Zealand, Fiji and the Western Pacific. The types of law books are wide in breadth including dictionaries, general histories of law, court records, Ecclesiastical records, municipal law, and procedure books. At the beginning of the first volume, one may find a table listing printers of law books in the 15th and 16th centuries.

The entries themselves are arranged by subject and an author and subject index can be located at the end of the book. This reference book was compiled almost entirely from other catalogs. Therefore, the preface to the reference source warns that because of this, many of the books listed are erroneously classified and some of the editions simply do not exist. This source is useful for its incredible coverage of law books and material. Despite the fact that it does not contain detailed description of the items' contents, a book collector, seller, or scholar will find the other bibliographical information rich in detail and is most useful in the areas of English, Irish, and Scottish law. The full text of volume I is available through HathiTrust.

Kraus, H.P. and Thomas Alfred Walker. *Law Books and Manuscripts, 15th-18th Centuries: From the Library of T.A. Walker and from Other Sources: With Many Items in International Law*. New York: Kraus, 1977.

Late nineteenth century international law scholar, Thomas Alfred Walker, best known for his 1899 treatise, *A History of the Law of*

Nations, collaborated with rare book dealer H.P. Kraus to write a 40-page catalog of Walker's private library. Entries provide prices and photocopies of the individual items.

This is a useful reference source for any book dealer, collector, or scholar interested in rare books that deal specifically with international law. Availability is scarce, however. Only 10 libraries worldwide are known to possess copies and is not available online.

Laeuchli, Ann Jordan. *A Bibliographical Catalog of William Blackstone*. Buffalo: William S. Hein & Co. Inc., 2015.

This detailed, comprehensive, and updated version of Spicer Eller's 1938 "The William Blackstone Collection in the Yale Law Library: A Bibliographical Catalogue," incorporates materials added to the Yale Law Library's Blackstone collection since 1938 and outside the scope of the Yale Blackstone collection. It consists of 671 entries spanning 556 pages. The first five sections of Laeuchli's work describes the numerous editions and abridgements of Blackstone's *Commentaries* published in England and Ireland, America, and other European countries. Other sections focus on parodies of the *Commentaries*, Blackstone's other legal writings, and commentary and criticism of Blackstone and his *Commentaries*.

This revised bibliography also includes a guide to symbols and references. Three indices are useful in locating entry numbers by author, editor, or translator, then by publisher, place of publication, or bookseller, and, finally, by dedication. These indices are an incredible addition, as Eller's *Catalog* did not contain indexing. While Laeuchli also kept much of Eller's original annotations, a table cross-referencing items included in both works can serve as an index to Eller's original work. Because this is the most expansive and thorough bibliography of Blackstone's writings to date, it is useful for any law book, dealer, collector, or scholar. It is also useful in that it provides a window into the development of legal education in England, and by extension, in America from the mid-19th century well into the 20th century.

Hill, John B. and William G. Stearns. *Catalogue of the Library of the Law School of Harvard University*. Cambridge: Hilliard & Metcalf, 1909.

Harvard University's Law Library houses perhaps one of the largest rare law book collections in the United States. In this two-volume catalog, researchers will find a number of early to mid-nineteenth century books on civil law donated by Joseph Story, a significant number of rare volumes on English, American, Roman, and Canon

Law, including a nearly complete set of the "Rota Romana," every English edition of Coke's First Institutes, and over fifty editions of Blackstone's *Commentaries*. The first catalog of the Harvard Law Library was originally published in 1826 with subsequent editions in 1834, 1841, and 1846.

The 1909 edition listed here contains 111,500 volumes on American and English Common Law only and is alphabetically arranged by author. A separate bibliography of trials can be found at the end of volume II. Each entry contains very limited bibliographical description, but does present collation information, multiple editions, and publication year and location. No subject index or general index is provided. Since this is a catalog and contains copy specific descriptions, any rare law book bibliographer will find this useful for an incredibly wide spectrum of American and English original legal sources. It is available online through HathiTrust.

Marke, Julius J. *A Catalogue of the Law Collection at New York University, With Selected Annotations.* New York: The Law Center of New York University, 1953.

Another exemplar of an institutional law library catalog, Marke compiled this work to be a systematic review of the printed materials in the New York University Law Library associated with the law from its genesis to December of 1950. The catalog is divided into eleven sections. The subject headings under each section are arranged alphabetically, as opposed to chronologically or thematically. While the entire catalog is comprised of 1,214 pages, the sections dedicated to rare law book-related materials contain an impressive 245 pages themselves. Section I deals with sources of law, including early English and American sources. Section II is dedicated to the history of law and its institutions. Here, rare legal sources cover ancient and primitive law, canon and ecclesiastical law, Celtic law, and early English and Anglo-American law.

Each entry contains a short bibliographical description, along with the place and date of publication. If a title has more than one edition, the last edition is only listed, unless another edition was deemed to hold some significance. Separate author and subject indexes have been provided, in addition to a large body of cross-references within the main text of the catalog. This catalog may serve rare book collectors, dealers, and scholars more as a checklist than a bibliographical tool. It is available in HeinOnline.

Adams, J.N. and G. Averley. *A Bibliography of Eighteenth Century Legal Literature: A Subject and Author Catalogue of Law*

Treatises and All Law Related Literature Held in the Main Legal Collections In England. **Tyne, England: Avero Publications Ltd., 1982.**

As of the printing of this bibliography in 1982, English legal scholars such as Maitland had primarily studied the Medieval and early modern period. However, attention began to turn toward the eighteenth century and this bibliography was written to encourage more research in this largely unexplored historical field. Moreover, it not only includes merely legal texts, but law related texts as well, such as library sale catalogs of members of the legal profession, biographical materials on members of the legal profession and those accused or convicted of crimes, and poems, plays, and satires on the law and legal profession. The bibliography includes all the eighteenth-century items in the British Library Catalog, the Bodleian Library, and several Inns of Courts' libraries.

The bibliography's entries are first organized by subject area and then alphabetically by author within the subject area. It includes a classification scheme similar to the Dewey Decimal System but is not very intuitive to use. This reference work is relatively easy to access, as it has several holdings in North America and Europe.

Cowley, John D. ***A Bibliography of Abridgments, Digests, Dictionaries and Indexes of English Law to the year 1800.*** **Quaritch, 1932; reprinted, Wm. W. Gaunt & Sons, 1979.**

Originally published in 1932 for the members of the Selden Society, an organization dedicated to the study and advancement of knowledge of the history of English law, Cowley's bibliography is another often cited reference work. Even though there had been numerous bibliographies written on this subject, Cowley believed that it was time to correct the "serious mistakes" of laymen made through a lack of knowledge of legal history or the books themselves, and of professional legal historians who had relied too much on trade catalogs, library catalogs, and general reference works. The purpose of the bibliography, then, is to list and describe as much as possible all printed editions of abridgments, digits, dictionaries, and indices of English law from the late 1490s to 1800.

Individual entries provide publication year, edition number, collation information, and notations to reference works consulted. Descriptions of the contents and significance of each source are not included. Thirty-nine photocopies of the titlepages to various books are dispersed throughout the bibliography and an appendix can be found in the book containing editions published after 1800 of

works originally published before 1800. This reference work is useful for finding detailed physical descriptions of English legal books and allows researchers to find all statutory and common laws in force at any given time, thereby seeing how a particular field of law developed over time. The original 1932 edition is available in HenOnline.

American Law (Colonial era to 19th century):

Pennsylvania Historical Society Library. *The Charlemagne Tower Collection of American Colonial Law.* Philadelphia: Pennsylvania Historical Society, 1890.

Charlemagne Tower was a New York attorney during the mid-nineteenth century and served with distinction in the Union Army during the Civil War. After the war, he retired from the practice of law and became a coal, iron, and railroad magnate. Tower was also a bibliophile in his own right and was one of the first to amass a significant collection on American colonial law. After his death, his library was donated to the Pennsylvania Historical Society where its members compiled this catalog of Tower's collection on American colonial law. Even at the time of its publication, the rarity and historical importance of the items contained in the catalog were unequaled in the world, making it one of the most important legal collections ever formed.

The entries in this catalog encompass the surviving first editions of compiled laws issued by each of the twelve colonies except Rhode Island, New Jersey, and Maryland, the first edition of the laws of Vermont, and the laws of the British and Danish West Indies. Almost every first edition is supplemented by all of the subsequent revised laws before 1800 and the original session laws, the latter being the rarest of rare legal sources. The session laws cover the years 1673-1788. The entries themselves contain minimal bibliographical description, including only publishing year, collation, and format information. Thus, for the rare book collector or dealer, it serves more as a checklist than an in-depth bibliographical tool. It is available through HeinOnline.

De Puy, Henry F. *A Bibliography of the English Colonial Treaties With The American Indians Including a Synopsis of Each Treaty.* New York: AMS Press, Inc., 1917.

Containing only 54 entries, this short reference work provides varying degrees of bibliographical descriptions of English colonial treaties with Native Americans from 1677-1768. Each entry does give a brief synopsis of the treaties' contents, collation, size, and the location of known copies in major libraries and private collections. A photocopy of the individual treaties also accompanies each entry. This reference source may be slight in size, but enormous in importance. As De Puy notes in the introduction, the fact that these treaties are rare is illustrated by the fact that only one public library in the United States possesses 1/3 of the number of titles in this reference book, while thirteen titles are known to only exist as singular copies. Additionally, of two no copy is known to exist in America.

This reference source is useful to those collectors, dealers, and scholars, as it fills a particular niche in the world of rare law books and American treaty history in general. It can be accessed online through HathiTrust and HeinOnline.

Benedict, Russell. *Acts and Laws of the Thirteen Original Colonies and States Constituting the Extraordinary Collection of Hon. Russell Benedict.* New York: American Art Association, 1922.

A valuable companion to *The Charlemagne Tower Collection of American Colonial Law*, this private collection catalog of Judge Russell Benedict, Justice of the Supreme Court of New York, was made available for public sale by the American Art Association on February 27th, 1922. There are a number of imprints by William Bradford, John Peter Zenger, and Benjamin Franklin. The types of legal materials include compiled laws, session laws, local ordinances, Journals of Congress, and other items deemed to have been the only known copy. Many individual documents are signed by well-known historical figures such as William Bradford.

The catalog includes 479 items. Each entry contains detailed descriptions on book collation and editions, thorough annotations, references and location of known copies. The catalog also contains photocopies of selected title pages. This is an extraordinary reference tool for copy specific bibliographical description. It is available in HathiTrust and HeinOnline.

Woxland, Thomas A. and Patti J. Ogden. *Landmarks in American Legal Publishing: An Exhibit Catalog*. St. Paul: West Pub. Co., 1990.

Law librarians Thomas A. Woxland and Patti J. Ogden prepared an exhibit at the University of Minnesota Law School for the purpose of highlighting the law books that were the milestones of legal publishing in the United States. The catalog is divided thematically into ten groups starting with important English legal sources and ending with 20th century publishing technologies—microfiche, computer databases, and Compact Disc libraries. Of particular note, many of the sources contained within the exhibit catalog represent the first of their kind, such as the first nominative reporter, the first casebook, the first American law dictionary.

This catalog is especially valuable due to each title's bibliographical description and narrative that encompasses contemporaneous commentary of the books or reviews of the books. What might be most useful to the researcher, then, is Woxland and Ogden describe each title within its own historical context.

Cohen, Morris. *Bibliography of Early American Law.* Buffalo: William S. Hein & Co., Inc., 1998.

This six-volume reference set lists all books on the topics of law or politics that were published in America prior to 1860. Cohen purposefully excluded legal documents filed with the court during litigation and official law materials, such as compiled statutes, case reporters, and other legal texts. He felt that court reporters and compiled statutes had been adequately listed and described in other legal bibliographies. This source is very useful to those conducting historical legal research and collectors of rare law books, as it provides rich, extensive, and detailed bibliographical information.

The entries are grouped under broad subject topics and then further divided into subtopics. At first glance, it seems that one can look up a particular type of literature by jurisdiction. However, the headings are somewhat confusing because the topics are subdivided by jurisdiction but a title or an author is also recorded in the same size type as the jurisdiction heading. Each entry contains an introductory paragraph explaining the historical event related to the entry item or a detailed biography of the individual who was a central figure of the event described. Each entry is also given its own number for quick reference and bibliographical description on the locations where copies of the items can be found. This bibliography also includes a jurisdiction index which organizes the items published in foreign jurisdictions. There is also a "Place and Publisher" index, which may be useful for those interested in book history.

McQueen Mcintosh: Florida's Federal, State, and Confederate Judge

Robert M. Jarvis*

ABSTRACT

This article provides the first detailed look at the life of McQueen McIntosh (1822-68). During his relatively brief career, McIntosh served as a federal, state, and Confederate judge in Florida, one of just a handful of men to hold all three offices. Despite this accomplishment, McIntosh does not have a formal biography and the little that has been written about him contains significant gaps and errors.

INTRODUCTION

In his day, McQueen McIntosh was a man of renown. Born in Georgia in 1822, he was appointed to Florida's federal bench in 1856. A slaveholder, he resigned in 1861 to protest the election of Abraham Lincoln. After leading Florida out of the Union, he was tapped to be the judge of the state's new maritime court at Key West. When Florida subsequently joined the Confederate States of America (CSA), this court was replaced by an identical CSA court. Once again, McIntosh was chosen to be its judge.

Time, however, has not been kind to McIntosh. Besides being on the wrong side of history, McIntosh has suffered from bad luck: none of his judicial opinions have survived and, as a result, none are in the *West* reporters. Similarly, very few of the newspapers that chronicled his career are extant. McIntosh also is regularly confused with other members of his enormous extended family, such as James McQueen McIntosh (1828-62), a much-lauded CSA general who died at the Battle of Pea Ridge in Arkansas.[1]

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[1] A 1927 newspaper article got so confused that it identified James as McIntosh's son. *See Anniversary of History Society Here*, SARASOTA HERALD, Jan. 30, 1927, § 2, at 3.

Because of the foregoing, little now is known about McIntosh. This can be seen most readily by looking at McIntosh's anemic Federal Judicial Center (FJC) and Wikipedia pages.[2]

Due to the paucity of information about McIntosh, he is routinely given short shrift by modern day writers. A 2021 *Federal Lawyer* article about Florida's early federal judges, for example, simply repeats McIntosh's FJC biography, right down to its incorrect statement that McIntosh "served as a judge of the Confederate District Court for the District of Florida."[3] This position, which McIntosh *never* held, was filled first by Jesse J. Finley (1861-62) and then by George S. Hawkins (1862-65).[4]

Even more glaring, *Find-a-Grave*, the massive website that contains burial information on 226 million individuals and is a standard reference tool for genealogists, historians, and other researchers, identifies McIntosh as "Judge McQueen Hillary McIntosh."[5] As discussed below, "Hillary" was McIntosh's mother's maiden name and the middle name of McIntosh's brother William.

To set matters straight and shed light on one of the few men to hold judicial office in the federal, state, and Confederate governments,[6]

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[2] *See McIntosh, McQueen (Biographical Directory of Article III Federal Judges, 1789-present)*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/judges/mcintosh-mcqueen (last visited May 1, 2025); *McQueen McIntosh*, WIKIPEDIA: THE FREE ENCYCLOPEDIA, https://en.wikipedia.org/wiki/McQueen_McIntosh (last visited May 1, 2025).

[3] Ira Cohen, *Florida's Early Federal Legal History (1824-1940)*, 68 FED. LAW. 40, 43 (July/Aug. 2021).

[4] *See* WILLIAM M. ROBINSON, JR., JUSTICE IN GREY: A HISTORY OF THE JUDICIAL SYSTEM OF THE CONFEDERATE STATES OF AMERICA 153-54 (1941).

[5] *See Judge McQueen Hillary McIntosh*, FIND-A-GRAVE.COM, https://www.findagrave.com/memorial/223266539/mcqueen-hillary-mcintosh (last visited May 1, 2025) [hereinafter *McIntosh Find-a-Grave Page*].

[6] As far as I can tell, only two other men share this distinction. Alexander M. Clayton served on Arkansas's federal territory court; Mississippi's High Court of Errors and Appeals; and the CSA District Court for the District of Mississippi. *See* Leslie H. Southwick, *Alexander Clayton: (1801-1889) Judge*, MISSISSIPPI ENCYCLOPEDIA, Apr. 13, 2018, https://mississippiencyclopedia.org/entries/alexander-clayton/. Daniel Ringo served on the Arkansas Supreme Court; the U.S. District Court for the District of Arkansas; and the

this article provides a proper summary of McIntosh's life. It also includes the only known photograph of McIntosh. Taken during Florida's 1861 secession convention in Tallahassee, it shows McIntosh at the high point of his life.

EARLY YEARS

McIntosh was born in 1822 (no source provides an exact date) in McIntosh County, Georgia.[7] His parents were Maria Harriet (née Hillary) (1788-1862) and Major William Jackson McIntosh (1782-1863).[8] While Maria was a native of Colleton County, South Carolina,[9] William was the son of General John Baillie McIntosh,[10] part of the famed McIntosh clan, which had immigrated from Scotland to New Inverness (later renamed Darien), Georgia, in the 18th century.[11]

Maria and William married on May 15, 1808.[12] Including McIntosh, the couple had nine children.[13] McIntosh's most famous sibling was his older brother William Hillary McIntosh (1811-90), who became an ordained minister and a leader in the Southern Baptist Convention.[14] It sometimes is reported that McIntosh also was the

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CSA District Court for the District of Arkansas. *See* William H. Pruden III, *Daniel Ringo (1803-1873)*, ENCYCLOPEDIA OF ARKANSAS, Feb. 10, 2020, https://encyclopediaofarkansas.net/entries/daniel-ringo-3568/.

[7] *See* THE CHILDREN OF PRIDE: A TRUE STORY OF GEORGIA AND THE CIVIL WAR 1608 (Robert Manson Myers ed., 1972).

[8] *Id.*

[9] *See Maria Harriet McIntosh*, GENI, Oct. 10, 2018, https://www.geni.com/people/Maria-Harriet-McIntosh/6000000004570621434.

[10] *See William Jackson McIntosh*, GENI, Oct. 10, 2018, https://www.geni.com/people/William-McIntosh/6000000004570621415.

[11] *See* J.G.B. Bulloch, *A Sketch of the McIntosh Family*, 7 MAG. HIST. 103, 103 (Feb. 1908).

[12] *See* 3 WALTER H. MCINTOSH, MCINTOSH-MACKINTOSH FAMILIES OF SCOTLAND AND AMERICA 51 (1982).

[13] *See* JOSEPH GASTON BAILLIE BULLOCH, A HISTORY AND GENEALOGY OF THE FAMILY OF BAILLIE OF DUNAIN, DOCHFOUR AND LAMINGTON 75 (1898) [hereinafter BAILLIE OF DUNAIN].

[14] For a profile of William, see *William Hillary McIntosh*, HISTORY OF THE BAPTIST DENOMINATION IN GEORGIA 376-78 (1881).

brother of the noted authoress Maria Jane McIntosh,[15] but this is incorrect.[16]

Nothing has been found regarding McIntosh's childhood. By the time he was a young man, however, he had decided to become a lawyer. Thus, "After attending Franklin College (Athens) with the class of 1843[,] he read law."[17] One source claims that "McIntosh read law with an established firm,"[18] but provides no further details. It is not known if McIntosh considered enrolling in the Augusta Law School (ALS), a small proprietary institution that at the time was Georgia's only law school.[19]

On December 21, 1847, McIntosh married Georgia Fannin (1825-1908), the daughter of Jane and Major Abraham B. Fannin.[20] Like the McIntoshes, the Fannins were a celebrated Georgia family whose American roots dated back to colonial times.[21]

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[15] *See, e.g., "McIntosh, Chief of Borlum,"* 2 HISTORICAL COLLECTIONS OF THE JOSEPH HABERSHAM CHAPTER, DAUGHTERS OF THE AMERICAN REVOLUTION 500, 501 (Mrs. William Lawson Peel ed., 1902).

[16] Maria (1803-78) was the daughter of Mary and Lachlan McIntosh. *See* Bob Franks, *Maria J. McIntosh*, GEORGIA GEN WEB PROJECT, https://www.thegagenweb.com/galiberty/maria.html (last visited May 1, 2025).

[17] Myers, *supra* note 7, at 1608. *See also* CATALOGUE OF THE TRUSTEES, OFFICERS, ALUMNI AND MATRICULATES OF THE UNIVERSITY OF GEORGIA AT ATHENS, GEORGIA, 1785-1906, at 46 (1906) (indicating that McIntosh studied with the Class of 1843 but did not earn a degree). In 1843, Franklin College was the sole functioning component of the University of Georgia. *See* Larry Dendy, *University of Georgia*, NEW GEORGIA ENCYCLOPEDIA, June 8, 2017, https://www.georgiaencyclopedia.org/articles/education/university-of-georgia/.

[18] *See McQueen McIntosh*, PRABOOK, https://prabook.com/web/mcqueen.mcintosh/2063190 (last visited May 1, 2025).

[19] ALS opened in 1833 and closed in 1854. *See* Thomas Rogers Hunter, *Litchfield on the Savannah: William Tracy Gould and the Deep South's First Law School*, 19 J. S. LEGAL HIST. 177, 177 (2011).

[20] *See* Peel, *supra* note 15, at 501. In at least one source, Georgia's first name is given as "Georgiana." *See Georgiana Mcintosh in the New York, U.S., State Census, 1905*, ANCESTRY.COM, https://www.ancestry.com/discoveryui-content/view/6454873:7364 (last visited May 1, 2025).

[21] *See* GARY BROWN, JAMES WALKER FANNIN: HESITANT MARTYR IN THE TEXAS REVOLUTION (2000). As Brown explains, the family arrived in America in the 1600s. During the Revolutionary War, it split over

The wedding took place in Savannah, Georgia,[22] and was officiated by McIntosh's brother William.[23] By this time, McIntosh was a lawyer; as a result, the couple's wedding license lists the groom (somewhat redundantly) as "McQueen McIntosh, Esq. Barrister."[24] Following the ceremony, Georgia and McIntosh settled in Savannah.[25]

During his short time in Savannah, McIntosh was involved in only one reported case. In *Cooper v. Mayor*, 4 Ga. 68 (1848), McIntosh surprisingly represented a group of free Blacks who had been jailed for failing to pay the city's $100 residency tax. Although the trial court held that the tax—which applied only to free Blacks—could be enforced by incarceration, on appeal the Georgia Supreme Court reversed.

LAW PRACTICE IN JACKSONVILLE

In 1850, Georgia and McIntosh moved from Savannah to Jacksonville, Florida. The reason why has not been found. Perhaps, however, it had something to do with the fact that McIntosh had run

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which side to back. Having chosen the British, Edmund Fanning later fled to Canada. "Edmund's brother, James W. Fanning, adopted the independence cause and fought on the colonists' side. . . . After the war, he immigrated to Georgia and became a successful and wealthy planter. To disassociate himself from his despised Tory brother, James dropped the 'g' from the family name. . . ." *Id.* at 3-4.

[22] *See McQueen McIntosh in the Georgia, U.S., Marriage Records from Select Counties, 1828-1978*, ANCESTRY.COM, https://www.ancestry.com/discoveryui-content/view/216044:4766 (last visited May 1, 2025) (Marriage License No. 2987, dated Dec. 21, 1847, issued by Seaborn Goodall, Clerk of the Court of Ordinary for the County of Chatham, Georgia, authorizing the Reverend William Hillary McQueen to marry Georgia Fannin and McQueen McIntosh, returned and recorded Dec. 27, 1847).

[23] *Id.*

[24] *Id.*

[25] *See McQueen McIntosh in the Georgia, U.S., Property Tax Digests, 1793-1892*, ANCESTRY.COM, https://www.ancestry.com/discoveryui-content/view/3252494:1729 (last visited May 1, 2025) (1848 Chatham County property tax roll), and https://www.ancestry.com/discoveryui-content/view/3131760:1729 (last visited May 1, 2025) (1849 Chatham County property tax roll).

up numerous debts and was being sued regularly in Savannah's Court of Common Pleas.[26]

Just before leaving for Florida, Georgia and McIntosh became parents for the first time. Ultimately, they would have four children (two boys and two girls): Thomas (b. 1850), Henry (b. 1853), Jessie (often misspelled "Jesse") (b. 1854), and Georgia (birth year unknown).[27] Following McIntosh's death, Henry changed his first name to "McQueen" to honor his father.[28]

In September 1850, having obtained his Florida law license, McIntosh announced his admission to the bar by running a classified ad in *The Floridian & Journal*, a Tallahassee newspaper. In pertinent part, it reads: "Will attend the Circuit Courts in the Eastern Circuit; the United States District Court at St. Augustine; the Supreme Court at Tallahassee; and prosecute Claims for citizens in any part of Florida against the Government at Washington, either before Congress or at the Departments."[29]

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[26] *See McQueen McIntosh in the Savannah, Georgia, U.S., Court Records, 1790-1934*, ANCESTRY.COM (last visited May 1, 2025). This file contains records regarding the following cases in which McIntosh was a defendant (none name Georgia as a co-defendant): Robinson v. McIntosh—Nov. 15, 1849—suit for $97.48, https://www.ancestry.com/discoveryui-content/view/5682:2769; Snider v. McIntosh—Feb. 7, 1849—judgment for $229.27, https://www.ancestry.com/discoveryui-content/view/517935:2769; Simpson v. McIntosh—July 7, 1847—case discontinued (amount not specified), https://www.ancestry.com/discoveryui-content/view/521943:2769; Thomas v. McIntosh—May 3, 1847—suit for $114.62, https://www.ancestry.com/discoveryui-content/view/477315:2769; Smith v. McIntosh—July 9, 1845—judgment for $55.62, https://www.ancestry.com/discoveryui-content/view/476622:2769. It is not known why McIntosh was having so much trouble paying his debts during this period.

[27] *See* BAILLIE OF DUNAIN, *supra* note 13, at 75. See also *McQueen McIntosh in the 1860 United States Federal Census*, ANCESTRY.COM, https://www.ancestry.com/discoveryui-content/view/7324318:7667 (last visited May 1, 2025) [hereinafter *1860 Census*] (at lines 1-5).

[28] *See* BAILLIE OF DUNAIN, *supra* note 13, at 100.

[29] *Classified Ad*, FLORIDIAN & J. (Tallahassee), Sept. 14, 1850, at 4.

McIntosh quickly found himself handling a wide range of matters, including collection cases,[30] corporate cases,[31] criminal cases,[32] personal property cases,[33] and real property cases.[34] Unsurprisingly, many of these lawsuits involved slaves.[35]

FEDERAL JUDICIAL SERVICE

On August 13, 1855, Isaac H. Bronson, the judge of the U.S. District Court for the Northern District of Florida, died.[36] Bronson's death set off an epic battle over who would his fill his seat. When the dust finally settled, McIntosh emerged triumphant:

> The vacancy created by [Bronson's] death intensified sectional and political rivalries within the state. . . .
>
> Stephen R. Mallory, [Florida's] moderate [U.S.] senator from Key West who shared the concerns of commercial interests in the state's northern Gulf Coast ports, endorsed George S. Hawkins, a former U.S. attorney, Florida Supreme Court justice, state legislator, and circuit court judge from Apalachicola. . . . However, Florida's senior senator, David Yulee, sponsored McQueen McIntosh, a . . . radical states' rights Democrat who had moved to Jacksonville from Georgia in 1850 and had close connections to the railroad industry in the eastern and central regions of the state. On February 27, 1856, President Franklin Pierce, at the urging of his attorney general, Caleb Cushing, appointed McIntosh to the vacancy.[37]

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[30] *See*, *e.g.*, Buffington v. Quackenboss, 5 Fla. 196 (1853).
[31] *See*, *e.g.*, Dibble v. Jacksonville & Alligator Plank Road Co., 6 Fla. 279 (1855); Barbee v. Jacksonville & Alligator Plank Road Co., 6 Fla. 262 (1855).
[32] *See, e.g.,* Frances v. State, 6 Fla. 306 (1855); Barber v. State, 5 Fla. 199 (1853).
[33] *See*, *e.g.*, Branch v. Branch, 6 Fla. 314 (1855); Archer v. Hart, 5 Fla. 234 (1853).
[34] *See*, *e.g.*, Burrett v. Doggett, 6 Fla. 332 (1855); Daniels v. Henderson, 5 Fla. 452 (Fla. 1854); Doggett v. Hart, 5 Fla. 215 (1853).
[35] In Kelly v. Wallace, 6 Fla. 690 (1856), for example, McIntosh successfully represented the owner of a slave named Peter who, while hired out to the defendants (a sawmill), drowned when he was ordered to retrieve a loose log even though he could not swim. Similarly, in Luke v. State, 5 Fla. 185 (1853), McIntosh was able to have the criminal conviction of a slave named Luke set aside, thereby allowing his owner to reclaim him.
[36] *See Death of Judge Bronson*, FLORIDIAN & J. (Tallahassee), Aug. 25, 1855, at 2.

By any measure, McIntosh's new domain was a primitive and impoverished one. In 1856, Florida's largest city—Pensacola—had just 2,500 residents; there was virtually no industry of any kind (a small percentage of the population was engaged in brickmaking and timber production); most people were farmers (the major crops were corn, cotton, and sweet potatoes); only a handful of schools existed and very few children (24%) were enrolled in them; there were no universities; roads (to the extent they existed) were sandy, rough, and rutted; there was just one completed railroad line (a 21-mile link between St. Marks and the capital city of Tallahassee); and wealth was measured almost entirely in slaves—in Leon County, for example, the indentured outnumbered Whites almost three to one (9,120 to 3,499) and had a collective estimated value of more than $4 million.[38]

McIntosh's judicial salary was $2,250,[39] the modern-day equivalent of $77,572.86.[40] For this relatively meager sum, McIntosh was expected to hold court at Apalachicola, Pensacola, Saint Augustine, and Tallahassee.[41] This required extensive travel under less-than-ideal circumstances:

The inadequacy of the public transportation system frequently prevented a judge from reaching the seat of court at the appointed

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[37] KERMIT L. HALL & ERIC W. RISE, FROM LOCAL COURTS TO NATIONAL TRIBUNALS: THE FEDERAL DISTRICT COURTS OF FLORIDA, 1821-1990, at 24 (1991) (footnotes omitted). McIntosh's appointment came as something of a surprise, for the Democrats had been getting ready to nominate him for a seat in the U.S. House of Representatives. *See Jacksonville (Fla.) Correspondence*, CHARLESTON DAILY COURIER (SC), Apr. 1, 1856, at 2.

[38] All these figures are drawn from Herbert J. Doherty, Jr., *Florida in 1856*, 35 FLA. HIST. Q. 60 (1956).

[39] *See Receipts and Expenditures—Letter from the Secretary of the Treasury Communicating Statements of the Receipts and Expenditures of the United States for the Year Ending June 30, 1858*, at 126 (1859), https://www.govinfo.gov/content/pkg/GOVPUB-T-0ffbdca2733ba2a066de1df1b8656f93/pdf/GOVPUB-T-0ffbdca2733ba2a066de1df1b8656f93.pdf.

[40] *See* S. Morgan Friedman, *The Inflation Calculator*, https://westegg.com/inflation/ (last visited May 1, 2025) (converting 1856 dollars into 2023 dollars).

[41] *See U.S. District Courts for the Districts of Florida: Meeting Places*, FEDERAL JUDICIAL CENTER, https://www.fjc.gov/history/courts/u.s.-district-courts-districts-florida-meeting-places (last visited May 1, 2025).

time. . . . For instance, when Judge McIntosh of the northern district of Florida arrived at Apalachicola for the February term, 1858, just after the court had been adjourned [by the clerk], he promptly called a special term to begin the following morning.[42]

As mentioned earlier, none of McIntosh's federal judicial opinions have survived. A sense of McIntosh's time on the Northern District bench, however, can be derived from other sources, such as the minutes kept by the court's clerks.[43] These summaries, 220 pages in all, reveal that McIntosh primarily heard business disputes.[44] In addition, McIntosh was kept busy by a plethora of administrative chores, such as admitting attorneys to the court's rolls; ruling on requests to be excused from jury duty; granting naturalization petitions; and overseeing the court's personnel.[45]

Even more helpful, however, are old newspapers. In January 1860, for example, it was reported that McIntosh had begun hearing the latest installment of the long-running legal battle that had been spawned by the death of Hardy B. Croom, a wealthy Tallahassee planter originally from North Carolina. Croom and his immediate family had died when the ship they were sailing on (the *Home*) sank near Cape Hatteras, North Carolina, during the "Racer's Hurricane" of 1837.[46] Various parties subsequently came forward, with some claiming under North Carolina's intestacy laws and others

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[42] ROBINSON, *supra* note 4, at 140-41.

[43] These minutes now are preserved at the National Archives in Atlanta under the heading "21.11.1 Records of the U.S. District Court for the Northern District [of Florida]." *See* E-mail from Desiree Capitanio, Archives Technician, National Archives at Atlanta, to the author, dated Sept. 21, 2023, at 1:19 p.m. (copy on file with the author).

[44] The 220 pages are divided as follows: 1) "Tallahassee General Minute Book," January to December 1856 and January 1857 (56 pages); 2) "Apalachicola Minutes," February 1857 to December 1859 and February to November 1860 (118 pages); and "Tallahassee Law Minutes," January and December 1860 (46 pages). *See* E-mail from Desiree Capitanio, Archives Technician, National Archives at Atlanta, to the author, dated Sept. 22, 2023, at 3:30 p.m. (copy on file with the author).

[45] *Id.*

[46] The storm is named for the first ship it damaged, the British naval vessel *Racer*. In all, the storm killed 105 people. *See 180th Anniversary of Racer's Hurricane*, NOAA—HURRICANE RESEARCH DIVISION, Oct. 2, 2017, https://noaahrd.wordpress.com/2017/10/02/180th-anniversary-of-racers-hurricane/.

claiming under Florida's intestacy laws. In 1857, the Florida Supreme Court ruled in favor of the former.[47] Although this appeared to settle the matter, the case soon was restarted in front of McIntosh:

The question of the domicile of the late Hardy B. Croom . . . has been sought to be revived . . . by Edward C. Bellamy and his wife in a new suit against Smith and Armstead. Mrs. Smith, who obtained the decree in the former cause, pleaded the judgment of the [Florida] Supreme Court and the decree which was rendered as a bar to any further discussion or inquiry into the question. The case was argued on Monday and Tuesday last before Judge McIntosh, of the U.S. District Court. . . .[48]

A short time later, the Apalachicola *Commercial Advertiser* began covering a case titled *Cook v. Barque Gleaner*.[49] The *Gleaner* had run into trouble (the paper does not elaborate) and had to be rescued. When the salvors subsequently went to court seeking to be rewarded for their efforts, McIntosh carefully examined the facts and found that only some of the salvors had rendered useful service and they had done so to varying degrees. As a result, McIntosh entered the following order: "To John Cook, of [the] sch[ooner] Walter M, and crew, $2342.90; to Rich J. Andrews, petitioner, $600; to H.C. Swain and three men, petitioners, at $25 each, $100; the petition of Augustus Beerman, of sloop California, dismissed—making total salvage of $3,042.90."[50]

Based on the little bit of evidence that still exists, McIntosh's two most notable cases while serving as a federal judge involved a ship called the *E.A. Rawlins* and an uprising known as the "Regulator Rebellion."

In March 1859, the *Rawlins* was arrested by the U.S. Coast Survey steamer *Vixen* while anchored in St. Joseph's Bay.[51] Subsequently, the *Rawlins* was brought to Apalachicola, where she was "libeled" (*i.e.*, sued) on suspicion of being engaged in the outlawed African slave trade; additionally, four of her crew members—Horace H.

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[47] *See* Smith v. Croom, 7 Fla. 81, 179 (1857).

[48] *In the U.S. District Court*, FLORIDIAN & J. (Tallahassee), Jan. 21, 1860, at 2. Further information about this case has not been found. As a result, how McIntosh ruled is unknown.

[49] *See Disasters, Etc.*, DAILY EVENING TRAVELLER (Boston), Mar. 8, 1860, at 4.

[50] *Id.*

[51] *See The Barque E.A. Rawlins*, CHARLESTON DAILY COURIER (SC), Mar. 23, 1859, at 2.

Hoyden, Francis L. Norton, Henry Sloan, and William Thomas—were indicted for murder.[52] The victim was the ship's master—identified only as the "Spanish Captain"—who was killed after it was discovered that he "had a large amount of money in his charge, besides a valuable gold chronometer watch and other valuables."[53]

In May 1859, newspapers reported that McIntosh had begun hearing the case.[54] Two weeks later, it was reported that McIntosh was having difficulty seating a jury.[55] In July 1859, the Baltimore *Daily Exchange* provided its readers with an update on how the trials were going:

Sloan, the second mate, was first tried, and after a tedious trial, was convicted of manslaughter, and sentenced to a fine of one thousand dollars and three years' imprisonment.

There being no United States penitentiary in Florida, he was placed in the Apalachicola jail until he could be taken to the one in Washington[, D.C.]. The door was found open lately and he has escaped.

Norton, the first mate, was tried and found not guilty, although there appeared little difference in the evidence between him and the second mate.

[H]adyn [sic] was to be tried at Pensacola, and was confined on board the [*Rawlins*] preparatory to being taken there. He also has escaped to parts unknown.[56]

With his work finished in Apalachicola, McIntosh now traveled to Pensacola, where Thomas was waiting to be tried and where several other cases also were pending. In August 1859, the Mobile *Advertiser* summarized their outcomes by writing:

Mr. J. Gonzales, Deputy United States Marshal for the Northern District of Florida, passed through our city yesterday, en route for Washington, having in charge five prisoners, convicted at the recent term of the United States District Court at Pensacola. Two of

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[52] *See The Slaver E.A. Rawlins*, SUN (Balt.), June 29, 1859, at 1.
[53] *Capture of the Bark E.A. Rawlins*, DAILY EXCHANGE (Balt.), Mar. 29, 1859, at 1.
[54] *See Later [News] from the Florida Ports*, DAILY PICAYUNE (New Orleans), May 19, 1859, at 1.
[55] *See The Rawlins Trial—Going Abroad for Jurors*, CHARLESTON MERCURY (SC), June 1, 1859, at 4.
[56] George D. Wise, *Sequel of a Late Slave Case in Florida*, DAILY EXCHANGE (Balt.), July 28, 1859, at 2.

them [Sloan, who had been recaptured, and Thomas] are convicted of murdering the Captain of the barque E.A. Rawlins, on the high seas; one of mutiny in the harbor of Pensacola; a fourth, of murder in the Navy Yard, and a fifth of robbing the mail. They have each been sentenced to the penitentiary, and as there is no such thing in Florida, their destination is the Federal Penitentiary in the District of Columbia.[57]

While in Pensacola, McIntosh also signed an order condemning the *Rawlins* and directing the U.S. marshal to sell her.[58]

In October 1860, McIntosh faced an even more fraught situation when the murder of three abolitionists touched off mass riots in Calhoun County (70 miles west of Tallahassee), an incident that came to be known as the "Regulator Rebellion." To quell the disturbance, McIntosh "directed his United States deputy marshal, H.K. Simmons, to summon a posse and execute such processes in Calhoun County as he should order."[59] The Pensacola *Tribune* subsequently wrote: "Hon. McQueen McIntosh, of the U.S. District Court, and Hon. J.J. Finley, of the State Judiciary, were untiring in their endeavors to restore tranquility."[60]

RESIGNATION AND ROLE IN FLORIDA'S SECESSION CONVENTION

Although he had sided with the government in the *Rawlins* case, and helped put down the Regulator Rebellion, McIntosh was firmly on the side of those who opposed abolition. Thus, in November 1860, McIntosh let it be known that he would resign if Abraham Lincoln was elected president.[61]

On the day after the election, McIntosh wired the following message to Florida State Senator George W. Call, Jr.: "Lincoln being elected I shall resign and advocate secession.—The West will go for it. What

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[57] *Prisoners Removed*, CHARLESTON DAILY COURIER (SC), Aug. 24, 1859, at 1.
[58] *U.S. Marshal's Sale—The United States vs. The Bark E.A. Rawlins*, DAILY TRUE DELTA (New Orleans), Aug. 21, 1859, at 8.
[59] WILLIAM WATSON DAVIS, THE CIVIL WAR AND RECONSTRUCTION IN FLORIDA 44 (1913).
[60] *Arrest of Florida Outlaws*, GLASGOW WKLY. TIMES (MO), Nov. 8, 1860, at 2.
[61] *See Latest Election Returns—Georgia and Florida*, N.Y. COMM. ADVERT., Nov. 9, 1860, at 3 ("The mail publishes a dispatch from Apalachicola station that McQueen McIntosh, Federal Judge for Florida, will not hold office under Lincoln.").

say you?"[62] Call quickly replied: "Don't resign. The State will secede beyond a doubt, but it is well for the U.S. Judge to be our friend."[63]

On January 3, 1861, McIntosh made good on his threat and submitted his resignation.[64] In doing so, he became one of 15 federal judges to resign out of loyalty to the South's cause.[65]

By now, McIntosh had been elected to represent Apalachicola at Florida's upcoming secession convention.[66] Formally known as the Convention of the People of Florida (CPF), it had been authorized by Florida's General Assembly on November 30, 1860,[67] and voting for delegates had taken place on December 22, 1860.[68]

The CPF opened in Tallahassee on January 3, 1861.[69] Its 69 delegates[70] "represented the various sections of Florida society and economy"[71] and included doctors, farmers, lawyers, merchants, and planters.[72] Fifty-one of the delegates owned slaves;[73] of those who did, the median number of slaves was 35.6.[74] McIntosh, with 63 slaves,[75] was one of the group's largest slaveholders.[76]

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[62] *Telegraphic Correspondence*, FLORIDIAN & J. (Tallahassee), Nov. 24, 1860, at 3.
[63] *Id.*
[64] *See The Florida State Convention*, N.Y. HERALD, Jan. 10, 1861, at 1, 8.
[65] *See* Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789-1992*, 142 U. PA. L. REV. 333, 426 (1993).
[66] *See Meeting of Southern Conventions and Legislatures*, N.Y. HERALD, Jan. 7, 1861, at 8.
[67] *See* John F. Reiger, *Secession of Florida from the Union: A Minority Decision?*, 46 FLA. HIST. Q. 358, 362 (1968).
[68] *Id.*
[69] *See* Ralph A. Wooster, *The Florida Secession Convention*, 36 FLA. HIST. Q. 373, 374 (1958).
[70] For a list of the delegates, see *id.* at 383-85.
[71] *Id.* at 374.
[72] *Id.* at 375.
[73] *Id.* at 376.
[74] *Id.*
[75] *Id.* at 383.
[76] The CPF's two largest slaveholders were G.W. Parkhill of Leon County (172 slaves) and George T. Ward, also of Leon County (170 slaves). *Id.* at 376.

Judge McQueen McIntosh at the 1861 Florida Secession Convention
(photograph courtesy of the State Archives of Florida / Florida Memory RC00517 / reproduction by Michael Hopkins of Michael Hopkins Photography)

During the CPF's deliberations, the critical question was *not* whether Florida would secede but *when* it would do so. While some delegates (the "immediates") wanted Florida to leave the Union at once, others (the "cooperationists") preferred to wait until the rest of the South (particularly Alabama and Georgia) acted. As an immediate, McIntosh quickly took matters into his own hands:

Former federal judge McQueen McIntosh introduced a series of resolutions that came to define the purpose of the Convention itself. First, [they] made [it] clear that the [Convention] believed secession

to be a constitutional right of the states to [be] enact[ed] as they saw fit. Because of the supposed constitutionality of secession, the elected representatives at the Convention were . . . tasked with the responsibility of this severance. In what would be the most important wording of the resolution[s], the [Convention] found "just and proper cause" for Florida to secede from the Union.

The passage of the McIntosh resolutions was the final push toward immediate secession. . . . By January 10, the final Ordinance of Secession had passed the Convention by a vote of 62 to 7. [When Convention President John C. McGehee] announced [that] the Ordinance [had] passed, marked in the Convention Journal of Proceedings at 12:22 p.m., Florida became the third state to declare secession from the Union.[77]

FLORIDA'S STATE ADMIRALTY COURT

In addition to McIntosh's secession ordinances, the CPF's delegates adopted various other ordinances. Ordinance No. 17, dated January 19, 1861, "abolished" the U.S. District Court for the Southern District of Florida at Key West and transferred its authority to a new court known as the "Court of Admiralty for the Southern District of Florida."[78] The incongruity of a state convention abolishing a federal court apparently gave none of the delegates pause. As the CPF's records reveal, Ordinance No. 17 was proposed by McIntosh.[79]

Governor Madison S. Perry initially tapped Senator Stephen R. Mallory to head the new court,[80] but Mallory, being a reluctant secessionist, declined the appointment.[81] Perry then named McIntosh to take Mallory's place.[82]

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[77] Michael Paul McConville, "The Politics of Slavery and Secession in Antebellum Florida, 1845-1861," at 88-89 (footnote omitted; paragraphing slightly altered for improved readability) (unpublished M.A. thesis, University of Central Florida, Summer 2012), https://stars.library.ucf.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=3221&context=etd.

[78] *See* ROBINSON, *supra* note 4, at 21.

[79] *See id.* at 82-84.

[80] *See Secession Items*, BUFFALO MORN. EXPRESS, Feb. 11, 1861, at 2.

[81] *See Hon. McQueen McIntosh*, CHARLESTON DAILY COURIER (SC), Feb. 21, 1861, at 1.

[82] *Id.*

THE CSA'S ADMIRALTY COURT

On February 8, 1861, the deputies of the CSA's Provisional Congress, meeting in Montgomery, Alabama, promulgated a "Provisional Constitution."[83] This temporary document remained in effect until February 22, 1862, when the CSA's Permanent Congress replaced it with a "Permanent Constitution."[84]

Article III, section 1(1) of the CSA's Provisional Constitution provided: "The judicial power of the Confederacy shall be vested in one Supreme Court, and in such inferior courts as are herein directed, or as the Congress may from time to time ordain and establish."[85] Article III, section 1(2) further provided: "Each State shall constitute a District, in which there shall be a court called a District Court[.]"[86]

Recognizing that Florida needed a second Confederate district court, but hamstrung by Article III, section 1(2), the CSA's Provisional Congress decided to utilize Article III, section 1(1). Thus, on March 11, 1861, it voted to establish a "Court of Admiralty and Maritime Jurisdiction" (CAMJ) at Key West.[87] As has been explained elsewhere, the CAMJ was a "plain evasion," but "a happy solution," to the CSA's Provisional Constitution's limit of one district court per state.[88] With the establishment of the CAMJ, Ordinance No. 17 became a nullity.[89]

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[83] *See The Constitution of the Southern Confederacy*, N.Y. HERALD, Feb. 10, 1861, at 1. For the text of the CSA's Provisional Constitution, see [CONFEDERATE STATES OF AMERICA] DEPARTMENT OF JUSTICE, THE STATUTES AT LARGE OF THE PROVISIONAL GOVERNMENT OF THE CONFEDERATE STATES OF AMERICA 1-8 (James M. Mathews ed., 1864) [hereinafter PROVISIONAL CONGRESS STATUTES].

[84] *See [No Headline in Original]*, MORN. POST (London), Feb. 22, 1862, at 4. For the text of the CSA's Permanent Constitution, see PROVISIONAL CONGRESS STATUTES, *supra* note 83, at 11-23.

[85] PROVISIONAL CONGRESS STATUTES, *supra* note 83, at 6.

[86] *Id.*

[87] *See id.* at 60-61 ("An Act to Establish a Court of Admiralty and Maritime Jurisdiction at Key West, in the State of Florida").

[88] *See* ROBINSON, *supra* note 4, at 299, 300.

[89] Nevertheless, on April 24, 1861, the CPF passed Ordinance No. 32, which repealed numerous prior ordinances, including Ordinance No. 17. *See* CONSTITUTION OR FORM OF GOVERNMENT FOR THE PEOPLE OF FLORIDA, AS REVISED AND AMENDED AT A CONVENTION OF THE PEOPLE BEGUN AND HOLDEN AT THE CITY OF TALLAHASSEE ON THE THIRD DAY OF JANUARY, A.D. 1861, TOGETHER WITH THE ORDINANCES ADOPTED BY SAID CONVENTION 45-46 (1861).

On March 16, 1861, Jefferson F. Davis, the CSA's Provisional President, nominated, and the CSA's Provisional Congress approved, McIntosh to be the CAMJ's judge.[90] Subsequently, a pair of recess appointments made Fernando J. Moreno the CAMJ's marshal and John L. Tatum the CMAJ's district attorney.[91] If McIntosh appointed someone to be the CAMJ's clerk, as he was authorized to do under section 4 of the CAMJ statute,[92] there now is no record of it.[93]

In May 1861, McIntosh traveled to Key West to take up his duties as judge of the CAMJ. This trip proved to be a disaster, with McIntosh barely escaping with his life:

When Florida left the Union, the Federal government had a gunboat and two companies of artillery at the Key West Naval Base, sufficient to enforce beyond question United States authority on the island. But the soldiers could not control sentiment, and the people were soon divided into pro-Secessionists and pro-Unionists.

The only United States civil officials at Key West who did not resign their offices after Florida seceded were District Judge William Marvin [of the U.S. District Court for the Southern District of Florida] and Charles Howe, Collector of Customs. Neither the state nor the Confederate government recognized the authority of Judge Marvin or Collector Howe.

Early in May, 1861, McQueen McIntosh, a secession leader, was sent to Key West as the new state appointee to the bench occupied by Marvin. McIntosh demanded that Marvin relinquish the office

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[90] *See* 1 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA, 1861-1865, at 153 (1904).

[91] *See Letter from Montgomery*, DAILY PICAYUNE (New Orleans), Apr. 11, 1861, at 1. Moreno (1823-1905) and Tatum (1837-75) were both Key West residents and, until recently, had held these same positions at the U.S. District Court for the Southern District of Florida. *See* JEFFERSON B. BROWNE, KEY WEST: THE OLD AND THE NEW 211 (1912).

[92] *See* PROVISIONAL CONGRESS STATUTES, *supra* note 83, at 60.

[93] The most obvious choice, however, would have been Joseph B. Browne, who had just resigned as the clerk of the U.S. District Court for the Southern District of Florida. Like Moreno and Tatum, Browne was an ardent secessionist. For a profile of Browne (1814-88) written by his son Jefferson, see BROWNE, *supra* note 91, at 225-26.

and surrender all records and papers pertaining to the post of district judge. Judge Marvin refused, [and only] his [subsequent] personal intervention with the Union officers kept McIntosh from being arrested. Instead, McIntosh was allowed to leave the island.[94]

The meeting between McIntosh and Marvin occurred on Monday, May 12, 1861.[95] In all likelihood, it took place in the "Stone Building," which in 1859 had become Key West's new federal courthouse.[96]

The press quickly spread word of McIntosh's misadventure, with the *National Republican* (a newspaper in Washington, D.C.) reporting:

McQueen McIntosh, of the Confederate States, and appointed to the position of judge of this district, arrived [in Key West] a few days [ago], and, finding the island in the quiet possession of the United States, has concluded it best to leave to-day [May 16, 1861]. Himself and the [CAMJ's] district attorney, J.L. Tatum, sail for Tampa this evening.[97]

McIntosh's trip quickly led to calls to dissolve the CAMJ, and only the CSA's pride saved the court:

In the fall following Judge McIntosh's unsuccessful effort to hold court at Key West, one of the Florida deputies, Jackson Morton,

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[94] JOHN E. JOHNS, FLORIDA DURING THE CIVIL WAR 155 (1963) (paragraphing inserted for improved readability).

[95] In his book, Browne reproduces a letter that U.S. Brevet Major William H. French sent to U.S. Brevet Captain George L. Hartsuff on the day McIntosh left Key West (Friday, May 16, 1861). *See* BROWNE, *supra* note 91, at 218-19. According to French, McIntosh arrived in Key West on Sunday, May 11, 1861, and planned to hold the first session of the CAMJ on Tuesday, May 13, 1861. McIntosh used the intervening day (Monday, May 12, 1861) to have his meeting with Marvin. McIntosh then spent the next four days cooling his heels, waiting for permission to leave the city. An anonymous letter in the *New York Herald*, dated Wednesday, May 14, 1861, disagrees slightly with this timeline, reporting that McIntosh arrived in Key West on Monday, May 12, 1861. *See Our Key West Correspondence*, N.Y. HERALD, May 21, 1861, at 8.

[96] The Stone Building was the court's home from 1859 to 1885. *See* BROWNE, *supra* note 91, at 68, 75.

[97] *Key West Loyal*, NAT'L REPUB. (Washington, DC), May 27, 1861, at 2.

moved [on November 29, 1861] to have the Committee on the Judiciary inquire into the expediency of rescinding the act creating the Court of Admiralty. On December 23, 1861, the Committee recommended that the act be repealed, and Congress repealed it at once. When the deputies had had an opportunity to think the matter over during Christmas week, they apparently concluded that the abolishment of the court might be construed as a concession in favor of Union sovereignty at Key West, for upon the reopening of Congress after New Year [January 2, 1862] the abrogation of the court was reconsidered and withdrawn by unanimous consent.[98]

Despite being unable to take his seat, for the rest of the war McIntosh remained a CSA judge and collected his $3,500 salary.[99] On at least one occasion (at Marianna in July 1863), however, McIntosh sat on the bench, taking the place of Judge George S. Hawkins, who had been disqualified in a particular case.[100]

FINAL YEARS

The end of the Civil War left McIntosh financially debilitated due to the emancipation of his slaves.[101] To try to rebuild his fortune, McIntosh resumed practicing law;[102] opened a real estate firm;[103] and, like other Southern rebels, applied for amnesty, which was granted in March 1867.[104] In April 1867, in a further effort to adjust to his new circumstances, McIntosh appeared in Tallahassee at a program organized by the Freedmen of Leon County. According

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[98] ROBINSON, *supra* note 4, at 306-07.
[99] *Id.* at 307-08.
[100] *Id.* As explained *supra* text accompanying note 4, Hawkins became Florida's second CSA district court judge in 1862.
[101] In the 1860 federal census, slaves represented 70% of McIntosh's wealth. *See 1860 Census*, *supra* note 27, at line 1, columns 8-9.
[102] *See* MARTINDALE'S DIRECTORY 278 (James B. Martindale ed., 1868) (list of Tallahassee lawyers, including "McQueen McIntosh").
[103] *See Display Ad*, SEMI-WKLY. FLORIDIAN (Tallahassee), Aug. 27, 1867, at 1 (solicitation by "McIntosh & Osborn, Real Estate Brokers"). McIntosh's partner was Thomas W. Osborn, a former assistant commissioner of Florida's Freedmen's Bureau. *See* Joe M. Richardson, *An Evaluation of the Freedmen's Bureau in Florida*, 41 FLA. HIST. Q. 223, 223 (1963).
[104] *See McQueen Mcintosh in the U.S., Confederate Applications for Presidential Pardons, 1865-1867*, Ancestry.com, https://www.ancestry.com/discoveryui-content/view/2318:1187 (last visited May 1, 2025) (indicating that McIntosh was pardoned on March 28, 1867).

to the Tallahassee *Sentinel*, "[Florida] Gov. [David S.] Walker and Judge McIntosh addressed [the Black members of the audience] kindly, advising industry, counselling moderation in the use of their new privileges, and tendering all the aid in their power."[105]

A short time later, it was reported that McIntosh had been readmitted to practice at the Northern District of Florida—his former court—by his successor Judge Philip Fraser.[106] Before being readmitted, McIntosh was forced to "subscrib[e] to an oath [that he is] sincerely attached to the Union and the Constitution, and well disposed to the peace, good order, integrity, happiness and prosperity of the Government, and will defend the same against all enemies, foreign and domestic."[107]

Because of his untimely death, McIntosh did not practice for very long after the war. However, in 1867, in a case called *Ex parte Edwards*, 11 Fla. 174 (1867), he convinced the Florida Supreme Court to release his client, a man named A.K. Edwards, from jail. Edwards had been incarcerated for allegedly violating an injunction that had been issued in a case "arising from certain transactions . . . connected with the making of a crop of cotton in Leon county in 1866."[108]

On June 18, 1868, McIntosh died in Pensacola at the age of 46.[109] The cause is unknown—news accounts from the time simply state that he passed away "after a painful illness of six months duration."[110] Given his relative youth; the time from diagnosis to death; and the lack of any evidence of traumatic injury, it seems a fair bet that McIntosh died of cancer. McIntosh, however, insisted that his death was caused by his work: "He has been the leading counsel in the case of the Alabama and Florida Railroad in bankruptcy here [in Pensacola], which he conducted with signal ability; and, in this arduous service, as he believed and alleged, he contracted the disease which terminated only in death."[111]

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[105] *From the Tallahassee Sentinel: Reconstruction in Florida*, DAILY CLARION (Jackson, MS), May 2, 1867, at 3.
[106] *See The Southern States—Florida—The First Session of the United States District Court*, N.Y. TRIB., May 28, 1867, at 1.
[107] *Id.*
[108] *Edwards*, 11 Fla. at 174-75.
[109] *See Florida—Miscellaneous*, DAILY PICAYUNE (New Orleans), June 26, 1868, at 4.
[110] *See Death of Hon. McQueen McIntosh*, FLORIDA UNION (Jacksonville), July 18, 1868, at 2.
[111] *Id.*

The location of McIntosh's grave is a mystery. *Find-a-Grave* states that McIntosh's burial details are "unknown."[112] Another source, however, reports that after she died, Georgia (McIntosh's widow) was buried in Savannah's Bonaventure Cemetery,[113] where the McIntosh family has its own plot.[114] As such, it seems likely that McIntosh also is buried in Bonaventure Cemetery, albeit without a headstone or other identifying marker.

CONCLUSION

Shortly after his death, the Pensacola *West Florida Commercial* eulogized McIntosh by writing: "Judge McIntosh was a man of ardent temperament and lofty personal pride, yet of warm, generous, [and] kindly impulses."[115] One hundred and fifty-seven years later, the first half of this assessment undoubtedly is correct. As for the second half, there is no way to know whether the paper was being factual or merely gracious.

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[112] *See McIntosh Find-a-Grave Page*, *supra* note 5.
[113] *See* Myers, *supra* note 7, at 1608.
[114] The McIntosh family plot (H-140) is in the far eastern portion of the cemetery. *See Bonaventure Cemetery Maps*, CITY OF SAVANNAH, https://www.savannahga.gov/DocumentCenter/View/3092/BONAVENTURE-SECTION-H?bidId= (last visited May 1, 2025).
[115] Myers, *supra* note 7, at 1608.

BOOK REVIEWS

Podvia, Mark W. *The Strange Case of Dr. Paul Schœppe*. Clark, N.J.: Talbot Publishing, 2022. xv, 147. ISBN 9781616196752. $24.95.

In January of 1869, a wealthy 69-year-old unmarried woman, Maria Steinnecke, died rather suddenly in the sleepy town of Carlisle, Pennsylvania, which she visited off and on, after suffering a day of acute bodily distress. A local doctor, Paul Schœppe, a 27-year-old German immigrant, had been seeing her regularly for palsy but otherwise she had looked to be in good health. After she died, Ms. Steinnecke was taken to her home city of Baltimore for burial. All seemed normal until just days later, when Dr. Schœppe tried to (yellow flag) cash checks from Ms. Steinnecke that looked to be forged, and (red flag) claimed that the two were engaged to be married and presented a second will for probate, in his handwriting, that left her entire estate to him. One exhumation, an autopsy, and two murder trials later and you have the fascinating tale of *The Strange Case of Dr. Paul Schœppe*.

The first trial ended in a conviction of murder and a sentence of execution for Dr. Schœppe. The prosecution had entered medical evidence from expert witnesses after an autopsy had found traces of prussic acid in Ms. Steinnecke's stomach and intestines. The defense attacked the autopsy proceedings and findings, raising several credible issues – was the prussic acid the actual case of death, where was the proof that it was the doctor who had administered it, could the acid have been produced by harmless substances in the stomach, why hadn't they examined the kidneys? However, the jury found the medical and other evidence to be indicative of guilt and brought in their verdict of guilty. It was then that the case, and Carlisle, became the center of attention, going on to involve the Pennsylvania appellate judiciary system, the Pennsylvania legislature, the medical profession, the legal profession, the national press, the German-American community, and even the Prussian government. After two new state laws, including one that changed how death penalty appeals were managed by the Pennsylvania Supreme Court, a second trial was held and Dr. Schœppe was found innocent. But, was he? And, if he was innocent, was someone else guilty?

It was with much anticipation that I started reading *The Strange Case of Dr. Paul Schœppe*, and, as expected, the author[1] didn't disappoint. The basis of the story is, of course, a good old-fashioned murder mystery – did the dastardly foreign doctor poison an innocent elderly woman while scheming to perpetrate a fraudulent will? That alone would make for a fun read. But the book is so much more than that. To begin with, the author does a wonderful job of immersing the reader in a very specific time and a very specific place. It is impossible to read the book and not *feel* that you are living in Carlisle, a small, agricultural-based town in the south-central part of Pennsylvania just after the Civil War. The reader also gets to thoroughly know all the players in the drama, at least as much as one can when dealing with an event this long ago.

But perhaps the most interesting facet of the book is how the author manages to touch on so many distinct aspects of life and law in 19th Century America. The reader is lead on a journey through Anglo-American jurisprudence, the state of medical knowledge at the time, the role that public opinion and the press play in sensational trials, the potential negative effects of ethnic prejudice, and even a primer on autopsies and poisons. All through the book the breadth and depth of the author's exhaustive research is apparent, with scrupulous attention paid to the details found buried in contemporaneous documents and archival materials (leave it to the librarian and archivist to nail that). It is a complex story, and the author handles it masterfully from start to finish, even presenting us at the end with some rather provocative revelations of Dr. Schœppe's pre- and post-trial life. And like all tales told by good historians, some questions are answered but many others are asked, leaving the reader to mentally engage with the book long after they have put it down.

So … did Dr. Schœppe deliberately poison Ms. Steinnecke to set himself up on Easy Street? You'll have to be the judge of that.

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University of Idaho College of Law Library

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[1] Full disclosure – "the author" and I have been friends since we met in the Hilton elevator at the 2005 San Antonio AALL Annual Meeting.

Bogus, Carl T. *Madison's Militia: The Hidden History of The Second Amendment*. New York: Oxford University Press, 2023. vii, 327. ISBN 9780197632222. $31.99.

The recent Supreme Court decisions have put more emphasis on the history and tradition surrounding the Second Amendment and individual gun rights. Bogus' book brings some of that history and tradition into context. The debates in Congress related to the Second Amendment are minimal. The discussion in the House of Representatives was about conscientious objectors and the requirements for raising a standing army (pg. 209). The full debate takes up less than four pages in the Congressional Record. The Senate, however, did not record their discussions.

Most of Bogus' book looks at events and documents that the founding fathers would have known about at the time they were debating the Second Amendment. These include the four state constitutions that had a right to bear arms provision before the federal version and the source of the original right to bear arms provision the English Declaration of Rights of 1689. Madison did not copy any of these earlier provisions verbatim. Bogus' conclusion is that states used militias to control insurrections, especially slave insurrections in the south, the Second Amendment was a guarantee that the federal government could not deprive states of arming their militias as a way to end slavery.

At this point in history, the purpose of the militia was to prevent the need for a standing army. In the past, governments would disarm the militia in order to establish a more favorable standing army. The militia, which Bogus compares to the modern-day National Guard (pg. 315, footnote 15), well not effective against trained soldiers were necessary for the States. There are several examples in the book that illustrate how the militia was ineffective in battle. On many occasions militias would surrender or run away without firing a single shot, often dropping their guns so they could run faster. Furthermore, most men at the time did not own a gun (only 1 in 5), which would make them ill equipped to fight a standing army. However, the states (both Northern and Southern) did regularly call up the militia to suppress disturbances within the state, including rebellions, slave revolts and attacks from Native Americans. There were no local police at this time in America.

This book is a fantastic addition to academic libraries, especially those with US history sections. The book's footnotes provide citations to firsthand authority like the Federalist Papers, letters from the founding fathers and floor debates. While the book focuses on

Bogus' thesis and the need for slave patrols, it does not provide any counter positions. This book is a useful source for supplying historical context and citations to primary authority related to the creation of the Second Amendment. However, relying exclusively on this book would not provide the reader with a full perspective of the Second Amendment and individual gun rights history.

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Widener, Michael and Ryan Greenwood. *Histories of Legal Literature: A Hundred Years of English-Language Scholarship.* Clark, N.J.: Talbot Publishing, 2024. viii, 201. ISBN 9781616196912. $49.95.

Note: The following is a slightly revised version of the letter supporting this work for the 2025 AALL Joseph L. Andrews Legal Literature Award.

The authors' professional careers are in the fields of rare books and legal history as shown by their biographies which make them experts in the work under review. Michael Widener, former Special Collections Librarian at the Tarlton Law Library at the University of Texas at Austin (1991-2006) and Rare Books Librarian at the Lilian Goldman Law Library, Yale Law School (2006-21). Professor Ryan Greenwood worked at Columbia, Rutgers, and Yale Law School (as Mike Widener's 2013-14 Rare Book Fellow), before becoming the Curator of Rare Books and Special Collections at the University of Minnesota Law Library.

The authors write in an opening paragraph: "The history of law is known above all through its literature, diverse body of texts. For both legal historians and law librarians, an understanding of how this literature evolved and was transmitted was essential….In addition, the historical development of law libraries, the profession of law librarianship, and the tools of the profession are intricately bound with the history of the literatures they preserve." (p.1). Their work over ten years has produced an important legal research tool for law librarians.

To meet this objective, this work covers one hundred years from 1921 to 2022 with a post-script adding some additional titles. "It is a checklist of 998 publications: 540 journal articles, 275 essays in collective works, and 183 monographs." (p.15). These figures include 540 periodicals from 188 journals and 275 chapters from 146 collective works. The authors analyze why there has been such an increase in legal writing, reaching a spike in the 2010s.

In describing the categories, of 188 journals, three periodicals providing more than a fifth of the entries (124 out of 540) are led by *Law Library Journal* (95), *Legal Reference Services Quarterly* (17), and *Unbound: An Annual Review of Legal History and Rare Books* (12), all whose editors are AALL members (something we as law librarians should be proud of). The actual numbers of each periodical with more than six entries can be found in appendix 1 (pp. 195-96). A second list of twelve collective works with six or

more articles and seven more complete works (99 entries) provide the reader with variety of works mostly in Anglo-American law, but also medieval and canon law (Appendix 2, pp.196-97). The 183 monographs are published from a multiple countries. Then follows a highlight of the five top contributors to the collection (Michael H. Hoeflich, John H. Baker, Douglas J. Osler, Morris L. Cohen, and Alain J. Wijffels). A complete list of authors with six or more articles are listed in Appendix 3 (p.198).

The authors present an annotated listing of top ten reference works (pp.39-42) and each of their "top ten" favorite titles (pp.43-49). These thirty titles alone are a useful contribution to the reader's knowledge of historical works.

The chapter on Contours of the English-Language Scholarship analyzes the historical dataset of 998 items indexed under 392 subject headings and 149 name headings. The index falls into seven major categories: bodies of law, legal genres, legal topics, bibliographic genres, bibliographic topics, names, and chronological periods. The topics can range from one entry for a single library, two to eight for most of the entries, and a select few may have more than ten subjects (pp. 53-54). They also provide a more detailed statement of terms like African Law, Bibliographies, English law, etc. Throughout the chapter, the authors offer important directions that will help guide readers into further research.

Of historical periods or specific types of law, the major categories of law with their subdivisions are American law (36), English law (20), Medieval law (16), and Roman law (12), Besides the type of law, the immense geographical scope of this work is shown by the different countries covered like Germany, Ireland, Italy, Korea, South Africa, Scotland and others. For a bibliophile, just reading through each of the entries recognizing many Anglo-American sources (but some forgotten) as well as the foreign entries from journals unknown (to me)—the Dutch journal, *Tidjschristischft voor Rechtsgeschiedenis / Legal History Review (nos. 372, 998)*, the German journal, Zeitschrift der Savigny-Stiftung fur Rechtsgeschichte: Germanistische Abteilung) (nos. 428, 430), or Korean journal, *Sungkyun Journal of East Asian Studies* (no. 714)—or to obscure topics like "A Medieval Puzzle: The 'Architecture' of the Page in Manuscripts and Incunabula of the Codex Justianus," in *Trends of Statistical Codicology* (no. 269) presents a plethora of detailed entries.

Professors Widener and Greenwood have compiled an important wide-ranging, original, richly rewarding bibliography that will become a permanent reference source for anyone conducting historical legal research.

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BOOK ESSAY

Canon, Dan. *Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class.* New York, NY: Basic Books, 2022. vi, 324 pp. ISBN 978-1541674677. $75.00.

Dan Canon's *Pleading Out: How Plea Bargaining Creates a Permanent Criminal Class* is not a work of history. Instead, it is a passionate, well-argued indictment of the reality of the American criminal justice system, where most defendants never get a trial and are induced to accept a criminal record in a plea bargain where the state never has to prove its case. It does, however, include much history and highlights areas where historical research could be fruitful. What Canon, a civil rights attorney and University of Louisville Brandeis School of Law professor, lacks in formal training as a historian is more than compensated for a storehouse of personal experience with the injustices that occur when the American theory of justice doesn't align with its reality.

I have titled this a book essay, rather than a book review, to signal that I am not entirely neutral. Dan is a colleague and a friend, and I was interviewed by him about English common law, I also provided reference assistance to help him obtain archival records for the case that is featured in *Pleading Out's* introduction.

That introduction begins in 1972 with an arrest in a Lexington, Kentucky, grocery store of two black men who are charged with forging a $88.33 check to buy dog food and cigarettes. When one of the men, 29-year-old Paul Lewis Hayes made his second court appearance the prosecutor insisted that Hayes accept a plea bargain rather than go to trial. Hayes refused, arguing that he had no idea that the man he was with was trying to pass a bad check. Rebuffed, the angry prosecutor then charged Hayes with additional charges under the state's habitual offender statute, based on a prior conviction. Hayes stuck to his guns and demanded a trial. He lost and instead of the five-year plea he was offered, he was sentenced to life in prison. Eventually the case made it to the U.S. Supreme Court which upheld the conviction in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978). In its decision, the Court found that while defendants have a theoretical right to a free trial, if they refuse to engage in plea bargaining, they can be slapped with a severe trial penalty.

How did plea-bargaining—a concept unknown to the drafters of the U.S. Constitution—become so institutionalized that America's high court was willing to send someone to jail for life for daring to challenge it? Canon uses the first four chapters to try to explain.

He first starts by discussing the history of the jury in the United States as it was received as part of the English common law. He explains how early juries of the colonial era and early republic were not only charged with deciding issues of fact before the court they also were empowered to decide the law to be applied to those facts—a point of increasing tension between judges trained in the law and jurors who had their own opinions on justice. As America evolved from an agricultural nation to one with a growing urban population and mercantile wealth, social stratification increased the divide as judge and jury now increasingly occupied separate economic spheres. Artisans began to organize to bargain collectively, foreshadowing the labor movements of the industrial age.

Canon highlights a leading Massachusetts case, *Commonwealth v. Hunt*, where the state supreme court found that labor unions were not per se illegal. The case was written by Lemuel Shaw, a Harvard educated former commercial lawyer, who was not thought to be a friend of labor, having previously ruled that injured workers could not sue their employers if a co-worker or "fellow servant" could be blamed.

With organized artisans and other workers of various degrees of class consciousness on juries, it was perhaps inevitable that judges (and legislators) who identified more with those workers' bosses would successfully transform the jury system in America to one where judges decided the law and jurors were confined to determining the facts. But even with the jury's power reduced, working class jurors were still distrusted.

And it was in Shaw's Massachusetts where the origin of plea bargaining can be found. With the rise of industrialization, Boston increasingly would become social stratified between working people and the increasingly rich "Brahmins." The criminal justice system, designed to be frugal, was straining as the city's population and complexity grew. Moreover, the elites didn't quite trust the ordinary citizens called up on juries to always reliably convict defendants of their own class. The plea bargain was discovered to be the perfect mechanism for these twin concerns. Tax dollars did not need to be expanded to scale up the justice system if defendants would take a plea for a reduced sentence and quickly pass through the system. Moreover, prosecutors didn't need to worry that working class juries would sympathize with working class defendants—and thus

not punish property offenses to the degree that property owners felt justified.

This, Canon argues, was the beginning of the creation of a permanent criminal class that is the focus of his book. The societal problem with plea bargaining (one that even the defendant rarely sees clearly), is that in exchange for a relatively light sentence, that defendant gains a criminal record. And, because plea bargaining can efficiently and effectively work through large dockets to resolve many cases, that creates more citizens who are attainted with a criminal record then would have ever occurred if the state had to try them separately in trials.

Of course, a criminal record comes with consequences. In modern times, criminal justice reformers have documented dozens of negative collateral effects of a criminal record. Former offenders can't get certain licenses, are denied various grant and loan opportunities, can't take certain jobs, and can even be denied the right to participate in their children's extracurricular activities. These consequences are not just debilitating to the former defendant. Society suffers when large portions of its workforce are prevented from freely accessing the employment market by the effects of a criminal record. Moreover, as Canon discusses further in the book, plea bargaining empowers bad policing because the pleas offered by prosecutors are mostly based on the assertions of police—assertions that will never be tested by the trial process. At best, it leads to lazy practices that are uncovered by good defense attorneys when a case eventually does go to trial. At worst, it subverts justice and converts police biases into the social and racial composition of America's disproportionately large criminal class.

Canon's historical analysis is confined to these early chapters, but throughout the book he gives vivid anecdotes from recent history, to develop these themes and his overall thesis about the problematic history and current impact of plea bargaining on furthering injustices in the American criminal justice system. While history plays only a role in the story told by *Pleading Out*, the book should spark further research among historians about how the modern criminal justice system arose and how modern practices can be tied to social, economic, and racial issues in the past.

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